Chicago-Kent Law Review

Volume 91
Issue 1 *Congressional Dysfunction and Executive Lawmaking During the Obama Administration*

Article 11

1-29-2016

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Samantha Gaul
IIT Chicago-Kent College of Law

THE TECHNICAL BARRIERS TO TRADE AGREEMENT: A RECONCILIATION OF DIVERGENT VALUES IN THE GLOBAL TRADING SYSTEM

SAMANTHA GAUL

INTRODUCTION

Over the past twenty years, the world has witnessed technology advance at an exponential rate—undoubtedly altering the way that societies function internally and the manner in which they relate to others. And the age of innovation is just getting started. As one scholar predicts, "[i]n this and the next decade, we will begin to make energy and food abundant, inexpensively purify and sanitize water from any source, cure disease, and educate the world's masses."[1] If that premonition is true, then one can only assume that globalization will continue to demand cooperation amongst the world's masses, at least from those who want to survive, let alone thrive. However, because "the world's masses" is a simple and tidied reference to what is actually a messy amalgam of different stakeholders, certain fundamental tensions are inherent to participation in the international sphere.

In the context of multilateral trading, a historical tension exists between economically oriented, laissez-faire, pro-trade concerns and social, environmental, and health concerns.[2] International trade scholar Sungjoon Cho eloquently describes this tension as an "inevitable phenomenon considering the multiplicity of values that individuals, states, and institutions pursue."[3] On the one hand, "[p]eople

1. Vivek Wadhwa, *Why I Believe That This Will Be the Most Innovative Decade in History*, FORBES (June 25, 2012, 7:00 AM), http://www.forbes.com/sites/singularity/2012/06/25/most-innovative-decade-in-history/.

2. *See generally* Sungjoon Cho, *Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma*, 5 CHI. J. INT'L L. 625 (2005) (describing the "glaring tension between free trade and social regulation").

3. *Id.* at 626. For a general discussion, see Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INTL L. 28, 29 (2002); *see also* Gabrielle Marceau, *WTO Dispute*

seem to desire free trade—or at least global free markets, driven by the principle of efficiency—that expands economic opportunity and promotes material welfare"; on the other hand, people simultaneously value the principle of regulatory autonomy, especially when it comes to bettering their "social hygiene in the areas of environmental quality and human safety."[4] But these conflicting values are inextricable from one another in a world that encourages, and quite frankly mandates, a high level of economic interdependency. Thus, so long as innovators continue to innovate, as new products enter the market, and as new scientific information becomes available, tension between advocates of the free market and social regulators will persist.

But what if institutional actors could reconcile these conflicting values—at least toward the more efficient and practical goal of alleviating (rather than eliminating) the underlying tension? This Note will argue that reconciliation is in fact possible[5]—and further, that significant steps are already being taken to produce the desired result. Part I of this Note discusses the historical tension between regulatory autonomy and free market values, as they surfaced during the evolution from the General Agreements on Tariffs and Trade ("GATT") to the World Trade Organization ("WTO"). Part II explores the practical implications of the Technical Barriers to Trade Agreement ("TBT") by examining a trio of recently decided TBT cases. Applying this jurisprudence to the currently pending dispute challenging Australia's Tobacco Plain Packaging Act ("TPPA"), Part III predicts that Australia will be successful in defending its regulation, and argues that the outcomes of these TBT cases reflect a step toward practical reconciliation between market efficiency and regulatory autonomy.

Settlement and Human Rights, 13 EUR. J. INT'L L. 753 (2002); Philip M. Nichols, *Forgotten Linkages—Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 461 (1998).

4. Cho, *supra* note 2, at 626.

5. *See generally id.*

DISCUSSION

I. FREE TRADE VS. SELF-REGULATION: FUNDAMENTAL TENSION FROM GATT TO WTO

GATT was established in 1947 as an indirect result of the war-victors' combined effort to create three institutions that would eliminate the causes of war, also known as the "Bretton Woods System."[6] The Bretton Woods System proposed a tripartite scheme of international institutions: The International Monetary Fund ("IMF"), The World Bank ("World Bank"), and the International Trade Organization ("ITO"). The IMF was designed to govern international monetary and financial matters. The World Bank was established to provide a guiding forum for international development. And finally, the ITO was created to address broad international trade issues, including important social issues connected to but not directly within the scope of "trade" per se.[7] While the first two institutions were successfully materialized and remain important fixtures in the international arena to this day, the ITO was stillborn. Given the broad spectrum of both trade and social issues that the ITO proposed to address, Congress feared that agreeing to the ITO would cede too much power to an international body. After failing to obtain congressional approval, the ITO was reduced to GATT—one of the many chapters of the originally conceived ITO charter.[8]

From 1948 until 1993, GATT operated as a "club" pursuant to its Protocol of Provisional Application. Essentially, this clause allowed members to "spur trade liberalization or contravene the rules of GATT when politically or economically necessary."[9] Thus, GATT was in no way a binding treaty. Moreover, GATT consisted of little more than a list of derogations and exemptions, primarily operating as a vehicle towards the freest of trade.[10] However, GATT did include certain exemptions under Article XX, which clearly responded to numerous social concerns, including environmental protection

6. *Id.* at 627.
7. *Id.* at 639–40.
8. *Id.* at 627.
9. Susan Aaronson, *Historical Roots of GATT and the Failure of the ITO*, ECON. HISTORY ASS'N (Dec. 21, 2014), http://eh.net/encyclopedia/from-gatt-to-wto-the-evolution-of-an-obscure-agency-to-one-perceived-as-obstructing-democracy-2/.
10. Cho, *supra* note 2, at 629.

and human health.[11] And while Article XX provided that those regulatory concerns might be sufficient, under certain circumstances, to justify "overrid[ing] the free trade obligations set forth in the other provisions,"[12] GATT espoused an inherent pro-trade bias by labeling free trade concerns as "obligations" and social concerns as "exemptions."

To illustrate, consider GATT's allocation of the burden of proof compared to that of a criminal proceeding in the United States. In the latter, the criminal is presumed to be innocent until proven guilty, and the prosecution has the burden of proving otherwise. That is because the United States Constitution provides him with a *right* to liberty. And while the commission of a criminal act invokes an *exception* to his right to liberty (e.g., incarceration), the prosecution bears the burden of proof to show that the exception should apply. One can transpose this analysis to the GATT structure, where free trade is a *right*, and social concerns are the *exception*. While, in a criminal proceeding, the criminal prosecutor bears the burden of proof to show why incarceration applies as an exception to the right to liberty, the party invoking the exception (e.g., the regulation) under GATT bears the burden of proof to show why that exception overrides the right to free trade.

Not surprisingly, this pro-trade bias did not sit well with environmentalists and public health organizations.[13] During the fifty years of growth in world trade under the GATT regime, the presumption working against domestic regulators sparked fury in domestic policymakers, and in turn minimized their perception of GATT's legitimacy.[14] By the late 1980s, after several failed attempts to breathe life into GATT as a meaningful institution, a growing number of nations felt that global trade expansion would be better served by a more formal international organization. Hence, in 1994, the World Trade Organization ("WTO") was born as a product of the Uruguay Round of Multilateral Trade Negotiations (the "Uruguay Round").[15]

While the WTO (World *Trade* Organization) is similar to GATT (General Agreements on Tariffs and *Trade*) in that both "have locat-

11. *See* General Agreements on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

12. Cho, *supra* note 2, at 629.

13. *Id.* (describing protestors depicting GATT and free tradists as "cold blooded monsters who cared little about legitimate environmental protests").

14. *Id.* at 651.

15. *See* Aaronson, *supra* note 9.

ed their primary institutional identity in the disposition of trade issues,"[16] the WTO has a much broader purview.[17] Importantly, the Uruguay Round produced a new set of rules governing social issues that provides domestic policymakers, environmentalists, and public health advocates rights on which to stand: the Sanitary and Phytosanitary Agreement ("SPS")[18] and the TBT.[19] While this Note only addresses the practical implications of the latter agreement as it has recently been interpreted by the WTO Panel and Appellate Body, it is worthwhile to note that the SPS and the TBT complement one another in an effort to "strike[] a delicate balance between the policy goals of trade facilitation and national autonomy in technical regulations."[20]

II. TBT ARTICLE 2.2 AND A TRIO OF CASES

Juxtaposed to the content-oriented approach under GATT, the SPS and TBT focus on process—or manner—oriented disciplines. That is, they are concerned with "*how* to regulate" rather than "*what* to regulate."[21] This becomes extremely important when examined against the backdrop of the "world's masses": these are groups comprised of governments, public and private institutions, and individuals, separated by culture, development, religion, and politics, with such degrees of separation often resulting in a divergence in values among them. Under the old GATT, the content-oriented approach left ample room for the adjudicating body to negate the social values of the regulating state.[22] By contrast, the TBT is structured to achieve two opposing goals simultaneously: ensuring trade liberali-

16. Cho, *supra* note 2, at 639–40.

17. *See* Aaronson, *supra* note 9 (noting that the WTO covers "subsidies, intellectual property, food safety and other policies that were once solely the subject of national governments").

18. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493, https://treaties.un.org/doc/Publication/UNTS/Volume%201867/v1867.pdf.

19. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120, https://treaties.un.org/doc/Publication/UNTS/Volume%201868/v1868.pdf [hereinafter TBT].

20. *Sanitary and Phytosanitary Measures and Technical Barriers to Trade Summary*, GLOB. TRADE NEGOTS.: CTR. FOR INT'L DEV. AT HARVARD UNIV., http://www.cid.harvard.edu/cidtrade/issues/spstbt.html (last updated Apr. 2004).

21. Cho, *supra* note 2, at 665.

22. *Id.* at 651. The focus on the "content" of a given domestic measure left room for the reviewing panels to second-guess or negate the legitimate policy objectives and/or social values of the regulating state.

zation while allowing WTO members to adopt technical regulations to pursue their legitimate policy objectives, such as the protection of human health or the environment. Thus, the structure of the TBT seeks to alleviate the historical tension between free trade and social regulation. TBT Article 2.2, specifically, is a tool of reconciliation between these competing values, as it limits the degree of trade-restrictiveness to the extent necessary to fulfill legitimate objectives.

The scope of the application of the TBT includes every technical regulation pertaining to products. "Technical regulation" is defined in Annex 1.1 of the TBT as a "[d]ocument which lays down product characteristics or their related process and production methods . . ."[23] The second sentence of Annex 1.1 of the TBT further states that a regulation that applies to a product is a "technical regulation" if it addresses product characteristics.[24] TBT Article 2.2 states 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 fulfill a legitimate objective**, taking account of the risks non-fulfillment 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.[25]

Therein, the language of the provision requires that any challenge brought under Article 2.2 must undergo a two-step analysis. The adjudicating body must first determine whether the regulating country has a legitimate objective; second, it must decide whether the particular regulation is more trade-restrictive than necessary to fulfill that objective.[26] Furthermore, the relevant case law mandates an additional consideration, which may or may not be organically

23. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Article 2.2, 1868 U.N.T.S. 120, https://treaties.un.org/doc/Publication/UNTS/Volume%201868/v1868.pdf [hereinafter TBT 2.2] (emphasis added).

24. *Id.*

25. *Id.*

26. Panel Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 7.333, WTO Doc. WT/DS406/R (adopted Sept. 2, 2011) [hereinafter US Clove Cigarettes Panel Report].

addressed by the two-step analysis[27]: if the current regulation *does* contribute to achieving a legitimate objective, does the complaining party provide sufficient evidence of a proposed alternative that is equally effective in furthering the goal? While Article 2.2 has been historically underexplored, the WTO's Panel and Appellate Body has recently decided a trio of cases that, when taken together, provide clarity and guidance.[28]

A. US Tuna II: A "Dolphin-Safe" Tuna Labeling Scheme

The Appellate Body's reasoning and ultimate decision in the case of *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (*US Tuna II*) indicates a willingness to take advantage of the room for regulation carved out by Article 2.2. In that case, Mexico challenged a labeling scheme enacted by the United States under its Dolphin Protection Consumer Information Act ("DPCIA"), claiming that it violated Articles 2.1 and 2.2 of the TBT.[29] The labeling scheme under DPCIA reflects a prominent environmental concern and is designed to protect dolphins by providing information to consumers about how tuna was caught.[30] Specifically, fisheries and retailers can only apply the "dolphin-safe" label if the tuna was caught using methods that do not include setting on dolphins or driftnet fishing on the high seas.[31] And while it is not obligatory for the importation or sale of tuna in the United States market[32]—in other words, retailers are still able to sell their tuna product in the market without a "dolphin-safe" label—the underlying idea is that consumers prefer to purchase a tuna product bearing a

27. Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 461, WTO Doc. WT/DS384/AB/R and WT/DS386/AB/R (adopted June 29, 2012), https://www.wto.org/english/tratop_e/dispu_e/384_386abr_e.pdf [hereinafter US COOL Appellate Body Report].

28. *See generally id.*; US Clove Cigarettes Panel Report, *supra* note 26; Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 172, WTO Doc. WT/DS381/AB/R (adopted May 16, 2012), https://www.wto.org/english/tratop_e/dispu_e/381abr_e.pdf [hereinafter US Tuna II Appellate Body Report].

29. US Tuna II Appellate Body Report, *supra* note 28, ¶ 172.

30. Elizabeth Trujillo, *The WTO Appellate Body Knocks Down U.S. "Dolphin Safe" Tuna Labels but Leaves a Crack for PPMs*, 16 AM. SOC'Y INT'L L. INSIGHTS 25 (July 26, 2012), http://www.asil.org/insights/volume/16/issue/25/wto-appellate-body-knocks-down-us-"dolphin-safe"-tuna-labels-leaves.

31. US Tuna II Appellate Body Report, *supra* note 28, ¶ 172.

32. *Id.*

"dolphin-safe" label. Thus, the DPCIA creates an impetus for fisheries to catch tuna without posing a risk to dolphins.[33]

The Appellate Body found that the DPCIA violated Article 2.1 of the TBT, which prohibits "less favorable treatment," because the measure modified the competitive condition of the market to the detriment of Mexican tuna products.[34] Moreover, the DPCIA conditioned eligibility for the "dolphin-safe" label upon documentary evidence, depending on whether the tuna was harvested inside or outside of the Eastern Tropical Pacific Ocean (the "ETP").[35] Where tuna was harvested inside the ETP, there was a difficult-to-satisfy evidentiary requirement; where tuna was caught outside the ETP, there was no evidentiary requirement.[36] Thus, non-ETP tuna was automatically eligible for the dolphin-safe label, even if dolphins had in fact been seriously injured. Thus, while the DPCIA did not discriminate against Mexico on its face, the measure did not apply even-handedly: Mexican fisheries primarily harvest tuna inside the ETP and it would be "impossible" to overhaul the entire Mexican tuna industry to satisfy the DPCIA's requirements.[37]

However, despite finding a violation of Article 2.1 of the TBT, the Appellate Body found that the measure was consistent with Article 2.2. In other words, while the application of the measure was *de facto* discriminatory,[38] the measure itself was not "more restrictive than necessary."[39]

1. Legitimate Objective?

In *US Tuna II*, the Appellate Body defined "objective" as a "thing aimed at or sought; a target, a goal, an aim."[40] It defined the word "legitimate" as "lawful; justifiable; proper."[41] To determine the "objective" under Article 2.2 of the TBT, "a panel must assess what a

33. *Id.* ¶ 29. The United States introduced evidence in support of the contention that, at the time the measure at issue was adopted, "there was strong consumer sentiment that setting on dolphins to catch tuna was unacceptable and that something should be done to ensure that consumers had a choice not to purchase a product that contained tuna caught in association with dolphins." *Id.*

34. *Id.* ¶ 284.

35. *Id.*

36. *Id.*

37. *Id.* ¶ 300.

38. *See id.* ¶ 375.

39. *Id.*

40. *Id.* ¶ 313.

41. *Id.*

Member seeks to achieve . . . [and] may take into account the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure."[42] In *US Tuna II*, the objective at issue was twofold: (1) to "ensur[e] that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins"; and (2) to "contribut[e] to the protection of dolphins by ensuring that the [United States] market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins."[43] The lack of analysis suggests that the legitimate objective prong was not at issue in the *US Tuna II* case. Thus, there seems to be an underlying assumption that protecting the lives of dolphins, both directly and indirectly by providing accurate information to consumers, is a "target, [] goal, [or] aim" that is "lawful, justifiable, [and] proper."[44]

2. More Trade Restrictive than Necessary to Achieve the Legitimate Objective?

In determining whether the regulation fulfills the legitimate objective, the Appellate Body reasoned that the degree of achievement of a particular objective may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure.[45] Moreover, in analyzing the phrase "unnecessary obstacles to international trade" together with "not . . . more trade restrictive than necessary," with the latter qualifying the former, the Appellate Body looked to the following factors:

> (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-fulfillment of the objective(s) pursued by the Member through the measure.[46]

As the complainant bearing the burden of proof, Mexico suggested that the United States could have adopted an alternative regulation that would have been less trade restrictive. Specifically,

42. *Id.* ¶ 314.
43. *Id.* ¶ 20.
44. *See id.* ¶ 330 n.663.
45. *Id.* ¶ 150.
46. *Id.* ¶ 322. It is important to note that the complainant bears the burden of proof in showing that a technical regulation is inconsistent with Article 2.2 of the TBT.

Mexico argued that the Agreement on the International Dolphin Conservation Program ("AIDCP") label (which could be obtained despite setting on dolphins) and the US "dolphin-safe" label should be allowed to coexist in the United States market.[47] Mexico argued that AIDCP's "dolphin-safe" label would provide consumers with information about methods other than the strict no-setting measure used to protect dolphins.

In comparing the current measure with Mexico's proposed alternative, the Appellate Body partially combined its analysis as to the "degree of contribution made by the measure" as well as the "trade-restrictiveness" of the measure. Specifically, in contemplating the degree of contribution made by the United States' measure to the legitimate objective at issue, the Appellate Body determined that the United States' labeling scheme fulfills its objective to a greater degree than Mexico's proposed alternative.[48] Since, under the proposed alternative measure, tuna caught in the ETP by setting on dolphins would be eligible for the AIDCP's "dolphin-safe" label, it would contribute to the objective to a lesser degree than the current measure. Specifically, it has the potential to mislead consumers, and more importantly "it would allow more tuna harvested in conditions that adversely affect dolphins to be labeled 'dolphin-safe.'"[49] Thus, Mexico failed to show a less-restrictive alternative to the current measure that could successfully contribute to the legitimate objective of dolphin protection.

Ultimately, even though the Appellate Body found the measure inconsistent with Article 2.1, it found the labeling scheme consistent with Article 2.2.[50] Thus, to comply with the ruling, the United States had to make the labeling requirements outside the ETP match the more stringent requirements inside the ETP.[51] Because the measure was found to be noncompliant with Article 2.1, it is clear that free trade is still a reckoning concern in the eyes of the WTO. However, the case illustrates that, by allocating the burden of proof onto the complaining party, TBT Article 2.2 procedurally aligns itself with the theory that a defending regulator is "innocent until proven guilty."

47. *Id.* ¶ 59.
48. *Id.* ¶ 330.
49. *Id.*
50. Jonathan Carlone, Note, *An Added Exception to the TBT Agreement After Clove, Tuna II, and Cool*, 37 B. C. INT'L & COMP. L. REV. 103, 121 (2014).
51. *Id.*

B. US Clove Cigarettes: A Complete Ban

In 2009, President Obama signed the Family Smoking Prevention and Tobacco Control Act ("FSPTCA").[52] The United States House Energy and Commerce Committee had proposed the FSPTCA with a goal towards reducing the number of young Americans who begin smoking.[53] The Act provided the Food and Drug Administration ("FDA") with a new broad statutory authority to regulate tobacco products under the Federal Food, Drug, and Cosmetic Act ("FDCA").[54] Section 101 of the FSPTCA adds chapter IX, section 907(a)(1)(A) to the FDCA, banning the production and sale of cigarettes with certain characterizing flavors.[55] Specifically, section 907(a)(1)(A) of the FDCA (included via the FSPTCA) prohibits cigarettes containing characterizing flavors "'(other than tobacco or menthol) or [from containing an] herb or spice.'" The flavors prohibited by section 907(a)(1)(A) include (but are not limited to), "strawberry, grape, orange, **clove**, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee."[56]

Indonesia, the largest exporter of clove cigarettes to the United States before the ban,[57] challenged the FSPTCA claiming that it violated Articles 2.1 and 2.2 of the TBT. Menthol cigarettes are primarily produced in the United States, whereas clove cigarettes are primarily produced in Indonesia.[58] Thus, Indonesia argued that banning clove cigarettes while continuing to permit the sale of menthol cigarettes[59] would discriminate against Indonesia in violation of Article 2.1 of the TBT and GATT Article III: 4.[60] The outcome was identical to that in *US Tuna II*, as the *US Clove Cigarettes* Appellate Body found the ban to be inconsistent with Article 2.1, but consistent

52. Lucas Ballet, Comment, *Losing Flavor: Indonesia's WTO Complaint Against the U.S. Ban on Clove Cigarettes*, 26 AM. U. INT'L L. REV. 515, 517 (2011).

53. *Id.* at 518.

54. *Id.* at 517.

55. Appellate Body Report, *United States–Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 26, WTO Doc. WT/DS406/AB/R (adopted Apr. 4, 2012) [hereinafter US Clove Cigarettes Appellate Body Report].

56. US Clove Cigarettes Panel Report*, supra* note 26, ¶ 2.4 (emphasis added).

57. Ballet, *supra* note 52, at 516–17.

58. Carlone*, supra* note 50, at 109.

59. Ballet, *supra* note 52, at 516–17.

60. Tania Voon, *Cigarettes and Public Heath at the WTO: The Appeals of the TBT Labeling Disputes Begin*, 16 AM. SOC'Y INT'L L. INSIGHTS 6 (Feb. 28, 2012), http://www.asil.org/insights/volume/16/issue/6/cigarettes-and-public-health-wto-appeals-tbt-labeling-disputes-begin.

with Article 2.2.[61] Because the United States only appealed the Panel's decision in finding a violation of Article 2.1, the *US Clove Cigarettes* Appellate Body Report does not delve into the analysis conducted under Article 2.2. Therefore, the *US Tuna II* Panel's discussion remains the guide for purposes of the Article 2.2 analysis.

Keeping in mind the fact that Indonesia had the burden of proof as the complaining party in *US Clove Cigarettes*, its claim was unsuccessful with respect to Article 2.2 of the TBT for two main reasons. First, the Panel stated that Indonesia failed to show that the ban on clove cigarettes did not contribute to the prevention of youth smoking.[62] Second, Indonesia failed to show that an alternative, less-restrictive measure would contribute to the legitimate objective pursued by the United States.[63]

1. Legitimate Objective?

In *US Tuna II*, the Appellate Body defined "objective" as a "thing aimed at or sought; a target, a goal, an aim."[64] It defined the word "legitimate" as "lawful; justifiable; proper."[65] Just as the protection of dolphins satisfied this definition in *US Tuna II*, the protection of public health by reducing youth smoking in *US Clove Cigarettes* was also considered a legitimate objective—that is, a target, goal, or aim that is lawful, justifiable, and proper.[66]

The parties in *US Clove Cigarettes* agreed that the public health objective of the clove cigarette ban was to reduce youth smoking. And while the objective of the FSPTCA, and of section 907(a)(1)(A) in particular, is not set forth in the FSPTCA itself, the Panel referred to the explanations provided by a House Energy and Commerce Committee Report, which stated:

> Consistent with the overall intent of the bill to protect the public health, including by reducing the number of children and adolescents who smoke cigarettes, section 907(a)(1) is intended to pro-

61. *See* US Clove Cigarettes Panel Report, *supra* note 26, ¶ 7.432; US Clove Cigarettes Appellate Body Report, *supra* note 55, ¶ 233.

62. Leonid Shmatenko, *Regulatory Measures Through Plain Packaging of Tobacco Products in the Light of International Trade Agreements*, 4 CZECH Y.B. INT'L L. 27, 38 (2013).

63. *Id.*

64. US Tuna II Appellate Body Report, *supra* note 28, ¶ 322.

65. *Id.*

66. *See* US Tuna II Appellate Body Report, *supra* note 28, ¶ 313 (defining the term "legitimate objective").

> hibit the manufacture and sale of cigarettes with certain 'characterizing flavors' that appeal to youth.[67]

With the Committee Report as its guide, the Panel rejected Indonesia's arguments that the true objective of the ban was not "legitimate" because it excluded menthol cigarettes as a result of a political compromise and out of concern for potential loss of U.S. jobs.[68] The Panel stated that even if Indonesia's assertions were true, it would not detract from the "legitimacy" of the objective.[69]

2. More Trade Restrictive than Necessary to Achieve the Legitimate Objective?

The Panel prefaced its second prong analysis by noting that "'the level of protection' sought is directly connected to the question of whether a measure is 'more trade-restrictive than necessary.'"[70] Indonesia argued that the ban on clove cigarettes was more restrictive than necessary because it greatly exceeded the level of protection sought by the United States. Specifically, because a large number of cigarettes purportedly smoked by youth were not banned by the FSPTCA, Indonesia argued that the level of protection sought by the regulation must be deterrence, not strict prohibition, of adolescent tobacco consumption.[71] The Panel flatly rejected this line of reasoning, stating that "[g]iven the U.S. Government's long and frustrating experience in trying to limit youth smoking, the 'high' level of

67. US Clove Cigarettes Panel Report, *supra* note 26, ¶ 2.6–¶ 2.7 (citing H.R. Rep. No. 111-58, pt. 1, at 37 (2009)).

68. *Id.* ¶ 7.345. Indonesia called the ban a "'disguised restriction' on international trade and 'a wolf disguised in the sheep's clothing' of public health."

69. *Id.* ¶ 7.347–7.349. "It is self-evident that measures to reduce youth smoking are aimed [at] the protection of human health, and Article 2.2 of the *TBT Agreement* explicitly mentions the 'protection of human health' as one of the 'legitimate objectives' covered by that provision." In *EC – Asbestos*, the Appellate Body stated that "the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree.' In addition, we recall that in *Brazil – Retreaded Tyres*, the Appellate Body agreed with the panel that 'few interests are more vital and important than protecting human beings from health risks.'" *Id.* ¶ 7.347.

70. *Id.* ¶ 7.370. Both parties agreed with this assertion, which comes from the sixth recital to the preamble of the TBT Agreement, stating that "no country should be prevented from taking measures 'necessary . . . for the protection of human . . . life or health . . . at the levels it considers appropriate.'" *Id.* Furthermore, the Panel noted previous explanations offered by the Appellate Body: "in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also 'preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued.'" *Id.*

71. *Id.* ¶ 7.371.

protection sought by the United States is evidenced by the measure applied—a complete ban."[72]

Next, the Panel applied the following factors as established in *US Tuna II*:

> (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-fulfillment of the objective(s) . . .

Under the first factor of the "Necessary" test, the Panel examined whether banning clove cigarettes makes a material contribution to the objective of reducing youth smoking. Among the various arguments set forth by Indonesia and rejected by the Panel was that prohibiting only a "tiny sliver" of the cigarettes smoked by youth could not make a material contribution to the public health objective of reducing youth smoking.[73] This did nothing for Indonesia, as the argument seems to suggest that the measure is actually less trade-restrictive than necessary to fulfill its objective.[74] Furthermore, the extensive scientific evidence before the Panel provided overwhelming support for the ban and its ability to contribute to the objective of reducing youth smoking.[75] It is particularly important to note that the

72. *Id.* ¶ 7.372. ("The level at which the United States considers appropriate to protect public health is to eliminate from the market, not simply restrict access to, those products that are disproportionately used by young people.").

73. *Id.* ¶ 7.395.

74. *Id.* The Panel explained that this "would mean that, in order to make a material contribution to the objective of reducing youth smoking, the United States would have to ban more types of cigarettes than it has." *Id.* Thus, the Panel failed "to see how the ban on clove cigarettes can be found to be 'more trade-restrictive than necessary' to fulfil [sic] its objective based on the conclusion that it is *less* trade-restrictive than necessary to fulfil [sic] its objective." *Id.*

75. *Id.* ¶ 7.401–¶ 7.415. "Some researchers have suggested that eugenol, which is present in substantial quantities in clove cigarette smoke . . . anesthetizes the backs of smokers' throats and tracheas, permitting deeper inhalation and possibly encouraging smoking in persons who might otherwise be dissuaded by the harshness of regular cigarettes." *Id.* ¶7.402 (citing CTRS. FOR DISEASE CONTROL & PREVENTION, EPIDEMIOLOGIC NOTES AND REPORTS ILLNESSES POSSIBLY ASSOCIATED WITH SMOKING CLOVE CIGARETTES, 34 MMRW WEEKLY 21, 297–99 (May 31, 1985), http://www.cdc.gov/mmwr/preview/mmwrhtml/00000549.htm). "Clove cigarettes are sometimes referred to as 'trainer cigarettes' and may serve as 'gateway' products that introduce young people to smoking." *Id.* ¶ 7.406 (citing Susan Farrer, *Alternative Cigarettes May Deliver More Nicotine Than Conventional Cigarettes*, 18 NAT'L INST. ON DRUG ABUSE NOTES 2 (Aug. 2003), http://archives.drugabuse.gov/NIDA_Notes/NNVol18N2/Alternative.html). "[F]lavoured cigarettes can promote youth initiation and help young occasional smokers to become daily smokers by reducing or masking the natural harshness and taste of tobacco smoke and increasing the acceptability of a toxic product." *Id.* ¶ 7.408 (citing Carrie M. Carpenter et al., *New Ciga-*

Panel took into account certain guidelines set forth by the World Health Organization Framework on Tobacco Control ("WHO FCTC") (recommending the regulation of flavored tobacco), as this could help to shape the direction of further decisions.[76] Given the "genuine relationship of ends and means" between the objective pursued and the measure at issue, the Panel found that the ban on clove cigarettes makes a material contribution to the objective of reducing youth smoking.[77]

Indonesia further argued that even if the ban materially contributed to the objective, there were less-restrictive alternatives available that would make an equivalent contribution. The following is a non-exhaustive list of alternatives proposed by Indonesia: "restricting the sales of cigarettes to adult-only locations"; "limiting the display of tobacco products"; "placing strict requirements on packaging"; and "requiring health warnings."[78] While the Panel stated that "[i]t seems clear enough that each of these measures would be less trade-restrictive than the ban, . . . 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 . . . ."[79] And finally, the Panel emphasized that even if the listing of such alternative measures could be found sufficient to establish a prima facie case, the United States successfully trumped such claims by showing that many of those alternative measures were already in place—and that those alternatives have failed.[80]

C. US COOL: Labeling Scheme for Imported Pork and Beef

For the third time in a row, in *United States—Certain Country of Origin Labelling (COOL) Requirements* (*US COOL*), the Appellate

rette Brands with Flavors that Appeal to Youth: Tobacco Marketing Strategies, 24 HEALTH AFF. (2005).

76. *Id.* ¶ 7.413 (citing *World Health Organization, The Scientific Basis of Tobacco Product Regulation*, WHO TECH. REPORT SERIES 945 (2007). A study group of eleven experts established by the WHO FCTC noted that "[t]he recent production and promotion of flavored tobacco products is a major public health concern" as the "flavors could entice youth to experiment with tobacco products." *Id.* As such, the WHO FCTC study group recommends that "[r]egulations should be developed to prohibit manufacturing and marketing of candy-like and exotically flavoured tobacco products targeting young and novice smokers." *Id.*

77. *Id.* ¶ 7.417.

78. *Id.* ¶ 7.422.

79. *Id.* ¶ 7.423.

80. *Id.* ¶ 7.425.

Body found a regulatory measure to be discriminatory in violation of Article 2.1, yet shied away from declaring the respective measures "more trade-restrictive than necessary," thereby declaring the measure to be consistent with Article 2.2 of the TBT.[81] First, a brief discussion of the facts and conclusion as to Article 2.1 is necessary to understand the analysis under Article 2.2.

Canada and Mexico (the complainants) alleged that the United States' country of origin labeling ("COOL") requirements for beef and pork violated, *inter alia*, Article 2.1 and 2.2 of the TBT.[82] The measure at issue in *US COOL* was the United States' Agricultural Marketing Act of 1946, as amended by the 2008 Farm Bill and implemented through an Interim Final Rule of July 28, 2008, which imposed labeling requirements on beef and pork to be sold at retail that was produced from imported cattle and hogs.[83] With respect to Article 2.1, the complainants successfully argued that the COOL measure was discriminatory because it accorded less favorable treatment to imported livestock than domestic livestock.[84] In reaching its conclusion, the Appellate Body focused on the *de facto* disparate impacts of the COOL measure as it modified the conditions of the market to the detriment of the complainants—a comparable analysis to that applied in *US Tuna II*, discussed *supra* Part II(A).

Specifically, in order for retailers to have the information necessary to comply with the COOL measure and to apply the appropriate label (out of the four options prescribed), the upstream meat producers had to segregate livestock according to origin.[85] This record-keeping process was expensive, and imposed additional costs on producers and retailers alike. Consequently, the measure incentivized the United States' beef and pork industries to rely exclusively on U.S. livestock, as they could then avoid the measure altogether.[86] To that end, the COOL measure disadvantaged the complainant exporters of cattle and hogs in violation of Article 2.1.

However, the next step of the TBT analysis in *US COOL* solidified a pattern that will be difficult to ignore with respect to future (and currently pending) TBT disputes: despite violating Article 2.1, the

81. *See* US COOL Appellate Body Report, *supra* note 27, ¶ 8.3.
82. *Id.*
83. *Id.* ¶ 7.7, 7.10.
84. *Id.* ¶ 348.
85. *Id.* ¶ 7.17.
86. *Id.* ¶ 287.

Appellate Body found that the measure itself was not "more trade-restrictive than necessary" and thus did not violate Article 2.2.[87]

1. Legitimate Objective?

In this case, the Panel found, and the Appellate Body upheld, that the objective of the COOL measure was to provide consumers information about the origin of beef and pork products. As to the question of legitimacy, the Appellate Body critiqued certain aspects of the Panel's analysis but ultimately upheld the Panel's conclusion that the origin requirement was a legitimate objective. Notably, the Appellate Body's affirmation was rooted in the burden of proof allocation under TBT. Here, the complainants failed to show, through either arguments or evidence, that providing consumers with information is *not* a legitimate objective.[88]

2. More Trade Restrictive than Necessary to Achieve the Legitimate Objective?

Under the "Necessary" prong of its analysis, the Appellate Body sought to review the same principal measures as it had in *US Tuna II* and *US Clove Cigarettes*: (i) the degree of the measure's contribution to achieving the legitimate objective, (ii) the trade-restrictiveness of the measure, and (iii) the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfillment. It is important to note that the Appellate Body reversed the Panel's conclusion that the COOL measures violated Article 2.2, despite the fact that it could not complete the majority of the legal analysis for lack of sufficient evidence.[89] First, the Appellate Body could not determine with any specificity the degree of the measure's contribution. As to the second and third factors, the Appellate Body seemed to indicate that they would probably have failed the "Necessary" test had the Panel made clear and precise findings based on sufficient evidence.[90] Despite such an impression, the Appellate Body reversed the Panel's finding that the COOL measures were inconsistent with Article 2.2 because the Panel had contrived and applied a "minimal threshold" analysis. In fact, the reversal was based *solely* on the

87. US COOL Appellate Body Report, *supra* note 27, ¶ 8.3.

88. *Id.* ¶ 453.

89. *Id.* ¶ 468.

90. *Id.* ¶ 479 (stating that the measure seemed to be of a "considerable degree of trade restrictiveness" and that the risks posed by non-fulfillment "would not be particularly grave").

Appellate Body's determination that the COOL measures contributed, at least to some extent, to the legitimate objective of providing consumers with information.[91]

In a defining moment for TBT jurisprudence, the Appellate Body explained that there is no "minimum threshold of fulfillment" required to satisfy Article 2.2.[92] In other words, instead of focusing on whether the particular measure fulfills the underlying objective completely, or meets some minimal level of fulfillment, the more appropriate question is whether the measure makes an *actual* contribution to the objective.[93] To this extent, the Appellate Body seemed to suggest that this inquiry is qualitative, rather than quantitative. Here, even the most confusing labels under the COOL scheme provided more information than was previously available,[94] and thus contributed to the legitimate objective of providing consumers with information about beef and pork products. This line of reasoning has important implications for future dispute adjudication. First, while the *degree* of a measure's contribution to achieving its legitimate objective is a factor formally prescribed by the Appellate Body, in actuality, it is a question of whether the measure contributes to achieving the objective at all. The reasoning in *US COOL* seems to suggest that even where a particular measure's contribution to achieving a legitimate objective is minimal, it is still better than nothing at all. However, where the complaining party argues that an alternative measure is less restrictive (as is basically required for any complaining party to succeed on an Article 2.2 challenge[95]), the degree of the current measure's contribution becomes important to the extent that it can be compared to that of the proposed alternative.

Taken together, *US Tuna II*, *US Clove Cigarette*, and *US COOL* reveal that TBT Article 2.2 allows for deference to the social concerns of regulating states—a concept that was historically absent from dispute adjudication under the old GATT. One might perceive this trio of cases as espousing bias in favor of social regulation at the expense of trade liberalization, but this perception would be wrong. It is a delicate balancing act. However, it is true that the Ap-

91. *Id.* ¶ 7.352.

92. *Id.* ¶ 461.

93. *Id.* ¶ 468.

94. *Id.* ¶ 476 (noting that the clearest label would indicate countries of birth, raising, and slaughter of livestock from which meat is derived, and the most confusing label would at least provide some information as to the origin).

95. *Id.* ¶ 461.

pellate Body seems unwilling to use Article 2.2 to strike down a regulation unless the complaining party can show that a less trade-restrictive alternative would contribute to the achievement of the regulating state's legitimate social concern. To understand that this is not bias, one could imagine a set of scales, with "social regulation" on the left scale and "free-trade" on the right, each weighing exactly the same. If the social regulation could be struck down entirely, removing all weight from the left scale, the result would look like the unbalanced multilateral trading regime under the old GATT: unopposed, free-trade domination. However, TBT assumes that both scales should maintain *some* weight. For example, TBT 2.2 will only get rid of the current social regulation if there is another alternative to take its place—to preserve its weight. And in situations where the measure is found to be discriminatory under TBT 2.1, thereby offsetting the balance in favor of social regulation at the expense of free trade, the measure must be altered.[96]

III. AUSTRALIA'S TOBACCO PLAIN PACKAGING ACT VIEWED IN LIGHT OF RECENT TBT JURISPRUDENCE

In 2011, Australia implemented what has been deemed "the world's toughest law on cigarette promotion."[97] Despite the law's reputation of stringency, this Note predicts that the law will be upheld against attack under Article 2.2 as a transplant of the reasoning in the aforementioned TBT cases, which suggests that plain packaging would not be more trade-restrictive than necessary.

In an effort to improve public health by "discouraging smoking," and "encouraging cessation,"[98] Australia's Tobacco Plain Packaging Act ("TPPA") prohibits tobacco companies from displaying their distinctive logos on cigarette packs.[99] Since the TPPA's enactment, Ukraine, Honduras, Cuba, Indonesia, and the Dominican Republic have commenced disputes in the WTO, and a record forty more countries seek to be joined in the dispute settlement process.[100] In

96. *See, e.g.*, US Tuna II Appellate Body Report, *supra* note 28.

97. Rob Mcguirk, *Australian Court OKs Logo Ban on Cigarette Packs*, USA TODAY (Aug. 14, 2012), http://usatoday30.usatoday.com/news/world/story/2012-08-14/australia-logo-cigarette-pack-ban/57059912/1.

98. *Id.*

99. *Tobacco Plain Packaging Act 2011* (Austl.) ch 2 pt 2 div 1 para 20 [hereinafter TPPA]; *see also* Mcguirk, *supra* note 97.

100. *World Trade Organization Panel to Hear Oral Arguments on Australia Tobacco Plain Packaging Case from June 1-5, 2015*, ACTION ON SMOKING & HEALTH (June 1, 2015)

addition to its proscription on trademarks, the TPPA further requires that tobacco product packages be "drab dark brown" in a matte finish, with no visible brand features other than the brand and variant name in a standard form and font below a mandatory graphic health warning.[101] And finally, the TPPA prescribes a standardized shape for cigarette packs and cartons. Together, these regulations constitute the measures at issue in the pending WTO dispute settlement proceedings.

In its complaint, Ukraine alleges, *inter alia*, that the TPPA violates certain provisions of the TBT Agreement. Following the Appellate Body's interpretation of Annex 1.1, the plain packaging at issue in this dispute would be found to be a "product characteristic" that applies to an identifiable product: tobacco. Specifically, Ukraine argues that the TPPA violates Article 2.2 of the TBT because Australia's "measures constitute an unnecessary obstacle to trade and are more trade restrictive than necessary to achieve the stated health objectives."[102]

1. Legitimate Objective?

The stated goals of the TPPA are as follows:

> [T]o improve public health by: (i) discouraging people from taking up smoking or using tobacco products; and (ii, () encouraging people to give up smoking and to stop using tobacco products; and (iii, () discouraging people who have given up smoking . . . from relapsing, and (iv) reducing people's exposure to smoke from tobacco products.[103]

The legitimacy of this objective will likely not be disputed in the Australia TPPA case. First, the TBT explicitly includes the protection of public health as one of the legitimate objectives the agreement is intended to cover.[104] To that end, a breadth of scientific knowledge makes the negative health impacts of tobacco consumption hard to ignore. According to the World Health Organization (WHO), tobacco-related diseases are now "the single most important cause of pre-

http://www.ash.org.uk/media-room/press-releases/:world-trade-organization-panel-to-hear-oral-arguments-on-australia-tobacco-plain-packaging-case-from-june-1-5-2015.

101. TPPA, *supra* note 99, at ch 2 pt 2 div 1 para 19(2)–(3).

102. Request for Consultations by Ukraine, *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Request for Consultations by Ukraine*, 3, WTO Doc. WT/DS434/1 (Mar. 15, 2012).

103. TPPA, *supra* note 99, at ch 1 pt 1 sub-para 3(1).

104. *See* TBT 2.2, *supra* note 23.

ventable deaths in the world."[105] Attributing over twenty major categories of fatal and disabling diseases to tobacco consumption, the WHO predicts that tobacco will cause an estimated 100 million deaths over the next twenty years.[106] Currently, tobacco consumption kills nearly 6 million people per year.[107] "[A]pproximately one person dies every six seconds due to tobacco, accounting for one in ten adult deaths[,] [and] [u]p to half of current users will eventually die of a tobacco-related disease."[108] Unfortunately, Australian tobacco consumers are not immune to tobacco's negative health impacts.[109]

To be sure, the Appellate Body's analysis in *US Clove Cigarettes* indicates that reducing smoking is a legitimate public health objective. Yet unlike *US Clove Cigarettes*, where Indonesia argued, albeit unsuccessfully, that the exemption of menthol cigarettes was a disguised restriction on international trade and therefore negated the legitimacy of the stated objective, no such argument will be available in this case. Here, the TPPA's plain packaging measures apply to "all tobacco products." Moreover, the objective of the TPPA arguably falls squarely in line with the objectives of the labeling measure implemented in *US COOL* if interpreted as an effort to prevent deceptive practices by providing consumers information about tobacco products.[110]

While Ukraine or other joining parties may make a creative argument as to why Australia's objective to reduce smoking falls short of legitimacy, it is unlikely that this aspect of the analysis will garner much attention given the plain language of Article 2.2 and the Appel-

105. *Trade, Foreign Policy, Diplomacy and Health: Glossary of Globalization, Trade and Health Terms: Tobacco*, WORLD HEALTH ORG., http://www.who.int/trade/glossary/story089/en/ (last visited Aug. 29, 2015).

106. *See id.* "Of the 100 million projected tobacco-related deaths over the next 20 years, about half will be of people in the productive ages of 35-69. In general, 9% of women in developing countries and about 22% in developed countries currently smoke. Without robust and sustained initiatives, these figures are expected to rise dramatically, with today's 250 million women smokers rising to 340 million by 2020." *Id.*

107. *Media Centre – Tobacco Fact Sheet 339*, WORLD HEALTH ORG., http://www.who.int/mediacentre/factsheets/fs339/en/ (last updated July 2015).

108. *Id.*

109. *Ukraine Launches WTO Challenge Against Australia Cigarette Packaging Law*, INT'L CTR. FOR TRADE & SUSTAINABLE DEV. 16 BRIDGES (Mar. 21, 2012), http://www.ictsd.org/bridges-news/bridges/news/ukraine-launches-wto-challenge-against-australia-cigarette-packaging-law (data provided by the Australian government shows that smoking has a high rate of mortality; "smoking kills 15,000 Australians annually").

110. This is comparable to the legitimate objective found in US COOL Appellate Body Report, discussed *supra* note 27, ¶ 351.

late Body's interpretation in *US Clove Cigarettes*. Instead, the majority of the argument and analysis will likely take place under the "Necessary" test of the second prong.

2. More Trade Restrictive than Necessary to Achieve the Legitimate Objective?

In determining whether the TPPA is more restrictive than necessary to achieve a legitimate objective, the panel will consider the following factors as established by the above-mentioned cases:

> (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-fulfillment of the objective(s).[111]

First, in determining the degree of contribution of the TPPA, it is significant to note that tobacco packaging is "one of the last remaining forms of tobacco advertising in Australia . . ."[112] Thus, there is a strong argument that the regulation of tobacco packaging will at least make *some level* of contribution towards reducing tobacco use. As the Appellate Body determined in *US Clove Cigarettes*, there is no minimal threshold a regulation must meet in order to satisfy the "contribution" prong of the analysis. The degree of the contribution becomes important only when analyzed in relation to the trade restrictiveness of the measure and when compared to any proposed alternative.

At the TBT Committee, Australia explained that the TPPA was based on "extensive research and evidence that carefully explored the impact of tobacco packaging."[113] For example, Australia introduced evidence released by the Cancer Council of Australia ("CCAC"), reviewing "research over two decades across five countries from 24 published experimental studies."[114] The key findings from the CCAC report were as follows:

111. US Tuna II Appellate Body Report, *supra* note 28, ¶ 322.

112. Comm. on Technical Barriers to Trade, *Minutes of the Meeting of 15-16 June 2011*, ¶ 29, WTO Doc. G/TBT/M/54 (Sept. 20, 2011) [hereinafter TBT Committee June 2011] ("Australia noted that tobacco packaging was, simply put, one of the last remaining forms of tobacco advertising in Australia and plain packaging legislation was therefore the next logical step in Australia's tobacco control efforts.").

113. *Id.* ¶ 30.

114. *Id.*

a) young adult smokers associate cigarette brand names and package designs with positive personal characteristics, social identity and aspirations;
b) packaging can create misperceptions about the relative strengths, level of tar and health risk of tobacco products;
c) decreasing the number of design elements on a cigarette pack reduces its appeal and perceptions about the likely enjoyment and desirability of smoking; and,
d) plain packaging increases the impact of health warnings.[115]

After the official implementation of the TPPA in September 2012, the CCAC conducted a second study during the Act's rollout period; the organization released a report on its findings in July of 2013.[116] The comprehensive study included population surveys of attitudes and behaviors relating to smoking, and found that "compared with smokers smoking from branded packs, smokers who were smoking from the new plain packs were more likely to perceive their tobacco as being lower in quality and tended to be lower in satisfaction, were more likely to think about and prioritize quitting, and more likely to support the plain packaging policy."[117]

Moreover, while Australia is the first nation to successfully implement plain packaging,[118] the WHO FCTC issued guidelines in 2008 recommending its parties to consider the introduction of plain packaging.[119] Moreover, the parties to the WHO FCTC have agreed that health measures for tobacco control are crucial to establishing national health policies to protect their populations.[120] As mentioned, the Panel in *US Clove Cigarettes* took into account the WHO FCTC's guidelines recommending its parties to regulate flavored

115. *Id.*

116. Melanie Wakefield et al., *Introduction Effects of the Australian Plain Packaging Policy on Adult Smokers: A Cross-sectional Study*, BMJ OPEN (2013), http://bmjopen.bmj.com/content/3/7/e003175.full.

117. *Id.* at 1.

118. *Id.* at 1.

119. TBT Committee June 2011, *supra* note 112, ¶ 27. There are 180 states that have joined the WTO Framework Convention on Tobacco Control, including both Australia and Ukraine. *See Parties to the WHO Framework Convention on Tobacco Control*, WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, http://www.who.int/fctc/signatories_parties/en/ (last updated Feb. 12, 2015). However, at the TBT Committee, Ukraine argued that Australia's plain packaging measure could not be justified under the WHO FCTC because the plain packaging requirements went far beyond the obligations set out within the WHO FCTC. *See* TBT Committee June 2011, *supra* note 112, ¶ 13.

120. TBT Committee June 2011, *supra* note 112, ¶ 19.

tobacco.[121] Thus, the panel reviewing the Australia TPPA dispute will almost certainly take the WHO FCTC's recommendations into consideration, along with any relevant evidence, to determine that the plain packaging measure highly contributes to the legitimate objective of protecting public health.

As to the second factor of the "Necessary" test, even if the adjudicating panel finds that the TPPA is highly trade-restrictive, standing alone, that determination will not be dispositive. For example, in *US Tuna II*, the panel held that the "dolphin-safe" labeling scheme was trade-restrictive because it structurally prevented Mexican fisheries from gaining access to the label, thus altering the market in the United States' favor.[122] Similarly, in *US COOL*, the panel found that the United States' labeling requirements for meat produced by imported cattle and hogs was trade-restrictive, as it altered the market by incentivizing domestic retailers to purchase domestic cattle and hogs so they could avoid the labeling hassle altogether.[123] Yet, in both cases, the Appellate Body held that the respective regulations did not violate Article 2.2 of the TBT. While the analysis from *US Tuna II* is arguably more applicable to the current case than *US COOL*, the latter case demonstrates a valuable point: despite the Appellate Body's suspicions that the measure could have been found inconsistent with Article 2.2 if the Appellate Body would have had the appropriate evidence in front of it, the Appellate Body ultimately upheld the regulation. This illustrates the Appellate Body's willingness to give great deference to domestic regulations where they are in furtherance of a legitimate social concern.

In *US Tuna II*, the Appellate Body upheld the measure after finding that Mexico failed to propose an alternative that would contribute to achieving the legitimate objective of dolphin protection, considering the risks at issue and the consequences of nonfulfillment. In other words, Mexico's proposed alternative would not create the same incentive to implement dolphin-safe fishing practices, and the result (more dead or seriously injured dolphins) was gauged to be very undesirable.[124] But in *US COOL*, the analysis suggests that the regulation may have been found inconsistent with Article 2.2

121. *See* US Clove Cigarettes Panel Report, *supra* note 26, ¶ 7.413 and accompanying text.

122. US Tuna II Appellate Body Report, *supra* note 28, ¶ 160.

123. US COOL Appellate Body Report, *supra* note 27, ¶¶ 287, 348.

124. US Tuna II Appellate Body Report, *supra* note 28, ¶ 330.

had the Appellate Body been able to adduce the appropriate evidence (including that of a proposed alternative) because the current labels were complicated and confusing. Therefore, because consumers probably did not understand or value the majority of the information on the label (because they did not understand it), the consequence that would arise from implementing an alternative that failed to fulfill the objective (to provide the consumer with certain information about their meat products), would be minimal at best.[125] However, the Appellate Body determined that, in the absence of a proposed viable alternative, a little information is better than no information at all. Thus, it refused to strike down the regulation under Article 2.2.[126] This reaffirms the idea that trade-restrictiveness is not itself a violation of TBT, as the agreement gives weight to social regulations in pursuit of legitimate objectives. Under TBT Article 2.1, trade-restrictiveness is a violation where it is not applied even-handedly (*de jure* or *de facto* discrimination); but under TBT Article 2.2, trade restrictiveness is measured as it relates to contribution to the legitimate objective and the risk of nonfulfillment.

Furthermore, as solidified by the TBT jurisprudence, Ukraine will need to show a viable alternative in order to have any shot at success. In *US Clove Cigarettes*, the Panel upheld the United States' outright ban on clove cigarettes, after conceding that the proposed alternatives (including "placing strict requirements on packaging"[127] and "requiring health warnings"[128]) proposed by Indonesia would be "less trade-restrictive."[129] Following this line of reasoning, Australia might argue that, in the instant TPPA dispute, the plain packaging requirements and required health warnings are certainly "less trade-restrictive" than the ban in *US Clove Cigarettes*. But because the ban in *US Clove Cigarettes* applied only to flavored cigarettes, not all tobacco, there is no guarantee that the adjudicating panel in the TPPA dispute will find such logic convincing. In other words, an outright ban on *one* category of cigarettes might be considered more trade-restrictive than placing strict packaging requirements on that one category, but less trade-restrictive than strict packaging regulations that apply to *all* categories of tobacco.

125. US COOL Appellate Body Report, *supra* note 27, ¶¶ 476, 478-79.
126. *Id.* ¶¶ 479, 491.
127. US Clove Cigarettes Panel Report, *supra* note 26, ¶ 7.422.
128. *Id.*
129. *Id.* ¶ 7.423

Ukraine (or any complainant) might contend, *inter alia*, that Australia could have adopted a less strict packaging requirement that would allow trademarks to appear on the packaging. For example, at the TBT Committee, Chile expressed concerns with the plain packaging aspect of the TPPA, suggesting that Australia could achieve the same objective through the use of "better, newer information in visible health warnings without affecting the legitimate use of the brand names to differentiate between manufacturers."[130] However, even if this question is answered in the affirmative, it is not dispositive of the analysis. First, as the Appellate Body emphasized in *US Tuna II*,[131] *US Clove Cigarettes*,[132] and *US COOL*,[133] the complaining party bears the burden of proof to show sufficient evidence that such a proposed alternative would make an equivalent contribution to the objective. However, it is important to note that, in this case, tobacco packaging is one of the last remaining sources of tobacco advertising left in Australia.[134] Thus, Australia will certainly have the opportunity to argue, as the United States did in *US Clove Cigarettes*, that there are other measures in place that have failed to achieve Australia's legitimate objective of protecting public health.[135] For example, several Australian territories have already implemented a requirement for graphic health warnings on cigarette packs.[136]

While Australia may argue that these previously enacted regulations fail to contribute to the achievement of protecting public health, a complaining party might point to available research studies in an effort to refute Australia's contention. For example, one research study shows an overall decrease of smoking in Australia from 2001 to 2011-2012.[137] Thus, a complaining party may argue that since

130. TBT Committee June 2011, *supra* note 112, ¶ 10.

131. *See* US Tuna II Appellate Body Report, *supra* note 28, ¶ 330 (noting that Mexico's proposed alternative would not contribute to the objective of protecting dolphins to the same degree as the United States' current measure).

132. US Clove Cigarettes Panel Report, *supra* note 26, ¶ 7.423 (the Panel stated 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").

133. US COOL Appellate Body Report, *supra* note 27, ¶ 469 (upholding the trade-restrictive COOL measure in the absence of sufficient evidence for a proposed alternative).

134. *See* TBT Committee June 2011, *supra* note 112 and accompanying text.

135. *See generally Tobacco in Australia: Advertising—State and Territory Legislation,* THE CANCER COUNCIL, http://www.tobaccoinaustralia.org.au/11-4-state-and-territory-legislation (last updated May 2015).

136. *Id.* New South Wales, South Australia, and Tasmania have previously enacted tobacco regulations requiring tobacco products and displays to display graphic health warnings.

137. *4125.0 Gender Indicators, Australia*, *Jan 2013, Smoking, Key Series*, AUSTL. BUREAU OF STATISTICS (Jan. 30, 2013),

smoking rates are steadily declining, Australia's previous methods of tobacco regulation are already working to protect public health, and therefore a more trade-restrictive measure is not necessary. However, as the Appellate Body has emphasized, a member has the right "to achieve its desired level of protection with respect to the objective pursued."[138] Therefore, even if smoking rates are shown to have decreased by 5% for females and 7% for males since 2001,[139] Australia may still argue that it seeks a greater level of protection to public health than the prior regulations could afford. And finally, the adjudicating panel must consider the serious risks to public health that are at issue here, and the consequences that nonfulfillment will create (e.g., continued disease and death among Australia's smoking population). This last deliberation will serve to buttress Australia's contention that the TPPA is necessary to achieve Australia's desired level of protection of public health.

CONCLUSION

The trio of cases decided under TBT Article 2.2 reveals that dispute resolution in the context of multilateral trading mandates a careful consideration of social and regulatory concerns, and affirms that there is a positive right to regulation. Effective balancing of free-trade and social concerns is imperative for trade facilitation in an ever-innovating era of increasing economic interdependency. Where individuals, private and public institutions, and governments must interact with and depend on one another in order to thrive, some disputes are inevitable. However, the WTO must maintain its reputation of legitimacy in the eyes of all stakeholders, so as to avoid the same fate as the old GATT.[140] While some may argue that the pendulum has swung too far in a reactionary fashion, this Note suggests that equilibrium is closer to actualization than ever before. To that end, it is argued that the most fundamental concern underlying free-

http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4125.0main+features3320Jan%202013 [hereinafter AUSTL. BUREAU OF STATISTICS]. Between 2001 and 2011-12, overall rates of smoking have decreased for both males and females. The age standardized rate of current smokers for males aged 18 years and over fell from 27% in 2001 to 20% in 2011-12, and declined from 21% in 2001 to 16% for females.

138. US Clove Cigarettes Panel Report, *supra* note 26, ¶ 7.370 and accompanying text.

139. AUSTL. BUREAU OF STATISTICS, *supra* note 137 and accompanying text.

140. *See* Cho, *supra* note 2, at 673 (citing Panel Report*, United States – Sections 301-310 of the Trade Act of 1974*, ¶ 7.76, WTO Doc. WT/DS152/R (Jan. 27, 2000). "The global trading system is 'composed not only of States but also, indeed mostly, of individual economic operators,' such as producers, importers, and consumers." *Id.* at 674.

trade—efficiency[141]—will be better achieved by a global trading system that does not minimize the legitimate social concerns of its participants, as this will facilitate trust, thereby incentivizing participation. Additionally, where the delicate balance between free markets and social regulation is achieved, long-term efficiency can be promulgated by stability and predictability.[142] Arguably, efficiency is best served by the WTO's use of already existing built-in legislative enactments, like the TBT, rather than starting anew in entirely uncharted territory.[143]

141. *See id.* at 626 (noting that free markets are driven by the principle of efficiency).

142. *See id.*

143. WORLD TRADE ORG., WORLD TRADE REPORT 2012, TRADE AND PUBLIC POLICIES: A CLOSER LOOK AT NON-TARIFF MEASURES IN THE 21ST CENTURY (2012), http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report12_e.pdf.