

WTO Appellate Body Ruling in *United States – Certain country of origin labeling requirements*: Trading away consumer rights and protections, or striking a balance between competition-based approach in trade and consumer interests?

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OPSOMMING

WHO Appelliggaam Beslissing in *United States – Certain Country of Origin Labeling Requirements*: Erosie van Verbruikersbeskerming en Veiligheid, of is dit Noodsaaklik ten einde 'n Balans te Bewerkstellig Tussen Handelsregulering en Verbruikersbelang?

Hierdie bydra oorweeg die bevinding van die Appelliggaam van die Wêreldhandelsorganisasie (World Trade Organization) in die geval van *United States – Certain Country of Origin Labeling (COOL) requirements* (US – COOL). Die kern oorweging is of die bevinding in die voormelde beslissing, neerkom op 'n erosie van verbruikersbeskerming en veiligheid, en of dit 'n noodsaaklike euwel is in 'n poging om 'n balans tussen handelsregulering en verbruikersbelange daar te stel. Die bevinding dien as bewys van die kompleksiteit van die interpretasie en toepassing van die Wêreldhandelsorganisasie se ooreenkomste. Sommige van die interpretasies het die potensiaal om 'n positiewe of 'n negatiewe impak op verbruikersregte te hê. Die betrokke bevinding van die Wêreldhandelsorganisasie sit gedeeltelik die beskouing voort dat hierdie organisasie nie verbruikersbelange vooropstel nie. In 'n poging om 'n balans tussen die kompeterende benadering in handel aan die een kant, en verbruikersbelange aan die ander kant te handhaaf, het die betrokke bevinding die onvermydelike impak dat dit die vermoë van die staat om verbruikers te beskerm, verswak het.

1 Introduction

In his book, *The Wealth of Nations*, Adam Smith, one of the great economists of his time, wrote that:

Consumption is the sole end and purpose of all production; and the *interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer*. The maxim is so perfectly self-evident, that it would be absurd to attempt to prove it. But in the mercantile system, the interest of the consumer is almost constantly sacrificed to that of the producer; and *it seems to consider production, and not consumption, as the ultimate aim and object of all industry and commerce ... It cannot be very*

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difficult to determine who have been the contrivers of this whole mercantile system; not the consumers, we may believe, whose interest has been entirely neglected; but the producers, whose interest has been so carefully attended to; and among this latter class our merchants and manufacturers have been by far the principal architects.¹

Those who studied Adam Smith's *The Wealth of Nations*, will recall that emphasis has often been on his proposition of comparative advantage principle at the centre of which is division of labour. However, Smith did not only provide an account of the dawn of the Industrial Revolution, he also spoke at length about consumerism and the interest of trade liberalism, producers and consumers.

In contrast, the philosophy of the World Trade Organisation (WTO) primarily seeks to establish a multilateral trading system focusing mainly on trade issues. Apart from scant reference to sustainable development which may be related to people or private party interest, the WTO's trade-oriented approach takes insignificant cognisance of consumer or peoples' interests and may have negative ramifications on other issues, including the protection of consumer rights. There is no doubt that any question of when, how and to what extent consumers must be protected within the context of the WTO framework of international trade and mercantilism remains controversial. Nevertheless, it is also a question that consumer rights scholars and those in the field of international economic law should be prepared to tackle, even if there can be no definitive answers.

This paper addresses the following questions relevant to consumer interest and protections: What role has country of origin labelling (COOL) to play besides being just a measure to provide point-of-purchase information, and relevance to product literacy? Has COOL any significant value and role to play in respect of consumer protection? These questions are addressed in the light of the 2012 WTO Appellate Body ruling in *United States – Certain Country of Origin Labeling (COOL) requirements*² (US – COOL). The *United States – COOL* was one of the three disputes³

1 Smith *The Wealth of Nations* (1937) 625.

2 Appellate Body Report, *United States – Certain Country of Origin Labeling (COOL) Requirements* (hereinafter “US-COOL”), WT/DS384/AB/R, WT/DS386/AB/R (2012-06-29).

3 The other rulings are: Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (hereinafter “US – Clove Cigarettes”) WT/DS406/AB/R, adopted 2012-04-24; and Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II (Mexico))*, WT/DS381/AB/R, adopted 2012-06-13. For more on US – Tuna disputes, see Silveira & Obersteiner ‘The Scope of the TBT Agreement in Light of Recent WTO-Case Law’ 2013 *Global Trade and Customs Journal* 112-120; Partiti ‘The Appellate Body Report in *US – Tuna II* and Its Impact on Eco-Labeling and Standardization’ 2013 *Legal Issues of Economic Integration* 73–94; McGivern ‘The TBT Agreement Meets the GATT: The Appellate Body Decision in *US – Tuna II*’ 2012 *Global Trade and Customs Journal* 350-354.

around the provisions of the Agreement on Technical Barriers of Trade⁴ (TBT Agreement). The TBT Agreement, which entered into force in 1995, is the multilateral successor to the Standards Code, signed by General Agreement on Trades and Tariffs (GATT) contracting parties at the conclusion of the 1979 Tokyo Round of Trade Negotiations. TBT provides WTO member countries with the powers to impose measures against technical barriers of trade, over and above other exception-based protections in Article XX of the GATT⁵ and other WTO agreements.⁶

Interesting to note, is that the WTO Appellate Body ruling in *United States – COOL* was against the country which demanded more protection for consumers, including having to embark on a complete overhaul of the consumer laws.⁷ In addition to the contextualisation of the study in part 1 of this article, part 2 provides a summary of the factual scenario of the dispute and the key findings of the Appellate Body. Part 3 addresses ramifications of the Appellate Body ruling. Key consideration is whether the Appellate Body finding in *United States – COOL dispute* amounts to erosion of consumer protections and safety or if it was a necessary evil to strike a balance between trade regulation and consumer interest. The paper is concluded in part 4. In this paper, I argue that the *United States – COOL* ruling has the potential to continue the disjuncture between the legal protections given to consumers and trade liberalism. The ruling by the WTO Dispute Settlement Body (DSB) muddies attempts by the Appellate Body in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna Products (US – Tuna II)* to clarify key conceptual issues of the TBT Agreement. The latter dispute involved environmental labelling requirements. The *United States – COOL* ruling, by the Appellate Body, in part perpetuates the perception that the WTO is anti-consumer

4 The WTO Agreement on Technical Barriers to Trade 1995 (TBT Agreement).

5 For in-depth discussions on the GATT Article XX, see Bowen 'The World Trade Organization and its interpretation of the Article XX exception to the General Agreement on Tariffs and Trade, in the Light of Recent Developments 2001 *Georgia journal of international and Comparative Law* 181.

6 Other WTO agreements with exception-based protection include the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Note that art 1.5 of the TBT Agreement explicitly states that its provisions do not apply to sanitary and phytosanitary measures as defined in annex A of the SPS Agreement. SPS Agreement deals with food safety, while the TBT Agreement address issues of consumer safety, health, environmental protection and measures such as labelling to an extent that they impact trade. Similarly, in terms of art 1.4 of the TBT Agreement its provisions are not applicable to purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies. The relevant Agreement to apply in such cases will be the *WTO Agreement on Government Procurement (AGP)*.

7 Cohen 'Warne Lecture 'Is It Time for Another Round of Consumer Protection? The Lessons of Twentieth-Century U.S. History' 2010 *Journal of Consumer Affairs* 234-246.

interests.⁸ Butcher and Ip argue that some of the WTO decisions compromise consumer interest in favour of commercial interests.⁹

1.2 Definition of Concepts and Terms

1.2.1 Country of Origin, and Country of Origin Labelling

COOL is a measure intended at making consumers aware of the country of origin and the content of goods.¹⁰ Thus, COOL may have several effects and uses including, but not limited to, serving consumer literacy¹¹ purposes, by readily providing the necessary information.¹²

Chattalas and Takada simply, and in more consumer accessible terms, refer to country of origin (COO) as a country which certain products or brands are associated.¹³ Certainly, association with COO has a great influence on consumer perceptions about product quality¹⁴ and choice.¹⁵ In trade terms the determination of COO of the product is not a simple exercise, as it involves different tests and criteria. The WTO Agreement on Rules of Origin (WTO/GATT ROOs), for example, provides

8 See *Consumer Interests and Sustainable Development in International Trade Law*. 2003 available from http://www.ecologic.eu/download/projekte/1850-1899/1885/1885_vzbv_policy_brief.pdf.

9 Butcher & Ip 'Are Chinese Consumers Winners or Losers under WTO Membership?' 2007 *Macquarie Journal of Business Law* 71.

10 For more on the understanding of the concepts of COOL see, Krissoff, Kuchler, Nelson, & Somwaru *Country-of-origin labeling: Theory and observation* 2004 USDA Economic Research Service Outlook Report WRS04-02 available from <http://www.ers.usda.gov/publications/WRS04/jan04/wrs0402/>.

11 On product literacy see for example, Pappalardo 'Product Literacy and the Economics of Consumer Protection Policy' 2012 *The Journal of Consumer Affairs* 319-332.

12 See Dransfield, Ngapo, Nielsen, Bredahl, Sjöden, Magnusson, Campo, & Nute. 'Consumer choice and suggested price for pork as influenced by its appearance, taste and information concerning country of origin and organic pig production' 2005 *Meat Science* 61-70.

13 Chattalas & Takada *Place Branding and Public Diplomacy* (2013).

14 COO impact may be cognitive, affective or normative. See generally Ehmke & Tyner 'Measuring the Relative Importance of Preferences for Country of Origin in China, France, Niger, and the United States' 2008 *Agricultural Economics* 277-285; Verlegh & van Ittersum 'The Origin of the Spices: The Impact of Geographic Product Origin on Consumer Decision Making' in Frewer, Risvik & Schifferstein (eds) *Food, People and Society* (2001) 267-279.

15 Sung-Tai & Wyer 'Effects of Country-of-Origin and Product-Attributes: Information on Product Evaluation: An Information Processing Perspective' 1989 *Journal of Consumer Research* 175-87; Wilkey & Nes 'Country-of-Origin Effects on Product Evaluation' 1982 *Journal of International Business Studies* 89-99. See also Al-Sulaiti, & Baker 'Country of origin effects: a literature review' 1998 *Marketing Intelligence & Planning* 150 - 199.

the approach to be used in determining the ROOs.¹⁶ Possible approaches include preferential ROOs test- used to inquire into the nationality or the country of origin of the goods to determine whether such goods should enjoy the benefits of tariffs and quota elimination under a trading arrangement;¹⁷ substantial transformation test – in terms of which a new product should be created that differs in name, character or use from the original article, as a result of the manufacturing process;¹⁸ and the wholly-obtained or produced test according to which a good is regarded as having originated in the territory of a party where the good is wholly obtained or entirely produced.¹⁹

1 2 2 Product Identity and Product Literacy

Pappalardo succinctly explains the attainment of product literacy as follows:

I would say that a person attains product literacy when he or she possesses the tools necessary to determine if a particular product or service will meet his or her goals given his or her limited resources – including limited wealth, limited time, and limited household production capabilities.²⁰

Thus, product identity is an aspect of consumer behavioural economics,²¹ which in the case of Pappalardo's definition, involves

16 GATT Agreement on Rules of Origin (GATT ROO) of 1994 art 1(1). See also, SADC Protocol on Trade, *Annex 1 Concerning the Rules of Origin for Products to be traded between the Member States of the Southern Development Community* (agreed to on 1999-07-15 by the SADC Ministers of Trade). See LaNasa 'Rules of Origin in the Uruguay Round's Effectiveness in Harmonizing and Regulating Them' 1996 *American Journal of International Law* 625, for an extensive discussion of the WTO/GATT rules of origin.

17 *Idem* 626 & 626 n 6 & 7.

18 See Edwards 'National Juice Products Association v United States: A Substantial Transformation of the Country-of-Origin Substantial Transformation Test?' 1987/1988 *The University of Miami Inter-American Law Review* 493-507. The substantial transformation test has featured mainly in the USA's anti-dumping determinations since the early eighteenth century. See *Anheuser-Bush Brewing Association v United States*, 207 US 556, 562 (1908); *Rules of Origin*, ABA Standing Committee on Customs Law (ABA Rules of Origin) (1991) 11. See also, *GATT Agreement on Rules of Origin* on art 3(b) read with art 9(2)(c)(ii) & (iii). It is also a major test in the EU. See, EU Basic Law – Regulation No 802/68, OJ (1968) L 148/1.

19 GATT ROO Agreement art 3(b) read with art 9(2)(c)(i). In 2011 the WTO came up with an interesting concept of 'Made in the World' (MIW) which influences the way in which the traditional ROOs may be considered. For more on MIW see Yadav 'Are the WTO's Rules of Origin Turning Archaic as a Result of Trade in Value-Added?' 2014 *Estey Centre Journal of International Law and Trade Policy* 162-178.

20 Pappalardo *supra* n 11 at 321. See also Pappalardo 'Regulate, Inform, or Educate? Choosing Efficient Consumer Policy Strategies' 1997 *Advancing the Consumer Interest* 27-31.

21 See Salinger 'Behavioral Economics, Consumer Protection and Antitrust' 2010 *Competition Policy International* 65-86. There is a litany of studies on consumer purchasing behaviours studies, for example, Mafinini & Dhurup 'Assessing Consumer Purchasing Decision Styles: An Empirical Investigation From South Africa' 2014 *International Business & Economics*

information evaluation and the ability to appreciate and act in accordance with such an evaluation in order to make such an informed choice. Therefore, COOL is important to consumer product literacy and is a mandated disclosure in many jurisdictions.²²

2 Summary of Decision

2.1 Facts: the Appellate Body, *US – COOL*

The *US – COOL* dispute, which began with the request of the establishment for panel intervention by Canada,²³ and by Mexico,²⁴ was based primarily on claims by Canada and Mexico that the United States country of origin labelling policy, as expressed in the 2002 Farm Bill,²⁵ is discriminatory in that it gives United States grown foods preferential treatment to the disadvantage of products from territories outside the United States. The COOL measure requires retailers selling specific products in the United States to label those products with their country of origin, irrespective of whether the products are imported or locally produced.²⁶ It also specified how each of the origins of meat must be labelled according to circumstances of each case.²⁷

Mexico, Canada and the United States each appealed “certain issues of law and legal interpretations developed in the Panel Reports”²⁸ pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the DSU).²⁹ Canada appealed certain aspects of the Panel's analysis under Article 2.2, and requested the Appellate Body to complete the legal analysis in the event

Research Journal 679 – 688; Radder & Pietersen ‘Decision-making styles of young Chinese, Motswana and Caucasian consumers in South Africa: an exploratory study’ 2006 *Journal of Family Ecology and Consumer Science* 20-31; Walsh, Mitchell & Hennig-Thurau ‘German consumer decision-making styles’ 2001 *The Journal of Consumer Affairs* 73-79; Shoham & Dakalas, ‘Family consumer decision making in Israel: The role of teens and parents’ 2003 *Journal of Consumer Marketing* 238-251; Hiu, Siu, Wang & Chang ‘An investigation of decision-making styles of consumers in China’ 2001 *Journal of Consumer Affairs* 26-345; Gonen & Ozmete ‘Decision-making styles of young Turkish consumers’ 2006 *Journal of the Home Economics* 26-33.

22 For more on mandated information disclosure, see Omri & Schneider ‘The Failure of Mandated Disclosure’ 2011 *University of Pennsylvania Law Review* 101–204.

23 See *Request for the Establishment of a Panel by Canada*, WT/DS384/8.

24 See *Request for the Establishment of a Panel by Mexico*, WT/DS386/7.

25 The 2002 Farm Bill amended the Agricultural Marketing Act of 1946 by adding requirements for COOL labelling at the final point of sale for various meats, fish, shellfish, peanuts, fruits, and vegetables.

26 See *US – COOL*, par 239 & 245.

27 *Idem* 3-5.

28 *Idem* 1.

29 Pursuant to the Rule 24(1) of the *Working Procedures*, Australia, Brazil, Colombia, the European Union, and Japan each filed a third participant's submission.

that it reversed the Panel's finding under Article 2.2.³⁰ Canada also raised conditional appeals with respect to the COOL measure under Articles III: 4 and XXIII: 1(b) of the GATT 1994.³¹

The TBT Agreement enjoins WTO members to ensure that technical regulations, standards, and conformity assessment procedures are not used for protectionist purposes.³² Also, that they do not unjustifiably impede trade.³³ Annex I.1 of TBT Agreement defines “technical regulation” as a:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method (own emphasis).

In terms of the three part test set by the Appellate Body Report *European Communities – Trade Description of Sardines (EC – Sardines)*:³⁴ (a) the document applies to an identifiable product or group of products;³⁵ (b) the document must lay down one or more product characteristics;³⁶ and (c) compliance with these characteristics must be mandatory.³⁷

In terms of Annexure I.2 of the TBT Agreement, a standard is:

Document approved by a recognised body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method (own emphasis).

For example, a government requiring that all watermelons weighing 70 grams or more should be labelled “Grade A” amounts to a standard. But, such a standard may not preclude watermelons weighing less from being sold.³⁸

In terms of Annex 1:3 of the TBT Agreement, “conformity assessment procedures” refer to “[a]ny procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or

30 *Supra* n 26 at par 434.

31 *Idem* 494.

32 See TBT Agreement art 2.1.

33 *Idem* 2.2.

34 Appellate Body Report *European Communities – Trade Description of Sardines (EC – Sardines) WT/DS231/AB/R*, adopted 2002-10-23.

35 See *EC – Sardines* par 176.

36 *Ibid.*

37 *Ibid.*

38 For more on the clarification of key conceptual issues by the Appellate Body see Partiti ‘The Appellate Body Report in *US – Tuna II* and Its Impact on Eco-Labeling and Standardization’ 2013 *Legal Issues of Economic Integration* 73.

standards are fulfilled” (own emphasis). Included as conformity assessment procedures are, for example, registration, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; accreditation and approval, and their combinations.

The TBT Agreement allows members the necessary regulatory discretion to protect human, animal and plant life and health, national security, the environment, consumers, and other policy interests.³⁹ Thus, the TBT Agreement makes provision for members to exercise rights to enact product regulations for approved (legitimate) public policy purposes or objectives. Article 2.1 of the TBT Agreement provides for the national treatment and the most favoured nation (MFN) treatment disciplines as follows:

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.

2.2 Key Findings of the Appellate Body

The Appellate Body report was circulated to members on 29 June 2012, following the Panel’s report, and its finding and conclusions recorded at paragraph 489. Upholding the Panel’s report, in part and for different reasons, the Appellate Body held that COOL measure in question violates Article 2.1 of the TBT Agreement in that it granted less favourable treatment to imported Canadian cattle and hogs than to like domestic cattle and hogs.⁴⁰ In its analysis under Article 2.1 of the TBT Agreement, the Appellate Body agreed with the Panel that the COOL measure has a detrimental impact on imported livestock because its recordkeeping and verification requirements create an incentive for processing exclusively domestic livestock, and a disincentive against using similar (like) imported livestock.⁴¹ The Appellate Body found, however, that the Panel’s analysis was incomplete because the Panel did not go on to consider whether this *de facto* detrimental impact stems exclusively from a legitimate regulatory distinction⁴², in which case it would not violate Article 2.1.⁴³ The Appellate Body found that the COOL measure lacks even-handedness because its recordkeeping and verification requirements impose a disproportionate burden on upstream producers and processors of livestock as compared to the information conveyed to consumers through the mandatory labelling requirements for meat sold at the retail level.⁴⁴ That is, although a large amount of information must be tracked and transmitted by upstream producers for purposes of providing consumers with information on COO, not much information is

39 See *chapeau* of the TBT Agreement.

40 *Supra* n 26 at par 496(a)(i) & (iv) & par 279.

41 *Idem* 292 & 496(a)(ii).

42 *Idem* 293.

43 *Idem* 271.

44 *Idem* 347.

actually communicated to consumers in an understandable or accurate manner.⁴⁵ Accordingly, the detrimental impact on imported livestock cannot be said to stem exclusively from a legitimate regulatory distinction, and instead “it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination in violation of Article 2.1”.⁴⁶ For these reasons, the Appellate Body upheld the Panel’s finding under Article 2.1.

The Appellate Body also reversed the Panel’s finding with regards to Article 2.2 of the TBT Agreement. The latter ruled that the COOL measure violates Article 2.2 of the TBT Agreement because it does not fulfill the legitimate objective of providing consumers with information on the origin of products.⁴⁷ While finding that the Panel did not err in finding that, pursuant to Article 2.2 of the TBT Agreement, the COOL measure served a legitimate objective,⁴⁸ the Appellate Body did find that the Panel erred in its interpretation and application of Article 2.2.⁴⁹ In particular, the Appellate Body found erroneous the proviso by the Panel that a measure could be consistent with Article 2.2 of the TBT Agreement only if it fulfilled its objective completely or exceeded some minimum level of fulfilment.

3 Did the Appellate Decision Trade Away Consumer Protections and Safety, or Strike a Balance Between Trade and Consumer Interests?

3.1 Competition-based Approach Versus Legitimate Objective Approach

The decision of the Appellate Body in *US- COOL* is among the WTO rulings that outline and set guidelines on what WTO members can and cannot do when adopting technical regulations in order to be consistent with the TBT Agreement. From a competition perspective, the ruling supports the fact that technical regulations may not impact negatively or modify the conditions of trade, pursuant to Article 2.1 of the TBT Agreement. The fundamental question that remains, is whether the ruling has any significant ramifications on the discipline of the protection

45 *Ibid.*

46 *Idem* 293. See also par 327.

47 *Idem* 496b(v) & (vi).

48 *Idem* 496(a)(iv). See also par 432 & 433.

49 But note that the Appellate Body made “no finding with respect to the United States’ claim that the Panel erred in finding that the COOL measure is ‘trade-restrictive’ within the meaning of Article 2.2, because that claim of error is dependent upon the Appellate Body’s reversal of the Panel’s finding under Article 2.1 of the TBT Agreement”. See TBT Agreement par 496(b)(1).

of consumers, and on socializing the WTO jurisprudence and practice in general?

Did the *United States country of origin labeling measures* serve “legitimate” objectives? In answering this question, it would be remiss not to mention the Panel ruling in *United States – Measures Affecting the Production and Sale of Clove Cigarettes*⁵⁰ (Panel Report, *US – Clove Cigarettes*), in which taking a regulatory approach to the issue under the discussion, the Panel stated that:

[W]e do not believe that the interpretation of Article 2.1 of the TBT Agreement, in the circumstances of this case where we are dealing with a technical regulation which has a legitimate public health objective, should be approached primarily from a competition perspective.⁵¹

Not relying heavily on the competition-based approach, the Panel took a different approach and felt it desirable to consider what it termed the “declared legitimate public health objective”⁵² of the measure in question. However, the declared legitimate public health objective approach was later rendered inapplicable by the Appellate Body. Favouring the competition-approach, the Appellate body held that regulatory concerns identified by the Panel could be taken into account ‘to the extent that they are relevant [some examination] and are reflected in the products’ competitive relationship’.⁵³

With the above stated Appellate Body position, the question is: Does consumer protection under COOL measure serve a “legitimate objective” for the purposes of the TBT Agreement? The TBT Agreement refer to consumer right and protection as understood under the traditional consumer protection law as legitimate purpose. In my view, however, since the protection of human life and health is deemed a legitimate interest in Article 2.2, the reach of the provisions of Article 2.2 are therefore wide enough to cover consumer protection within the general understanding of consumer protection law. Given the declared purpose and the main business of the WTO, this may, to some scholars, be a political and controversial issue as it suggests a convergence between international trade regime and national consumer protection regime. What is beyond any doubt however, is that consumer interests are directly and/or indirectly affected by the WTO discipline. As noted by Smith, the act of consumption is final to any economic activity, otherwise

50 WTO Panel, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (Panel Report, *US – Clove Cigarettes*), WT/DS406/R (September 2, 2011).

51 *Idem* 7.119.

52 *Idem* 7.116.

53 Appellate Body Report, *US – Clove Cigarette* par 156.

no production and distribution would be worth pursuing.⁵⁴ It is consumers who keep the trade activities going through demand for goods and services. In their generation and supply of these goods and services, WTO members must also be mindful of consumer interests and to do whatever is possible to protect these interests. Therefore, the litigation of COOL cannot be done in clinical isolation of the interests of consumers.

3.2 What is in a “Label”?

Consumer preferences to product properties may be based on various reasons, such as the labelling, COO⁵⁵ or origin-indicators,⁵⁶ risk perceptions,⁵⁷ stereotypes,⁵⁸ ethnocentric,⁵⁹ hedonic, utilitarian, altruistic,⁶⁰ or other reasons.⁶¹ Literature clearly shows that labelling is one of the most important and direct means of communicating product information between buyers and sellers. It is one of the primary means by which consumers differentiate between individual foods and brands to make informed purchasing choices. Inaccurate consumer information

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- 54 The view of consumers as having a say in the final economic activity finds support in the argument of consumer sovereignty. See Goodwin, Nelson, Ackerman & Weisskop. *Consumption and consumer sovereignty* (2008) available from http://ase.tufts.edu/gdae/education_materials/modules/consumption_and_the_consumer_society.pdf.
- 55 See Schnettler, Vidal, Silva, Vallejos & Sepúlveda ‘Consumer Willingness to Pay for Beef Meat in a Developing Country: The Effect of Information Regarding Country of Origin, Price and Animal Handling Prior to Slaughter’ 2009 *Food Quality and Preference* 156-165.
- 56 See Pepler. ‘Where Is My Food From: Developments in the WTO Dispute over Country-of-Origin Labeling for Food in the United States’ 2013. *Drake Journal of Agricultural Law* 405.
- 57 See Angulo & Gil ‘Risk Perception and Consumer Willingness to Pay for Certified Beef in Spain’ 2007 *Food Quality and Preference* 1106-1117.
- 58 See Janda & Rao ‘The Effect of Country-of-Origin Related Stereotypes and Personal Beliefs on Product Evaluation’ 1997 *Psychology & Marketing* 689-702.
- 59 See Umberger, Feuz, Calkins & Killinger. ‘U.S. consumer preference and willingness-to-pay for domestic corn-fed beef versus international grass-fed beef measured through an experimental auction’ 2002 *Agribusiness: An International Journal* 491–504; Watson & Wright ‘Consumer Ethnocentrism and Attitudes toward Domestic and Foreign Products’ 2000 *European Journal of Marketing* 1149-1166; Cummings, Harrison & Rutström ‘Homegrown Values and Hypothetical Surveys: Is the Dichotomous Choice Approach Incentive-Compatible?’ 1995 *American Economic Review* 260-66; Yagci ‘Evaluating the Effects of Country-of-Origin and Consumer Ethnocentrism’ 2001 *Journal of International Consumer Marketing* 63-85.
- 60 See Umberger, McFadden & Smith ‘Does Altruism Play a Role in Determining U.S. Consumer Preferences and Willingness to Pay for Natural and Regionally Produced Beef?’ 2009 *Agribusiness: An International Journal* 268-285.
- 61 See generally Chattalas & Takada ‘Warm versus competent countries: National stereotyping effects on expectations of hedonic versus utilitarian product properties’ 2013 *Place Branding and Public Diplomacy* 88-97; Ravi & Wertenbroch ‘Consumer Choice Between Hedonic and Utilitarian Goods’ 2000 *Journal of Marketing Research* 60-71.

can be very costly in many respects.⁶² Consumer commodity specific labelling and specifications is very important also as part of product literacy,⁶³ and the protection of consumers from manipulative advertising.⁶⁴ It may be important in helping consumers in their determination of which products are from the countries that have unconscionable or questionable methods of production, such as products made under unacceptable labour condition or standard.⁶⁵ Thus, COOL may be an important determinant of consumers' willingness to pay.⁶⁶ Relevant to the discussion of the case in question, it should be noted that the United States consumers' preference for COOL is one of the highest in the world,⁶⁷ particularly as far as beef products are concerned.⁶⁸

4 Conclusion

The findings in the *US - COOL* dispute is evidence of another complex interpretation and application of WTO agreements. Some of the interpretations of both the Panel and the Appellate Body have the potential of impacting positively or negatively on consumer rights and chipping away some of the basic consumer protections. Also, the findings are evidence of the preparedness, or the willingness, of the WTO to strike down country policies and standards that it considers high-level and restrictive.

Be that as it may, the international community must accept the fact that consumer is king⁶⁹ and ensure that in their stream of commerce, consumers' interests are protected through various measures, including COOL. The WTO trade rules may not be read in clinical isolation with

62 Senauer, Kinsey & Roe 'The Cost of Inaccurate Consumer Information: The Case of the EPA Mileage Figures' 2005 *Journal of Consumer Affairs* 193 – 212.

63 On consumer literacy, see generally Pappalardo *supra* 11 at 319.

64 Thomas, Fowler & Grimm 'Conceptualization and Exploration of Attitude toward Advertising Disclosures and Its Impact on Perceptions of Manipulative Intent' 2013 *Journal of Consumer Affairs* 564-87.

65 Dickson 'Utility of No Sweat Labels for Apparel Consumers: Profiling Label Users and Predicting Their Purchases' 2005 *Journal of Consumer Affairs* 96-119.

66 See Gao & Schroeder 'Effects of Label Information on Consumer Willingness-to-Pay for Food Attributes' 2009 *American Journal of Agricultural Economics* 795-809; Loureiro & Umberger 'Assessing Consumer Preferences for Country-of-Origin Labeling' 2005 *Journal of Agricultural and Applied Economics* 49-63.

67 See generally Loureiro & Umberger *supra* n 66 for a study on how consumers perceive COOL. See also Lusk & Anderson 'Effects of country-of-origin labeling on meat producers and consumers' 2004 *Journal of Agricultural and Resource Economics* 185-205.

68 Umberger, Feuz, Calkins & 'Country-of-Origin Labeling of Beef Products: U.S. Consumers' Perceptions' 2003 *Journal of Food Distribution Research* 103-116.

69 Thornsbury & Fairchild 'King or Pawn? Consumer Preferences in International Trade' 2004 *Choices* 35-38 available from <http://www.farmdoc.illinois.edu/policy/choices/20041/2004-1-07.pdf>.

other interests such as local consumer protection laws.⁷⁰ In my view, COOL measures serve a very important legitimate objective of consumer protection. This objective must be encouraged and should not be nullified in favour of pure mercantilist desires. Food labels are an essential source of information for consumers, and should not merely be struck down because they do not allege or speak to the safety of the product. From a consumer protection perspective, COOL should be viewed as providing consumers the necessary effective control and choice over what they buy and eat, be it for hedonic, utilitarian, altruistic, ethical, religious, or other reasons. As pointed out by Kovalsky and Lusk, little validity can be obtained from the standard economic analysis of consumer behaviour which assumes consumers know their preferences with certainty and therefore, measures such as country of origin labels may not really be of utmost importance.⁷¹ In sum, the interpretation of the TBT Agreement in *US-COOL* case in an effort to strike a balance between competition-based approach in trade and consumer interests inevitably made weaker States Parties to protect consumers.

70 See Sibanda. A human rights approach to World Trade Organization trade policy: another medium for the promotion of human rights in Africa. 2005 *African Human Rights Journal* 38-405 discussing the human right-based approach paradigm shift in the WTO.

71 Kovalsky & Lusk 'Do Consumers Really Know How Much They Are Willing to Pay?' 2013 *Journal of Consumer Affairs* 98; an empirical study by Dan, Loewenstein, & Prelec 'Coherent Arbitrariness: Stable Demand Curves without Stable Preferences' 2003 *Quarterly Journal of Economics* 73.