

CASE NOTES

BEYOND DISCRIMINATION?

THE WTO PARSES THE *TBT AGREEMENT* IN *US — CLOVE CIGARETTES*, *US — TUNA II (MEXICO)* AND *US — COOL*

I INTRODUCTION

In the Tokyo Round of the 1970s, as industrialised countries started to eliminate tariffs, negotiators began to focus on the barriers that would emerge after tariffs were gone. The concern was that barriers to trade caused by the use of behind-the-border regulations could offset, or at least significantly undermine, the market access gained from negotiated tariff reductions. To tackle the problems of protectionist non-tariff barriers, they negotiated the plurilateral *Agreement on Technical Barriers to Trade* ('*TBT Agreement*' or '*TBT*').¹ The Uruguay Round later refined the text of the *TBT Agreement* and incorporated it in a World Trade Organization agreement that would be binding on and enforceable against all WTO members.²

Push-back against the *TBT Agreement* began immediately and has steadily increased; political and academic commentary has urged flexible interpretation of the *TBT Agreement* to create more policy space for government regulation.³ Yet exporter interest in standards-related barriers to market access, which the *TBT Agreement* combats, is also at an all-time high.⁴ With continuing weak economic growth, producers need export markets more than ever before. *TBT* provisions prohibiting discrimination can safeguard market access gained from bargained-for tariff cuts. In addition, *TBT* provisions facilitating harmonisation of technical regulations to international standards and mutual recognition of domestic standards can significantly reduce costs for exporters who seek to maximise economies of scale.

Under *TBT* art 2.1, discrimination against imported products based on national origin is prohibited and therefore illegitimate. However, even non-discriminatory regulations can impose increased costs on imports due to

¹ *Agreement on Technical Barriers to Trade*, opened for signature 12 April 1979, 1186 UNTS 276 (entered into force 1 January 1980).

² *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*') ('*TBT Agreement*').

³ See, eg, Nathalie Bernasconi-Osterwalder and Johannes Norpoth, 'Is World Trade Law a Barrier to Saving Our Climate? Questions and Answers' (Report, Centre for International Environmental Law and Friends of the Earth, September 2009) <http://www.ciel.org/Publications/ClimateTradeReport_foee-ciel_sep09.pdf>; Steven Bernstein and Erin Hannah, 'Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space' (2008) 11 *Journal of International Economic Law* 575; Henrik Horn and Joseph H H Weiler, '*European Communities — Trade Description of Sardines: Textualism and Its Discontent*' in Henrik Horn and Petros C Mavroidis (eds), *The WTO Case Law of 2002* (Cambridge University Press, 2005) 248.

⁴ See, eg, Office of the United States Trade Representative, '2013 Report on Technical Barriers to Trade' (Report, April 2013); *Eighteenth Annual Review of the Implementation and Operation of the TBT Agreement*, WTO Doc G/TBT/33 (27 February 2013) (Note by the Secretariat) [2.6]–[2.10].

regulatory differences between the home and export markets. Article 2.2's commitment to avoiding technical regulations that impose unnecessary obstacles to trade tackles the issue of these 'difference costs' head-on but, at the same time, limits governments' policy space.

In three decisions adopted in mid 2012,⁵ the WTO Appellate Body interpreted these provisions of the *TBT Agreement*, accepting claims of discrimination under art 2.1 but rejecting all claims under art 2.2. This case note explores these decisions and the extent to which they provide guidance for governments, stakeholders and the public on the outcome of future *TBT* cases. It describes the measures that triggered these complaints, summarises the Panels's and Appellate Body's findings and synthesises the salient findings on discrimination and the obligation to avoid unnecessary obstacles to international trade.

II THE DISPUTES

A US — Clove Cigarettes

The *United States — Measures Affecting the Production and Sale of Clove Cigarettes* ('US — Clove Cigarettes') dispute arose from United States legislation banning cigarettes flavoured with any material other than tobacco or menthol and granting the US Food and Drug Administration ('FDA') authority to regulate tobacco products.⁶ According to data submitted by the parties, approximately one quarter of US smokers use menthol cigarettes, while a mere 0.1 per cent use clove cigarettes.⁷

Indonesia, where clove cigarette production is a major employer, lobbied against the ban on clove cigarettes and requested dispute settlement consultations soon after it was enacted on 7 April 2010.

The Panel was established on 20 July 2010 and circulated its report on 2 September 2011.⁸ It found that the legislative provision at issue is a technical regulation and that the US violated *TBT* art 2.1 by banning clove cigarettes and exempting menthol cigarettes.⁹ The Appellate Body upheld this finding but for different reasons.¹⁰ The Panel rejected Indonesia's claim under *TBT* art 2.2, finding that Indonesia had failed to demonstrate that the clove cigarette ban was more trade-restrictive than necessary to fulfil the legitimate objective of reducing youth smoking, taking account of the risks that non-fulfilment would create.¹¹

⁵ Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R, AB-2012-1 (4 April 2012) ('US — Clove Cigarettes'); Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) ('US — Tuna II (Mexico)'); Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, AB-2012-3 (29 June 2012) ('US — COOL').

⁶ *Family Smoking Prevention and Tobacco Control Act*, Pub L No 111-31, § 907(a)(1)(A), 123 Stat 1776, 1799 (2009).

⁷ Panel Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/R (2 September 2011) [2.25] ('US — Clove Cigarettes').

⁸ *Ibid* [1.3].

⁹ *Ibid* [7.293].

¹⁰ Appellate Body Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/AB/R, [233].

¹¹ Panel Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/R, [7.429]–[7.432].

Indonesia decided not to appeal this finding, choosing to focus its resources on defending the national treatment finding.¹²

The Panel and the Appellate Body also examined art 5.2 of the Doha Ministerial Decision on *Implementation-Related Issues and Concerns* of 14 November 2001.¹³ Article 5.2 defines the phrase ‘reasonable interval’ in *TBT* art 2.12 as ‘not less than 6 months’.¹⁴ The Panel¹⁵ and the Appellate Body¹⁶ found that art 5.2 is ‘a subsequent agreement’ within the meaning of art 31(3)(a) of the *Vienna Convention on the Law of Treaties*.¹⁷ The Panel also found that the US had violated *TBT* art 2.12 by failing to allow at least a six month interval between the publication and entry into force of the technical regulation.¹⁸ The Panel found that the US violated *TBT* art 2.9.2 by failing to notify WTO Members, through the Secretariat, of the products to be covered by the new legislative provision at a stage when amendments were still possible.¹⁹ It rejected Indonesia’s claims under *TBT* arts 2.5, 2.8, 2.9.3, 2.10 and 12.3.²⁰ These findings were not appealed.

B US — *Tuna II (Mexico)*

The dispute in *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (‘US — *Tuna II (Mexico)*’) involved a challenge by Mexico against US laws regulating the use of the ‘dolphin-safe’ label on tuna products. In the Eastern Tropical Pacific (‘ETP’) the association of dolphins and large yellowfin tuna has led tuna fishers to ‘set on’ groups of dolphins on the surface, with purse seine nets that encircle the dolphins and tuna beneath. Dolphins drown during purse seine fishing when they are unable to jump over the closing nets and escape.

The *Dolphin Protection Consumer Information Act* (‘*DPCIA*’) regulates the use of the dolphin-safe label on tuna products in the US.²¹ As applied by implementing regulations²² and a federal appellate court ruling in *Earth Island Institute v Hogarth*,²³ the *DPCIA* allows tuna harvested in the ETP by purse seine nets to use the dolphin-safe label only when an observer has certified that no dolphins were killed or seriously injured and no purse seine nets were

¹² Linda Yulisman, ‘Indonesia Will Not Appeal WTO Ruling on US Tobacco Ban’, *The Jakarta Post* (online), 14 January 2012 <<http://www.thejakartapost.com/news/2012/01/14/indonesia-will-not-appeal-wto-ruling-us-tobacco-ban.html>>.

¹³ *Implementation-Related Issues and Concerns*, WTO Doc WT/MIN(01)/17 (20 November 2001) (Decision of 14 November 2001).

¹⁴ *Ibid.*

¹⁵ Panel Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/R, [7.576].

¹⁶ Appellate Body Report, *US — Clove Cigarettes*, WTO Doc WT/DS406, [268].

¹⁷ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (‘*VCLT*’).

¹⁸ Appellate Body Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/AB/R, [297].

¹⁹ Panel Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/R, [7.542].

²⁰ *Ibid* [7.463], [7.498], [7.507], [7.551], [7.649].

²¹ *Dolphin Protection Consumer Information Act*, 16 USC § 1385 (2006) (‘*DPCIA*’).

²² *Dolphin-Safe Labeling Standards*, 50 CFR § 216.91 (2012).

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

intentionally deployed or used to encircle dolphins during that fishing trip.²⁴ For tuna caught outside the ETP, where there is no significant dolphin-tuna association, it will be sufficient for the captain of the vessel to certify the latter.²⁵

Mexico challenged the consistency of this measure with US commitments under the *TBT Agreement* and the *General Agreement on Tariffs and Trade 1994* ('*GATT*').²⁶ A majority of the Panel found the measure to be a technical regulation, with one Panel Member dissenting. On appeal, the Appellate Body agreed that the measure is a technical regulation.²⁷

The Panel rejected Mexico's national treatment claim under *TBT* art 2.1, finding that Mexico had not established that the measure accords less favourable treatment to Mexican tuna products.²⁸ According to the Panel, while the US tuna fleet no longer set upon dolphins to catch tuna, the Mexican tuna fleet had decided to continue this practice.²⁹ Moreover, the decision of US tuna processors to discontinue purchases of tuna caught by setting on dolphins predated the *DPCIA* and its definition of dolphin-safe and Mexican fishers could still decide to change their fishing practices to comply with the dolphin-safe label. For these reasons, the Panel found that while the impact of the measure was largely on Mexican tuna fishers, this arose from factors not related to the origin of the product and instead reflected private choices by Mexico's fishing fleet.³⁰

On appeal, the Appellate Body overturned the Panel's *TBT* art 2.1 findings and instead concluded that the measure accorded Mexican tuna products less favourable treatment than tuna products from the US and other countries.³¹ According to the Appellate Body, the measure modified the conditions of competition in the US market to the detriment of Mexican tuna products.³² The Appellate Body also found that the US had failed to justify the measure's treatment of access to the dolphin-safe label for tuna caught in the ETP as non-discriminatory, compared to the less stringent requirements for tuna caught outside the ETP which still have significant risks of dolphin mortality.³³

The Panel also found that the dolphin-safe labelling provisions were inconsistent with *TBT* art 2.2. It found that while these provisions' stated objectives were legitimate within the meaning of art 2.2, the *DPCIA* was more trade-restrictive than necessary to accomplish those objectives.³⁴ Moreover, allowing use of an alternative label — the label established by the *Agreement on*

²⁴ Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [2.20] ('*US — Tuna II (Mexico)*').

²⁵ *Ibid* 7–8 (Table: *US Dolphin Safe Labelling Conditions*), [2.24]–[2.25].

²⁶ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') ('*GATT 1994*').

²⁷ Appellate Body Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/AB/R, [199].

²⁸ Panel Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/R, [7.374].

²⁹ *Ibid* [7.327]–[7.328].

³⁰ *Ibid* [7.378].

³¹ Appellate Body Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/AB/R, [299].

³² *Ibid* [298].

³³ *Ibid* [297].

³⁴ Panel Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/R, [7.620].

the *International Dolphin Conservation Program* ('AIDCP')³⁵ — would constitute a less trade-restrictive alternative that would achieve a level of protection equivalent to that achieved by the *DPCIA*, taking into account the risks non-fulfilment would create.³⁶ The Panel also found that the *DPCIA* only partially fulfilled its stated objectives in relation to dolphin-harming fishing practices outside the ETP.³⁷

With respect to Mexico's claim under *TBT* art 2.4, the Panel ruled that the *AIDCP* definition of dolphin-safe is a 'relevant international standard'³⁸ and that the *AIDCP* is an 'international standardizing organization' for the purposes of art 2.4.³⁹ The US appealed these findings. Mexico appealed the Panel's finding that the *AIDCP* dolphin-safe standard is an effective and appropriate means to fulfil US objectives at the US's chosen level of protection.

Regarding art 2.4, the Appellate Body agreed with the US that the Panel had erred in finding that it had to consider whether the *AIDCP* was an 'organization', rather than a 'body'.⁴⁰ Instead, the Appellate Body explained that an international standard is one that has been adopted by an international standardising body, which is 'a body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all Members'.⁴¹ According to the Appellate Body, whether a body has recognised standardisation activities requires that WTO members are aware of, or have reason to believe, that the international body engages in such activities.⁴² Participation in its activities by WTO members will count as evidence that the body's activities in standardisation are 'recognized'.⁴³ Other relevant evidence includes whether the standardising body had complied with a *TBT* Committee Decision⁴⁴ setting out principles and procedures for those bodies to follow in the development of international standards.⁴⁵ The Appellate Body found that because the *AIDCP* is not open to all WTO members (as its membership is by invitation only), the *AIDCP* is not an 'international standardizing body' under the *TBT Agreement*.⁴⁶ This finding led the Appellate Body to conclude that it was not required to address Mexico's appeal of the Panel's finding that there was no violation of *TBT* art 2.4.⁴⁷

³⁵ *Agreement on the International Dolphin Conservation Program*, opened for signature 21 May 1998, TIAS No 12956 (entered into force 15 February 1999).

³⁶ Panel Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/R, [7.577]–[7.578].

³⁷ *Ibid* [7.599].

³⁸ *Ibid* [7.707].

³⁹ *Ibid* [7.692].

⁴⁰ Appellate Body Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/AB/R, [395].

⁴¹ *Ibid* [359].

⁴² *Ibid* [362].

⁴³ *Ibid* [390].

⁴⁴ *Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995*, WTO Doc G/TBT/1/Rev.10 (9 June 2011) (Note by the Secretariat) annex B ('*Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5, and Annex 3 of the Agreement*') ('*TBT Committee Decision*').

⁴⁵ Appellate Body Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/AB/R, [373]–[375]. The Appellate Body found that the *TBT Committee Decision* is a 'subsequent agreement' within the meaning of art 31(3)(a) of the *VCLT*: at [371]–[372].

⁴⁶ *Ibid* [397]–[398].

⁴⁷ *Ibid* [400].

C US — COOL

In the dispute of *United States — Certain Country of Origin Labelling (COOL) Requirements* ('US — COOL'), Canada and Mexico challenged a US law that requires country of origin labelling ('COOL') for certain meat products.⁴⁸ The COOL measures emerged from the struggle between small ranchers, cattlemen and feedlot operators (represented by the Ranchers and Cattlemen's Action Legal Fund (R-CALF) and the National Farmers Union), and their monopsony customers, the highly concentrated US meat packing industry, in which four firms control 80 per cent of total steer and heifer slaughter.⁴⁹ By opening the US border to livestock from Canada and Mexico, the *North American Free Trade Agreement*⁵⁰ had created an integrated North American livestock market. Small cattle operators 'saw COOL as a way to prevent packers from strategically using imported cattle to leverage down livestock prices, as well as to curb imports'.⁵¹

In the *Farm Security and Rural Investment Act of 2002*, these small cattlemen obtained new country of origin labelling provisions for beef, lamb, pork, seafood, fresh fruits and vegetables and peanuts.⁵² However, after the US Department of Agriculture ('USDA') estimated implementation costs might reach \$3.9 billion, Congress postponed most COOL implementation until 2008. The *Food, Conservation, and Energy Act of 2008* then included mandatory COOL requirements and factors to be considered in labelling origin and extended mandatory COOL to goat meat, chicken, macadamia nuts, pecans and ginseng.⁵³ To reduce packers' compliance costs, the 2008 legislation allowed commingling of meat of different origins, reduced record-keeping requirements and reduced fines from \$10 000 to \$1000.⁵⁴ The USDA then introduced more flexibility in interim implementing regulations. Canada and Mexico requested

⁴⁸ The Dispute Settlement Body established a single panel to hear the complaints of Canada and Mexico.

⁴⁹ See Clement E Ward, 'Assessing Competition in the US Beef Packing Industry' (2010) 25(2) *Choices Magazine* (online) <<http://www.choicesmagazine.org/magazine/article.php?article=121>>. See also Stephanie Paige Ogburn, 'Cattlemen Struggle against Giant Meatpackers and Economic Squeezes', *High Country News* (online), 21 March 2011 <<http://www.hcn.org/issues/43.5/cattlemen-struggle-against-giant-meatpackers-and-economic-squeezes>>. The principal advocates of country of origin labelling ('COOL') were the Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America ('R-CALF USA') and the National Farmers Union. The meat packers were represented by the American Meat Institute.

⁵⁰ *North American Free Trade Agreement*, opened for signature 17 December 1992, 32 ILM 289 (entered into force 1 January 1994).

⁵¹ Wendy A Johnecheck, 'Consumer Information, Marks of Origin and WTO Law: A Case Study of the *United States — Certain Country of Origin Labeling Requirements* Dispute' (Food and Policy Applied Nutrition Program Discussion Paper No 43, 5 May 2010) 6, n 23 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579828>.

⁵² *Farm Security and Rural Investment Act of 2002*, Pub L No 107-171, § 10816, 116 Stat 134 (2002). The relevant provisions in the 2002 and 2008 Farm Bills and the COOL regulations, both preliminary and final, are easily accessible: Agricultural Marketing Service, United States Department of Agriculture, *COOL Historical Information* (23 May 2013) <<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=LegislativeandRegulatoryHistoricalInformation&rightNav1=LegislativeandRegulatoryHistoricalInformation&topNav=&leftNav=&page=COOLHistory&resultType=&acct=enryofornbl>>.

⁵³ *Food, Conservation, and Energy Act of 2008*, 7 USC §§ 1638–1638d (2012).

⁵⁴ *Farm Security and Rural Investment Act of 2002*, 7 USC §§ 1638–1638d (2012).

consultations in the WTO in December 2008. In consultations, Canada agreed to hold off on a panel request for eight months and, in exchange, the USDA modified its regulations. Just before leaving office, the Bush Administration issued a Final Rule allowing the use of multi-country labelling for commingled meat only for meat slaughtered during a single production day.⁵⁵

The Obama Administration's new USDA Secretary, Tom Vilsack, immediately delayed the date when the COOL regulations would come into effect and cancelled all funding for COOL enforcement.⁵⁶ After intense pressure from both sides, on 20 February 2009 Vilsack announced that the Final Rule would go into effect on 16 March as originally scheduled. He released a letter urging meat packers to voluntarily provide information about which production step occurred in each country, rather than simply listing multiple countries of origin.⁵⁷ On 7 May 2009, Canada and Mexico renewed their WTO consultation requests and added to them the COOL Final Rule and the Vilsack letter.

The Final Rule requires four origin labels for muscle cuts of meat and an origin label for ground beef or pork, determined by the history of the animal from which the meat was derived. These labels define country of origin on the basis of whether the animal was born, raised and/or slaughtered in the US, as follows.⁵⁸

⁵⁵ 'Confidential Letters Detail Canada-US Pact on WTO COOL Case' (13 July 2009) *Daily News, Inside US Trade*; 'Canada Shelves WTO COOL Case after Negotiating Changes with US' (2009) 27(2) *Inside US Trade*; *Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts*, 7 CFR § 65 (2009).

⁵⁶ 'New USDA Chief Announces Delay of Country-of-Origin Labeling Rule' (23 January 2009) 27(3) *Inside US Trade*; 'USDA No Longer Plans to Enforce Country Labeling Rule on April 1' (6 February 2009) 27(5) *Inside US Trade*.

⁵⁷ United States Department of Agriculture, 'Vilsack Announces Implementation of Country of Origin Labeling Law' (News Release, 0045.09, 20 February 2009); Letter from Thomas J Vilsack to Industry Representatives, 20 February 2009 <<http://www.usda.gov/wps/portal/usda/usdahome?contentid=2009/02/0045.xml>>.

⁵⁸ Panel Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc WT/DS384/R, WT/DS386/R (18 November 2011) [7.90]–[7.100] ('US — COOL').

Table One: COOL Origin Labels⁵⁹

Category	Meaning/Description
Category A	Label A — ‘Product of the US’: for meat from Category A animals (exclusively born, raised and slaughtered in the US; or born and raised in Alaska or Hawaii and transported to the US through Canada for not more than 60 days and slaughtered in the US) ⁶⁰
Category B	Label B — ‘Product of the US, Country X, and Country Y (if applicable)’ (eg, ‘Product of the US, Mexico and Canada’): for meat from Category B animals (animals that are not exclusively born, raised and slaughtered in the US, but are born, raised or slaughtered in the US but were not imported into the US for immediate slaughter). The retailer may designate the country of origin as all of the countries in which the animal may have been born, raised or slaughtered. ⁶¹ Meat can also use Label B if it is from commingling of meat in categories A and B, A and C, B and C or A, B and C, during a single production day. ⁶²
Category C	Label C — ‘Product of country X and the US’ (eg, ‘Product of Canada and the US’): for meat from Category C animals (imported into the US for immediate slaughter). ⁶³ Meat can also use Label C if it is from Category B animals or if it is from commingling of meat in categories A and B, A and C, B and C or A, B and C, during a single production day. ⁶⁴
Category D	Label D — ‘Product of country X’ for 100 per cent foreign meat imported into the US where no production steps have occurred in the US (eg, ‘Product of Australia’ for boxed beef processed in and imported from Australia). ⁶⁵
Ground Beef or Pork	‘all countries of origin of such ground beef [or] pork’ or ‘all reasonably possible countries of origin of such ground beef [or] pork’. ⁶⁶

The Panel Report, circulated on 18 November 2011, found that the COOL statute and regulations are a technical regulation but the Vilsack letter is not.⁶⁷ The Panel found that the muscle cut labelling provisions of the ‘COOL measure’ (the statute and regulations) violate *TBT* art 2.1 but the ground meat labelling provisions do not.⁶⁸ The Appellate Body upheld the Panel finding that the measure violates *TBT* art 2.1, but for different reasons.⁶⁹ The Panel further found that the COOL measure violates art 2.2 (a finding reversed on appeal, as discussed below).⁷⁰

⁵⁹ Remy Jurenas and Joel L Greene, ‘Country-of-Origin Labeling for Foods and the WTO Trade Dispute on Meat Labeling’, (Report, Congressional Research Service, 17 February 2012) 12–13.

⁶⁰ 7 USC § 1638a(2)(A) (2012); *Country of Origin Notification*, 7 CFR § 65.300(d) (2009).

⁶¹ 7 USC § 1638a(2)(B) (2012); *Country of Origin Notification*, 7 CFR §65.300(e)(1) (2009).

⁶² *Country of Origin Notification*, 7 CFR §65.300(e)(2) (2009).

⁶³ 7 USC § 1638a(2)(C) (2012); *Country of Origin Notification*, 7 CFR §65.300(e)(3) (2009).

⁶⁴ *Country of Origin Notification*, 7 CFR §65.300(e)(4) (2009).

⁶⁵ 7 USC § 1638a(2)(D) (2012); *Country of Origin Notification*, 7 CFR §65.300(f) (2009).

⁶⁶ 7 USC § 1638a(2)(E) (2012); *Country of Origin Notification*, 7 CFR §65.300(h) (2009).

⁶⁷ Panel Report, *US — COOL*, WTO Doc WT/DS384/R, WT/DS386/R (18 November 2011) [7.196], [7.216].

⁶⁸ *Ibid* [7.420], [7.437], [7.547]–[7.548].

⁶⁹ Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [350].

⁷⁰ Panel Report, *US — COOL*, WTO Doc WT/DS384/R, WT/DS386/R, [7.720].

Finally, the Panel found that by issuing the Vilsack letter, the US had failed to administer the COOL measure in a reasonable manner, violating *GATT* art X:3(a).⁷¹ It rejected Mexico's claims under *GATT* art X:3(a) that the USDA's changes in interpretation of the COOL measure were too frequent to be reasonable and constituted non-uniform administration; and also that the USDA's administration of COOL was partial to cow-calf producers.⁷² It also exercised judicial economy in respect of the non-violation nullification or impairment claims under *GATT* art XXIII:1(b). These findings were not appealed.

The rest of this note focuses on the analysis of the panels and the Appellate Body on the national treatment obligation in *TBT* art 2.1 and the obligations in *TBT* art 2.2.

III THE NATIONAL TREATMENT OBLIGATION

The complainants in all three of these cases claimed breach of the *TBT* art 2.1 national treatment commitment, providing the Panels and the Appellate Body with multiple opportunities to develop and clarify the meaning of this provision. According to the Appellate Body, the national treatment obligation in *GATT* art III:4 provides 'relevant context' for interpreting *TBT* art 2.1.⁷³ This Part therefore begins by outlining the Appellate Body's approach to *GATT* art III:4.

GATT art III:4 applies to 'all laws, regulations and requirements affecting ... internal sale, offering for sale, purchase, transportation, distribution or use'⁷⁴ of imported products and has been given a broad interpretation by the Appellate Body.⁷⁵ The narrower national treatment provisions of *GATT* art III:2 apply only to indirect taxes. The Appellate Body has found that the general principle in *GATT* art III:1 that laws, regulations and requirements 'should not be applied to imported or domestic products so as to afford protection to domestic production' informs *GATT* art III:4,⁷⁶ revealing that the national treatment commitment is aimed at preventing protectionism — measures that discriminate between domestic and imported goods based on national origin.

Identifying when a measure is protectionist requires distinguishing between laws that are merely more burdensome or costly for imported goods to comply with and laws that impose these costs on imported goods because they are foreign. This is particularly challenging for claims of de facto discrimination — as in these *TBT* cases — where the measure being challenged is origin-neutral but nevertheless has a detrimental impact on imported goods. In

⁷¹ Ibid [7.886].

⁷² Ibid [7.870], [7.879]–[7.881], [7.884]–[7.887].

⁷³ Appellate Body Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/AB/R, [100]. See also Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [269].

⁷⁴ *GATT* 1994 art III:4.

⁷⁵ See, eg, Appellate Body Report, *United States — Tax Treatment for 'Foreign Sales Corporations' — Recourse to Article 21.5 of the DSU by the European Communities*, WTO Doc WT/DS108/AB/RW, AB-2001-8 (14 January 2002) [207]–[210].

⁷⁶ Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (12 March 2001) [100] ('*EC — Asbestos*'), citing *GATT* 1994 art III:1.

these cases, a panel must determine whether the measure can be justified by a legitimate regulatory distinction or instead is protectionist.

GATT art III requires a government to treat an imported product no less favourably than a like domestic product. In the 1990s, *GATT* panels attempted to distinguish between protectionist regulatory or tax measures and measures enacted for other purposes by determining whether regulatory distinctions between domestic and imported products were for legitimate regulatory aims and, if so, finding that the products were not 'like'; or, if the aim of a regulation was to protect domestic goods from competition, finding that the products were 'like'.⁷⁷ This was the 'aim and effects' test.⁷⁸

An important problem with the aim and effects test was that it required panellists to identify the regulatory purpose. Where governments often regulate to achieve a range of objectives, establishing the aim of a measure presents both conceptual and evidentiary challenges.⁷⁹ In the 1996 case of *Japan — Taxes on Alcoholic Beverages*, the Appellate Body rejected the aim and effects test in favour of a market-based approach that determines likeness by assessing whether the imported and domestic goods compete in the market.⁸⁰ The Appellate Body found that whether products are like should be determined on a case by case basis applying the criteria for likeness outlined in that decision drawing on the 1970 *GATT* Working Party report on *Border Tax Adjustments*:

- (i) physical properties, nature and quality;
- (ii) product end uses in a given market;
- (iii) consumers' tastes and habits; and
- (iv) tariff classification.⁸¹

The Appellate Body followed this approach in later cases applying *GATT* art III:4.⁸² While rejecting an inquiry into regulatory purpose, the Appellate Body did find that where art III:1 'informs' the national treatment obligation, panels should analyse the measure's structure and application, in order to determine whether it affords protection to the like domestic products.⁸³

There are, however, important limits to determining likeness based on the market; governments may seek to draw distinctions between products based on

⁷⁷ See, eg, *United States — Measures Affecting Alcoholic and Malt Beverages*, GATT Doc DS23/R (16 March 1992, adopted 19 June 1992) (Panel Report) GATT BISD 39S/206.

⁷⁸ Robert E Hudec, 'GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test' (1998) 32 *International Lawyer* 619, 627.

⁷⁹ Donald H Regan, 'Judicial Review of Member-State Regulation of Trade within a Federal or Quasi-Federal System: Protectionism and Balancing, *Da Capo*' (2001) 99 *Michigan Law Review* 1853, 1887–9. See also Donald H Regan, 'Further Thoughts on the Role of Regulatory Purpose under Article III of the *General Agreement on Tariffs and Trade*: A Tribute to Bob Hudec' (2003) 37 *Journal of World Trade* 737, 738.

⁸⁰ Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, AB-1996-2 (4 October 1996) 15–23.

⁸¹ *Ibid* 20–2; *Border Tax Adjustments*, GATT Doc L/3464 (2 December 1970) (Report of the Working Party) GATT BISD 18S/97 [18].

⁸² See, eg, Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/AB/R, AB-1997-3 (9 September 1997) [215]–[216].

⁸³ Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 29.

factors other than those that determine whether goods compete, such as how a product was produced or its health or environmental impacts. These limits to the ability of a market framework to reflect broader regulatory aims of governments led Hudec to observe that '[i]t is difficult to understand why important issues of regulatory policy should turn on these sterile concepts of physical likeness'.⁸⁴

Although the Appellate Body rejected the idea that regulatory aims should determine likeness, it recognised that the like product analysis can take into account product differences that lead to regulation. In *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products* ('*EC — Asbestos*'), Canada challenged a French ban on imports of asbestos fibres and products containing asbestos.⁸⁵ The Appellate Body rejected the Panel's finding that products containing asbestos and those without asbestos were like products.⁸⁶ The Appellate Body characterised likeness as being about a competitive relationship between products, but found that the carcinogenic health effects of asbestos would lead consumers to distinguish between these products, leading to the conclusion that asbestos and non-asbestos products did not compete and are therefore not like products.⁸⁷ In finding that these perceived health risks could be part of the like product analysis, the Appellate Body incorporated a reference to regulatory aims, but only to the extent that these reflect consumer preferences.⁸⁸

In *EC — Asbestos*, the Appellate Body also explicitly recognised the need to inquire into protectionist aims as part of a national treatment analysis — not in determining whether domestic and imported products are like, but in determining whether like imported goods have been accorded less favourable treatment. It noted:

The term 'less favourable treatment' expresses the general principle, in Article III:1, that internal regulations 'should not be applied ... so as to afford protection to domestic production'. If there is 'less favourable treatment' of the group of 'like' imported products, there is, conversely, 'protection' of the group of 'like' domestic products. However, a Member may draw distinctions between products which have been found to be 'like', without, for this reason alone, according to the group of 'like' imported products 'less favourable treatment' than that accorded to the group of 'like' domestic products.⁸⁹

Here, the Appellate Body is providing space for consideration of regulatory intention, not as part of the like product analysis but in determining whether the measure accords less favourable treatment to the like imported product. As the Appellate Body makes clear, a finding of less favourable treatment is a finding of protection.⁹⁰ This suggests that when differential treatment is not protectionist, and can be justified by a legitimate policy goal, a panel should decline to find that there is favourable treatment. Additionally, panels are to compare not arbitrarily chosen product pairs, but the *groups* of like domestic and imported

⁸⁴ Hudec, above n 78, 626.

⁸⁵ Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R, [1]–[2].

⁸⁶ Ibid [126].

⁸⁷ Ibid [122].

⁸⁸ Ibid [122], [130], [145].

⁸⁹ Ibid [100] (emphasis in original).

⁹⁰ Ibid.

products; if a measure requires the group of imported goods to be treated less favourably, it is more likely to have protectionist aims.⁹¹

IV THE APPELLATE BODY'S APPROACH TO *TBT* ART 2.1

Article 2.1 of the *TBT Agreement* provides:

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.⁹²

This general non-discrimination clause incorporates both national treatment and most favoured nation obligations. In the case of national treatment claims under art 2.1, a complainant must establish three elements: first, that the measure at issue is a technical regulation as defined by *TBT* annex 1; secondly, that the imported and domestic products are like; and thirdly, that imported products are accorded less favourable treatment than like domestic products.⁹³

TBT art 2.1 cannot be simply equated to *GATT* art III:4, however, because there is a key contextual difference. Measures that violate art III:4 may be consistent with the *GATT* if they do so for one of the supervening policy reasons listed in *GATT* art XX, but there is no comparable provision in the *TBT Agreement* that could shelter violations of art 2.1. In the three cases discussed in this note, the Panels and the Appellate Body were faced for the first time with appropriately interpreting and applying the national treatment commitment in art 2.1, taking into account its *TBT* context.

A *Is the Measure a Technical Regulation?*

Article 2 of the *TBT Agreement* only applies to 'technical regulations' and not every government measure is a technical regulation. *TBT* annex 1.1 defines a 'technical regulation' as a

[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.⁹⁴

In the earlier case of *European Communities — Trade Description of Sardines*, the Appellate Body found that to be a 'technical regulation', a measure must apply to an identifiable product or group of products; it must lay down one or more characteristics of the product; and 'compliance with the product characteristics must be mandatory'.⁹⁵

In *US — Clove Cigarettes* and *US — COOL*, the parties did not dispute that the measures at issue were technical regulations. In *US — Tuna II (Mexico)*, the

⁹¹ Amelia Porges and Joel P Trachtman, 'Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects' (2003) 37 *Journal of World Trade* 783, 796.

⁹² *TBT Agreement* art 2.1.

⁹³ Appellate Body Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/AB/R, [202].

⁹⁴ *TBT Agreement* annex 1.1.

⁹⁵ Appellate Body Report, *European Communities — Trade Description of Sardines*, WTO Doc WT/DS231/AB/R, AB-2002-3 (26 September 2002) [176] ('*EC — Sardines*').

US and Mexico also did not dispute that the measure lays down product characteristics for the purposes of tuna labelling.⁹⁶ Rather, they disagreed as to whether compliance with the product characteristics laid down by the *DPCIA* was mandatory. In this regard, the *DPCIA* does not ban domestic sale of tuna that does not bear a dolphin-safe label, it merely regulates access to the label by tuna canners. As noted above, a majority of the Panel found that compliance with the measure was mandatory and the US appealed.⁹⁷

The Appellate Body agreed that the *DPCIA* is a technical regulation and rejected the US's appeal.⁹⁸ It found that a panel must distinguish between a technical regulation and a standard on a case by case basis, taking into account factors such as whether the measure at issue is a law or regulation and whether the measure alone determines how a particular matter can be addressed.⁹⁹ The Appellate Body found that compliance with the *DPCIA* is mandatory because tuna canners must comply with the labelling requirements in order to make any dolphin-safe claim on a can label;¹⁰⁰ the *DPCIA* and its regulations include surveillance and enforcement mechanisms; and the *DPCIA* prohibits using any other label with the term 'dolphin-safe'.¹⁰¹

B *Are the Imported and Domestic Goods 'Like Products'?*

The three *TBT* cases approached the like product analysis differently, due to the facts and the Panels' approaches. As the *COOL* measure explicitly discriminated between products based on origin, the Panel found that the meat products and animals at issue were like products.¹⁰² The Panel in *US — Tuna II (Mexico)* analysed product physical characteristics and properties, end uses, tariff classification and consumer preferences (as in a *GATT* art III analysis) and found that all the tuna products at issue were like.¹⁰³ Neither of these determinations was appealed.

The Panel in *US — Clove Cigarettes*, on the other hand, decided to diverge from the Appellate Body's competition-oriented approach to likeness under art III:4. It pointed out that the *TBT Agreement* applies in a regulatory context

⁹⁶ During the Uruguay Round negotiations on the *TBT Agreement*, Mexico declined to accept that the *TBT Agreement* could apply to labelling or regulations applying to the manner in which a product is produced ('non-product-related process and production methods' or 'npr-PPMs'): see *Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics*, WTO Doc WT/CTE/W/10, G/TBT/W/11 (29 August 1995) (Note by the Secretariat) [146]–[151]. However, in *US — Tuna II (Mexico)*, neither Mexico nor the US disputed that the *DPCIA* labelling requirements regarding the manner in which tuna is fished 'apply to' a product (namely tuna products), and if they were mandatory, would be subject to *TBT* art 2: Panel Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/R [7.78]. As a result, the adopted Panel and Appellate Body reports applied the *TBT Agreement* to this npr-PPM, settling this long-standing argument.

⁹⁷ Panel Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/R, [7.145]–[7.188].

⁹⁸ Appellate Body Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/AB/R, [199].

⁹⁹ *Ibid* [188].

¹⁰⁰ *Ibid* [196].

¹⁰¹ *Ibid* [194]–[195].

¹⁰² Panel Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [7.256].

¹⁰³ Panel Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/R, [7.233]–[7.251].

and to a narrower group of measures and lacks the purpose clause of art III:1.¹⁰⁴ The panel found that the *TBT Agreement* should not be ‘approached primarily from a competition perspective’ and that the like product analysis must ‘pay special notice’ to the public health objectives of the technical regulation at issue.¹⁰⁵ It then examined the four traditional likeness criteria but weighed the criteria differently according to the measure’s purpose of regulating flavoured cigarettes for public health reasons, effectively bringing the aim and effects test back into the like product analysis. The US had argued that banning clove cigarettes and not menthol cigarettes was not discriminatory because these products are different. The Panel found instead that these products are like because they share the key characteristic of having additives that produce characterising flavours, reduce the harshness of tobacco and have a numbing effect; that they have the same end use (to be smoked); and that they are similar for the purpose of starting to smoke.¹⁰⁶ The US appealed.

The Appellate Body affirmed the Panel’s conclusion, but rejected its approach. Noting that the *GATT* and the *TBT Agreement* ‘overlap in scope and have similar objectives’,¹⁰⁷ the Appellate Body found that the balance in the *TBT Agreement* between avoiding unnecessary obstacles to international trade and recognising members’ right to regulate is ‘not, in principle, different from the balance set out in the *GATT*’ where art XX qualifies obligations such as national treatment.¹⁰⁸ In the *GATT*, this balance is expressed by the national treatment rule in art III:4 as qualified by art XX; in the *TBT Agreement*, the balance is found within *TBT* art 2.1 itself.¹⁰⁹ The Appellate Body then again categorically rejected the Panel’s reasoning that in the *TBT Agreement* ‘likeness’ should be interpreted by focusing on a technical regulation’s legitimate objectives and purposes. Instead, the Appellate Body emphasised the importance of the competitive relationship between the products.¹¹⁰

It nevertheless pointed out that the product characteristics laid down in a technical regulation may be relevant to determining whether products are like under art 2.1; and a technical regulation itself may provide ‘elements that are relevant to’ both a like product analysis and an analysis of less favourable treatment.¹¹¹

Turning to the Panel’s analysis of whether clove and menthol cigarettes compete, the Appellate Body found the Panel’s analysis that the end uses of clove and menthol cigarettes was ‘to be smoked’ was not sufficiently comprehensive and failed to consider other more specific end uses such as satisfying an addiction to nicotine.¹¹² Regarding the Panel’s analysis of consumer tastes and habits, the Appellate Body found its approach too narrow, as it had failed to assess the tastes and habits of all relevant consumers.¹¹³

¹⁰⁴ Panel Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/R, [7.106].

¹⁰⁵ *Ibid* [7.119].

¹⁰⁶ *Ibid* [7.187]–[7.188], [7.198]–[7.199], [7.231]–[7.232].

¹⁰⁷ Appellate Body Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/AB/R, [91].

¹⁰⁸ *Ibid* [96].

¹⁰⁹ *Ibid* [109].

¹¹⁰ *Ibid* [112].

¹¹¹ *Ibid* [97].

¹¹² *Ibid* [132].

¹¹³ *Ibid* [137].

Nevertheless, the Appellate Body held that the Panel's finding that young smokers considered clove and menthol cigarettes to be substitutable supported a finding that they were like products.¹¹⁴

While the Appellate Body again rejected use of an aim and effects test in analysing whether products are like, it stated that 'we are not suggesting that the regulatory concerns underlying technical regulations may not play a role in the determination of whether or not products are like'.¹¹⁵ As in *EC — Asbestos*, the Appellate Body found that regulatory concerns may be relevant to a finding of likeness 'to the extent they have an impact on the competitive relationship between and among the products concerned'.¹¹⁶ Applying this approach to the *Border Tax Adjustments* factors, the Appellate Body explained that end uses 'describe the possible functions of a product, while consumer tastes and habits reflect the consumers' appreciation of these functions'.¹¹⁷ This suggests that the Appellate Body is prepared to consider regulatory purpose when it is already reflected in how the products compete. However, such cases raise the question of why the measure was necessary in the first place.

The Appellate Body's focus on the *Border Tax Adjustments* factors as the touchstone for a competitive relationship also revealed the challenges of assessing consumer tastes and habits. For instance, in *EC — Asbestos* the Appellate Body reasoned that liability for product health risks would affect a manufacturer's decision whether to use asbestos or substitute products.¹¹⁸ This reasoning supports the view that consumer tastes and habits should be constructed as they would exist in an idealised market with consumer protection laws and complete information about the products in question.¹¹⁹

However, clearly a regulation itself can affect consumer tastes and habits. The law's capacity to inform consumers of product differences — which in turn influences consumption patterns — can undermine the role of the market as an objective benchmark for assessing whether two products are competitive and substitutable.¹²⁰

As a result, the Appellate Body has sought to determine consumers' tastes and habits as they would be without the measure at issue, by discounting the impact of the challenged measure on consumer tastes and preferences. In *US — Clove Cigarettes*, for instance, the ban on imports of clove cigarettes could lead consumers to conclude that clove cigarettes do not compete with menthol cigarettes. This led the Appellate Body in that case to state that

in determining likeness based on the competitive relationship between and among the products, a panel should discount any distortive effects that the measure at

¹¹⁴ Ibid [157].

¹¹⁵ Ibid [117].

¹¹⁶ Ibid [119].

¹¹⁷ Ibid [125].

¹¹⁸ Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R, [122].

¹¹⁹ Robert Howse and Elisabeth Tuerk, 'The WTO Impact on International Regulations: A Case Study of the *Canada — EC Asbestos* Dispute' in Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart, 2001) 284, 301.

¹²⁰ See, eg, Mario F Teisl, Brian Roe and Robert L Hicks, 'Can Eco-Labels Tune a Market? Evidence from Dolphin-Safe Labeling' (2002) 43 *Journal of Environmental Economics and Management* 339.

issue may itself have on the competitive relationship, and reserve the consideration of such effects for the analysis of less favourable treatment.¹²¹

The Appellate Body also went on to observe that

a panel should determine the nature and the extent of the competitive relationship for the purpose of determining likeness in isolation from the measure at issue, to the extent that the latter informs the physical characteristics of the products and/or consumers' preferences.¹²²

The need to assess whether there is a competitive relationship between the domestic and like products in isolation from the measure at issue reveals limits on the market as an objective standard for determining likeness. The Appellate Body's assumptions that regulation can be separated out from the market, and that likeness can be determined on the basis of pure market factors, disregard the extent to which regulation permeates modern economies and informs consumers' attitudes. Modern sophisticated markets do not exist independently of laws and regulations that protect property rights, enforce contracts and penalise producers for the harm their products cause to the health and safety of consumers. Trying to separate the impact on the market of a challenged regulation from the impact of these other regulations will require panels to base their decisions on hypothetical speculation about how consumers *would* behave absent the challenged measure. A panel engaged in a hypothetical inquiry of this sort may be pulled away from the objective facts of whether and how goods compete in the market, toward its own assessment of how consumers *should* view the products at issue.

C *Is There 'Less Favourable Treatment' of the Like Imported Goods?*

The question of whether the imported goods were accorded less favourable treatment than the like domestic goods was at issue in all the *TBT* cases. Following its approach to *GATT* art III:4, the Appellate Body confirmed that the comparison needs to be between the *group* of imported products and the *group* of like domestic goods.¹²³

A threshold issue is whether less favourable treatment results from the measures at issue or from other factors. In two of the three cases, the US argued that external and non-origin-related factors, including private firms' decisions, were the proximate cause of any harm to imports: in *US — Tuna II (Mexico)*, the decision by the Mexican tuna fleet to comply with the *AIDCP* regime instead of the *DPCIA*; and in *US — COOL*, meat processors' decisions to choose to process domestic livestock exclusively. The Panel in *US — Tuna II (Mexico)* agreed with the US that the *DPCIA*'s detrimental impact on Mexican tuna resulted from private choice.¹²⁴ The Appellate Body reversed this finding, observing that the conditions of competition for Mexican tuna had been modified not by private actors but by the measure that controls access to the dolphin-safe label.¹²⁵ In *US — COOL*, the Appellate Body affirmed the Panel's finding that while the *COOL* measure did not require segregating livestock by origin, 'where private

¹²¹ Appellate Body Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/AB/R, [111].

¹²² *Ibid.*

¹²³ *Ibid* [182].

¹²⁴ Panel Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/R, [7.378].

¹²⁵ Appellate Body Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/AB/R, [239].

actors are induced or encouraged to take certain decisions *because of the incentives created by a measure*, those decisions are not “independent” of that measure’.¹²⁶ This led the Appellate Body to conclude that it was the COOL measure that modifies the conditions of competition in the US market to the detriment of imported livestock.¹²⁷

The next issue is whether a finding of detrimental impact is sufficient to find a breach of art 2.1 or whether more is required. According to the Appellate Body, there is no less favourable treatment where the detrimental impact on the like imported goods stems exclusively from a legitimate regulatory distinction.¹²⁸ This approach of the Appellate Body followed from the absence in the *TBT Agreement* of an exception provision like *GATT* art XX. As the Appellate Body observed, within the *GATT* there is a ‘balance’ between the *GATT* art III commitment to accord national treatment and the exceptions in *GATT* art XX, so that discriminatory measures may be permitted if they comply with art XX.¹²⁹ The Appellate Body found that a similar balance exists *within TBT* art 2.1.¹³⁰ In reaching this conclusion, the Appellate Body noted that the second recital of the *TBT Agreement* confirms that the *TBT* and *GATT* ‘overlap in scope and have similar objectives’.¹³¹ The Appellate Body also found the *TBT Agreement*’s fifth and sixth recitals relevant, observing that the fifth recital states an ‘objective of avoiding the creation of unnecessary obstacles to international trade’ which the sixth recital ‘counterbalances’ by recognising Members right to regulate.¹³² This led the Appellate Body to

understand the sixth recital to suggest that Members have a right to use technical regulations in pursuit of their legitimate objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the *TBT Agreement*.¹³³

These recitals were context that supported the Appellate Body’s conclusion that ‘[a]rticle 2.1 should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions’.¹³⁴ The Appellate Body explained that this inquiry should be made by analysing the ‘design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed’.¹³⁵

¹²⁶ Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [291] (emphasis in original).

¹²⁷ *Ibid* [292].

¹²⁸ Appellate Body Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/AB/R, [174]. See also Appellate Body Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc WT/DS302/AB/R, AB-2005-3 (25 April 2005) [96] (*DR — Cigarettes*’).

¹²⁹ Appellate Body Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/AB/R, [109].

¹³⁰ *Ibid*.

¹³¹ *Ibid* [91].

¹³² *Ibid* [93]–[95].

¹³³ *Ibid* [95].

¹³⁴ *Ibid* [174]. See also Appellate Body Report, *DR — Cigarettes*, WTO Doc WT/DS302/AB/R, [96].

¹³⁵ Appellate Body Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/AB/R, [182].

In assessing whether detrimental impact stems exclusively from a regulatory distinction, the focus is on the legitimacy of the regulatory distinction.¹³⁶ In *US — Clove Cigarettes*, the issue was whether the distinction the technical regulation drew between clove and menthol cigarettes was justified. The US argued that the reason it had refrained from banning menthol cigarettes was to avoid the impact on the US healthcare system of having to treat millions of menthol cigarette addicts and the risk of a black market in menthol cigarettes developing.¹³⁷

The Panel found that the reasons given did not justify the regulatory distinction, because applying the ban only on clove cigarettes would not achieve the measure's objective of reducing youth smoking, as menthol cigarettes would remain available.¹³⁸ Moreover, the Panel found that the US's reason for banning clove cigarettes was to impose the costs of the ban on cigarette producers from other members.¹³⁹

The Appellate Body upheld this finding, although for different reasons. For the Appellate Body, the fact that almost all clove cigarettes were from Indonesia and that menthol cigarettes were made by US manufacturers strongly suggested that the detrimental impact on the competitive opportunities of clove cigarettes reflected discrimination.¹⁴⁰ The Appellate Body also held that this detrimental impact did not flow from a legitimate regulatory distinction.¹⁴¹ One reason was because both clove and menthol cigarettes use flavouring to mask the cigarette taste.¹⁴² Additionally, the US argument that distinguishing between clove and menthol cigarettes to avoid possible costs to the US healthcare system of treating youths for withdrawal was not justified because addicted cigarette smokers could still switch to non-flavoured cigarettes in the event of a ban on menthol cigarettes. As a result, the risks of a ban on menthol cigarettes on the US health system would not likely materialise.¹⁴³

In *US — Tuna II (Mexico)*, the dolphin-safe label could only be used if tuna had been caught without encircling or setting on dolphins and there was no dolphin mortality in the ETP, while tuna caught outside the ETP using other fishing techniques that also harmed dolphins could still apply the dolphin-safe label. This regulatory distinction made the label unavailable for Mexican tuna, which is largely caught in the ETP, leading to the labelling rule's detrimental impact. As the Appellate Body explained, '[t]he question before us is thus whether the United States has demonstrated that *this* difference in labelling conditions is a legitimate regulatory distinction'.¹⁴⁴ The Appellate Body upheld the Panel's finding that this regulatory distinction was not "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the

¹³⁶ Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [271].

¹³⁷ *Ibid* [225].

¹³⁸ Panel Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/R, [7.289].

¹³⁹ *Ibid* [7.289]–[7.290].

¹⁴⁰ Appellate Body Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/AB/R, [224].

¹⁴¹ *Ibid* [225].

¹⁴² *Ibid*.

¹⁴³ *Ibid*.

¹⁴⁴ Appellate Body Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/AB/R, [284] (emphasis in original).

ocean' and, for this reason, found that the detrimental impact on Mexican tuna products did not arise exclusively from a legitimate regulatory distinction.¹⁴⁵

In *US — COOL*, the Appellate Body found that the relevant regulatory distinctions were the distinctions between the birth, raising and slaughter of livestock and between the four labels for muscle cuts of beef and pork.¹⁴⁶ The rules require livestock and meat producers to track the place of birth, raising and slaughter of each animal and piece of meat; transmit the information to the next processing stage; and keep records in case of USDA audit.¹⁴⁷ However, the required consumer labels for muscle cuts used relatively little of this information, were confusing and the record-keeping requirements applied even when the meat produced was exempt from labelling.¹⁴⁸ Least-cost compliance with the COOL regulation would always lead a processor to use exclusively domestic livestock.¹⁴⁹ For these reasons the Appellate Body found that

the COOL measure does not impose labelling requirements for meat that provide consumers with origin information *commensurate* with the type of origin information that upstream livestock producers and processors are required to maintain and transmit.¹⁵⁰

The Appellate Body underlined that the gap between the producer record-keeping and verification requirements and the limited information on consumer labels was of central importance.¹⁵¹ And the Panel had found that these producer requirements — by necessitating segregation and incentivising processing of only domestic livestock — detrimentally impacted Canadian and Mexican livestock.¹⁵²

The Appellate Body then found that the regulatory distinctions imposed by the measures at issue amounted to arbitrary and unjustifiable discrimination against imported livestock and could not be said to be applied in an even-handed manner.¹⁵³ Since the elaborate information collected through the record-keeping and verification requirements was not conveyed to consumers, the detrimental impact of these requirements could not be explained by the need to provide origin information to consumers.¹⁵⁴ Accordingly, the detrimental impact on imported livestock was not justified by a legitimate regulatory distinction, but reflected discrimination violating *TBT* art 2.1.¹⁵⁵

¹⁴⁵ Ibid [297].

¹⁴⁶ Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [341]. The label definitions are available at: Panel Report, *United States — COOL*, WTO Doc WT/DS384/R, WT/DS386/R, [7.90]–[7.100].

¹⁴⁷ Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [342].

¹⁴⁸ Ibid [343]–[345]. Meat exempt from consumer labelling includes, for example, meat used in processed foods or in restaurants: 7 USC §§ 1638(2)(B), 1638a(b) (2012).

¹⁴⁹ Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [345].

¹⁵⁰ Ibid [343] (emphasis in original).

¹⁵¹ Ibid [346]–[347].

¹⁵² Panel Report, *US — COOL*, WTO Doc WT/DS384/R, WT/DS386/R, [7.420].

¹⁵³ Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [349].

¹⁵⁴ Ibid.

¹⁵⁵ Ibid [349]–[350].

V *TBT* ART 2.2 — NO MORE TRADE RESTRICTIVE THAN NECESSARY

In all three of these disputes, the complainant claimed that the measures at issue violated art 2.2 of the *TBT Agreement*, which requires that technical regulations not be more trade-restrictive than necessary to fulfil a legitimate objective, in order to avoid creating unnecessary obstacles to trade. The text of art 2.2 balances trade liberalisation with the right to regulate and involves concepts of necessity, as follows:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available technical and scientific information, related processing technology or intended end-uses of products.¹⁵⁶

At the panel level, the art 2.2 claims had mixed results. In *US — Clove Cigarettes*, the Panel rejected Indonesia's claim (and Indonesia did not appeal).¹⁵⁷ In the other two disputes, the Panels concluded that the US had breached art 2.2.¹⁵⁸ On appeal, the Appellate Body reversed these conclusions, presenting its analysis first in *US — Tuna II (Mexico)* and then developing it further in *US — COOL*. The analysis below compares the Appellate Body decisions in light of the Panel reports. The Appellate Body and the Panels focused on how to evaluate the legitimacy of regulatory objectives in these cases and in general; and then on what legal framework to use in applying the concept of necessity.

A *Legitimate Objectives*

In applying art 2.2 to a technical regulation, the first step is to determine what the measure's objectives are. Next is to determine whether these objectives are legitimate or are instead to obstruct imports or protect domestic producers.¹⁵⁹

There may be considerable disagreement about what the objectives of a measure are. In *US — COOL*, for instance, Canada and Mexico argued that the true objective of the provisions that together comprised the 'COOL measure' (the statute, regulations and Vilsack letter) was to protect US cattle and hogs against livestock imports, not to provide consumer information on origin.¹⁶⁰ Canada and Mexico brought forward evidence regarding the chequered legislative process leading to adoption of the measures, as well as the way that the measures only applied to products that face competition from imports.¹⁶¹

¹⁵⁶ *TBT Agreement* art 2.2.

¹⁵⁷ Panel Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/R, [7.325]–[7.432].

¹⁵⁸ Panel Report, *US — COOL*, WTO Doc WT/DS384/R, WT/DS386/R, [7.549]–[7.720]; Panel Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/R, [7.379]–[7.623].

¹⁵⁹ See, eg, Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [370]–[372].

¹⁶⁰ Panel Report, *US — COOL*, WTO Doc WT/DS384/R, WT/DS386/R, [7.681]–[7.683].

¹⁶¹ *Ibid* [7.683], [7.686]–[7.689].

The Appellate Body in these cases directed panels to resolve such problems through an independent evaluation of the facts. A panel must consider what a member seeks to achieve by means of a technical regulation and ‘independently and objectively’ assess the objectives pursued, taking into account the texts of statutes, legislative history and other evidence regarding the structure and operation of the measure at issue.¹⁶² In *US — COOL*, the Appellate Body affirmed that a panel may not simply rely on the defending party’s submissions, but must make its own evaluation taking the evidence into account.¹⁶³ Canada argued that the structure and coverage of COOL (including its exceptions and exclusions) made no sense for a consumer information objective, but the Panel (upheld by the Appellate Body) found that it is not unusual for regulations to have exceptions for practical reasons that may not necessarily involve protectionist intent and that individual statements by legislators or interest groups are not necessarily probative of a measure’s objective.¹⁶⁴

US — Tuna II (Mexico) illustrates the wide potential scope of objectives. The Panel in that case agreed with the US that the objectives of the US tuna labelling provisions were to ensure that consumers were not misled about whether tuna products contain tuna caught in a manner that harms dolphins and to contribute to protecting dolphins by not incentivising tuna fishing that adversely affects dolphins.¹⁶⁵ It found that these objectives fall within those listed in art 2.2 — further finding that protection of animal life or health in art 2.2 is not limited to endangered species¹⁶⁶ and that, as the US had a right to determine its own objectives, it could prioritise dolphins over other species.¹⁶⁷

The next step is to determine whether an objective is ‘legitimate’ — defined by the Appellate Body as ‘lawful, justifiable, or proper’.¹⁶⁸ Protectionism is not legitimate, but the Appellate Body in these cases has given a wide potential scope to ‘legitimate objectives’. The Appellate Body found that any objective listed by name in art 2.2 is legitimate and that the list in art 2.2 is open-ended; and that the Preamble of the *TBT Agreement* lists additional objectives and objectives listed elsewhere in the *Marrakesh Agreement Establishing the World Trade Organization*¹⁶⁹ may also provide guidance for what might be considered legitimate under *TBT* art 2.2.¹⁷⁰ Even if it is not listed in art 2.2, the panel must

¹⁶² Appellate Body Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/AB/R, [314]; Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [370]–[371].

¹⁶³ Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [397]–[399].

¹⁶⁴ Panel Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WTO Doc WT/DS386/R, [7.684]; Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [403]–[420].

¹⁶⁵ Panel Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/R, [7.401]–[7.425] (relying on the title of the *DPCIA*, statements of fact in the statutory text and the measures’ structure and design).

¹⁶⁶ *Ibid* [7.437].

¹⁶⁷ *Ibid* [7.441]–[7.443].

¹⁶⁸ Appellate Body Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/AB/R, [313].

¹⁶⁹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).

¹⁷⁰ *Ibid* [313].

determine whether the objective is legitimate.¹⁷¹ The party that makes a claim under art 2.2 has the burden of establishing that ‘the relevant objective falls outside the scope of the legitimate objectives covered by’ art 2.2.¹⁷²

In *US — Tuna II (Mexico)*, Mexico argued that it was illegitimate for the US to use labelling to coerce changes in foreign fishing practices. The Appellate Body disagreed. It found that

the mere fact that a WTO Member adopts a measure that entails a burden on trade in order to pursue a particular objective cannot per se provide a sufficient basis to conclude that the objective that is being pursued is not a ‘legitimate objective’ within the meaning of Article 2.2.¹⁷³

Thus, the objectives of a measure and the burden it imposes on trade are two separate issues.

B *More Trade-Restrictive than Necessary*

The remaining task in applying art 2.2 is to determine whether the technical regulation at issue is ‘more trade-restrictive than necessary to fulfil a legitimate objective’. A threshold issue is how to perform the analysis concerned. In all three cases, the US argued that art 2.2 should be interpreted consistently with art 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*¹⁷⁴ and note 3 to art 5.6 and, therefore, that a measure is consistent with *TBT* art 2.2 (regardless of its contribution to meeting legitimate objectives) if no alternative measure exists that is significantly less restrictive to trade.¹⁷⁵ Instead,

¹⁷¹ Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [372].

¹⁷² *Ibid* [442].

¹⁷³ Appellate Body Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/AB/R, [338].

¹⁷⁴ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘*Agreement on the Application of Sanitary and Phytosanitary Measures*’) [496] (‘*SPS Agreement*’). Footnote 3 of the *SPS Agreement* provides that

a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

¹⁷⁵ The content of art 5.6 and footnote 3 of the *SPS Agreement* reflect changes negotiated by the US in December 1993: see ‘US Forces Pro-Green Chances in *GATT* Sanitary & Phytosanitary Text’ (10 December 1993) 11(49) *Inside US Trade*; ‘Green Groups Proposals for Uruguay Round’ (10 December 1993) 11(49) *Inside US Trade*. While US negotiators secured some changes to the *TBT* text, they were unable to gain acceptance for a footnote to *TBT* arts 2.2 and 2.3 that would parallel footnote 3 to the *SPS Agreement*. A letter from *GATT* Director-General Peter Sutherland to the chief US negotiator dated 15 December 1993 stated that

it was clear from our consultations at expert level that participants felt it was obvious from other provisions of the *Agreement* that the *Agreement* does not concern itself with insignificant trade effects nor could a measure be considered more trade restrictive than necessary in the absence of a reasonably available alternative.

the Appellate Body (generally confirming the views of the Panels)¹⁷⁶ applied the ‘weighing and balancing’ approach it had evolved in art XX cases since *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*.¹⁷⁷

In the two appeals that involved art 2.2 (*US — Tuna II (Mexico)* and *US — COOL*), the Appellate Body started by assuming that ‘necessary’ in art 2.2 will be read to involve a balancing process, as in the prior art XX jurisprudence.¹⁷⁸ In *US — Tuna II (Mexico)*, the Appellate Body found that in art 2.2,

the assessment of ‘necessity’ involves a relational analysis of the trade-restrictiveness of the technical regulation, the degree of contribution that it makes to the achievement of a legitimate objective, and the risks non-fulfilment would create.¹⁷⁹

1 *Fulfilment of Objectives*

The text of art 2.2 speaks of what would be necessary ‘to fulfil a legitimate objective’. This might logically be read to require that technical regulations actually fulfil some legitimate objective. The Panel in *US — COOL* did so; it characterised the COOL measure’s objective as ‘to provide as much clear and accurate origin information as possible to consumers’.¹⁸⁰ However, it found that the COOL measure failed to fulfil this identified objective because the measure failed to convey meaningful origin information to consumers. For this reason, the *US — COOL* Panel concluded that the COOL measure was inconsistent with art 2.2.¹⁸¹

However, in choosing to apply the balancing approach developed in relation to art XX to *TBT* art 2.2, the Appellate Body also chose not to require any minimum threshold for fulfilment of objectives.¹⁸² The panel’s task, as directed by the Appellate Body, is instead to evaluate a measure’s degree or level of

This letter was transmitted to Congress with the text of the *TBT Agreement: Statement of Administrative Action, Message from the President Transmitting the Uruguay Round Trade Agreements*, House Document 103–316 (27 September 1994) 790–1. The US arguments in all three of the recent *TBT* disputes referred to the Sutherland letter: Panel Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/R, [6.69]–[6.73]; Panel Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/R, [4.97]; Panel Report, *US—COOL*, WTO Doc WT/DS384/R, WT/DS386/R, annex B-3 (*Executive Summary of the Second Written Submission of the United States*) [22].

¹⁷⁶ Panel Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/R, [7.357]–[7.361]; Panel Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/R, [7.464]; Panel Report, *US — COOL*, WTO Doc WT/DS/384/R, WT/DS386/R, [7.669]–[7.670].

¹⁷⁷ Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R, WT DS169/AB/R, AB-2000-8 (11 December 2000) [159]–[164].

¹⁷⁸ Appellate Body Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/AB/R, [318]–[322]; Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [374]–[378].

¹⁷⁹ Appellate Body Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/AB/R, [318].

¹⁸⁰ Panel Report, *US — COOL*, WTO Doc WT/DS384/R, WT/DS386/R, [7.620].

¹⁸¹ *Ibid* [7.719]–[7.720] (reversed on appeal: see below n 185).

¹⁸² Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [461]. The Appellate Body states that ‘a panel’s assessment should focus on ascertaining the degree of contribution achieved by the measure, rather than on answering the questions of whether the measure fulfils the objective completely or satisfies some minimum level of fulfilment of that objective’: at [468].

contribution to the legitimate objective that the government is actually pursuing, relying on the ‘design, structure, and operation’ of the technical regulation and evidence on how it is applied.¹⁸³ The degree or level of contribution is

something that is revealed through the measure itself. In preparing, adopting, and applying a measure in order to pursue a legitimate objective, a WTO Member articulates, either implicitly or explicitly, the level at which it pursues that objective.¹⁸⁴

Panels should focus on the actual degree of contribution that a measure makes toward its objective, not the contribution it should have made or whether the measure completely fulfils or satisfies some minimum level of fulfilment of that objective.¹⁸⁵ In *US — COOL*, the Appellate Body reversed the Panel’s conclusion on this issue and attempted to complete the analysis of art 2.2.¹⁸⁶

2 Trade-Restrictiveness

The balancing process requires an assessment of the trade-restrictiveness of the measure at issue (its ‘limiting effect’ on trade). The Appellate Body pointed out that art 2.2 does not ban all trade-restrictive measures, but only those that exceed the level of restrictiveness that is ‘necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective’.¹⁸⁷ The Appellate Body summarises:

A panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. In most cases, a comparison of the challenged measure and possible alternative measures should be undertaken. In particular, it may be relevant for the purpose of this comparison to consider whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available.¹⁸⁸

The Appellate Body noted that the burden of proof with respect to these elements rests with the complainant that brings a claim under art 2.2. The complainant may identify a possible alternative measure that is less restrictive, makes an equivalent contribution to the relevant objective and is reasonably available. If it does so, then the respondent must rebut the complainant’s prima facie case.¹⁸⁹

In *US — Tuna II (Mexico)*, Mexico argued that allowing coexistence of the labels (so that both *AIDCP* label and *DPCIA* label dolphin-safe tuna products

¹⁸³ Appellate Body Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/AB/R, [317].

¹⁸⁴ Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [373].

¹⁸⁵ *Ibid* [468]. The Appellate Body also pointed out that by stopping at that point in its analysis, the Panel had failed to evaluate Mexico’s alternative measures and had relieved them of part of their burden of proof: at [469].

¹⁸⁶ *Ibid* [468].

¹⁸⁷ Appellate Body Report, *US — Tuna II (Mexico)*, WTO Doc WT/DS381/AB/R, [319].

¹⁸⁸ *Ibid* [322].

¹⁸⁹ *Ibid* [323].

could be sold in the US market) would be a reasonably available and less restrictive alternative. The Panel found that the *DPCIA* labelling regime itself only partially fulfilled its stated objective of protecting dolphins; that allowing coexistence would not increase the level to which consumers are misled about the significance of tuna fishing methods; and that allowing the *AIDCP* label to be used in the US market would discourage dolphin mortality as much as the *DPCIA* does.¹⁹⁰

The Appellate Body reversed the Panel decision. It pointed out that the Panel had compared the *DPCIA* regime with the *AIDCP* regime, instead of Mexico's proposed alternative (coexistence).¹⁹¹ Since the *AIDCP* only applies to the ETP, coexistence would only affect the degree to which US objectives are achieved with respect to fishing in the ETP, not elsewhere. The Appellate Body found that for these reasons, the Panel should have compared the degree to which coexistence would contribute to US objectives by focusing only on conditions in the ETP.¹⁹² In the Appellate Body's view, coexistence would not contribute to consumer information and dolphin protection as much as a *DPCIA*-only regime, because coexistence would allow more tuna harvested in the ETP, in conditions that adversely affect dolphins, to be labelled as dolphin-safe.¹⁹³ For this reason, the Appellate Body reversed the Panel's conclusion that the *DPCIA* breaches art 2.2.¹⁹⁴

In *US — COOL*, the Appellate Body attempted to complete the analysis of the COOL measure under art 2.2. It had accepted the Panel's findings that the objective of the measure was to provide consumers with information on product origin and that this objective is legitimate. The Appellate Body noted Panel findings that Label A did contribute to achieving this objective, but that Labels B and C provided unclear, imperfect or inaccurate information to consumers.¹⁹⁵ The Appellate Body observed that the COOL measure made *some* contribution to its objective, but on the basis of the Panel findings, the Appellate Body could not assess the *degree* of contribution.¹⁹⁶ As for trade-restrictiveness, the Appellate Body read the Panel findings under art 2.1 as indicating a 'considerable degree of trade-restrictiveness insofar as it has a limiting effect on the competitive opportunities for imported livestock as compared to the situation prior to the enactment of the COOL measure'.¹⁹⁷ The Panel's analysis of the COOL measure's trade effects also supported its trade-restrictiveness.¹⁹⁸ The Appellate Body also noted that the Panel findings indicated that the consequences of non-fulfilment of the objective would not be particularly grave

¹⁹⁰ Ibid [327]–[328].

¹⁹¹ Ibid [330]–[331].

¹⁹² Ibid [329]–[330].

¹⁹³ Ibid [330].

¹⁹⁴ Ibid [331].

¹⁹⁵ Ibid [462]–[465]. The label descriptions are available at: Panel Report, *US — COOL*, WTO Doc WT/DS384/R, WT/DS386/R, [7.90]–[7.100].

¹⁹⁶ Appellate Body Report, *US — COOL*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R, [472]–[476].

¹⁹⁷ Ibid [477].

¹⁹⁸ Ibid.

(noting the evidence that most US consumers are not prepared to pay for origin information on meat).¹⁹⁹

The next step in a balancing analysis would be to compare the contribution and trade-restrictiveness of an alternative measure. In *US — COOL*, Canada and Mexico had suggested four alternatives for providing consumer information on origin,²⁰⁰ but the Panel had not examined these alternatives and had not made any factual findings on their reasonable availability, relative degree of contribution and trade-restrictiveness. The Appellate Body discussed these alternatives, but was unable to reach any conclusions in the absence of the necessary factual findings by the Panel.²⁰¹

VI CONCLUSION

The Appellate Body has developed an interpretation of the *TBT*'s non-discrimination obligations that is robust, replicable and meshes with the corpus of WTO non-discrimination law. The approach it has taken — assessing likeness in a market context, requiring both detrimental impact on imports and less favourable treatment, as well as taking legislative purpose into account in evaluating less favourable treatment — should come as no surprise. Significantly, the absence of an exceptions provision in the *TBT Agreement* led the Appellate Body to find that the balance in the *GATT* between the national treatment commitment and the exceptions provision also exists within *TBT* art 2.1.²⁰² This led the Appellate Body to find that a technical regulation that is not protectionist and is for a legitimate objective will be lawful.²⁰³ Thus, even though *GATT* art XX cannot be invoked with respect to *TBT* obligations and the *TBT* does not have any other overriding exceptions provision, the Appellate Body's interpretation might give members greater policy space under the *TBT Agreement* to adopt technical regulations that are non-protectionist.

In reaffirming the role of the market and, specifically, the relevance of the *Border Tax Adjustments* factors for assessing likeness, the Appellate Body has also emphasised the need for panels to use these tools to undertake a sophisticated analysis of whether the imported and domestic goods compete. In *US — Clove Cigarettes*, for instance, the Appellate Body made clear that it was not enough for the Panel to conclude that the end use of menthol and clove cigarettes was simply 'to be smoked' and that the Panel should have also dealt with other specific uses such as satisfying a nicotine addiction. The Appellate Body has consistently told panels that likeness must be assessed case by case; these three *TBT* disputes underline that panels must avoid a mechanical application of the *Border Tax Adjustments* factors and, instead, must proceed carefully and with greater attention to the variety of factors that can influence how markets operate.

¹⁹⁹ Ibid [478]–[479].

²⁰⁰ Ibid [480]–[490].

²⁰¹ Ibid [480]–[491].

²⁰² Appellate Body Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/AB/R, [109].

²⁰³ Ibid [174].

The Appellate Body's analysis of art 2.2 has also resolved many of the issues discussed in the academic literature on the *TBT Agreement*.²⁰⁴ By opting for the same balancing approach as in *GATT* art XX, it has gone for a familiar methodology. The Appellate Body has telegraphed a highly deferential approach to defining the objectives of a measure and a catholic willingness to go beyond the list in art 2.2 and embrace a broad scope for possible legitimate objectives —other than the objective of protectionism, which remains illegitimate. A complaining party faced with the burden of proving that the true objective of a measure is protectionism is likely to also bring a claim under art 2.1. The Appellate Body in these cases has provided panels with the tools to resolve cases under art 2.1 instead of ruling under art 2.2.

In order to prevail against a technical regulation under art 2.2, a complaining party would need to identify the regulation's legitimate objectives; demonstrate how little the regulation actually fulfils them and how much it restricts trade; identify alternatives; and demonstrate that the preferred alternatives are reasonably available, would better accomplish the objectives and would be less trade-restrictive. A case of this sort may be more difficult and costly to make, but it is still possible.

Significantly, by conceptualising *TBT* arts 2.1 and 2.2 in *GATT* art XX terms, in these cases the Appellate Body has firmly injected a *GATT* art XX-type analysis into the *TBT Agreement*. For instance, the Appellate Body has found that the balance between *GATT* art III and *GATT* art XX is reflected in *TBT* art 2.1. This led to the conclusion, discussed above, that technical regulations that have a detrimental impact on competition by the like imported good, which cannot be justified by a legitimate regulatory distinction, will breach the non-discrimination commitment. As in the case of the chapeau to *GATT* art XX, the focus of the Appellate Body is on the application of the measure — the detrimental impact — and whether the regulatory distinction in the measure that causes this detrimental impact is connected to achieving a legitimate policy goal.²⁰⁵

These Appellate Body reports have also linked other elements of art XX to *TBT* art 2.2. When a panel analyses the contribution a regulation makes to achieving the member's legitimate goals under *TBT* art 2.2, its analysis will parallel an analysis of contribution to stated policy goals conducted under *GATT* arts XX(b) or XX(d). A panel's analysis under *TBT* art 2.2 of whether alternative, less trade-restrictive measures exist will parallel the analysis it would undertake of whether the measure at issue is necessary under *GATT* arts XX(b) or XX(d).

The path that the Appellate Body has mapped out may exclude complaints that concern the costs imposed by pure difference of approach to regulation. The Appellate Body may be signalling that in its view, such cost differences, absent

²⁰⁴ See, eg, Gabrielle Marceau and Joel P Trachtman, 'The *Technical Barriers to Trade Agreement*, the *Sanitary and Phytosanitary Measures Agreement*, and the *General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods*' (2002) 36 *Journal of World Trade* 811; Peter Van den Bossche, Denise Prévost and Mariëlle Matthee, 'WTO Rules on Technical Barriers to Trade' (Working Paper No 2005/6, Faculty of Law, Maastricht University, October 2005).

²⁰⁵ See, eg, Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R, AB-2007-4 (3 December 2007) [246].

something more, should not be a ground for success in WTO disputes. If the *TBT Agreement* is unavailable as a path to deal with the costs of regulatory difference, then the governments and stakeholders affected by these costs will need to deal with them through negotiation and agreement. Existing regional trade agreements and ongoing and future trade negotiations will continue to provide the setting for negotiated regulatory harmonisation outside the WTO.

JOSHUA MELTZER* AND AMELIA PORGES†

* LLB, BComm (Monash); SJD, LLM (Michigan). Joshua Meltzer is a fellow in the Global Economy and Development program at the Brookings Institution and an adjunct professor at the John Hopkins School for Advanced International Studies. Previously, he was a diplomat at the Australian Embassy in Washington D.C. Prior to that he was a trade negotiator in Australia's Department of Foreign Affairs and Trade.

† Principal, Law Offices of Amelia Porges PLLC. All views expressed are entirely the authors' own and do not necessarily reflect the views of any past or present employer or client or other organisations with which they are affiliated.