THE IMPACT OF ECO-LABELLING ON TRADE AND CONSUMER CONSCIOUSNESS

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ABSTRACT

This paper seeks to analyse the role of consumer consciousness within the World Trade Organization **("WTO")** regime. This becomes an important facet to free trade, particularly because it has become an emerging trend for brands to label products as "sustainable" or "ethically sourced". Such labels have proven to be key factors in determining consumers' behaviour and this has been recognised by the WTO Technical Barriers to Trade Agreement **("TBT Agreement").**

Part I of this paper will introduce the abovementioned subject matter by highlighting the growing trend of sustainable development in the WTO regime with a particular focus on the idea of eco-labelling and offer insights into prominent debates on this question. Part II will analyse the role of consumer consciousness within the WTO framework using provisions of the TBT Agreement, particularly those related to the labelling of products and how this affect consumer behaviour. Part III will analyse various key decisions of the WTO Panel and Appellate Body which have recognised the importance of consumer information. Part IV shall operate as a conclusion as well as offer certain critiques of the current treatment of consumer interests under the WTO regime.

INTRODUCTION

One of the primary critiques levelled against free trade and indeed capitalism, in general, has been that it is fundamentally at odds with extra-economic factors such as the environment and indigenous populations amongst others.[i] The United Nations (the **"UN"),** via the Rio de Janeiro (1992) and Johannesburg (2002) conferences explicitly acknowledged the importance of sustainable development goals. These conferences also underscored the positive role that international trade could play in bringing about a more efficient allocation of scarce resources. Since its advent in 1995, the World Trade Organization (the **"WTO"),** has attempted to give Members the right to uphold goals of environmental protection while simultaneously safeguarding other Members against protectionism.[ii] The latest round of negotiations of the WTO Members, the Doha Round (2001) saw an in-depth discussion on questions of environmental measures and how these are to be effectively balanced with free trade. The Ministerial Declaration of this Round which was adopted on 14 November 2001 vide paragraphs 31-33 entitled 'Trade and environment' provided for instructions to the Committee on Trade and Environment. These included paying special attention to the effect that environmental measures have on market access in developing and least-developed countries. Furthermore, Ministers agreed to negotiate the elimination and/or reduction of tariff and non-tariff barriers to trade on environmental goods and services such as air filters or waste management consultancy services. It is interesting to note that the Declaration also asked the Committee to look into the area of labelling requirements for environmental purposes. In particular, the Committee was asked to examine whether the prevailing WTO rules are proving to be a hindrance to eco-labelling policies. Along with these negotiations, it was decided that parallel communication on the same must be achieved within the Technical Barriers to Trade **("TBT")** Committee.

As such, labelling is a subject assigned to the Committee on Trade and Environment ("CTE") vide item 3(b) of the work programme. The Doha Ministerial Conference assigned the issue of governmental labelling requirements to the CTE to determine whether these are in keeping with the broader objectives of the WTO agreements.

It has often been debated within the WTO framework itself whether such environmental labelling schemes are in keeping with the WTO's fundamental goal of aiding developing and least developed countries. This is because while such labelling is comparatively less trade-

restrictive and does aid consumers to make informed choices about their consumption, there have been cases where such measures are merely used to conceal protectionism. Furthermore, the rigorous procedure behind meeting these standards of "ethical consumption" and the concomitant resources often prove to be a hindrance to developing and least-developed countries.[iii]

It is also important to remember that the idea behind various eco-labelling schemes adopted by Members is to afford consumers the choice to determine whether and how much they value the particular goal sought to be achieved by the label. It has been argued that the effect of this is trade restrictiveness as they do affect purchasing decisions, however, the choice need not necessarily negatively impact imports and certainly do not prohibit imports altogether.[iv]

LABELLING UNDER THE TBT AGREEMENT

Brief Introduction to the Technical Barriers to Trade Agreement:

The TBT Agreement in its Preamble has recognized that Members are at liberty to take measures, which would include labelling requirements for the protection of the environment. However, it is also important to note that these must not be in the nature of disguised protectionism. To determine this, Annex 1.1, and Art.2 of the Agreement and the respective tier tests must be applied.

The NPR-PPM Controversy:

Annex I of the Agreement distinguishes between technical regulations and standards. The former includes what is known as regulations related to process and production methods **("PPMs")**. These might, on the one hand, be product-related PPMs which essentially means that the measure would be based on some part of the production that is visible in the end product in a tangible manner and labels would be affixed accordingly. On the other hand, certain production methods do not leave any traces in the end product ("**non-product related PPMs or NPR-PPMs"**) and this would then also affect labelling requirements. The latter kind of PPMs are violative of the obligations of both the national treatment principle as well as the

most favoured nation principle. This is because if such measures are adopted by an importing country without consultation of any kind and the environmental impact is restricted to analysis within the territory of the producing country, the sovereignty of the producing country would be adversely impacted.

Furthermore, the use of NPR-PPMs creates issues of differentiation in the sense that most developing countries believe that they are not a legitimate basis on which to conduct the "like-product" analysis as per GATT rules. The matter is made more complex because if NPR-PPMs were to be considered "like products" resulting in a particular importing Member's eco-labelling measure being held to have given less favourable treatment to an imported product and privileging a like domestic product, they might still be able to seek refuge under Art. XX(g) of the GATT.

Some countries have also argued that NPR-PPMs when applied to eco-labelling measures cannot be considered to be within the purview of the TBT Agreement. This argument has, for the most part, been advanced by developing countries due to fears that this would provide additional legitimacy under the prevailing WTO rules to discriminate between products and the already present unequal bargaining power between developed and developing countries would be exacerbated if developed countries were to use NPR-PPM requirements to preside over domestic production in developing countries which may reach beyond environmental issues.[v]

KEY PANEL DECISIONS ON ECO-LABELLING

While eco-labelling has come to be an emerging trend since the turn of the 21st century, the issue of compatibility with WTO rules for countries that decide to issue voluntary eco-labels based on NPR-PPMs has still not been decided.[vi]

U.S. Tuna II

The decisive case in this regard is that of U.S. Tuna II (Mexico).[vii] Here the measure at issue was the U.S. mandated tuna products being sold within its territory to be labelled as "dolphin-

safe" based on the Dolphin Protection Consumer Information Act ("DPCIA") and S.216.91 of Federal Regulations which provided for "Dolphin-safe labelling standards".

Mexico objected to such a unilateral measure by the U.S. in pursuance of an environmental objective as this had direct ramifications on the conduct of its State. Specifically, Mexican fishermen who caught large amounts of tuna in the Eastern Tropical Pacific ("ETP") Ocean (the specific area that the impugned U.S. Statutes covered), often had to locate tuna by searching for schools of dolphins first as schools of dolphin have been known to collect and swim atop tuna. The U.S. claimed that the purse seine nets used to trap tuna would inevitably also sometimes trap dolphins and cause them injuries/death. The effect of the U.S. modifying its Marine Mammal Protection Act in 1998 to incorporate dolphin-safe standards for imported tuna had the effect of Mexico being the target of an embargo in 1990. Thereafter the U.S. added the 'dolphin-safe' label requirement for tuna.

This led to Mexico filing a complaint before the GATT in the same year. The Panel initially found that the measures imposed by the U.S. were in contravention to its trade obligations as it could not firstly ban tuna imported from Mexico with the sole criterion being how the tuna was caught. This was essentially a PPM regulation. Further, these dolphin safe measures would have the effect of forcing other Members to accordingly alter their domestic environmental policies. This Panel Report did not get adopted as it came before the advent of the WTO system.

Later, the U.S. and Mexico were able to constitute a commission for the conservation of dolphins, however, the U.S. amended its Marine Mammal Protection Act once again in 1997 which upheld strict standards for the 'dolphin-safe' label. Interestingly, the focus of this label was not on dolphin mortality so much as fishing methods and geographical locations such as the ETP Ocean. This meant that even if tuna from Mexico had not been obtained by actually harming any dolphins, the mere fact that it was caught in the ETP using purse seine nets made it ineligible for the 'dolphin-safe' label required to enter the U.S. market. Meanwhile, domestically fished tuna which also affected dolphin mortality was not made subject to these requirements. Therefore, Mexico challenged the measure of using such labels stating that the U.S. had violated its obligations under Art.I:1 and III:4 of the GATT. It was further alleged by Mexico that the labelling requirements were technical regulations that did not meet the criteria of non-discrimination, necessity, and international compliance laid down by Art. 2.1, 2.2., and 2.4 of the TBT Agreement.

In this case, it was abundantly clear that the U.S. 'dolphin safe' labelling requirement was a mandatory labelling scheme and therefore, it fell squarely within the purview of a "technical regulation" under Art. 2 of the TBT Agreement. The AB in this case explained this further by stating that since the dolphin-safe labels had a direct impact on consumer choices, they must be treated as technical regulations.

The Panel also found that a label based on an NPR-PPM is covered by the definition of a technical regulation as laid down in Annex 1.1 of the TBT Agreement.

However, the Appellate Body ("AB") found that the two primary objectives of the U.S. dolphin-safe label requirements were firstly consumer information, and secondly dolphin protection. The first objective was protected by Art.2.2 of the TBT since it was towards the long-term goal of preventing deceptive practices and preserving the environment by providing consumers with necessary information. That said, the U.S. measure did fall foul of Art. 2.1 of the TBT because according to the AB, tuna captured irrespective of trapping dolphins were like products which the U.S. unjustifiably discriminated against by providing for narrow criteria such as only tuna obtained from the ETP region, etc.[viii]

Since the ruling in this case was premised on the fact that the labelling requirements were mandatory and therefore technical regulations, several unanswered questions remained about voluntary labelling schemes which would arguably affect consumer consciousness in a similar manner but still escape the strict scrutiny of Art.2.[ix]

EC-Sardines

The measure at issue in this case was a European Council Regulation which excluded all varieties of fish other than the Sardina pilchardus Walbaum to be labelled and marketed as "sardines". The species was commonly found in the Black Sea, the Mediterranean Sea, and the European Atlantic coast. This put several Peruvian fishermen at a disadvantage as the fish found on the South-American coast which displayed similar characteristics to the Sardina pilchardus Walbaum such as Sardinops sagax sagax could not be marketed as "sardines" within the European Union. The EU upheld its stance on this question even though there was a prevailing international standard that included 20 species of fish as "sardines" including the variety caught by Peruvian fishermen. The reason provided by the EU for not complying with

this standard was that it provided incomplete consumer protection against deceptive market practices and was in the interest of market transparency and fair competition.

The AB disagreed with the EU's contentions and upheld a broad interpretation of "technical regulations" under the TBT Agreement. The fact that the measure required labelling a product as "sardines" was directly linked to the identification of product characteristics and therefore it was a technical regulation. Furthermore, Art.2.4 expressly provided that Members must comply with prevailing international standards except where it is seen that these would be ineffective or inappropriate to fulfil legitimate objectives. The EU not complying with this standard had direct legal ramifications for the other fish species within the EU market.

The AB, in this case, upheld its stance from the *EC-Asbestos* case and stated that for a measure to qualify as a technical regulation, it would have to be tested with three criteria, viz: 1) the measure must apply to an identifiable product/group of products; 2) the measure must stipulate product characteristics; 3) the product characteristics laid down in the measure must be complied with as a mandate.[x]

This case is important in the context of ecolabelling because the AB ruled that the provisions of the AB would apply if a member country mandates the use of specific names for specific products in the market or defines the product's characteristics in any other manner. Therefore, merely ascribing a name or defining a product would also potentially come under a technical regulation.

Furthermore, the strict stance that both the AB as well as the Panel took in this case concerning compliance with prevailing international standards and what would justify departing from these is also a crucial factor in deciding future cases pertaining to labelling. [xi]

U.S. County of Origin Labelling ("COOL")

The measure at issue in this case was the legality of the U.S.'s COOL requirements that applied to cut meat of cattle and hogs based on four different labels that discriminated between meat sourced domestically and imported meat in the retail market. This measure was contested by Canada and Mexico.

Domestic producers who were in favour of the COOL measure argued that it was in the interest of consumer health as there had been instances of mad cow disease in Canada, hence knowing the country of origin with respect to cattle products was essential.

The Panel observed that the U.S. COOL measure was a breach of the implicit national treatment obligation contained in Art.2.1 of the TBT Agreement in as much as the measure amounted to treating imported livestock in a manner less favourable than its domestic counterpart.

The Panel also concluded that the measure was in breach of Art.2.2 of the TBT Agreement in as much it was more trade-restrictive than necessary and did not fulfil the alleged legitimate objective of providing consumers with information as two of the labels about comingled livestock if used interchangeably would confuse rather than educate consumers.

The Appellate Body agreed that the measure was violative of Art. 2.1 as it changed conditions of competition in the U.S. market in a manner detrimental to livestock imported from Canada as well as Mexico.

As far as the analysis under Art.2.2 was concerned, the AB stated that a tripartite assessment ought to have been conducted- 1) the degree of the measure's contribution to the legitimate objective sought to be pursued; 2) how trade-restrictive the measure is, and 3) the risk arising out of non-fulfilment of the measure. The objective of the COOL measure was said to be providing consumers with information about the country of origin of the livestock. This objective was not covered within the purview of Art. 2.2., but the AB clarified that the list provided in Art.2.2 is not an exhaustive one and that the question of a legitimate objective could also be analysed using the Preamble of the TBT as well as GATT provisions such as Art. XX (d). In this case, Canada and Mexico were not able to discharge their respective burden of proof that the COOL measures did not help prevent deceptive trade practices. Hence, the COOL measure was not inconsistent with Art.2.2.

Finally, reiterating the stance taken in *US Tuna II* and *US Clove Cigarettes*,[xii] the AB found that the even-handedness requirement would not be met when a measure is either designed or applied in a manner that is unjustifiable or arbitrary, in keeping with the chapeau of Art. XX of the GATT. [xiii]

CONCLUSION

As seen in the above cases, the AB has in general been reluctant to hold Members' labelling requirements to be violative of Art.2.2 of the TBT Agreement. This means that most measures imposed by Members, particularly eco-labels have significant liberty for technical regulations, even those pertaining to NPR-PPMs. While consumer information was argued as a ground for imposing the impugned measures in these cases, the respective Panel and AB did not conduct a thorough enough analysis of the ramifications of such labels on consumer consciousness, even though this could prove to be crucial in purchasing decisions. What is also important to note is the fact that the TBT Agreement vide Art .2.2. does not list consumer information as a legitimate objective, thereby exacerbating the lacuna. The existing legal position sets a fairly low bar in as much as labelling requirements can pass off as aligning with legitimate objectives so long as the labels convey a certain level of information. However, the AB in US-COOL failed to lay down the standards that would apply to such information. In conclusion, as iterated above, although eco-labels significantly impact consumer consciousness, there has been no consistent stance laid down in the jurisprudence of the WTO, and this has put several developing countries at a disadvantage as they are often unable to meet the requirements of such measures, particularly NPR-PPMs due to lack of resources.

ENDNOTES

[i] E.M. Wood, *Democracy against Capitalism: Renewing Historical Materialism* (Cambridge University Press 1995) 264-283.
[ii] 'Harnessing trade for sustainable development and a green economy', WTO Secretariat, < https://www.wto.org/english/res_e/publications_e/brochure_rio_20_e.pdf>.
[iii] --, 'Labelling' (WTO Website) < https://www.wto.org/english/tratop_e/envir_e/labelling_e.htm> accessed 26 April 2021.
[iv] Laurens Ankersmit, Jessica Lawrence, 'The future of environmental labelling: US-Tuna II and the scope of the TBT' (2012) , 127.
[v] John Polak, 'Trade as an Environmental Policy Tool? GEN, Ecolabelling and Trade' (World Trade Organisation Public Symposium, 2003) <https://www.wto.org/english/tratop_e/dda_e/symp03_gen_ecolab_e.doc> accessed 27 April 2021.
[vi] Volker Röben, 'Eco-Labelling' (2010) MPIL < https://jguelibrary.informaticsglobal.com:2136/view/10.1093/law:epil/9780199231690/law-9780199231690-e1572?rskey=rySsxt&result=1&prd=OPIL> accessed 30 April 2021.
[vii] WT/DS381: *United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* < https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm> accessed 30 April 2021.
[viii] Elisa Baroncini and Claire Brunel, 'A WTO Safe Harbour for the Dolphins: The Second Compliance Proceedings in the US-Tuna II (Mexico) Case' (2020) 19 World Trade Review 196.
[ix] *'The future of environmental labelling'* (n 4).
[x] Peter Van den Boscche and Warner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press, 2012) Ch.13.
[xi] Siwon Parl and Chris Wold, 'An Analysis of the WTO Appellate Body's Report in the *Sardines* Case: Implications for Ecolabels' (2005) < https://law.lclark.edu/live/files/169> accessed 30 April 2021.
[xii] WTO, Panel Report, *United States Measure Affecting the Production and Sale of Clove Cigarattes,* (2 September 2011) WT/DS406/R.
[xiii] Joshua Meltzer, 'The WTO Ruling on U.S. Country of Origin Labeling ("COOL")', [2012] 16 ASIL < https://www.asil.org/insights/volume/16/issue/23/wto-ruling-us-country-origin-labeling-%E2%80%9Ccool%E2%80%9D> accessed 13 May 2021.