World Trade Review (2013), 12: 2, 327–375
 doi:10.1017/S1474745612000638

The TBT Panels: *US–Cloves, US–Tuna, US–COOL*

ROBERT HOWSE*
New York University School of Law
PHILIP I. LEVY
University of Virginia Darden School of Business

Abstract: In a series of controversial 2011 decisions, WTO DSM Panels sought to reconcile legitimate regulatory interests of the state with various obligations to treat imported products in an even-handed and not unnecessarily trade-restrictive manner. Among the key points of contention were which obligation pertained in each case – national treatment, limits on technical regulations, or rules governing standards. In each case, the Panel imposed significant restrictions on national regulatory practices, and in each case the Panel reasoning was challenged by the Appellate Body. This paper addresses some of the key legal and economic issues raised in the original Panel decisions, leaving the late-breaking Appellate Body decisions for future analysis. Given the unsettled nature of the terrain, the economic analysis focuses primarily on the question of national treatment, while the legal analysis deals with other interesting points that emerge from these rulings, such as the appropriate level of deference to international standards and the legitimacy of labeling requirements.

1. Overview

The three cases we consider together bring to mind the classic Japanese film by Kurosawa, *Rashomon*. In that film, the same past event is recounted in very different ways by different observers. Applying that cinematic device to the three WTO cases at hand, one could tell a generic version of their tale in two ways:

1. A heroic, publically interested domestic government, eager to protect the public, notes that an imported product has noticeably different health and environmental effects than its domestic counterpart. This government, mindful of its neoclassical economic obligation to internalize externalities wherever they are found, crafts

* Robert Howse thanks Barry Appleton, Alessandra Arcuri, Simon Lester, Joost Pauwelyn, Mona Pinchis, Petros Mavroidis, and various participants in the International Economic Law blog for very helpful exchanges on these cases. His legal analysis in this paper draws freely on an amicus curiae brief he submitted to the Appellate Body in the *US–Tuna* case, and another draft paper on labeling and WTO jurisprudence, presented at the European University Institute Conference on Risk Regulation, 28–29 May. He thanks various participants in that conference for helpful comments. We are both grateful to comments from participants at the American Law Institute conference in Florence on 4 June.

regulations to protect the public from the potential dangers of these imported products. The government is no less concerned about the health and environmental impact of the domestic products; they will be covered by the regulations as well. The impact on imported and domestically produced products may differ, but that is an inescapable effect of the differences in the products.

Or:

2. A conniving and corrupt group of public officials sets out to protect a favored domestic industry from international competition. For whatever reason, foolish predecessors have blocked this country's ability to impose outright protection. But there is still hope. So long as these officials can find plausible differences between the domestic and imported products, they can write regulations that block the imported products, using those differences as justification. Of course, they cannot do this for just any differences (shape, color, etc.). The officials will have to find something legitimate, like some difference in health effects or environmental impact. But this is a problem that creative minds can solve. Whatever the rationale, the goal of promoting domestically produced products over imported ones will be achieved.

In the *US–Tuna II (Mexico)* case,[1] the United States argued that Mexican tuna-fishing methods posed a greater threat to dolphins than those used by US fleets. It adopted labeling regulations that would let consumers choose between tuna that met 'dolphin-safe' standards and tuna that did not. Mexico claimed its fishing methods posed no greater risk and that this labeling approach would either saddle it with unacceptable costs or would effectively exclude it from the market.

In the *Country of Origin Labeling* case (*US–COOL*),[2] the United States imposed regulatory requirements that would let US consumers know from whence their meat came. While various scares about cattle diseases might lead one to think that this was a human health and safety measure, the United States actually argued that it was not, that the intent was just to 'provide consumer information about origin'.[3] Canada and Mexico claimed that this measure was really an attempt at protectionism, one that would make imported livestock more difficult and costly to work with, thereby reducing the demand for their products.

In the *US–Cloves* case,[4] the United States prohibited flavored cigarettes, with exceptions made for tobacco and menthol flavors. The measure was part of the

1 Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R (*US – Tuna II (Mexico)*).

2 Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Report WT/DS384/AB/R / WT/DS386/AB/R (*US – COOL*).

3 *US – COOL*, WTDS386R-01, p. 144.

4 Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R (*US – Cloves*).

Family Smoking Prevention and Tobacco Control Act[5] and was meant to address health concerns about smoking. The US Food and Drug Administration argued that flavored cigarettes had special appeal to young people and made it easier to start smoking, by masking the tobacco flavor. The measure was thus directed at cutting into the more than 400,000 US smoking deaths each year. Indonesia, the primary source for clove cigarettes sold in the United States, argued that this ban unfairly discriminated against its exports, particularly since menthol cigarettes made in the United States were excluded from the ban.

A standard, reductionist economic approach to these questions might argue that any time a similar imported product is afforded worse treatment than its domestic equivalent, there is protectionism at play. That, in fact, is the basis for the 'national-treatment' provision in the General Agreement on Trade and Tariffs (GATT) Article III:4, which reads:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Yet this begs many questions. What does it mean for products to be similar? Does this mean that treatment must be exactly the same? What if the same treatment (e.g. a labeling requirement) proves significantly more costly for imported products than for domestically produced products? In judging either product similarity or treatment, do we care more about descriptions of the products or measures, or do we care about observed economic effects, such as substitutability in consumption or the effects on price or trade flows? And what of other parts of the GATT that allow for exceptions, particularly in the case of certain noble motives, such as protecting the health of humans, animals, and plants (the subject of GATT Article XX)? Does the given rationale for imposing the restrictions matter? And how do we decide whether the rationale that was offered was the true motivation for the measure, or just a convenient pre-certified excuse that masks protectionist intent?

The challenge for lawyers is at least as difficult. Even if one were to sort out these questions of principle, there are questions of where, exactly, in the texts of agreements or in the case law, these principles are to be found. The governance of regulation is significantly more complicated than the governance of measures such as tariffs and quotas, for the reasons given above. There are sections of text describing national-treatment obligations, sections governing technical barriers to trade, sections covering sanitary and phytosanitary regulation, and sections providing exceptions to the other sections. Lawyers, when arguing these cases

5 Pub. L. 111-31, 2009.

before Panels, tend to include any and all arguments and provisions that might work in their favor. This leads to sprawling, inclusive cases.

It also leads to confusion. The central issues raised in *US–Cloves, US–Tuna II*, and *US–COOL* are not new. They have been taken up over the years in cases such as *Japan–Alcoholic Beverages I*[6] and *II*[7] (1987, 1996), *US–Shrimp*[8] (1998), *Korea–Alcoholic Beverages* (1999),[9] and *EC–Asbestos*[10] (2001). Yet, despite this ample case history, crucial points remained unresolved. The uncertainty was sufficiently great that in each of the three cases handed down in the last year, the Appellate Body promptly overturned at least some of the key legal findings by the Panels.

From the standpoint of those who follow these questions closely, one of the headlines to emerge from this year's decisions is a new emerging standard for how to approach national-treatment cases, one that parallels well-established analytical approaches elsewhere and emphasizes the competitive relationship between products in determining whether they have been afforded 'less favorable treatment'. The Panel rulings also provided substantial new insight into restrictions on Technical Barriers to Trade (TBT). In each of these cases, the complainant succeeded in its claim of a TBT violation, and in each case the Panel considered a number of operative provisions of TBT, including Article 2.1 (National Treatment and Most Favoured Nation (MFN) Treatment), Article 2.2 (the requirement that technical regulations be no more trade-restrictive than necessary to achieve a legitimate objective); and Article 2.4 (the obligation to use international standards as a basis for technical regulations where they exist and where they are relevant and appropriate).

From those who carry placards and denounce the reign of faceless bureaucrats in Geneva, some of the headlines will be quite different. They will be that, once again, the WTO has impinged on the right of national governments to promote health, protect the environment, and inform consumers.

In this report, we will first attempt to extract the significant findings in each of the three cases. Whereas the economic analysis will delve more into the central question of national treatment, the legal analysis will largely focus elsewhere. This is because the three Appellate Body rulings to date have significantly rewritten the legal interpretation offered by the Panels. Thus, the legal aspects of national treatment will be an important topic for next year. This year's economic analysis can play into next year's more comprehensive analysis. For this year, we will also delve into other interesting legal and economic points that emerge from these rulings, such as the

6 BISD, 34th Supp. 83 (1988).

7 *Japan – Taxes on Alcoholic Beverages*, WT/DS 8/WT/DS 10/WT/DS 11.

8 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS 58.

9 *Korea – Taxes on Alcoholic Beverages*, WT/DS 75/WT/DS 84.

10 *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS 135.

appropriate level of deference to international standards and the legitimacy of labeling requirements.

The next section discusses the key issues in the three cases. Section 3 presents some of the economic questions at issue, while Section 4 focuses on the prominent legal aspects of the rulings. Section 5 concludes.

2. The key issues in the cases

US–Cloves

The context of the *US–Cloves* case is the long-standing and intensifying efforts of the United States to address the immense public-health consequences of tobacco use and addiction through a variety of regulatory approaches. Based on evidence that cigarettes with added flavors have a particular capacity to attract young people to smoking, the United States moved towards the banning of such cigarettes, in particular in the dispute at hand, clove cigarettes, which are almost overwhelmingly foreign-produced; Indonesia, the complainant in this case, having the bulk of the US market share. However, the US measure exempted menthol cigarettes, which are used by a hugely greater number of smokers than cloves. The Panel found that the US measure violated the national-treatment provision of TBT (Article 2.1). It applied a two-step approach, first of all examining whether Indonesian clove cigarettes and US menthol cigarettes were 'like products' and then, having found that they were, it considered whether there was less favorable treatment of cloves than menthol. To determine whether the products were 'like', the Panel used an approach (disapproved before and after this ruling by the Appellate Body) that considers likeness from the perspective of the defending Member's regulatory objectives. Here the objective was taken as preventing young people from getting addicted to cigarettes through their attraction to flavored cigarettes; since both cloves and menthol were flavored, they were like products from this perspective. With respect to less favorable treatment, the Panel found that since the vast bulk of clove cigarettes were imported and menthol cigarettes domestically produced, there was less favorable treatment of the group of imported products in relation to the group of domestic products. In coming to this conclusion, the Panel ignored arguments by the United States that there were significant differences in the regulatory challenges posed, respectively, by bans on clove and menthol cigarettes. Since the latter were already smoked by millions of people, the health issues of dealing with their dependency on a product no longer permitted (and the related issues of a possible black market) made banning menthol a vastly different undertaking than in the case of a specialty product like cloves.

At the same time, the Panel found the US measure justified under Article 2.2 of the TBT. While Indonesia had proposed a variety of other forms of tobacco regulation that it claimed were less restrictive than an outright ban on clove cigarettes, the Panel held that each of these alternatives was merely asserted by

Indonesia as hypothetically open to the United States, but without proof that it was reasonably available and would, in fact, achieve, to the same extent as a ban, the level of protection against the public-health effects of smoking.

The Appellate Body, while considerably modifying the Panel's legal interpretations with respect to TBT 2.1, including the use of regulatory objectives to determine whether products are 'like', upheld the finding of a national-treatment violation. The Appellate Body essentially based its ruling here on the Panel's finding of fact that the United States had not adequately shown that the difference in magnitude and kind of the regulatory challenge, posed by banning menthol cigarettes, justified the decision to ban cloves not menthol as legitimate and nondiscriminatory and therefore as consistent with treatment 'no less favorable'.

US–Tuna II

In *US–Tuna*, Mexico challenged a US measure that monitored and enforced a private voluntary label on tuna, the 'dolphin-safe' label. While Mexico made some polemical claims that the US measure was 'coercive' and was not in the spirit of international cooperation with respect to dolphin conservation under the Agreement on the International Dolphin Conservation Program (AIDCP), a regional intergovernmental regime for dolphin protection, its more precise legal claims focused on two aspects of the US measure. First of all, as interpreted by the US Courts, the US legal framework required the prohibition of the use of the label on tuna marketed in the United States in any instance where the tuna was caught by a method involving encircling or setting upon dolphins. This method is attractive to tuna fishers in the Eastern Tropical Pacific (ETP), where Mexican boats fish for tuna, because in that region dolphins are known to swim with tuna. Mexico argued that by not allowing tuna fished in this way to be certified as dolphin-safe, even if no actual dolphin was killed despite the encircling or setting upon of dolphins, the United States violated Article 2.1 of TBT; since this was a method typically used by Mexican fishers, not allowing it to qualify for 'dolphin-safe' labeling *de facto* limited the competitive opportunities for Mexican tuna in the United States.

Secondly, Mexico claimed that, while the United States had a strict monitoring and enforcement scheme for tuna originating in the ETP, with respect to tuna fished *outside* the ETP the United States allowed the label 'dolphin safe' to be used based upon the self-declaration of the captain of the fishing vessel that no dolphins had been set upon and no dolphins killed. Mexico did produce some credible evidence that there was genuine harm to dolphins from tuna-fishing outside the ETP, thus putting into question the justification for treating tuna from the two geographic regions so different. Since the United States made a distinction based upon geographical origin of the tuna, requiring much stricter regulatory enforcement within the ETP, the area where Mexican tuna was sourced, Mexico argued that there was a national-treatment violation. The Panel tended to conflate these rather different claims into a single claim of *de facto* discrimination with respect to the

requirement of not setting on dolphins. While finding that Mexican 'tuna' and US 'tuna' were like products, the Panel rejected the conflated claim, based on the observation that at the time the measure was introduced both US and Mexican fishing boats were using the method of setting upon dolphins, and thus the initial competitive effect on US and Mexican tuna of the banning of this method was the same. The choice of US fishers to avoid the method in order to be able to have their tuna certified as dolphin-safe and the Mexican fishers not to do so was a business decision, and did not reflect any lack of even-handedness in the requirement itself.

A threshold issue in the *Tuna* case was whether the US measure fell within the definition of a 'technical regulation' given that it was not a mandatory labeling scheme; there was no requirement that tuna be labeled for dolphin safety (or unsafety). The measure merely ensured that when the claim 'dolphin-safe' was made, certain criteria were followed that provided an adequate assurance that dolphins were not being killed or hurt. Even though, to use the precise definitional terms of 'technical regulation' in TBT, the US measure did not make the characteristic in question – 'dolphin safety' – mandatory for the product, which was defined as 'tuna' to be marketed in the United States, the Panel found that the measure was a technical regulation because it had *some* mandatory features. This is a very controversial finding, which has now been upheld by the Appellate Body, and we will make some criticisms of it in our analysis below.

Mexico also argued that there was a violation of TBT 2.2 because the US objective of informing consumers and protecting dolphins could be achieved if the United States were to permit both the label that it was now, in effect, imposing as the sole label and the alternative AIDCP dolphin-safe label, the latter allowing tuna to be caught in setting upon dolphins. According to Mexico, consumers could make an informed choice and if they wanted to ensure that tuna was not caught through setting upon dolphins, they could always choose the label certifying to that effect. The Panel held that, while having both labels freely available could create consumer confusion, it would be a less trade-restrictive alternative, provided that this confusion was avoided through a requirement that the label on each can of tuna be accompanied by explanatory language that indicated the precise claims behind the particular label at issue. It is surprising that the Panel would find a violation of 2.2 based on the failure to adopt this information-intensive least-restrictive alternative of explanatory tuna labels, since it was never proposed by Mexico, and never discussed in the pleadings or the hearings.

Finally, Mexico claimed that the United States was in violation of TBT 2.4 because it did not use the AIDCP alternative labeling scheme as a basis for its regulation. Mexico argued that the AIDCP was an international standard within the meaning of TBT 2.4. The Panel held that the AIDCP was an international standardization body, even though it is a regional organization to which only a small subset of WTO adhere, because at a particular point in time in the history of this organization there was a possibility for interested states outside the region to join it as parties to the treaty (this window had long passed). However, the Panel

ultimately determined that there was no violation based on the finding that the standard was inappropriate and ineffective to achieve the US objective, since that objective concerned avoiding harms to dolphins explicitly connected to the technique of setting upon them, such as stress and trauma.

The Appellate Body reversed the Panel's finding of a violation of TBT 2.2 and significantly altered its analysis of 2.1 and 2.4, but ultimately found a violation of 2.1; given the rather sharp discrepancy of treatment in the US scheme between tuna fished in the ETP (the operating zone of Mexican tuna fishers) and outside the ETP, the AB held that there was a lack of evenhandedness, constituting a violation of 2.1 based upon the methodology it had set out in *Cloves*.

US–COOL

The *US–COOL* case concerned a mandatory labeling scheme for the country of origin of a number of food products; the dispute however centered on the mandatory labeling of meat. The complainants, Mexico and Canada, claimed that the labeling scheme violated Article 2.2 of the TBT Agreement, in that the challenged measure in fact did not serve to fulfill the objective in question. In the *COOL* case, the United States required that the country of origin of the meat in question be disclosed through the employment of a series of labels applicable to different situations. A US-origin label was to be used to designate 'beef [or] … pork … derived from an animal that was … exclusively born, raised and slaughtered in the United States' (Label A). A 'Multiple Countries of Origin' label was to apply where there is more than one country of origin in that, at different stages, the animal was in different countries – for example, born in Canada and raised in the United States or born and raised in Canada and slaughtered in the United States (Label B). A third label applied where the animal was in the United States only at the stage of slaughter (Label C). A final label addressed the situation where an animal was in a particular foreign country at all stages ('Foreign Origin-D'). Additionally, in the case of ground meat and chicken products, the label must list all countries of origin or all 'reasonably possible' countries of origin. Canada and Mexico argued that this multi-label approach did not fulfill the US objective of providing as clear and accurate information as possible to consumers with respect to the origin of their meat, since the B and C labels and the ground-meat labeling were ambiguous and confusing in indicating to consumers that the meat could come from one or more of a number of countries. Canada and Mexico maintained that to be in fulfillment of the US legitimate objective, i.e. to be 'clear and accurate', labeling would have to indicate not merely the possible range of countries where the animal might have been at some stage, but in respect of each individual package of meat, which country it actually was in at each of the stages and for how long.

The Panel in *COOL* agreed with the complainants that the measure did not serve the US objective of providing consumers with clear and accurate information concerning the national origin of the products at issue, and on this ground it found

a violation of 2.2. (As will be discussed more thoroughly below, the legal interpretation underlying this finding is highly questionable.) Under Article XX (*Brazil–Tyres*[11]), a measure must be in relation to an objective covered by the treaty provision, must make a material contribution to that objective, and must be least-trade-restrictive in the sense that there is no reasonably available alternative measure that achieves the level of protection sought by the regulating measure, i.e. reduces the risk to the level deemed acceptable for that society by the authorities of the regulating measure. There is no requirement that the measure achieve the objective sought to the *greatest extent possible*. Yet the *COOL* Panel read this into 2.2 of the TBT Agreement. Indeed, a requirement that a Member's measure achieve a legitimate objective to the greatest extent possible would be inconsistent with the right under TBT of a Member to choose its level of protection, which the Appellate Body has recently in its Report in *US–Cloves* (subsequent to the *COOL* Panel decision) affirmed as fundamental to the object and purpose of the TBT Agreement. A Member could choose a high level of protection, but limitations in resources and other legitimate public-policy objectives might not allow it to fully achieve that level of protection. This is one reason why a Member's level of protection cannot be *simply* inferred from the measures it adopts. The fundamental obligation of least-trade-restrictiveness does not require that a measure achieve a Member's level of protection; it only requires that there be no alternative reasonably available alternative measure that makes an equal (or greater) contribution to the achievement of that level of protection. This criticism of the Panel will be pursued in some detail below. The Panel also made questionable factual assumptions or interpretations about the nature of the labeling scheme and how it would affect consumers' choices.

In reasoning that is extremely difficult to understand, the Panel also found a violation of TBT 2.1, National Treatment. Its reasoning seemed to center on the scenario that a meat producer that wanted to be able to sell some of its meat under the US origin label would, if it also wanted to produce meat products from imported livestock, be faced with regulatory costs in segregating the imported livestock from the domestic livestock in any stage of production taking place in the United States. Otherwise it would compromise its ability to label the meat from the US livestock as of US origin. As a consequence of this additional regulatory cost, the Panel reasoned, imported livestock would be less attractive at the margin than US livestock, thus leading to less favorable treatment of the imported livestock. Here the Panel appears not to have, as it would be expected to, compared the *group* of like imported with the *group* of like domestic products. Thus, some meat producers who found it highly profitable to process foreign-origin meat using US livestock as well, might not do so because of the regulatory costs of segregation involved in using US livestock in addition to foreign livestock. In each instance, it would be market considerations that would determine whether, at the margin,

11 *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS 332.

a particular producer might be inclined to avoid using US or avoid using imported livestock, due to the additional regulatory costs of using both imported and domestic as inputs.

Finally, the Panel dismissed a claim of violation of Article 2.4, largely on burden-of-proof grounds.

The Appellate Body reversed the Panel's finding of a violation of 2.2 of TBT but found a violation of 2.1. Using the methodology it developed in *Cloves*, the AB found a lack of evenhandness in that, where dealing with imported meat, processors would have to fulfill more complex or costly traceability requirements, holding information about each stage of production. This was not justified as a legitimate regulatory distinction because much of the information in question was not strictly speaking needed in order to verify the bona fides of what was being stated on the actual consumer label.

3. Economic questions

At the heart of each of these cases were questions about what makes products similar and, once similarity of products is established, how much flexibility regulators have in dealing with the products.

In the *US–Tuna II* case, there was relatively little question that tuna caught by US fishing fleets and tuna caught by Mexican fleets were directed at the same consumers and were competitive. The differences lay not in the tuna itself, but in the way the tuna was caught. In *US–Cloves*, there was a more serious question of whether products were similar. Clove cigarettes were not only produced in a different place, they had different ingredients and – arguably – a somewhat different target market than menthol cigarettes. In the *US–COOL* case, the United States was not claiming that Canadian or Mexican livestock were different or inferior, only that it was legitimate to require producers to inform consumers about the origin of their beef.

To establish an economic framework that encompasses these questions, it may be useful to start with an abstract ideal and then see how deviations from that ideal affect the analysis.

The ideal of like products and no less favorable treatment

Imagine there are two products that are identical in every respect except the country of origin. This is, in fact, the norm in standard theoretical approaches to trade with homogeneous products; wine is wine, cloth is cloth, and we quickly proceed to compare autarky prices. It has always been an abstraction, however. To really make these products identical, they must have matching dimensions, materials, functionality, methods of production, and even spillovers from those methods of production.

In the case of truly similar products, there would not be economic justification for any different treatment of an imported product once it had crossed the border. There is, of course, a large literature that talks about why a country might want

to treat imported goods differently from domestically produced goods (terms-of-trade possibilities, infant-industry arguments, etc.), but efficiency arguments alone would dictate that such distinctions be made at customs posts, which are substantially fewer in number than retail outlets. The issues raised in national-treatment questions – the differential imposition of regulatory or tax requirements on goods once they have entered a country – presume that the countries have, for whatever reason, eschewed the use of tariffs to block the import of foreign tuna, cigarettes, or beef. So there is a baseline economic presumption that identical products should receive identical regulatory and tax treatment.

The reasons for the eschewal of border instruments can matter, however. If, for example, a country has no domestic production in an industry x in year t, it may agree to bind its tariffs at zero. In year $t+10$, a domestic industry may have developed. If, for political-economy or national-welfare reasons, the country's government now wishes to protect industry x, it has at least three prominent options. First, it could just live with its past commitments and rue the shortsightedness of its predecessor. Second, it could try to renegotiate the bound tariff – a potentially problematic process that will bring about lost market access in other sectors. Or, third, it could engage in constrained optimization and adopt a second-best domestic measure that replicated the protectionist effect of the tariff. If it can successfully implement the third strategy, rather than the second, it has effectively denied trading partners the rights for which they bargained when the original tariff binding was set. Blocking such a maneuver is the central rationale for the GATT's national-treatment clause.

Problems in theory

What, then, if we begin to relax the assumption that the products are identical and allow them to differ in certain dimensions. At another extreme, the situation is also easy: if the foreign product is toxic whereas the home product is not, or if the foreign product serves an entirely different function, there is no argument that it should be regulated or taxed in the same way as the domestic product.

The difficult choices lie between these two extremes. If products are truly identical, even a protectionist government will be unable to find grounds on which to discriminate against the foreign goods. If products are significantly different, then there is no objection to different policy treatments. In the space in between, there will be the possibility for distinctions between the similar products, whether for good or ill. What if foreign sugared soda comes in half-liter bottles, but domestic sugared soda comes in only smaller cans?[12] One can imagine a panoply of differences, from product dimensions, to packaging, to manufacturing method, to health effects.

12 The mayor of New York, Michael Bloomberg, recently proposed banning oversized sugared drinks in New York City on health grounds.

At the extreme of protecting human, animal, or plant health, such distinctions are presumed to be legitimate and given excepted status under GATT Article XX. Yet even in this protected realm, it is not clear how different products have to be to permit differential treatment. Suppose a domestic type of cigarette had a 10% chance of causing lung cancer while an imported cigarette had an 11% chance of causing the same cancer. Let us stipulate that this difference is statistically significant. Should a domestic government be permitted to ban the imported cigarette on the basis of its elevated health risk, while permitting the sale of the domestic type? It is actually difficult to argue against such a distinction on strictly economic grounds. We might reject such a policy if we could argue that it was inefficient under any plausible set of societal preferences. But economics has relatively little to offer in terms of positive descriptions of societal preferences.[13] Even under strong assumptions, such as individuals with identical and well-behaved preferences, the approach to something like cigarette smoking involves a tradeoff between negative health impacts and personal freedom. There is no obvious cutoff point at which the health risks become too great. So why could that cutoff point not be a 10.5% chance of lung cancer, leaving domestic cigarettes on one side of the divide and foreign cigarettes on the other?[14]

The objection is more likely to be a practical one. While 10.5%, in the previous example, *could* be the cutoff point, it would seem to be a remarkable coincidence. There would be a strong suspicion, instead, that the small difference in health risks was being used as an excuse for excluding the foreign product and that health concerns were not the true motivation. Further, even if health risks *were* the true motivation and 10.5% were the true cutoff point, the damage done by requiring identical treatment of the domestic and foreign cigarettes would likely be minor. Such a requirement would leave the government with the option of banning both types of cigarettes or allowing both. In either case, the distance between the optimal and the restricted policies would be small.

In their treatise on national treatment, Grossman *et al.* (2012) discuss the different types of errors that could occur when passing judgment on the legitimacy of such a choice:

> One possible mistake is to permit measures that should be declared illegal. The cost of such mistakes are borne by the affected trading partner, and will at least partly take the form of reduced profits of exporters, and consequent losses of

13 The strong statements that are sometimes made about societal preferences generally stem from assumptions, not observations. The strength of the assumptions necessary to make bold statements about welfare gains is one indication of the difficulty posed by more general cases.

14 This example picks a number that neatly divides domestic and foreign producers, and thus invites suspicion. There have been GATT cases along these lines, such as *Canada–Beer*, Panel Report, *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, BISD 39S (1992). The situation would get more complicated if we vary the hypothetical such that some domestic cigarettes have risks over 10.5% and some foreign cigarettes come in below.

> income for other interests associated with the exporting firms. The other type of mistake is to outlaw measures that should be allowed. (p. 38)

They assert that this latter type of error could be very costly, given the importance of regulations in protecting human health or the environment. This last proposition seems problematic. Suppose we have two determinants of public well-being, x and y, and an objective function that gives us a level of well-being for any value of the variable, $W(x,y)$. We can say that variable x is 'important' for well-being if W changes rapidly for a given change in x and that variable y is 'unimportant' because W changes relatively slowly for the same change.[15] If we now consider the possibility of policy errors and consider errors of the same magnitude in x and y, then it would be the case that errors in the important x variable would be more worrying. But there is no particular reason why the threshold one would apply to differences in x and y would be the same. Returning to the carcinogenic cigarettes example above, one might provide greater deference to regulatory distinctions in health exactly because it is more important. This is just to argue that, *contra* Grossman *et al.*, there should *not* be a *general* presumption that outlawing measures that should be allowed would be the more costly mistake, even if such a presumption might be justified in particular contexts where the mistake of outlawing would result in much more grave consequences (such as loss of human life) than the reverse mistake of permitting.

The balance of risks between mistakenly permitting and erroneously banning might be clearer in an example fully lodged in the health sector. Suppose domestic regulation bars the import of a promising experimental drug for HIV/AIDS, on the grounds that the drug has not yet been subject to the stricter domestic clinical-trial regimen. Lives are certainly at stake, but they are at stake in both directions. It is possible that importing the drug would save lives through treatment. It is also possible that there are lethal side effects to the drug that would have been uncovered in more rigorous testing. Thus, the high stakes that are at play with measures concerning human health are not dispositive in either direction.

In the three cases considered in this paper, Panels decided to block the regulatory measures at issue. One of the interesting economic questions to pose for these cases is how costly the decisions might be if, in fact, they were in error.

Policy challenge #1: how to decide if products are sufficiently similar to merit national-treatment protection

It is worth spending a moment on the economic challenges before the Panels in these cases. A first challenge is to determine whether products are 'like'. In fact, depending on the section of the trade agreement under discussion, the legal

15 As this is simply meant to provide a heuristic explanation, we will not worry about what metric one would apply to compare the magnitude of policy changes.

https://doi.org/10.1017/S1474745612000638 Published online by Cambridge University Press

language might instead bring in products that are 'directly competitive or substitutable'. This is the difficult task of attempting to draw a bright line between identical products and those that are obviously distinct.

There are a number of obvious, descriptive measures one might use, as mentioned above, including size, functionality, health impact, and so forth. The question, though, as raised in the cigarette example above, is which of these differences is significant? The problem is that there is no generic answer to this question. The measurement difference between a half-inch wrench and 5/8-inch wrench may seem trivially small, but one may do the job and another may not. For a wrench, that measurement difference can be important; for a hemline, it may not be.

This dependence on the question being asked emerged as a key point in the Appellate Body review of the *US–Cloves* decision. There a crucial question was whether clove and menthol cigarettes were 'like' products. The Panel agreed with the complainant, Indonesia, that they were, in that they could both be smoked. The Appellate Ruling reversed:

> we disagree with the Panel that the end-use of cigarettes is simply 'to be smoked' and agree with the United States that there are more specific end-uses of cigarettes such as 'satisfying an addiction to nicotine' and 'creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke'. We consider, however, that, based on the Panel's findings referred to above, it can be concluded that both clove and menthol cigarettes share the end-uses of 'satisfying an addiction to nicotine' and 'creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke'. Accordingly, we consider that the more specific products' end-uses put forward by the United States also support the Panel's overall finding that clove and menthol cigarettes are like products.[16]

From an economic standpoint, this seems unsatisfying in its arbitrariness. It is certainly true that the more specific the criteria, the less probable a finding of 'likeness'. Had the Appellate Body progressed on from the 'pleasurable experience of cigarette taste' to the 'pleasurable experience of clove taste' it would have found that menthol cigarettes were different.

The possibility of looking at 'directly competitive or substitutable' in lieu of likeness seems to offer the possibility of bringing objective economic analysis to bear. The *Cloves* Panel and Appellate Body struggled with how one differentiated clove cigarettes from menthol cigarettes and both of them from cigars. One could certainly conduct econometric studies of the elasticity of substitution between products (how likely consumers are to switch in response to relative price changes). One would expect to find that the substitutability between cigars and cigarettes is lower than the substitutability between clove and menthol cigarettes, which would

16 *US – Cloves*, para. 132, p. 51.

in turn be lower than the substitutability between different brands of menthol cigarettes. The apparent precision of point estimates derived from a regression may be reassuring, but an econometric approach would still leave two problems. First, consumer-preference estimates are not always precise. These characterizations are not universal constants, waiting to be discovered (like, for example, the speed of light). They emerge from particular samples in a data set and are based on particular modeling of preferences. Even then, they emerge with error bands.

Of course, there is little we can know with precision and the perfect ought not be the enemy of the good. But this brings up the second problem: even if we assume away any error in estimation, or variability in preferences, there is no obvious economic threshold to establish to determine that products are directly competitive. One may well find that consumers are very willing to switch between different brands of gasoline, but very unwilling to switch between Coke and Pepsi.[17] That could hardly be taken to mean that Coke and Pepsi are not competitive products.

Finally, even if we could determine substitutability with precision and were able to normalize for different products, there would still be the question of what the threshold of significance might be. Ultimately, this would depend on the question one was asking. The upshot is that the fruitless grasping around by Panels and Appellate Bodies is entirely understandable.

Policy challenge #2: Similar treatment, different impact

If products are dissimilar, there is a presumption they can be treated differently through regulation. If products are similar, there is a presumption that they will be treated in like fashion. In the parlance, imported products are expected to receive treatment 'no less favorable' than similar domestic products. Here, though, an additional problem can arise.

To the extent that there are differences between similar products, those differences can mean that similar treatment will have a differential impact. This was a prominent part of the *US–Tuna II* case, though not one on which the complainant ultimately prevailed. The United States argued that it had established a set of requirements for a 'dolphin-safe' label that applied equally. Per the Panel, 'Mexico and the United States agree that the US measures are, on their face, origin neutral'.[18] After citing an earlier Appellate Body decision (*Korea–Beef*) that found

17 This, of course, is a major purpose of advertising: to convince consumers that these two types of soda are not at all the same thing. If advertising is successful, consumers are less willing to switch away from a product when the price goes up. The very malleability of this preference, though, indicates that it cannot fit the role of 'immutable constant'.

18 *US–Tuna II (Mexico)*, para. 4.251, p. 55.

that in some cases like products could receive disparate treatment, the *Tuna* Panel pulled out the double-negative:

> However, the Appellate Body did not state that a measure that does NOT treat domestic and imported like products differently is, for that reason, consistent with the national treatment obligation. That is precisely the effect of the supposedly 'origin neutral' measures at issue in this dispute.[19]

As summarized by the Panel, Mexico alleged *de facto* discrimination in the following way:

> US measures do not, on their face, discriminate on the basis of the foreign country that is the source of particular tuna and tuna products; rather, they discriminate on the basis of where the tuna is harvested and the fishing method. But this has the effect of favouring tuna and tuna products from some countries over others because different countries harvest tuna in different ocean fisheries using different fishing methods.[20]

Although the Panel found that the US labeling approach might have a detrimental impact, this did not constitute 'less favorable treatment'.

> We acknowledge, in this respect, that different products of various origins may be affected differently by a measure that lays down certain product characteristics with which compliance is mandatory. However … what matters for the purposes of determining whether there is a violation of Article 2.1 is not only the existence of some adverse impact on some imported products, but whether the group of imported products is placed at a disadvantage, in this respect, *compared to* the groups of like domestic and imported products originating in any other country.[21]

Narrow versus expansive interpretations

While these sprawling cases encompass an array of technical issues, there are some themes that have emerged from the literature and that are relevant in the three cases at hand. Grossman *et al.* (2012) note the occasional lack of coherence in the case law, and put forward two potential approaches to interpreting national treatment. The version that may be more concerned with the potential for unduly burdening imported goods, they label 'Interpretation XX' (after Article XX, containing the list of general exceptions to member obligations). This is a more expansive interpretation of the WTO Members' obligation to address the concerns of trading partners (p. 105).

The alternative interpretation they label 'Interpretation III (after Article III, containing the national-treatment clause). This is a narrower interpretation of

19 Ibid., para. 4.252, p. 55.
20 Ibid., para. 7.260, p. 177.
21 Ibid., para. 7.375, p. 205.

Members' obligations. They provide a contrast in keeping with the fishery theme of this section:

> Interpretation XX sees Art. III GATT as a net with fine meshes, and uses Art. XX GATT to evaluate what in the catch should be thrown back to sea. Interpretation III instead lets Art. III GATT take a more select catch, but one that for the most part is meant to be kept. (p. 105)

Thus, faced with the potential for the two types of error described above, Grossman *et al.* opt to tilt away from erroneously dismissing regulation, while the three cases seem to tilt in the opposite direction (away from erroneously permitting protectionism). This is consistent with Grossman *et al.*'s assessment that the penalties for underregulation are likely to exceed the penalties for overregulation, as contested above and as explored below.

First, however, the methodology in the quoted paragraph raises an additional factor to be put in the balance. The narrower interpretation they propose (Interpretation III) uses international efficiency criteria, such as whether the party imposing the regulation could – in theory – compensate the exporting party and still come out ahead (p. 114). A rule of this sort would be very difficult to implement, as it would require careful balancing of welfare changes in both countries. Would one look, for example, at proportionate change in welfare? Or would one conclude that large countries would normally win against small countries, since the same *per capita* gains would sum to a bigger number than matching *per capita* losses.

Such an approach would seem to increase both the complexity of litigation over these points and uncertainty over the outcome. To the extent that this prolongs the process, it offers a particular advantage to those who would use the regulatory process for protectionist ends. Depending on the discount rates of participants, a US administration, for example, might feel confident that it could apply regulatory barriers to afford protection to a favored industry and that, by the time a Panel and an Appellate Body had sorted through all the complications, it would have won its industry several years of commercial advantage.

There would seem to be an asymmetry to this sort of cost. If a relatively simple rule that favors the rights of imported goods is adopted, it would certainly be subject to error, but it is harder to see how it would be subject to abuse.[22]

22 Robert Howse dissents from the policy conclusion that follows from this economic analysis for reasons that relate to considerations of legitimacy both of the WTO system as a whole and the dispute-settlement organs in particular, and the appropriate relationship between WTO competences and domestic institutions, including the legislative branch. For these considerations, he prefers Interpretation III. Nevertheless, the economic analysis above illuminates the difficulty of applying Interpretation III, and in particular how the manner in which the adjudicator appreciates and weighs complex facts may well be decisive to the outcome. This is illustrated by the three cases under discussion.

An economic review of the decisions

In this section, we review the three cases through a particular lens. Following the earlier hypothetical discussion of the balance of costs and benefits surrounding potential judicial error, we take the opportunity to use these cases as data – how costly might it be if the decisions were wrong?

Clove cigarettes

In quick response to the Clove Cigarettes Appellate Body decision, the advocacy group Public Citizen issued a press release condemning the finding:

> The World Trade Organization's (WTO) final ruling today against U.S. efforts to reduce teen smoking shows that our current trade regime is simply incompatible with basic public health regulation … Countries should not be weakening their public health laws to comply with the anti-health, anti-environmental WTO rules.[23]

Here the depiction of the cost, if one assumes the ruling to be erroneous in its outcome, is the health cost associated with additional smoking. Yet in a national-treatment case, there is another obvious remedy: impose a burden just as onerous on the domestically produced good. The United States could choose to ban menthol cigarettes along with clove cigarettes. It is not hard to see where the political opposition to such a move might come from, but this is just a demonstration of why protectionist motives have a built-in advantage: domestic industry has representation in legislatures while imported products do not. This being said, the political economy in this particular case is exemplified not simply by a powerful domestic industry versus a foreign industry that is not represented domestically but by a small foreign niche industry (cloves) versus a large industry dominated by a relatively small number of multinational firms (menthol).

It does raise the question, however, of whether one should take political constraints as given when assessing the impact of the WTO decision. Is it legitimate to argue that a broader ban on cigarettes is not politically feasible, so the only practical choice is between limiting smoking imperfectly through blocking imports and not limiting it at all? Taking into account these political realities is not necessarily protectionism in the narrow sense that it is motivated by the goal of switching market share from foreign to domestic producers. But it is not even-handed in the sense that it reflects an imposition of a disproportionate burden on foreign economic interests for the achievement of albeit legitimate regulatory goals. The idea of national treatment as treatment no less favorable, in our view, extends beyond a discipline on protectionism in the narrow sense to this somewhat broader

23 Public Citizen, 'Public Citizen Condemns WTO Attack on U.S. Efforts to Reduce Teen Smoking', 4 April 2012, www.citizen.org/documents/release-on-wto-cigarette-ruling-4-4-12.pdf (accessed 6 March 2013).

notion of even-handedness. Even the original conception of the GATT was one not just of eliminating inefficient protection of domestic producers but ensuring that states do not externalize the costs of managing their own social and economic challenges on outsiders.[24] This is evident for example in the treatment of restrictions on *exports*, which are prohibited regardless of whether they have a protectionist effect (such as reducing the price of raw materials to domestic industries in competition with foreign industries). They are banned subject to exceptions such as Article XX(g), conservation of exhaustible natural resources, which notably requires even-handedness, i.e. that such restrictions be imposed in conjunction with restrictions on domestic production and consumption.

Tuna/Dolphin

Environmental groups were no more enthused about the decision in *US–Tuna II*. It was naturally interpreted as disregarding the welfare of dolphins. Yet one of the key points of contention in the case was whether Mexican methods were, in fact, more hazardous for dolphins than those advocated by the United States. Mexico had already subscribed to an international standard for dolphin protection. The problem was that the international standard differed from the US-backed standard.

The marginal environmental cost of the decision, were it considered erroneous, would be the incremental harm to dolphins imposed by following one standard versus the other. While that could, in principle, be large, it seems in this case that it is an instance of the theoretical argument provided above, in which the issue is very important, but the policy change is relatively small (the standard of dolphin protection) and the corresponding change in welfare would be relatively minor. Nevertheless, citizens/consumers may care considerably not only about overall rates of dolphin mortality but also the trauma and other harmful effects that result from the particular technique of setting on dolphins. There is nothing illegitimate in taking account of such preferences, if they exist. Here the Panel was dismissive but without Mexico having produced evidence that most consumers care only about dolphin mortality and not the specific harms to dolphins produced by setting upon them.

Country of origin labeling

As noted above, the *US–COOL* case is distinguished from its contemporaries in that it hinges not on the degree of similarity between the products in question (foreign versus domestic beef), but rather on the alleged differential impact of the labeling requirement on the complainants.[25] Given this alleged differential impact, there was substantial discussion in the Panel Report about the legitimacy of US

24 See Howse (2002).

25 All parties to the case agreed that there were compliance costs to the labeling requirements, though there was disagreement over the magnitude. Panel Report, *US–COOL*, p. 126.

https://doi.org/10.1017/S1474745612000638 Published online by Cambridge University Press

motives. Mexico and Canada both claimed that the United States's true motive in adopting the *COOL* requirement was protectionist.[26] The United States argued that its objective was to provide consumers with information so they could make informed choices. Mexico and Canada then asserted that, even if this were the true objective, it was not legitimate.[27]

It was interesting how tentative this last assertion was. Neither Canada nor Mexico made a blanket claim about the legitimacy of consumer-information requirements. It could be legitimate in certain circumstances, they argued. Mexico even provided some examples: 'for health or safety purposes or for making choices according to cultural or religious beliefs or dietary choices'.[28]

Ultimately, the Panel found that the goal of providing consumer information was legitimate and that country of origin was one type of information that could legitimately be required,[29] but that the *COOL* measure was illegitimate in practice because it failed to convey meaningful origin information.[30]

There are a number of interesting economic points about the arguments and findings. The reasoning of the Panel does not seem to grapple with the relative costs and benefits of allowing such regulation. As will be discussed below in the legal analysis, the Panel disregards entirely the issue of why and to what extent the information could be valuable to consumers. Instead, it merely notes that 'consumers may indeed have preferences for products produced by or originating in particular countries for a variety of reasons'.[31] It also notes that 'a considerable proportion of WTO Members' have origin information requirements.[32] To crudely paraphrase: it's plausible and everybody does it, so it's probably okay.

Yet, from an economic standpoint, this misses some important points. First, just because consumers might be curious does not mean that sating that curiosity is worth the cost. Suppose that consumers were curious about the genealogy of every worker involved in the production of a product; could this too be required? It is hard to see how it would affect consumer choices and it would be very costly to provide, but that is qualitatively similar to the facts of the *COOL* case.

It could be argued that information is at the core of consumer choice. That is true. But it is not obvious where the information has to come from. Where buyers do not trust the voluntary self-disclosure of sellers (the lemons problem) in some circumstances they may be able to rely on nongovernmental third parties (if we wish to purchase products that are kosher or a car that handles well in turns, we can get the necessary information from private sources – kosher-certification bodies

26 *US–COOL*, para. 7.580, p. 144.
27 Ibid., para. 7.623, 7.624, p. 153.
28 Ibid., para. 7.624, p. 153.
29 Ibid., para. 7.641, p. 159.
30 Ibid., para. 7.719, p. 176.
31 Ibid., para. 7.648, p. 161.
32 Ibid., para. 7.650, p. 161.

and auto-review magazines). Of course, due to collective-action problems, and also due to third parties having interests of their own that may not be entirely aligned with those of consumers (agency costs), nongovernmental third parties may not supply the optimal quantity and quality of information. Here one need only think of the controversy surrounding the role of bond-rating agencies in the recent economic and financial crisis. But this does not still tell us about the optimal role for government with respect to consumer information: the government may (as in the case of *Tuna*) monitor and enforce the claims associated with a voluntary industry-based disclosure scheme, or, in the case of *COOL*, mandate the disclosure of certain information in a particular format. We would not necessarily argue that a government should be precluded from requiring provision of information; just because a measure fails a cost–benefit test does not render it illegitimate. However, it is notable that the Panels never really engage in any analysis of the role of government in consumer information relative to other actors.

If one is to assess the potential costs of judicial error as discussed above, the cost of the provision and the availability of alternative sources of information both come into play. If the potential change in welfare from making a choice informed (as opposed to uninformed) by country-of-origin information is small, or if alternative sources of information exist, then the potential loss from erroneously disallowing the reporting requirement will be small. On the other hand, the more onerous the reporting requirement, the greater the cost to erroneously allowing a protectionist regulation to stand. In this case, the Panel may have reached the right result for the wrong reasons.

4. Legal questions

The TBT Agreement concerns, in large part, internal policies and regulations of WTO Members. Disciplining internal regulations in a multilateral system to which states with many different political and social systems adhere is a complex and sensitive matter. While usually advancing legitimate, nonprotectionist governmental objectives, such policies may be more trade-restrictive than necessary to achieve those objectives; and there are cases where they are intentionally designed to advantage domestic interests. In legislating and regulating, governments, particularly in pluralist liberal democracies, attempt to balance the interests of diverse constituencies. Regulations serve diverse objectives and reflect compromises between different groups. In such circumstances, it is not simple to draw a line between internal policies that are legitimate exercises of domestic regulatory autonomy (even if they have some trade-restrictive effects) and those that can be considered a form of protectionism or 'cheating' on the WTO bargain, in that they undermine the market access reasonably expected from commitments on liberalization of border measures in the multilateral trading system.

During the earlier era of the multilateral trading system, based on the General Agreement on Trade and Tariffs (GATT) 1947, the concern with domestic

regulation was largely focused on problems of discrimination: against imports in favor of domestic products (national treatment), and between imports from different member states (most-favored nation). The multilateral trading system was viewed as, mostly, a framework for negotiated bindings on the reduction or elimination of discriminatory border measures restricting trade, such as tariffs or quotas. In order to sustain such a bargain, it was necessary to ensure that member states did not 'cheat' on, or circumvent, these commitments through reintroducing measures amounting to import-discrimination in their domestic policies. The official theology of the trading system sanctioned complete regulatory autonomy and wide regulatory diversity: as long as they did not discriminate, member states were free to adopt whatever approach to domestic regulation they saw as appropriate. This outlook was well-suited to an international regime such as the GATT, which lacked the institutions, expertise, or explicit mandate to engage in 'positive integration' through regulatory rapprochement or harmonization.[33]

It is notable, however, that not even the nondiscrimination norm is an absolute constraint on regulatory autonomy in the GATT regime. In practice, it is largely impossible to determine, in a given case, which regulatory distinctions amount to impermissible 'discrimination', and which do not, without reference to *some* benchmarks or standards for, crudely speaking, 'legitimate' regulation. Consider debates about the meaning of 'like' products in the national-treatment obligation, such as whether social, environmental, ethical, and health considerations may be taken into account in determining whether products are 'like' for purposes of domestic regulatory treatment. Moreover, policies that violate national treatment or MFN might be justified, under certain conditions, where necessary or rationally related to particular policy objectives such as public morals, health, or the conservation of exhaustible natural resources. Judging the necessity or rationality of a particular regulatory device necessarily entails reviewing and appraising a set of domestic regulatory choices informed by diverse concerns (culture, social and community structures, administrability, the constitutional system, etc.).

In part due to recognition of this difficulty, as well as the related instability of the nondiscrimination norm as a means of disciplining domestic policy, two of the specialized agreements that emerged out of the Uruguay Round[34] gave a significant role to international standards as a means of managing the interface between domestic regulation and trade liberalization in the case of trade in goods. These were the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS). The international standards were imported in various ways from non-WTO standardization regimes, such as

33 For an economic perspective on the nondiscrimination norm as a basis for addressing regulatory trade 'barriers', see Horn (2006).

34 The Uruguay Round negotiations ran from 1986 to 1994, culminating in the Marrakech Declaration and Final Act of 15 April 1995, announcing the creation of the WTO.

the International Standards Organization (ISO) or the Codex Alimentarius, as normative benchmarks for judging the acceptability of WTO Members' domestic regulations from the viewpoint of trade liberalization.

The Agreement on Technical Barriers to Trade (TBT) covers technical regulations, standards, and conformity assessment with both technical regulations and standards (the definitions of each of these terms was an issue in the *Tuna* case, and we will address that below). TBT imposes obligations additional to those in the GATT. It is possible that the obligations of the TBT could apply simultaneously to those of GATT, provided the measure in question falls under the definitions in both agreements. The TBT Agreement's provisions are aimed at government regulations, and they also include a Code of Conduct for nongovernmental standardizing bodies.

Article 2.1 includes a National Treatment and MFN obligation stated in rather different language than Articles III:4 and I of the GATT respectively:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

Unlike the GATT, there is no equivalent to Article XX, which would allow measures to be justified even if they provisionally violated III:4 or I where necessary to achieve certain legitimate objectives. This is an important structural difference. The provision of TBT that is akin to GATT Article XX in its language is Article 2.2, but this Article, far from functioning as an exception to Article 2.1, imposes an *additional* obligation of least-trade-restrictiveness.

Article 2.2 reads:

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

The various qualifications on the substantive criterion of necessity – for example ('taking account of the risks nonfulfilment would create') least trade-restrictive – distinguish the TBT Agreement from Article XX of the GATT, which provides a means of justifying measures that have already been found to violate some provision of the GATT. Since it is not a matter of 'saving' measures that have already been impugned, the burden of proof is logically on the complainant to show that a less-restrictive alternative does exist, which would fulfill the defending Member's legitimate objective.

Under 2.2, the obligation to ensure the least-trade-restrictiveness of regulations is relative to the kinds of risks that would arise in the absence of the regulations. Deliberation about the choice of regulatory instrument can be a costly and time-consuming process. How far a Member should be expected to go in exhausting all the regulatory alternatives to find the least-trade-restrictive alternative is logically related to the kind of risk it is dealing with. Where what is at stake is a well-established risk to human life itself, a Member may be expected to act rapidly, rely on the scientific acquis to a large extent, and tend towards the more obviously effective and enforceable kinds of regulatory tools, as opposed to the more sophisticated and speculative ones.

It is important to note that Article 2.2 explicitly lists among the relevant elements of consideration in assessing risk 'available scientific and technical information'. This suggests that a WTO Member is not required to adopt or even explore a less-restrictive alternative that has not been shown as effective in achieving its legitimate objective on the basis of existing scientific and other relevant information.

Because 2.1 and 2.2 are autonomous but cumulative obligations, it follows that:

1. Even if a measure is consistent with 2.2 and the least-trade-restrictive to achieve a Member's legitimate objective, it may still be a violation of 2.1 national treatment or MFN treatment.
2. Conversely, in principle, a measure that is nondiscriminatory and indeed not in violation of any other norm of TBT may be scrutinized for whether it is least-trade-restrictive under 2.2.

These differences between GATT and TBT mean that, unless interpreted with great caution and sensitivity, TBT could be considerably more intrusive on domestic regulatory choices than the GATT. TBT raises the possibility that nondiscriminatory measures may be impugned. Also, the structure of TBT, as noted, makes national treatment and least-trade-restrictiveness separate obligations (rather than least-trade-restrictiveness being a defense or exception to other obligations like national treatment as in GATT). This leads to the possibility that even if it has not been shown to be unnecessarily trade-restrictive under 2.2 (and thus quite likely justifiable under the GATT Article XX exception), a measure may still end up in violation of TBT. This outcome seems at odds with the tolerance of regulatory diversity (and indeed the Panel in *Tuna/Dolphin* and the Appellate Body in *Cloves* ended up ruling the US measures impermissible even though they found, in effect, that these measures had not, under 2.2, been shown to be more trade-restrictive than necessary to achieve a Member's legitimate objective).

One of the key disciplines of the TBT Agreement is the obligation for WTO members to use relevant 'international standards' as a 'basis' for their technical regulations, unless the international standards are ineffective or inappropriate (Article 2.4). Yet international standards themselves are mostly of a voluntary nature and do not result, in most cases, in binding treaty commitments; quite a few of these standards are the creation of nongovernmental bodies, or private/public

partnerships where industry is the driving force. By virtue of Article 2.4 of the TBT Agreement, a very broad range of normative material, including privately generated norms in some cases, is converted or transformed into an international legal obligation.

In *dicta* in the *EC–Sardines*[35] ruling, the Appellate Body has suggested that a 'very strong and substantial' relationship may be required between domestic regulations and international standards to satisfy the obligation under TBT 2.4 to use international standards as a 'basis'; the Appellate Body has clearly implied that international standards have considerable, automatic legal force in the WTO. The TBT Agreement nowhere defines international standards, nor does the Agreement attempt to list the international regimes that qualify to promulgate international standards within the meaning of TBT 2.4. (The Appellate Body ruling in *Tuna/Dolphin* does now state some judicially invented criteria to determine which international regimes qualify under TBT 2.4).

US–Cloves

National Treatment – objective assessment

Due to the Appellate Body ruling, we will not discuss in depth the findings of the Panel with respect to national treatment. Yet we do think it is relevant to note, at least as a legal issue, the manner in which the Panel dealt with some of the facts. Article 11 of the DSU places Panels under a legal duty to make an objective assessment of the matter. They cannot ignore facts properly pleaded by the parties nor give contradictory or incoherent reasons for their findings.

The United States had presented evidence that, at the margin, clove cigarettes posed additional health risks. Here is the Panel's response:

> Nonetheless, the evidence filed by the United States suggesting that the presence of eugenol and coumarin in clove cigarettes makes them more harmful to health does not lead us to a different conclusion in terms of toxicity. Regardless of whether eugenol and coumarin might allegedly cause further health problems, the principal reason why cigarettes create health risks is the inhalation of combusted substances, which may cause different types of cancer, different types of cardio-vascular disease and various respiratory diseases and harms, among others.[36]

This statement is totally illogical. It makes no sense at all in terms of the analysis of health risks. Basically, the Panel is saying that, since all cigarettes are dangerous, a WTO Member – even if it has compelling evidence that, at the margin, one kind poses some special health risks that others do not pose – cannot distinguish in regulation between the two. The irrationality or incoherence in stating that evidence of additional health risks does not affect toxicity suggests that the Panel

35 Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359.

36 *US – Cloves*, para. 7.184.

could, in this particular instance, have been found in violation of Article 11 of the DSU; the Panel was at least under a duty to assess the significance of this additional toxicity in terms of the risks that the United States was concerned with in its regulation, rather than simply dismissing it as irrelevant. But the United States did not plead this specifically before the Appellate Body.

A related concern in the manner in which the Panel dealt with the facts is a lack of clarity concerning the burden of proof with respect to whether banning menthol would entail regulatory challenges of an entirely different order or scale than banning cloves. The Panel held, as noted, that the United States had not provided convincing evidence that banning a product to which millions of people were addicted would pose a very different and much more daunting regulatory challenge than banning cloves. The Panel seems to have assumed that once Indonesia demonstrated a differential impact on imported cigarettes relative to the group of domestic 'like' products, the burden of proof would shift to the United States to explain the distinction that resulted in the differential treatment in a nonprotectionist way. The Appellate Body in *Cloves* seems to have made a similar assumption. In any case, the United States might well have assumed that it would be a matter of common sense that if one immediately cuts off legal access to a product to which a large population is addicted, that a number of significant regulatory challenges would ensue.

Consider the following reasoning of the Appellate Body, albeit interpreting a different legal provision in the SPS treaty (the complainants pointed out that though the EU banned hormone-fed beef it did not ban products where the same or higher levels of hormones occurred naturally, such as broccoli):

> 221. We do not share the Panel's conclusions that the above differences in levels of protection in respect of added hormones in treated meat and in respect of naturally-occurring hormones in food, are merely arbitrary and unjustifiable. To the contrary, we consider there is a fundamental distinction between added hormones (natural or synthetic) and naturally-occurring hormones in meat and other foods. In respect of the latter, the European Communities simply takes no regulatory action; to require it to prohibit totally the production and consumption of such foods or to limit the residues of naturally-occurring hormones in food, entails such a comprehensive and massive governmental intervention in nature and in the ordinary lives of people as to reduce the comparison itself to an absurdity. (emphasis added)[37]

Instead of clarifying what kind of proof would be required beyond commonsense intuition of the difference between banning cloves and banning menthol, the *Cloves* Panel invented its own theory as to why the difference did not matter: menthol smokers could simply switch to regular (unflavored) cigarettes, thus avoiding either

37 Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.

the need for public-health measures to treat their dependency or to address the possibility of a black market in menthol. There was no evidence in the record, however, to suggest that this would be the actual behavioral result of banning menthol.

TBT 2.2

Reinforcing the approach to least-trade-restrictiveness taken by the Appellate Body in cases such as *EC–Asbestos* and *Brazil–Tyres* with respect to Article XX of the GATT, the *Clove* Panel emphasized that an alternative measure less restrictive of trade must be one capable of being implemented at reasonable cost in the real world: it is not enough for the complainant to assert the existence of a hypothetical or theoretical less trade-restrictive alternative in order to establish a violation of TBT 2.2. If this is the case for Article XX, it must be *a fortiori* true of TBT 2.2, because, not being in the nature of an exception, the initial burden of proof with respect to all the elements is on the complaining party. Thus, the Panel held: 'The problem is that the mere listing of two dozen alternative measures without more does not show that such measures would make an equivalent contribution to the achievement of the objective at the level of protection sought by the United States. We further note that Indonesia does not specify whether it is any one of these measures, or some combination of these measures, or all of these measures, that would be the alternative measure(s).'[38] Here the Panel's findings seem correct. Indonesia's pleadings were not precise or detailed enough to allow for an evaluation of whether any particular alternative measure (or some combination of them) could function in the real world at reasonable cost to achieve the level of protection sought by the United States.

Tuna

The definition of a technical regulation

In *EC–Asbestos* and *EC–Sardines*, the Appellate Body, interpreting the text of the TBT Agreement, set out and applied a three-part test for the determination of whether a measure is a 'technical regulation'.[39] The first step involves ascertaining an 'identifiable product' to which the measure applies. The second step is to determine that the measure is a document that lays down product characteristics. The third step is to determine whether the measure is 'mandatory'.

38 *US – Cloves*, para. 7.423.

39 Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243, para. 67; Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359, paras. 175–176.

Applying the first prong of this test, the Panel majority in *US–Tuna* found that there was an 'identifiable product' to which the measure applied, and that this 'identifiable product' was '*tuna*' or '*tuna product*'.[40] While the reasoning of the Panel to support its finding that 'tuna' or 'tuna product' is the relevant 'identifiable product' is sparse, it appears that this finding was consistent with the positions of both parties to this dispute.[41] In its application of the second and third steps, however, the majority erred.

In the case of the second step, the Panel wrongly characterized the measure as a document laying down a product characteristic.[42] The measure complained of by Mexico in its Request for a Panel, and as clarified in its various written submissions and oral statements before the Panel, was in the first instance the ruling of a US federal court concerning the assessment by US officials of conformity with the standards set out in the Dolphin Protection Consumer Information Act, and, second, with the various steps that the US government took to bring itself into compliance with that ruling.[43] At various points in the proceedings, Mexico underlined that it had no dispute with the standards in question themselves, provided that conformity with those standards was assessed in a manner that was, effectively, rendered illegal by the *Earth Island* court ruling.[44]

The *Earth Island* ruling is, plainly, not a document setting down product characteristics. Rather, the ruling concerns the acceptable parameters of executive discretion in the interpretation of a US statute that requires that US authorities assess and assure the conformity of market actors with a voluntary standardization scheme, *where those market actors have freely decided to participate in that scheme*. The *Earth Island* court did not explore necessary characteristics of tuna products entitled to the dolphin-safe label, but instead focused on the continued refusal of the Executive Branch to follow the instructions of both the legislature and

40 Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, para. 7.62.

41 See First Written Submission of the Mexican States, para. 196 (noting that tuna products 'is the identifiable group of products to which the document applies'); Answers of the United States of America to the Second Set of Questions from the Panel to the Parties to Panel Question 121 at para. 44 ('The panel should look at the market of tuna products in general.')

42 Panel Report, *US–Tuna II (Mexico)*, para. 7.76.

43 Request for Establishment of a Panel by Mexico, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/4 (10 March 2009) (identifying the Ninth Circuit decision in *Earth Island Inst.* v. *Hogarth* and the regulations enacted to implement it, as the measures in question); First Written Submission of the Mexican States, para. 121 (same).

44 See First Written Submission of the Mexican States, para. 128 (noting that, prior to the court decision, the US statute would have allowed tuna caught in sets where dolphins were killed or injured, but 'such possibility was rendered inapplicable by the 2007 Court decision in *Hogarth*'); Mexico's Response to First Set of Panel Questions, Question 53, para. 157 ('The statute and regulations originally provided a certain degree of discretion to the US Executive Branch to modify the dolphin-safe labeling standard, but the court ruling in *Earth Island* v. *Hogarth* removed that discretion.')

the judiciary in carrying out specific studies.[45] The court restricted the Executive Branch's discretion to change the rule, not because it sought to define what constituted a 'dolphin-safe' tuna product, but because 'the government's intransigence in following Congress's mandate renders this case one of the rare circumstances where generic remand is not appropriate'.[46] The subsequent administrative action complained of by Mexico is merely the consequence of the operation of the rule of law within the US constitutional and administrative system, whereby the judiciary controls the acceptable limits of discretion of the executive in the interpretation and application of federal statutes. Of course, this does not mean that the United States is not responsible for court decisions of this kind under its WTO obligations; however, here the role of the courts is such that the proper characterization of the judicial action under 2.2 is as going to 'conformity assessment' (what is required to conform to a certain nongovernmental standard such that one can nonfraudulently or nonmisleadingly identify one's product with that standard) and not to 'technical regulation'.

The mischaracterization of the *Earth Island* court ruling and its subsequent implementation (as required by US law) as 'a document laying down product characteristics' flows in part from a legal error identified by the minority panelist. The Panel failed to read Article 2 of the TBT Agreement in light of its context, within the meaning of Article 31 of the Vienna Convention on the Law of Treaties, as interpreted by the Appellate Body of the WTO.[47] *Thus, the Panel failed to consider as 'context' the TBT Agreement as a whole.* The Panel made the fatal error of not considering the relationship of Article 2 of the TBT Agreement to Article 5, which concerns 'Conformity with Technical Regulations and *Standards*'.[48] Article 5.1 explicitly governs the obligations of central-government bodies where 'positive assurance of conformity with technical regulations *or standards* is required'.[49] *Thus, contrary to what the Panel majority seems to have assumed, the involvement of central government administration in assurance of conformity with a standard – i.e. with a* ***voluntary*** *norm as defined in the TBT Agreement – does* ***not*** *convert that norm into a technical regulation.* There are important differences between state responsibility with respect to conformity assessment under 5.1 on the one hand and 'technical regulations' under 2.2 on the other. For example, and most apposite to the facts of this dispute, TBT 5.1 defines the concept of unnecessary obstacle to

45 *Earth Island Inst.* v. *Hogarth*, 494 F.3d 757, 762 (9th Cir. 2007) (noting that the Executive Branch had already been instructed in a previous case to carry out statutorily-specified studies regarding the impact on dolphin populations of purse-seine fishing and had still failed to do so).

46 Ibid., at 770.

47 Vienna Convention on the Law of Treaties, Article 31(1), 23 May 1969, 1155 U.N.T.S. 331.

48 Agreement on Technical Barriers to Trade, Art. 5, GATT Doc. MTN/FA II-AIA-6 (15 December 1993) [hereinafter TBT Agreement] *in* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/FA (15 December 1993), 33 I.L.M. 9 (1994) (emphasis added).

49 Ibid., at Art. 5.1 (emphasis added).

trade differently than it is defined in TBT 2.2. Thus, according to TBT 5.1.2: 'conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create'.[50]

The language of both the *Earth Island* ruling and the subsequent regulations signals that the central concern of the government was the assessment of conformity with the label requirements. The court stressed that to change the label, the Executive Branch was required to provide 'affirmative scientific evidence that the purse-seine fishery was not significantly impacting the dolphin population'[51] and that 'Congress's clear intent was to have the findings based on science alone'.[52] In finding the data insufficient and contrary to what Congress requested, the court noted that the Executive's evidence identified a number of possible ways that the purse-seine fishery could possibly adversely impact dolphin populations to find that 'the data does not furnish a rationale for, or evidence to support, the Secretary's finding'.[53] The court thus assessed the Executive Branch's evidence to determine whether purse-seine fishing in the ETP did not cause harm to dolphin populations, and thus conformed to the requirements of the voluntary 'dolphin-safe' labeling standard as defined by Congress. The implementing regulations 'govern[] the requirements' for the 'dolphin-safe label' and apply to tuna products that 'claim[] or suggest[] that tuna contained in the products were harvested using a method of fishing that is not harmful to dolphins'.[54] The regulations then set out in remarkable specificity, by method and location, what tuna-harvesting methods qualify for the label and allow for new scientific findings to further inform those requirements.[55] Both the court decision and the regulations show a preoccupation with scientific evidence demonstrating that particular harvesting methods do not adversely impact dolphin populations before they can be allowed to use the dolphin-safe label. This suggests that the mandatory requirements set out in both the ruling and the regulations are simply those that 'give the importing Member adequate confidence that products conform with the applicable technical … standards'.[56] This does not mean, however, that the Member has implemented a technical regulation.

With respect to the third step in determining whether a measure is a technical regulation under TBT, the Panel also erred. As the Appellate Body made clear in *EC–Sardines*, in order to be characterized as 'mandatory' under the third step,

50 Ibid., at Art. 5.1.2.
51 *Earth Island Inst.*, 494 F.3d at 765.
52 Ibid., at 768.
53 Ibid., at 766–767.
54 50 C.F.R. §§ 216.90–216.91.
55 Ibid.
56 TBT Agreement, art. 5.1.2.

compliance with the characteristic laid down in the document must be mandatory *with respect to the 'identifiable product'*.[57] This follows logically from the pivotal role of the concept of 'identifiable product' in the determination of whether a measure is a 'technical regulation', as articulated by the Appellate Body in *EC–Asbestos* and *EC–Sardines*. This concept delineates the relevant product class that is subject to enforcement or compliance action by the authorities of the Member taking the measure. In *EC–Sardines*, the identifiable product was held to be 'preserved sardines';[58] in order for 'preserved sardines' to be sold in the EC, they had to conform to the product characteristic in question.[59] In the instant dispute, the identified product is tuna – and yet tuna does not have to conform to the product characteristic at issue in order to be sold in the United States, as the minority panelist points out.[60]

Unfortunately, deviating from the thrust of its previous jurisprudence, the Appellate Body has now upheld the Panel's finding that the US measure in *Tuna* is a 'technical regulation', based on the notion that any mandatory element makes a measure a technical regulation. But can it possibly make sense to impose the same strict disciplines where the government is merely facilitating the implementation of a scheme where the norms in question originate from private actors as are appropriate where the decision to create the norm emanates from governmental rather than private actors, and government has shaped the norm at every stage? This is not in the least to say that where government plays a verification role with respect to voluntary schemes it should escape WTO disciplines altogether. But the approach of the Panel would convert virtually every kind of labeling or certification scheme into a technical regulation, thus making the separate disciplines that apply to standards and conformity assessment largely irrelevant or at least making their role in contrast to those concerned with technical regulations rather obscure or uncertain.

National Treatment

While, as noted, we do not intend to consider in detail the legal interpretations of the Panels concerning TBT 2.1, given the Appellate Body rulings in *Cloves, Tuna/Dolphin*, and *COOL*, one aspect of the Panel's findings on national treatment that was not directly addressed by the Appellate Body and raises important doctrinal considerations is the finding that there was no treatment less favorable of Mexican duty by virtue of the requirement of not setting upon dolphins since at the time the measure was enacted this practice was engaged in by US fishers as well as Mexican ones. Thus, if they wanted to use the label, fishers from both countries would be

57 Appellate Body Report, *EC–Sardines*, para. 185.
58 Ibid., para. 182.
59 Ibid., para. 190.
60 Panel Report, *US–Tuna II (Mexico)*, para. 7.161.

faced with adaptation costs. This consideration of the state of affairs at the time of the enactment of the measure might well be probative concerning protectionist intent at that time (of course, there could still be protectionism, if the regulator knew or supposed that for some reason the adaptation costs would be manageable by domestic fisheries but unsustainable by the Mexican fishery). But if we put the issue of protectionist intent aside, is it appropriate to determine state responsibility for treatment no less favorable based solely upon conditions existing at the time of enactment? There is a troubling implication for state responsibility that flows from the availability under WTO law (as it is generally interpreted) of only prospective relief. We can grasp this implication by considering, on the hypothetical, that foreign manufacturers respond by adapting their behavior and (at some real cost) meeting the energy efficiency standard that the domestic industry was already performing to. Assuming the imposition on foreign producers of a standard that domestic ones were already producing to was characterized as a violation of TBT 2.1, once the foreign industry has adapted and is producing to the required standard there is a strong argument that there is no continuing breach of 2.1. Unless one constructs a continuing-breach theory that the foreign manufacturers remain less competitive in the sense that they have to recoup the costs of adapting to the energy-efficiency standard through on-going higher prices, there is no effective state responsibility for the costs having been imposed in the first place.

TBT 2.2

Legitimate objective

The Panel accepted the United States dual objective of protecting dolphins and informing consumers as legitimate under TBT 2.2. It rejected Mexico's suggestion that an objective that involves placing pressure on producers elsewhere in the world to change their environmental practices (or governments to change their policies) is not 'legitimate' under TBT. This renders the approach to TBT consistent with the approach to Article XX of the GATT articulated in paragraph 121 of the *Shrimp/Turtle* Appellate Body ruling, where the Panel rejected the product/process distinction as a basis for limiting the general exceptions available to WTO Members under Article XX. One might argue that, in *Tuna*, the Panel went even further towards consigning the product/process distinction to irrelevance in that it found that process-based measures did not violate an operational norm as opposed to simply saying their justification as an exception might be entertained.

This relates to a very cogent point that has been made by Joost Pauwelyn.[61] The definition of a technical regulation under TBT includes 'product-related' PPMs (Process and Production Methods). Some commentators had suggested that 'product-related' meant that the processes would affect the physical characteristics

61 International Economic Law and Policy blog, at www.worldtradelaw.net (last visited 7 November 2012).

of the product. This interpretation assumes what one might call the PPM mythology that somehow the essence of a product is defined by its physical identity (as to how it has affected all manner of interests through its lifestyle). In *Tuna*, no one questioned that the labeling measure was 'product-related'. This is the correct interpretation of 'product-related'. As one of us (Howse) has argued previously, the qualification 'product-related' merely indicates that the TBT Agreement does not discipline PPMs *unrelated to traded goods*. For example, a PPM that addressed methods of production that is only traded as a service (such as the advice of a multinational consulting engineering firm as to how to safely operate a mine that provides raw materials to domestic industries) would not be covered by TBT, since TBT is a *lex specialis* to trade in goods. Similarly, PPMs that are traded only as intellectual property (such as process patents) would be governed by TRIPS but not TBT.

Finally, the Panel made it clear that protection of the life and health of animals is a legitimate objective under TBT 2.2 even where the goal is not the conservation of an endangered species (or instrumental to human economic interests or human health interests). This is an important recognition of animal welfare as a legitimate objective under TBT, and will have implications for the *Seal Products* dispute between Canada and Norway and the EU. Thus, the *Tuna* Panel held:

> [T]he protection of dolphins may be understood as intended to protect animal life or health or the environment. In this respect, a measure that aims at the protection of animal life or health need not, in our view, be directed exclusively to endangered or depleted species or populations, to be legitimate. Article 2.2 refers to 'animal life or health' in general terms, and does not require that such protection be tied to a broader conservation objective. We therefore read these terms as allowing Members to pursue policies that aim at also protecting individual animals or species whose sustainability as a group is not threatened.[62]

By the appellate stage, Mexico appeared to have basically conceded that protecting dolphins on this basis was a legitimate objective under TBT.

Least restrictive alternative/objective assessment

Article 11 of the DSU requires a Panel to make an 'objective assessment of the matter'.[63] A Panel may not make a finding on a matter that is not before it. To do so is a serious violation of due process, as the parties have not had an opportunity to

62 *US – Tuna II (Mexico)*, para. 7.437.

63 DSU, Art. 11, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N. T.S. 401, 33 I.L.M. 1226 (1994).

address the matter in the Panel proceedings.[64] An objective assessment also requires that a Panel's findings have a basis in the evidence on the record.[65] The finding in paragraph 7.575 is inconsistent with the requirements in Article 11 of the DSU in both these respects. First of all, *it is a finding on a matter that the Panel did not have before it*. Secondly, there is a *complete lack of evidence on the record* to support the finding.

In paragraph 7.575 of its Report, the Panel describes and finds to be less restrictive of trade and capable of fulfilling the US legitimate objectives, an alternative regulatory scheme with the following features: the United States would continue to ensure compliance with the 'dolphin-safe' designation but instead would permit two separate labeling and certification schemes, each of which defined 'dolphin-safe' in a somewhat different manner.[66] The labels in each case would be required to disclose to consumers the relevant meaning of 'dolphin-safe' that corresponded to the particular tuna in question.[67] In a note to paragraph 7.575, the Panel acknowledges that allowing the US and AIDCP labels to operate in tandem without more information, Mexico's proposed alternative, would be confusing.[68]

The less trade-restrictive alternative put forward by Mexico in its first and second submissions is significantly different from the complex scheme described by the Panel in paragraph 7.575. In paragraph 224 of its first submission, far from putting forth an alternative regulatory scheme for the United States that would be less trade-restrictive, Mexico claims that the US measures are in their entirety more trade-restrictive than necessary because '*in the absence of the US measures*, the preservation of dolphin stocks in the ETP fishery will continue to be accomplished by the requirements and procedures of AIDCP'.[69] In Mexico's second submission to the Panel, Mexico reiterates its claim that a technical regulation is entirely unnecessary to fulfill the US objectives: 'A less trade restrictive way of fulfilling the objectives would be to create dolphin safe standards *rather than* a technical regulation.'[70] In other words, the US objectives can be fulfilled by the operation of voluntary standards by the various labeling and certification schemes, with no requirement of government action through technical regulations. There is certainly

64 Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473), para. 174.

65 Ibid., para. 172; Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779, para. 142.

66 *US–Tuna II (Mexico)*, para. 7.575.

67 Ibid.

68 Ibid., para. 7.575 n. 815 ('The Panel recognizes that without additional information in the labels, the US and AIDCP dolphin-safe logos may be confused with one another.')

69 First Written Submission of the Mexican States, para. 244 (emphasis added).

70 Second Written Submission of the Mexican States, para. 210 (emphasis added).

no suggestion that Mexico's alternative would entail the new regulatory step of requiring that dolphin-safe designation be accompanied by an explanation on the label of the meaning of that designation. Mexico's claim is different: namely, that through the operation of the voluntary schemes in question, combined with market incentives, consumers will be at least as well informed as under the current measure, while trade will be less restricted. However, as noted above, the Panel expressly rejected Mexico's proposed alternative as confusing.[71]

An examination of the first and second set of questions to the Panel reveals that the Panel never asked the parties to comment on whether the kind of scheme concocted by the Panel in paragraph 7.575 was reasonably available, whether it would fulfill the US objectives to the same extent, and whether it would be less restrictive of trade. Instead, in its first set of questions to the parties, the Panel asked the United States about the adequacy of the AIDCP to achieve its objectives.[72] These questions are consistent with asking the United States to comment on Mexico's actual claim concerning the unnecessary trade-restrictiveness of the US measures, namely that as long as the AIDCP existed and functioned properly, the US measure was entirely unnecessary. An examination of Mexico's responses to the Panel's questions at the first and second Panel hearings reveals that neither the questions nor Mexico's responses disclose any consideration of the kind of alternative regulatory scheme concerning which the Panel made a finding in paragraph 7.575. In response to a question regarding whether Mexico thought the retailers would accept tuna products carrying the AIDCP label, Mexico communicated its intention that the two labels operate side by side without further explanation: 'It would be enough to simply clearly designate the labels "AIDCP Dolphin-safe" and "US Dolphin-safe" and let the retailers and final consumers make a buying decision based on that information.'[73] This statement is accompanied by a pictorial example of the AIDCP label, which conveys none of the information contemplated by the Panel in paragraph 7.575.[74]

A careful comparison of the finding in 7.575 of the Panel Report with Mexico's own submissions concerning alternative measures less restrictive of trade shows clearly that the alternative measure on which the Panel ruled was one that was never pleaded or considered in the Panel proceedings, and was one on which neither the United States nor Mexico had an opportunity to comment on or adduce evidence.

71 Panel Report, *US–Tuna II (Mexico)*, para. 7.575 n.813.

72 First Set of Questions from the Panel to the Parties, Questions 26 and 27. Question 26 inquired into the capability of the AIDCP label to meet its objective of progressively reducing dolphin mortality in the agreement area, and Question 27 asked the United States to compare the objectives of the AIDCP with those of its own statute governing use of the dolphin-safe label. Ibid.

73 Answers of the Mexican States to the Second Set of Questions from the Panel to the Parties to Panel Question 109, para. 62.

74 Ibid.; see also Exhibit MEX-121.

Thus, not surprisingly, the Panel's finding in 7.575 has *no basis in evidence on the record*. The Panel presumed, without any evidentiary foundation, that consumers would be at least as well informed or better informed than under the scheme challenged by Mexico, if they were presented with two different labels designating tuna as dolphin-safe, with dolphin-safe meaning different things in each case. The Panel *assumed* that if tuna were required to carry on its label an explanation of what the dolphin-safe designation meant in each case, consumer confusion would be avoided.[75] The Panel refers to 'information asymmetries' between producers and consumers and adopts – again without any argumentation or evidence by the parties on this matter – the view that such asymmetries are reduced and consumers protected in their bargains through the disclosure of more information.[76] Without any evidence on the record to support this finding, the Panel concluded that, as a result of this additional information, '[w]ell-informed consumers would be in a better position to use their purchasing power to influence the way tuna fisheries and canners operate'.[77]

As Hadfield *et al.* summarized in a 1998 article in the *Journal of Consumer Policy*,

> information and information asymmetries has been a staple of consumer protection analysis for well over thirty years. There is, however, a crucial distinction between earlier thinking about the role of information asymmetries and modern information theory. Early analysis saw in information asymmetries a brute inequality between buyers and sellers; resolution of this inequality, through the provision of information to buyers, it was thought would restore the balance and eliminate the bargaining disadvantage. Modern information theory, however, recognizes the subtle and complex ways in which information affects the dynamics of markets and bargaining settings and also recognizes the cost of being informed as an irreducible component of market transactions. (footnote omitted) These modern insights illuminate the paradox of attempting to use costly information procedures … to solve the problems created by the cost of becoming informed.[78]

Thus, depending on the manner in which consumers process additional information, and the way it is presented, they can end up making more- rather than less-distorted consumption decisions. If the information cost of understanding the meaning of 'dolphin-safe' becomes too high for example, consumers might end up switching from tuna to substitute products. In a rigorous study of 'dolphin-safe'

75 Panel Report, *US–Tuna II (Mexico)*, para. 7.575 ('[The additional information] would contribute to informing consumers about the precise dolphin-safe characteristics.')

76 Ibid. ('In our view, [the additional information] would enhance the ability of dolphin-safe labels to remedy market failures arising from asymmetries of information between tuna producers, retailers, and final consumers in the US market.')

77 Ibid.

78 Hadfield *et al.* (1998: 139).

labeling, based on the principles of modern information economics, Teisl *et al.* (2002: 350–352) describe how, in response to concerns about dolphins, US consumers were switching from tuna to substitute products until, eventually, the 'tuna-safe' labeling scheme won their confidence and resulted in increased market share for canned tuna in the United States.

How would US consumers respond to the coexistence of multiple labeling schemes with manifestly different meanings to the 'dolphin-safe' designation, as proposed by the Panel? How would they process the information the Panel suggests would have to be contained on each tuna label? In order to make a finding concerning the effect of the alternative measure on the fulfillment of the US legitimate objectives as well as its effect on trade, there would need to be *some* evidence on the record that is probative as to these questions of consumer behavior.

In the absence of any evidence on the record, the Panel substituted its own dogmatic (and outdated) view of information economics. This is a manifest and egregious departure from the Panel's duty under Article 11 of the DSU to make an objective assessment of the matter. If anything, the evidence from the relevant economic literature suggests that any uncertainty or variance with respect to the meaning of the standards associated with a given label could create very significant consumer confusion.[79] This need not mean that under Article 11 the Panel had a duty to consider any particular economic study or type of evidence; at the same time, the finding of the Panel depended upon controversial and questionable assumptions and dogmas, which were never explored in the proceedings and which the parties had no opportunity to question or contest.

The alternative measure invented by the Panel in paragraph 7.575 would entail the creation of a new label for all tuna that bears the 'dolphin-free' designation, which would be redesigned to contain additional information concerning the meaning of 'dolphin-free' in the case of that particular label. In effect, all tuna on the US market carrying the 'dolphin-free' designation would have to be relabeled. Whether or not the alternative measure invented by the Panel was reasonably available, whether it would fulfill to the same extent the legitimate objectives of the United States, *and* its relative trade-restrictiveness would require *some* consideration of the costs on sellers of tuna imposed by the Panel's new labeling requirement, as well as the regulatory costs to the United States of assuring that all tuna sold as 'dolphin-safe' did indeed bear a label setting out the correct information. That there is no evidence on the record concerning such costs further aggravates the Panel's dereliction of its duty under Article 11 of the DSU.

Article 13 of the DSU provides Panels with ample powers to seek information. The Panel posed extensive sets of questions to both parties after both the first and second hearings. The lack of any reference to evidence in the record to support the Panel's finding in paragraph 7.575 is conspicuous. But, as suggested, it is not

79 Harbaugh *et al.* (2011).

surprising – since this finding was concerning a matter that was never put before the Panel by the parties.

TBT 2.4

International standardization body

In its consideration of Mexico's claims under TBT 2.4, the Panel found, based in part on the determination that the AIDCP was 'open' to all WTO Members (a finding now reversed by the Appellate Body), that the AIDCP was an international standardization body.[80] The Panel made the legal interpretation that openness to all WTO Members includes a situation where the existing members of a body may, at their discretion, decide to accept a WTO Member as a new member of that body.[81] This understanding of openness is empty and trivial. *Any* standardization body could, in theory, decide at its whim, on the basis of consensus, to increase its membership. Thus, if the criterion that a body be 'open' to all WTO Members could be satisfied by the possibility that a body could invite at its discretion any WTO Member that so desires to join, it would be largely lacking in legal meaning. It would afford no legal security whatever to WTO Members that they are able to participate, if they so choose, in the formulation of standards that, under TBT 2.4, they are legally required to use as a basis for their technical regulations.

The Panel also suggested that the criterion of 'openness could be fulfilled if, during a certain temporal window, all WTO Members had an opportunity to choose to join the body.[82] The United States has ably, in its Appellant Submission, explained why, in fact, it is incorrect that, even during the temporal window referred to by the Panel, the AIDCP was open to all WTO Members.[83] Be that as it may, the legal interpretation of the Panel that 'open' to all WTO Members could include a situation where that body was open at a particular historical point in time to all Members is fundamentally defective – and not only for the rather simple reason that it is inconsistent with the use of the present tense 'is' in the TBT provision being interpreted.

80 Panel Report, *US–Tuna II (Mexico)*, para. 7.693.

81 Ibid., para. 7.691 ('[T]he AIDCP remains open to accession to any State … that is invited to accede to the Agreement on the basis of the parties' decision. To this day, the AIDCP membership is therefore open on a non-discriminatory basis to the relevant bodies of at least all WTO Members in accordance with the principle of openness.')

82 Ibid. (concluding that because the AIDCP membership was open from May 1998 until May 1999 to states whose vessels fished in the Agreement Area without restrictions on who could fish in the area, the AIDCP was open to all WTO Members).

83 Appellant Submission of the United States, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381 (20 January 2012), para. 142 (noting that even had the period for signature of the AIDCP been the same as when the resolution was developed, other WTO Members who might have had an interest other than fishing (such as consumer or conservation interests) were ineligible to become parties).

First of all, a state may well not have been a WTO Member while this temporal window was open (a significant number of states have acceded to the WTO relatively recently); a state might only seek compelling reasons to seek membership in the standardization body in question once it joined the WTO, and assumed the obligation in 2.4 to use international standards. The Panel's interpretation would allow such a body to deny membership on the basis that it was not sought and/or achieved during the historical window in question.

Second, a state might not have existed during a particular historical window; in such a case, it would have had no effective opportunity whatever to join the standardization body in question, even though now, having achieved statehood and acceded to the WTO, it is bound to use as a basis the standards promulgated by that body.

Third, paragraph 4 of Annex I refers to openness to 'the relevant bodies of all WTO Members'. Relevant bodies include, evidently in this context, domestic standardization bodies. Not all WTO Members have domestic standardization bodies; some developing-country Members have instituted such bodies only recently, and others do not yet have them. If the requirement of openness were satisfied by having maintained such openness during a particular historical window, then WTO Members who did not have 'relevant bodies' before that window closed would be prevented from participating in the creation of standards that they would be required by TBT 2.4 to use as a basis for their technical regulations.

This last consideration reminds us that the Panel never, in fact, properly turned its mind to the precise wording of paragraph 4, Annex I of the TBT Agreement. In particular, the Panel never considered the significance of the language 'relevant bodies' in the provision in question. The use of the expression 'relevant bodies of WTO Members' in paragraph 4, Annex I, reflects the fact that, in many WTO Members, standardization bodies are not state organs; indeed, this recognition is explicit in Articles 3 and 8, inter alia, which address the standardization and conformity assessment activities of nongovernmental bodies. *Membership* in the AIDCP is limited to states and regional economic organizations; no other reading of Article XXVI of the AIDCP is possible. A standardization body that does not have the international legal personality of a state or regional organization is per se prevented from Membership in the AIDCP (and always was).[84] Such a nongovernmental standardization body would be relegated to the status of an Observer, with very limited participatory rights, and no decisionmaking rights, as determined by Annex X of the AIDCP. We note, finally, that the Appellate Body reversed the Panel's findings under Article 2.4.

84 Indeed, even if for purposes of attribution under ILC Articles a standardization body's conduct could be attributable to a state, for example where it is exercising elements of governmental authority or acting under the direction of the state, this would still not provide the requisite international legal personality required for membership in AIDCP, which clearly limits membership to states and regional economic organizations.

Use of non-WTO law by the Panel

The Panel's finding in paragraph 7.575 also hinged on certain conclusions about the meaning, effect, and compliance with the AIDCP. These determinations are to be found, inter alia, in paragraphs 7.598, 7.608–7.612, and 7.615. The Panel's observations in these paragraphs represent explicit or implicit determinations regarding the meaning of the law of the AIDCP, the nature of the United States's obligations under the AIDCP, Mexico's compliance with the AIDCP, and the actual effect of the law of the AIDCP.

In light of its detailed examination of the requirements of the AIDCP and the obligations of parties to the treaty, the Panel concluded that 'allowing compliance with the AIDCP requirements to be advertised in addition to the current US label' would not result in a lower level of protection than the US label alone.[85] The Panel employed the AIDCP as an indispensable legal benchmark in determining that the US measure was more trade-restrictive than necessary and thus that the United States was in violation of TBT 2.2.

Article 11 of the DSU requires that the Panel 'make an assessment of the conformity with the relevant covered agreements'. Article 3.2 of the DSU explains what a Panel is required to do in order to make such an assessment, which includes interpreting the covered agreements in accordance with the customary rules of interpretation of public international law. Accordingly, the Panel's assessment of conformity under Article 11 must be governed by use of the sources of international law as determined by Article 38 of the Statute of the International Court of Justice and the Vienna Convention on the Law of Treaties.[86]

In making determinations or assumptions concerning the meaning and effect of the AIDCP and concerning compliance of states parties, the Panel failed completely to articulate the basis on which, under customary international law that relates to the interpretation of treaties, it was entitled to consider the AIDCP in coming to the conclusion that the United States had breached a provision of a WTO-covered agreement. In the *Mexico–Taxes on Soft Drinks* case, the Appellate Body indicated that the WTO dispute-settlement organs have a very limited or circumscribed jurisdiction to make determinations concerning whether states parties are in conformity with non-WTO legal rules.[87] In the ruling, the Appellate Body noted that it saw 'no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes'.[88]

One way in which a Panel may consider non-WTO law is as 'other relevant rules of international law applicable between the parties', as set out in Article 31(3)(c) of

85 Panel Report, *US–Tuna II (Mexico)*, para. 7.615.

86 Palmeter and Mavroidis (1998).

87 Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, 3 [*hereinafter Mexico–Taxes on Soft Drinks*], para. 56.

88 Ibid.

the *Vienna Convention on the Law of Treaties*.[89] As the Appellate Body has held in *EC–Aircraft*, the expression 'parties' in 31(3)(c) should not be read so as to *exclude* the consideration of international legal rules that are not binding on all Members of the WTO (this effectively overrules the approach on this issue of the earlier, widely criticized *EC–Biotech* Panel[90]). However, the Appellate Body also found that the WTO dispute-settlement organs should exercise caution when they consider non-WTO international legal rules that are binding only on a subset of WTO Members. Before making its determinations concerning the AIDCP, the Panel utterly failed to balance the important systemic considerations that the Appellate Body set out in *EC–Aircraft*[91] as at play in any decision to take into account non-WTO legal rules that are not applicable between all Members of the WTO. Indeed, as noted, it did not even set out the legal basis in the *Vienna Convention on the Law of Treaties* for its reliance on non-WTO law. This utter failure represents a violation of the duty of the Panel under Article 11 of the DSU.

The Panel did not appreciate that in judging the United States's compliance with the provisions of a WTO-covered agreement in relation to the legal rights and obligations, and the effects, of a different treaty regime, it was engaged in a delicate exercise of constructing a relationship between two separate international legal regimes, with important implications for what the International Law Commission has called 'fragmentation'. It completely ignored the United States's submissions that the AIDCP was a separate and distinct international legal regime that could not be simplistically employed to judge the conformity of the United States with the TBT Agreement. The AIDCP contains certain provisions for settlement of disputes and interpretation of the treaty. At times, in its submissions, Mexico presented the dispute before the Panel as a dispute concerning the United States's compliance with its obligations under the AIDCP. The Panel never turned its mind to whether the WTO rather than the AIDCP was the appropriate forum for this dispute, given Mexico's reliance on the AIDCP as well as its assertions about the consistency of the conduct of the United States with its undertakings in that non-WTO treaty regime.

Finally, in the *US–Shrimp* case, the Appellate Body considered the terms of a regional agreement that the United States had entered into with certain WTO Members as evidence that WTO Members nonparties of the agreement had been treated worse, and thus subject to discrimination within the meaning of the

89 Vienna Convention on the Law of Treaties, art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331.

90 Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III–VIII, 847.

91 Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, para. 845 ('[O]ne must exercise caution in drawing from an international agreement to which not all WTO Members are party.')

chapeau of Article XX of the GATT.[92] Although the ruling described the obligations of the Inter-American Convention in some detail, the Appellate Body concluded this examination demonstrated that 'consensual and multilateral procedures are available and feasible for the establishment of programs for the conservation of sea turtles'.[93] It used the Convention solely as a 'convincing demonstration' that the United States had negotiated seriously with some parties and had not done so with others.[94]

Especially in its 21.5 Report, the Appellate Body made it very clear that the terms of the regional agreement merely constituted some evidence of the kind of treatment that the United States might have offered, on a nondiscriminatory basis, to the claimants. In rejecting Malaysia's claim that the Panel below established a new legal standard, the Appellate Body explicitly reaffirmed that the Convention was only to be used as 'a basis for comparison' in terms of negotiating efforts and in no way 'transform[ed] the Inter-American Convention into a "legal standard"'.[95] The Appellate Body was therefore exceedingly careful to indicate that it was *not* imposing the other agreement as a juridical norm that was indispensable or decisive in assessing whether the United States was in compliance with the provisions of the covered agreements at issue in the dispute.

Cloves

TBT 2.2 Objective assessment

As noted above, the Panel in *COOL* found that the United States was in violation of TBT 2.2 because its measure did not achieve the US stated objective of clear and accurate information concerning the national origin of the products at issue. We would observe at the outset that, to the extent that Article 2.2 of TBT is considered to require the same kind of inquiry as Article XX of the GATT, the legal interpretation underlying this finding is highly questionable. Under Article XX (*Brazil–Tyres*), a measure must be in relation to an objective covered by the treaty provision, must make a material contribution to that objective, and must be least-trade-restrictive in the sense that there is no reasonably available alternative measure that achieves the level of protection sought by the regulating measure. There is no requirement that that measure achieve the objective sought to the *greatest extent possible*. Yet the *COOL* Panel read this into 2.2 of the TBT Agreement. Indeed, a requirement that a Member's measure achieve a legitimate objective to the greatest extent possible would be inconsistent with the right under

92 Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, paras. 169–171.

93 Ibid., para. 170.

94 Ibid., paras. 171–172.

95 Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481, para. 130.

TBT of a Member to choose its level of protection, which the Appellate Body has recently in its Report in *US–Cloves* (subsequent to the *COOL* Panel decision) affirmed as fundamental to the object and purpose of the TBT Agreement. A Member could choose a high level of protection, but limitations in resources and other legitimate public-policy objectives might not allow it to fully achieve that level of protection. This is one reason why a Member's level of protection cannot be *simply* inferred from the measures it adopts. The fundamental obligation of least-trade-restrictiveness does not require that a measure achieve a Member's level of protection; it only requires that there be no alternative reasonably available alternative measure that makes an equal (or greater) contribution to the achievement of that level of protection.

But this brings us to the way in which the Panel in *COOL* interpreted the US objective of 'clear and accurate information'. The Panel viewed this language as if it were stating a level of protection rather than an objective. Thus, it understood the United States to mean by the objective of clear and accurate information, that the United States was seeking the provision of the most detailed, or perhaps the greatest amount of information possible to consumers about the national origin of the products in question. The Panel identified the supply of the most, or the most detailed, information possible with a level of protection suggesting that consumers should be as perfectly informed as possible in their consumption decisions.

The Panel never contemplated that, due to the way that consumers process information, and the costs involved in doing so, consumers might end up being less perfectly informed if more information is supplied, due to the information-overload problem. A more simplified presentation of information might well be easier for consumers to process correctly, and thus might result in their consumption decisions more perfectly reflecting their preferences.[96] As Mulholland and Sylvan suggest: 'Market research ... in products as diverse as jams and retirement savings, suggests that past a point, when provided with more choice and information, we either walk away from markets, choosing not to choose or we choose randomly.'[97]

This relates to a more general consideration to which the Panel appeared completely oblivious, as noted above in the economic analysis: what counts as 'clear and accurate information' or the most 'clear and accurate' information is relative to the purpose for which the information is used and its *value* for that purpose. What counts as 'clear and accurate information' about the working of a computer will be different depending on whether the addressee is a hardware engineer, a software designer, a computer-science student, or a consumer. There are many empirical studies that suggest that governments often mandate disclosure of information that in fact has little value to consumers in their consumption

96 See, e.g., Wansink *et al.* (2004); Héroux *et al.* (1988).

97 'Section I: Setting the Context', OECD Roundtable on Economics for Consumer Policy, Summary Report, 26 July 2007, p. 11.

decisions. Is mandating the supply of largely worthless information to consumers a legitimate objective under TBT?

The legitimate regulatory objective here was consumer protection. This, rather obviously, means that the information is intended to facilitate consumers aligning their purchase decisions with their preferences to the greatest extent possible. What kind of labeling scheme achieves this objective depends on the nature of those preferences. It might be the case that some consumers are simply curious about the national origin of the products they buy: they get utility from the satisfaction of that curiosity (and I admit that in most democracies there would probably not be strong support for imposing significant regulatory costs on producer interests to satisfy an exogenous preference for knowledge about the national origin of products. It is more plausible to assume that the national origin of the products is related in some way to the utility of consumption of the product). What *kind of information* will allow consumers to best align their consumption decisions with their preferences will depend crucially on how their preferences related to the national origin of products. *But this is a question the Panel never addressed.*

Some consumers may be nationalistic or xenophobic. They may inherently gain more utility when they purchase goods produced in their own country simply out of nationalistic sentiment. Or they may be prejudiced against the majority ethnic or religious group of some particular country and so have a disutility from purchasing their products. We have serious doubts that facilitating such decisions based on nationalistic considerations is a 'legitimate objective' compatible with the objective and purpose of the WTO and, in particular, the disciplines on trade in goods that are inherently anti-protectionist in normative orientation. While the complainants in *COOL* did in fact argue that there was a protectionist motivation behind the country-of-origin labeling scheme, and the Panel dismissed the evidence that they provided in this regard (connected to legislative history), the Panel did not consider explicitly whether the preferences of consumers for products of a particular national origin might be protectionist and therefore whether facilitating consumption decisions that reflect such preferences might not be a 'legitimate' objective under TBT 2.2.

In fact, however, as some of the evidence presented by the United States suggested, in the case of meat products, consumers are concerned with the national origin of the products because they regard national origin as a proxy for safety and other aspects of quality. Indeed, the available evidence suggests that US consumers *will* only pay a premium for country-of-origin labeled beef to the extent that they believe beef from certain countries to be safer and of higher quality than other countries.[98] Moreover, consumer surveys suggest that a very high percentage of US consumers believe that US meat is fresher and safer than meat from other sources. According to Loureiro and Umberger (2007), 'U.S. meat is perceived to be the safest

98 Umberger (2004).

relative to meat from Argentina, Australia, Canada, Denmark, Mexico, and New Zealand. Nonetheless, meat from Canada, Australia, and New Zealand still received an average rating as "safe", but meat produced in Mexico and Argentina was not rated as safe'. On the other hand, there is a group of consumers who prefer grass-fed beef, which is more likely to be from Canada or Argentina as opposed to the United States.

If the value of information about national origin of meat to US consumers is entirely that of enabling them to use national origin as a proxy for safety and other quality attributes, it would make no sense to interpret the US goal of providing as much clear and accurate information as possible as requiring the provision of disclosure to extend to information that is irrelevant to consumers because it does not assist them in using national-origin information in this way. In effect, the United States would be imposing costs on producers to provide information that is worthless to consumers. This would not be consistent with the overall objective of consumer protection. The manner in which the Panel seemed to abstract from essential questions about the value of the information to consumers may be attributable in part to the US curious insistence that consumer health and safety were not among its regulatory objectives in the case of the *COOL* requirements.

Let us take the consumer concern with safety first of all. It is reasonable to assume that all stages in the production of meat can affect safety. A risk-averse consumer would thus get the most clear and accurate information from a country-of-origin label that specifies the country of origin as American where all the stages of production have occurred in the United States. Certainly such a consumer would be seriously misled by a 'made in America' label where *only* the slaughter of the animal occurred in the United States, since the great bulk of the practices and regulations affecting the ultimate safety of the meat – the consumer's central concern – would be in another, or other, jurisdictions.

What about the B and C labels, which the Panel characterized as not providing valuable information or creating ambiguity or confusion? Label B tells the consumer that the meat in question may have originated in a limited subset of countries. As far as the truly risk-averse consumer is concerned, label B serves the useful purpose of warning them that, although the meat in question may partly be from the country they identify as safest, there is a possibility that this is not the case. The risk-averse consumer will therefore know to choose A or D (to the extent that the D label refers to a country of origin other than the United States that the consumer associates with the highest degree of food safety).

However, there may be a somewhat less risk-averse consumer who does not always require meat from the country of origin that she identifies as having the highest safety standard. She may be willing to trade off some additional risk for a lower price or other attributes. At the same time, this consumer may still be concerned enough about safety that she may want to avoid meat that has been produced in whole or in part in countries she identifies with a serious lack of safety. From the perspective of this consumer, the information in label B is 'clear and

accurate'. She will be able to know whether there is a possibility of the meat originating in whole or in part from a country that she identifies with safety concerns that would dissuade her from consuming the meat. For example, if this consumer finds Canada and the United States acceptable for safety but not Mexico, then a label that says that the product may be meat of either the United States or Canada will communicate information that is clear, accurate, and of value to the consumer, just as will a label that the meat may be any of US, Canadian, or Mexican origin. In other words, the consumer will always have clear and accurate information concerning whether the meat comes from a country that is *un*acceptable to her with regard to safety.

Now let us take label C. This label indicates that all stages of production other than slaughter have occurred outside of the United States. There is nothing inherently lacking in accuracy or clarity about this information. It would be of value to a consumer who is willing to be satisfied that application at the border of US sanitary and phytosanitary standards to the live animal is sufficient to deal with safety concerns about other countries that arise at the prior stages of production, but who values the information that the slaughter of the animal has occurred in the United States as an indication of greater safety at that stage. Risks that some consumers consider as of paramount importance, such as E. coli contamination, may be identified closely with slaughterhouse practices. This kind of contamination often garners a great deal of public and media attention.[99]

In sum, once we consider the use by consumers of national-origin information as a proxy for safety, the Panel is wrong (paragraph 7.707) to suggest that labels that indicate the possible, as opposed to actual, origin of meat (label B in this case) do not communicate clear or accurate information to consumers or that such labels contribute to confusion or uncertainty. Similarly, the Panel is wrong to suggest that there is any lack of clarity as to the information being communicated by labels B and C. Both labels, it is true, list more than one country of origin. Label B does so in such a way to communicate to the consumers all of the countries whose conditions, practices, and regulations *may* have influenced the safety of the meat in question, whereas label C assures the consumer that, whatever other country the live animal may originate from, the safety of the slaughter stage is determined by US conditions, practices, and regulations. Of course, consumer heuristics are complex, and it might turn out that the presentation of the information in question on B and C could be such as to create confusion or ambiguity as to which information is being communicated by which label. But the Panel admitted that the complainants had not presented any actual empirical evidence of consumer confusion.

Let us now consider quality attributes other than safety. These attributes may be affected by various stages in the production process, breeding stock, corn-fed vs. grass-fed, etc. The requirements for Labels A and D, which apply to claims that

99 Roberts *et al.* (1999).

meat originates from a single country, prevent consumers from being misled that the stage(s) in production that are relevant to the quality attributes they are concerned with occurred in the country they identify with those attributes, by specifying that all stages of production must have occurred in that country. Labels B and C admittedly are less useful to consumers who are concerned with some nonsafety quality attribute they are seeking and that they identify with a particular country.

It is true that such consumers would gain further information from a label that specifies the country where each stage of production occurred for the actual meat in the package. However, the complexity of such a label, if we follow the general lessons of behavioral law and economics in this area, might be such as to deter the consumer from effectively using the information; at the same time, the regulatory costs entailed in this degree of traceability could be considerable. In sum, the Panel was wrong to think (as it seemed implicitly to do) that a reasonable regulator pursuing the goal of information being as clear and accurate as possible would require that each stage of production be specifically traceable to the country at which that stage took place. There is empirical evidence that consumers place considerably less value on very specific traceability than on more general assurances concerning the characteristics of products.[100]

Finally, the Panel cited as a further example of confusion or ambiguity the fact that in the case of commingling (the slaughter together of animals of both domestic and foreign origin) labels B and C were permitted to be used interchangeably. Yet why should this be confusing? From the point of view of the consumer who wants to know all the countries whose conditions, practices, and regulations may have affected the safety of the meat, B and C are equally informative. It is just that label C provides an additional piece of information, namely that the slaughter stage took place in the United States. As indicated above, this information will be useful to one particular group of consumers, those who are particularly concerned with safety at the slaughter stage. But this additional piece of information does not in any way obscure or make harder to process the basic information concerning the possible countries that may have affected the safety of the meat at some other stage of its production. Whether a producer chooses, in the case of commingled meat, to use label C would presumably depend on whether he or she believes that the information would lead some relevant group of consumers to prefer meat that they know has been slaughtered in the United States.

To conclude the discussion of the *COOL* case, the Panel's conclusion that the US measure did not correspond to the US goal of as clear and accurate information as possible concerning national origin was based on several errors of understanding and analysis – first of all, ignoring that the meaning of clear and accurate information where the goal is consumer protection depends on the way in which

100 See Hobbs (2003).

consumers use information; second, assuming that more information necessarily enhances accuracy and clarity from the relevant consumer point of view; and, third, not appreciating that the design of a labeling scheme may target different groups of consumers with overlapping, but not identical, interests in the kind of information without being ambiguous or confusing.

5. Conclusions

We began this paper with the observation that these are cases where it is far from obvious, from either the design of the measure or the broad policy, whether the measures are legitimate idealistic government regulation in the public interest or insidious if somewhat hidden protectionism. Depending on one's particular bias or perspective, one could look at the measures and the surrounding facts in very different ways. However the legal tests are refined by the Appellate Body, much will depend on the characterization of the measures and the facts related to them by the Panels. As we have shown, gauging the various effects of these kinds of measures on different market actors – consumers, foreign producers, domestic producers, and downstream processors – is a delicate and complex exercise.

While, as noted, Panels are bound in their fact-finding by the duty to make an objective assessment of the matter, and are also bound by the Appellate Body jurisprudence on the burden of proof, etc., the panelists do not normally (indeed very rarely) have a background as triers of fact or trial advocates. Even less are they likely to have the expertise to evaluate complex economic impacts. It is difficult to come to any conclusion but that the panelists in this case approached the measures and the surrounding facts with a *presumption* of protectionism. In the United States, against which the Panels decided in all three cases, judicial review of regulation would normally be done by experienced judges, assisted by law clerks who are the leading graduates of the best law schools. While US administrative law is complicated, and neither of us is a specialist in that field, some degree of deference to agency expertise and to the democratic process is evident in the approach to complex regulatory choices. US agencies are generally required to take into account, and treat fairly, affected economic interests, whether domestic or foreign. *More* intrusive review by an international body, which is *further* removed from the democratic will and legitimate political institutions than the domestic courts, may still be useful for protecting some politically *under*-represented foreign economic interests; but it is also likely to raise among other constituencies justified legitimacy concerns that cannot easily be solved within the confines of the existing WTO treaties and dispute-settlement practices. Some Appellate Body decisions have, as a matter of legal doctrine, directed Panels towards a greater sensitivity toward, if not actual deference to, the reasoned regulatory choices of domestic regulators and agencies (*EC–Hormones; Brazil–Tyres*). But the value of these decisions is limited in cases where the devil is in the details, the facts are not obvious in pointing to protectionism, and where the system persists in naming panelists who

are not professional adjudicators and who tend to have a deregulatory bias, easily presuming protectionism in the presence of complexity and ambiguity.

References

Grossman, G. M., H. Horn, and P. C. Mavroidis (2012), 'Legal and Economic Principles of World Trade Law: National Treatment', in ALI, *Legal and Economic Principles of World Trade Law: The Genesis of the GATT, the Economics of Trade Agreements, Border Instruments, and National Treatment, Report to ALI*.

Hadfield, G. K., R. Howse, and M. J. Trebilcock (1998), 'Information-Based Principles for Rethinking Consumer Protection Policy', *Journal of Consumer Policy*, **21**(2): 131–169.

Harbaugh, R., J. W. Maxwell, and B. Roussillon (2011), 'Label Confusion: The Groucho Effect of Uncertain Standards', *Management Science*, **57**(9): 1512–1527.

Héroux, L., M. Laroche, and K. L. McGown (1988), 'Consumer Product Label Information Processing: An Experiment Involving Time Pressure and Distraction', *Journal of Economic Psychology*, **9**(2): 195–214.

Hobbs, J. E. (2003), 'Traceability and Country of Origin Labelling', Policy Dispute Information Consortium 9th Agricultural and Food Policy Information Workshop, Montreal, 25 April.

Horn, H. (2006), 'National Treatment in the GATT', *American Economic Review*, **96**(1): 394–404.

Howse, R. (2002), 'From Politics to Technocracy and Back Again: The Fate of the Multilateral Trading Regime', *American Journal of International Law*, **96**(1): 94–117.

Loureiro, M. L. and W. J. Umberger (2007), 'A Choice Experiment Model for Beef: What US Consumer Responses Tell Us about Relative Preferences for Food Safety, Country-of-Origin Labeling and Traceability', *Food Policy*, **32**(4): 496–514.

Palmeter, D. and P. C. Mavroidis (1998), 'The WTO Legal System: Sources of Law', *American Journal of International Law*, **92**(3): 398–413.

Roberts, T., S. A. Malcolm, and C. A. Narrod (1999), 'Probabilistic Risk Assessment and Slaughterhouse Practices: Modelling Contamination Process Control in Beef Destined for Hamburger', *Probabilistic Safety Assessment PSA '99: Risk-Informed Performance-Based Regulation in the New Millennium*, Mohammad Modarres (ed.), 809–815.

Teisl, M. F., B. Roe, and R. L. Hicks (2002), 'Can Eco-Labels Tune a Market? Evidence from Dolphin-Safe Labeling', *Journal of Environmental Economics and Management*, **43**(3): 339–359.

Umberger, W. J. (2004), 'Will Consumers Pay a Premium for Country-of-Origin Labeled Meat?', *Choices*, 4th quarter.

Wansink, B., S. T. Sonka, and C. M. Hasler (2004), 'Front-Label Health Claims: When Less is More', *Food Policy*, **29**(6): 659–667.