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**Master's Thesis**

**Advancing Public Health in the WTO:  
Australia's Tobacco Plain Packaging Measures and its  
Implications on Efforts to Control NCD Risk Factors**

**WTO 에서의 공중 보건의 개선:**

**호주의 담배 포장 정책과 NCD 위험 요인 통제 노력에 대한**

**시사점**

**February 2019**

**Graduate School of International Studies**

**Seoul National University**

**International Commerce Major**

**Julia Lee**

**Advancing Public Health in the WTO:  
Australia's Tobacco Plain Packaging Measures and  
its Implications on Efforts to Control NCD Risk  
Factors**

**Ahn, Dukgeun**

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Commerce**

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**Graduate School of International Studies  
Seoul National University  
International Commerce Major**

**Julia Lee**

**Confirming the master's thesis written by**

**Julia Lee  
February 2019**

Chair	<u>Rhee, Yeongseop</u>	(Seal)
Vice Chair	<u>Moon, Hwyo-Chang</u>	(Seal)
Examiner	<u>Ahn, Dukgeun</u>	(Seal)



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## **Abstract**

Despite the growing tension between the international public health and trade communities due to the growing burden of non-communicable diseases (NCDs) and the expanding scope of the trade-liberalization agenda, the WTO's decision in favor of Australia's Tobacco Plain Packaging (TPP) measures has shined a light of hope on their possible reconciliation in the fight to contain the NCD epidemic. A close analysis of the Panel's finding on the TPP measures' consistency with Article 2.2 of the TBT demonstrates that its interpretations can have significant implications on the potential implementation of other NCD risk factor-control regulations, namely graphic health warnings on alcoholic beverages.

**Keyword:** WTO, WHO, NCD, tobacco plain packaging, graphic health warning

**Student Number:** 2016-23846

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# **I. Introduction**

The fragmented nature of supranational governance requires the coordinated cooperation of disparate international bodies that defend differing – and at times, conflicting – interests. The World Health Organization (WHO), as the United Nation’s directing and coordinating authority on international health, strives to combat communicable and non-communicable diseases to achieve “better health for everyone, everywhere” (About WHO, 2019). Meanwhile, the goal of the World Trade Organization (WTO), the only international organization that embodies the forum and rulebook for the trade between nations, “is to ensure that trade flows as smoothly, predictable and freely as possible” (About WTO: The WTO, 2019). Although the WHO and WTO are not inherently contradictory, the growing overlap between their policy scopes has fostered territorial tensions between the international public health and trade communities as the burden of non-communicable diseases (NCDs) and the purview of the trade-liberalization agenda continue to expand.

Responsible for over forty of the nearly fifty-seven million global deaths, NCDs are the leading cause of death in the world (GHO NCD Deaths, 2016). The WHO warned that the NCD epidemic is a “major public health challenge” that will only

exacerbate if ‘business as usual continues’ (WHO Global Action Plan, 2013). Thus, given that eighty percent of NCD-related deaths are preventable via the reduction of its behavioral risk factors, mainly tobacco consumption, harmful use of alcohol, unhealthy diet and physical inactivity, the WHO has aggressively advocated policies aimed at abating the growing public health crisis through the decreased consumption and exposure of its risk commodities by, *inter alia*, reducing access, restricting marketing and increasing prices. Such measures, however, are fundamentally incompatible with the free-trade principles of the WTO.

Moreover, since 1994, the WTO has amplified the scope of its coverage to encompass not only tariffs, but also non-tariff barriers to trade. One particular development into addressing non-tariff measures was the creation of the Agreement on Technical Barriers to Trade (TBT Agreement), which “seeks to ensure that technical regulations and standards, as well as testing and certification procedures, do not create unnecessary obstacles to trade” (Summary of the Final Act of the Uruguay Round: TBT Agreement, 2019). The broadened jurisdiction of the WTO through the TBT Agreement, which now includes the control of one of the WHO’s most progressive policy strategies, health warning labels and packaging, has heightened friction.

Yet, on 28 June 2018, the WTO ruled in favor of Australia’s plain packaging laws for tobacco products. This landmark decision shed some light of hope on the possibility for the public health and trade communities to reconcile tensions in order to confront the NCD epidemic in a consolidated global effort. This paper will analyze the Panel’s findings on *Australia – Tobacco Plain Packaging*<sup>1</sup>, in order to, subsequently, discern the applicability of its interpretation on the effort to control other NCD risk factors, namely alcohol. Specifically, this paper will focus on unpacking and understanding Article 2.2 of the TBT Agreement in the context of health warning labels and packaging for the purpose of NCD risk factor control.

## **II. Intersection between Public Health and Trade**

The progressive expansion of the free and fair exchange of goods and services under the World Trade Organization (WTO) through the systematic reduction of trade barriers and FTAs have had consequential implications to public health.

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<sup>1</sup> WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R of 28 June 2018 on *Australia – Certain Measures Concerning Trademark, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* [hereafter Panel Report, *Australia – Tobacco Plain Packaging*].

Scores of scholars have studied these effects and many have concluded that trade liberalization has both promoted and harmed public health (Baker, Kay, & Walls, 2014; Labonte, Mohindra, & Lencucha, 2011; Beaglehole & Yach, 2003). “It [has promoted] the transfer of goods, services, investment and technologies that promote health directly through for example, access to nutritious foods and essential medicines, [and] indirectly by stimulating economic growth and employment” (Baker, Kay, & Walls, 2014). However, absent adequate safeguards, such benefits have simultaneously come at the collateral public health price of a growing burden of NCDs through the facilitation of the proliferation of its risk factors, whether directly through “increased exposure to harmful or potentially harmful commodities notably tobacco, obesogenic foods and alcohol” or indirectly “through changes in labor markets leading to economic and employment insecurity, associated with increased chronic disease risk” (Labonte, Mohindra, & Lencucha, 2011). For the purpose of this paper, Section III will focus on the direct negative effects of trade liberalization to public health and, in particular its role in the diffusion of tobacco and alcohol.

According to McGrady, there are two main intersections of contention between strategies to combat NCDs and the international trade regime, where the latter

potentially poses risks to the former. The first is theoretical and lies in their incompatibility in terms of consumption, where,

“[t]he general benefits of liberal trade policies, such as greater competition and lower prices, can translate into negative health consequences. In particular, where increased competition and lower prices stimulate consumption of harmful products, there is likely to be a correlative increase in associated morbidity and mortality. This also has flow-on effects for health systems. Tariffs and subsidies affect the cost of goods meaning the use of these instruments can form an important part of the environment in which choices are made consumption” (McGrady, 2011).

And the second lies in the domestic regulatory autonomy of sovereign countries to implement measures to secure the health of its public. Public health advocates have argued that WTO Agreements limit the ability of Members to effectively control NCD health risks (McGrady, 2011).

## **1. Intersection of Contention: Consumption Goals**

A number of studies have offered empirical evidence to the conclusion that trade liberalization stimulates the consumption of NCD risk factors. Chaloupaka and Laixuthai were the first to study the effect of trade liberalization on tobacco

consumption. They focused on the impact of the U.S.'s imposition of Section 301 on Japan, Taiwan, South Korea and Thailand's tobacco markets from 1970 to 1991, concluding that,

“per capita cigarette consumption was nearly ten percent higher, on average, in 1991 in the four countries whose markets were open to U.S. cigarettes than it would have been if the markets had remained closed” (Chaloupka & Laixuthai, 1999).

Subsequently, Taylor and others confirmed and expanded Chaloupka and Laixuthai's study to 42 countries over a longer period of time, between 1970 and 1995. Furthermore, they found that while trade liberalization or 'openness' measure is positively correlated to increased cigarette smoking,

“trade liberalization has a large and significant impact on smoking in low-income countries, and a smaller, but still important effect on smoking in middle-income countries, while having no effect on higher income countries” (Taylor, Chaloupka, & Guindon, 2000).

Chaloupka and Laixuthai also provide two “possible explanations” for such causality. First, trade liberalization stimulates competition, which in turn reduces prices and increases demand. Second, trade liberalization intensifies the presence of advertising and targeted promotions, which also inspires demand. Although

Chaloupka and Laixuthai offer these reasoning for the positive relationship between the U.S.'s trade policy aimed at opening Asian markets and the increase in tobacco consumption, such phenomenon is additionally observed in other NCD risk commodities, such as alcohol.

McGrady contends that although the link between trade liberalization and alcohol consumption is less conspicuous as a result of a dearth of available empirical evidence, it is not unreasonable to assume it may have analogous repercussions to tobacco. Albeit still at a relative paucity, however, more scholarships have recently focused on this relationship. For example, Esser and others studied the effect of the expansion of transnational alcohol corporations on alcohol-associated harm. They concluded that the concentrated growth of alcohol corporations in the hands of a few is disconcerting as such oligarchies are able to spend more on marketing and therefore spur consumption (Esser & Jernigan, 2018), as hypothesized in Chaloupka and Laixuthai's second 'possible explanation'. The strategy of multinational alcohol corporations is to intentionally entice segments of the population that are historically not consumers (for example, women and under-aged youth) and to penetrate low- and middle-income-country markets, in order to precipitate "social and cultural

shifts, marked by an increase in the proportion of the population drinking alcohol (Esser & Jernigan, 2018).

## **2. Intersection of Contention: Regulatory Autonomy**

McGrady's second intersection of tension lies in regulatory autonomy. Trade agreements may be construed as a restriction on the freedom of domestic governments to implement comprehensive and effective measures to protect the health of its populace. For example, some tobacco-control advocates have argued that "trade agreements governing the implementation of nontariff barriers to trade limit regulatory freedom to such an extent that comprehensive and effective tobacco control is not permitted" (McGrady, 2011). Some scholars doubt the capability of the WTO to effectually mediate challenged measures – and by extension, contest the regulatory freedom of domestic governments – due to its fragmented approach to global health standards as a result of it not operating in a framework of precedential decision making (Sullivan, Drache, Little, & Donnell; Zeigler, 2006), which Sullivan and others have pinpointed as the 'fatal flaw' and 'black hole' of WTO jurisprudence. Zeigler advances this view by contending that, "the international community would achieve the greatest health benefit and avoid trade disputes by merely excluding tobacco and alcohol products and related services from trade agreements." He maintains that the

inherent conflict of interest between trade liberalization and public health control cannot be reconciled under the current architecture; and therefore, would be better served carved out.

On the other hand, a host of scholars oppose such view and instead firmly believe in the WTO's ability to not only balance trade and health interests, but also safeguard regulatory sovereignty. Voon evaluates key provisions of tobacco-control-related cases and concludes that sufficient latitude is weaved into the design of the WTO (for example, public health exception clauses) to allow for regulatory autonomy. "Despite ongoing concerns, there seems to be trend in WTO cases towards recognizing a significant degree of freedom for national governments to make regulations for public health or other objectives...[inasmuch as] regulations are justified by the available evidence and by designing and applying regulations in an even-handed manner" (Tigerstrom, 2013).

## **II. Australia's Tobacco Plain Packaging Measures**

After entering office in 2007, Australia's Prime Minister Kevin Rudd established a National Preventative Health Taskforce to fulfill his campaign promise of

making Australia the healthiest country by 2020. The Taskforce, which was charged with developing a strategy to tackle the nation's health issue, announced on 30 June 2009, a National Preventative Health Strategy focused on confronting Australia's main preventative health issues, namely obesity, tobacco and alcohol (i.e. the main NCD risk factors) (Ramesh & Thomas, 2018). Given that almost one million Australians died due to tobacco since 1950, the National Preventative Health Strategy set one of its goals to instill the 'world's best practice in tobacco control' (National Preventative Health Strategy, 2009). In order to achieve this target, specifically of reducing daily smoking to less than 10% by 2020, the dramatic reduction in the number of current and new smokers was required. The Taskforce recommended 11 key action areas to achieve its target, of which one was to eliminate the promotion of tobacco products through the design of its packaging:

“Consumer research indicates that decreasing the number of design elements on the package reduces its appeal and perceptions about the likely enjoyment and desirability of smoking. Requiring cigarettes to be sold in plain packaging would reinforce the idea that cigarettes are not an ordinary consumer item. It would also reduce the potential for cigarettes to be used to signify status. Plain packaging would increase the salience of health warnings: research subjects show an improved ability to recall

health warnings on plain packs” (National Preventative Health Strategy, 2009).

On 29 April 2010, the Rudd government announced it would introduce a series of measures designed to reduce smoking and its harmful effects. Of these measures, the most significant and relevant to this paper was the Tobacco Plain Packaging Act 2011 (TPP Act), which in conjunction with the Trade Marks Amendment (Tobacco Plain Packaging) Act 2011 (TMA Act)<sup>2</sup> and the Tobacco Plain Packaging Regulations 2011 (TPP Regulations)<sup>3</sup>, constitutes Australia’s Tobacco Plain Packaging Measures (TPP Measures). Fully implemented on 1 December 2012<sup>4</sup>, the TPP Measures, aimed at curbing tobacco consumption by ‘prohibit[ing] the use of al tobacco industry logos, brand imagery, colors and promotional text on the retail packaging of tobacco products’ in order to minimize the appeal of tobacco (Thomas, 2011), became the first regulation to

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<sup>2</sup> Trade Marks Amendment Act 2011 amends the Trade Marks Act 1995 in order to allow regulations to be made in relations to the use of trademarks under the TPP Act 2011.

<sup>3</sup> Tobacco Plain Packaging Regulations 2011 (TPP Regulations) prescribes requirements for the retail packaging and appearance of tobacco products for Part 2 of Chapter 2 of the TPP Act 2011.

<sup>4</sup> For the purpose of simplification, this paper will refer to the Tobacco Plain Packaging Act 2011, Trade Marks Amendment (Tobacco Plain Packaging) Act 2011, and the Tobacco Plain Packaging Regulations 2011 as the Tobacco Plain Packaging Measures (TPP Measures).

mandate plain packaging of tobacco products; thereby, heralding Australia as a global leader in public health reform (On Ciggies, Australia the World Leader in Public Health Reform, 2010).

In addition to ‘improv[ing] public health’, a stated objective of the TPP Act is ‘to give effect to certain obligations that Australia has as a party to the [FCTC]’. As aforementioned, the FCTC, adopted in 2003 to counteract the globalization of the tobacco epidemic, consists of several mandatory provisions designed to, as stated in its Article 3, ‘to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke’.

Under the strategy of consumer information provision, Article 11 on ‘Packaging and Labeling of Tobacco Products’ stipulates that,

1. Each Party shall...adopt and implement, in accordance with its national law, effective measures to ensure that:
  - a. Tobacco product packaging and labeling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions...and

- b. Each unit packet and package of tobacco products and any outside packaging and labeling of such product also carry health warnings describing the harmful effects of tobacco use, and may include other appropriate messages...

Article 5 on ‘General Obligations’ provides that ‘[e]ach Party shall develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans, and programmes in accordance with this Convention and the Protocols to which it is a Party’. On November 2008, two guidelines for the implementation of the FCTC by the Conference of Parties recommended plain packaging for the effective realization of Article 11. Article 11 FCTC Guidelines (‘Packaging and Labeling of Tobacco Products’) provides:

46. Parties should consider adopting measures to restrict or prohibit the use of logos, colors, brand images or promotional information on packaging other than brand names and product names displayed in a standard color and font size (plain packaging)...

And Article 13 FCTC Guideline (‘Tobacco Advertising, Promotion and Sponsorship’), which calls for ‘a comprehensive ban of all tobacco advertising, promotion and sponsorship’, recommends:

Packaging and product design are important elements of advertising and promotion. Parties should consider adopting plain packaging

requirements to eliminate the effects of advertising or promotion of packaging...

Australia was lauded for spearheading the tobacco control legislation in its strict adherence to FCTC obligations. However, unsurprisingly, it was also been met with aggressive opposition from the tobacco industry. Tobacco companies challenged – albeit unsuccessfully – the TPP Measures in the High Court of Australia<sup>5</sup> and the Hong Kong-Australia Bilateral Investment Treaty Investment-State Dispute Settlement. Following its victory in the High Court, then Director-General of the WHO, Dr. Margaret Chan lauded Australia’s effort and pioneer stance on tobacco control, and called upon the “rest of the world to follow Australia’s tough stance on tobacco marketing. With so many countries lined up to ride on Australia’s coat-tail, what [the WHO hopes] to see is a domino effect for the good of public health” (Chan, 2012).

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<sup>5</sup> In August 2011, British American Tobacco, Philip Morris, Imperial Tobacco and Japan Tobacco argued the TPP Measures violated Section 51(xxxi) of the Australian Constitution in that they amounted to an acquisition of intellectual property rights.

## 1. The TPP Measures

The TPP Measures control nearly every aspect of the retail packaging of tobacco products by proscribing all trademarks and marks and prescribing all specifications of the package's size, shape, color and type (precluding limited exceptions) (**Figure 1**)<sup>6</sup>. The TPP Measures apply to all tobacco products, defined as 'processed tobacco, or any products that contains tobacco, that is manufactured to be used for smoking, sucking, chewing or snugging; and it not included in the Australian Register of Therapeutic Goods maintained under the *Therapeutic Goods Act 1989*'.

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<sup>6</sup> The characteristics of the conditions or requirements of the TPP measures may be summarized as follows (Ishikawa, 2013):

Trademarks: No trademark may appear anywhere on the retail packaging.

Brand, Business and Company Name: Any brand name must be printed in Lucida Sans, no larger than 14 points in size, and in the color of Pantone Cool Gray 2C.

Package Color: All outer surfaces of packaging must have a matt finish and be in drab dark brown (Pantone 448C).

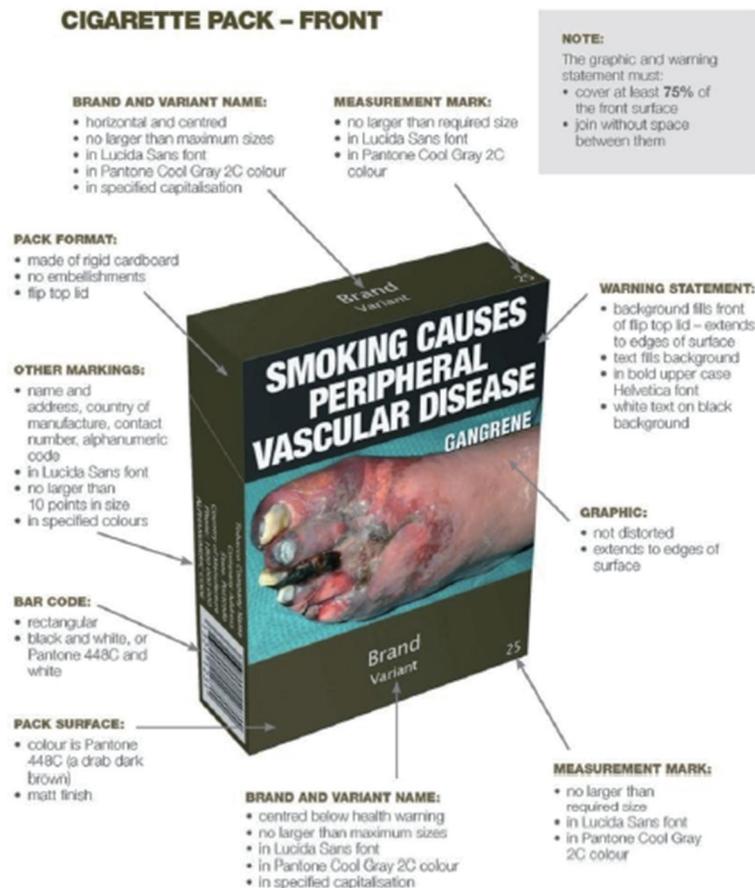
Warning Statement/Graphic: Both must cover at least 75% of the total area on the front outer surface, and at least 90% of the total area on the back outer surface including an explanatory message. The text of a warning statement must be white on a black background (*Competition and Consumer Act*, 2010).

Other Marks: No marks may appear anywhere on the retail packaging other than the following: (i) origin marks, (ii) calibrated marks, (iii) measurement mark, (iv) trade descriptions, (v) bar code, (vi) fire risk statement, (vii) locally made product statement, (viii) name and address of the person who packed the product, (ix) consumer contact telephone number.

The TPP Measures reduce the attractiveness of tobacco products by completely prohibiting trademarks and attributing stringent specifications to the appearance of the tobacco product. Retail packages must be compliant to permitted dimensions and rigidity, be ‘drab dark brown’ in color with a matt finish, and cannot be ‘embellished in any way, [unless] permitted by the regulations’. ‘Brand, business, company or variant names, and relevant legislative requirements’ must comply with the sanctioned font type, size and color, and be placed in their designated locations. Furthermore, in conjunction with complementary legislation, the Competition and Consumer Tobacco Information Standard 2011 seventy-five percent of the front and ninety percent of the back must be covered by a warning statement, graphic or explanatory message.

Those who fail to comply with the conditions and restrictions of the TPP Measures are subject to civil or criminal penalties.

**Figure 1.** TPP Measures as Applied to Front of a Cigarette Pack



Source: Panel Report, *Australia – Tobacco Plain Packaging*, Figure 1-2.

## 2. Legal Issue

In 2012 and 2013, four tobacco-producing countries<sup>7</sup> – Cuba, the Dominican Republic, Honduras and Indonesia – filed complaints to the WTO Dispute Settlement Body (DSB) claiming the TPP Measures violated:

<sup>7</sup> Ukraine had also filed, but withdrew its claim in 2015.

- (1) Agreement on Technical Barriers to Trade (TBT) Article 2.1 and 2.2;
- (2) Agreement Trade-Related Aspects of Intellectual Property Rights (TRIPS) Articles 2.1, 3.1, 15.4, 16.1, 16.3, 20, 22.2(b) and 24.3; and
- (3) General Agreement on Tariffs and Trade (GATT) Article III:4.

A Panel was composed for the adjudication of *Australia – Tobacco Plain Packaging* on May 2014 and, on June 2018, a Panel Report was circulated ruling in favor of Australia on all grounds. For its purposes, this paper focus on the arguments and ruling over whether the TPP Measures are ‘more trade-restrictive than necessary’ to fulfill its legitimate objective as interpreted in Article 2.2 of the TBT Agreement.

### **III. Unpacking TBT Article 2.2**

In order to determine whether the TPP measures violate Article 2.2 of the TBT Agreement, the Panel had to first establish whether the TPP measure fall within its scope (i.e. whether the TPP Measures constitute a ‘technical regulation’ within the meaning of the TBT Agreement).

Annex 1.1 of the TBT Agreement provides the definition of ‘technical regulation’:

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.

The Appellate Body in *EC – Asbestos* set forth the following criteria to determine whether a measure constitutes a ‘technical regulation’<sup>8</sup>:

- (1) document must apply to an identifiable product or group of products;
- (2) document must lay down one or more characteristics of the product; and
- (3) compliance with the product characteristics must be mandatory.

Australia contended that while the TPP Act and TPP Regulations fulfill the abovementioned criteria by virtue of being documents that lay down mandatory characteristics in respect to the packaging, marking and labeling of an identifiable

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<sup>8</sup> WT/DS135/AB/R of 12 March 2011 on *EC – Measures Affecting Asbestos and Products Containing Asbestos* [hereafter, AB Report, *EC – Asbestos*], para. 66-70.

group of products, tobacco, and therefore, constitute a ‘technical regulation’, the TMA Act does not satisfy the second criterium, ‘lay down one or more product characteristics’, because it focuses on ‘trademark’ rather than ‘physical’ requirements. Australia argued that the TBT Agreement “does not, on its face appear to be concerned with the exploitation of intellectual property”<sup>9</sup>; therefore, the TMA Act is not a ‘technical regulation’ and falls outside the scope of the TBT Agreement.

On the other hand, the Panel reasoned that “to the extent that the TMA Act is an ‘applicable administrative provision’ in respect of the requirements contained in the TPP Act and the TPP Regulations, it is an ‘integral part’ of that technical regulation.”<sup>10</sup> Therefore, the Panel rejected Australia’s argument and found the TPP measures – in its totality – to constitute a ‘technical regulation’ within the meaning of Annex 1.1 of the TBT Agreement.

Having established that the TPP measures fall within the scope of the TBT Agreement, the Panel proceeded to examine whether the challenged measures violate Article 2.2:

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<sup>9</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.28.

<sup>10</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.182.

Members shall ensure that technical regulations are not prepared, adopted or applied with the 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 preventions 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-use products.

To determine whether the TPP measures are ‘more trade-restrictive than necessary to fulfill a legitimate objective, the Panel adopted the two-fold criteria devised by the Appellate Body in *US – Tuna II (Mexico)*<sup>11</sup> to first, ascertain the

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<sup>11</sup> WT/DS381/AB/R of 16 May 2012 on *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* [hereafter Appellate Body Report, *US – Tuna II (Mexico)*], para. 322:

“In sum, we consider that an assessment of whether a technical regulation is ‘more trade-restrictive than necessary’ within the meaning of Article 2.2 of the TBT Agreement involves an evaluation of a number of factors. A panel should begin by considering factors that include (i) 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

‘necessity’ of the measure to ‘fulfill the legitimate objective’ and second, explore the plausible availability of less trade-restrictive measures. In the absence of *a priori* required order of analysis, the Panel determined that given the unique circumstances of the challenged measure, the appropriate approach involves in the first instance a ‘relational analysis of three factors:

- (1) the degree of contribution made by the measure to the legitimate objective at issue;
- (2) the trade-restrictiveness of the measure; and
- (3) 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.<sup>12</sup>

These factors will inform a ‘comparative analysis’ of proposed alternative measures in order to determine whether the TPP measures are ‘*more* trade-restrictive than necessary’ and in turn, create necessary or unnecessary obstacles to international trade.

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consequences that would arise from non-fulfillment of the objective(s) pursued by the Member through the measure. In most cases, a comparison of the challenged measure and possible alternative measures should be undertaken. In particular, it may be relevant for the purpose of this comparison to consider whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfillment would create, and whether it is reasonably available.”

<sup>12</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para.7.184.

## 1. Relational Analysis

### 1-1. Degree of Contribution

Included in the non-exhaustive list of ‘legitimate objectives’ stipulated in the third sentence of Article 2.2 of the TBT Agreement is the ‘protection of human health’. The Panel in *US – Clove Cigarettes* considered it to be “self-evident that measures to reduce youth smoking are aimed at the protection of human health.”<sup>13</sup> In addition, the Appellate Body in *Brazil – Retreated Tyres* noted, “few interests are more ‘vital’ and ‘important’ than protecting human beings from health risks.”<sup>14</sup> Considering the scientifically proven adverse effects of smoking on human health, the combination of both rulings thus, suggests that few objectives are more ‘vital’ and ‘important’ (thus, ‘legitimate’) than those aimed at reducing the use of, and exposure to, tobacco products.

Given the indisputability of the mortality and morbidity that accompanies smoking, the issue of ‘legitimate objective’ was largely uncontested in *Australia*

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<sup>13</sup> WT/DS406/R of 9 February 2011 on (Panel, 2011) [hereafter Panel Report, *US – Clove Cigarettes*], para. 7.347.

<sup>14</sup> WT/DS322/AB/R of 3 December 2007 on *B* (Draft Regulation on Alcohol Graphic Warning Labeling, 2010) (Appellate Body, 2007)[hereafter AB Report, *Brazil – Retreated Tyres*], para. 144 (footnotes omitted).

– *Tobacco Plain Packaging*. In fact, the complaining parties themselves articulated their acceptance to the legitimacy of the TPP measures.<sup>15</sup> Moreover, two of the complaining parties, Honduras and Cuba, as signatories to the FCTC, advocate for “tobacco control measures to be implemented...at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoking.”<sup>16</sup> Thus, the Panel – unsurprisingly – deemed the objectives of TPP measures ‘legitimate’ within the meaning of Article 2.2 of the TBT Agreement.”<sup>17</sup>

Having established the legitimacy of the TPP measures’ objective, the Panel proceeded to consider the extent to which the TPP measures contribute to this objective, if at all.

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<sup>15</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para 7.249:

“We also note Honduras’s observation that it has itself implemented comprehensive tobacco regulation measures and shares Australia’s goal of ‘reducing smoking prevalence and tobacco consumption’. The Dominican Republic considers ‘the improvement of public health by reducing smoking prevalence’ to be a legitimate objective within the meaning of Article 2.2. Cuba also accepts that the objective of reducing smoking prevalence is an entirely legitimate objective and that consumption and exposure to tobacco smoke cause death and disability. Indonesia also does not dispute that measures to reduce smoking prevalence protect public health and does not challenge the legitimacy of the objective pursued by Australia’s TPP measures.”

<sup>16</sup> FCTC, Article 3.

<sup>17</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.251.

In order to discern the TPP measures' degree of achievement of a particular objective, the Panel referred to *US – COOL*, where the Appellate Body observed that “[t]he 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.”<sup>18</sup> In the absence of a prescribed methodology, the Panel found it appropriate to approach the analysis as such:

- (1) consider the ‘design, structure and operation’ of the TPP measures to inform the selection of an appropriate methodology;<sup>19</sup>
- (2) evaluate the “evidence relating to the design, structure, and operation of the TPP measures;<sup>20</sup> and
- (3) view the TPP measures in the broader context of other tobacco control measures in Australia.<sup>21</sup>

### Design, Structure and Operation

Australia maintained that the TPP measures contribute to the legitimate objective of reducing the use of, and exposure to, tobacco products via a ‘causal chain’ or

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<sup>18</sup> WT/DS384/AB/R of 18 May 2015 on *United States – Certain Country of Origin Labeling (COOL) Requirements* [hereafter, AB Report, *US – COOL*], para. 461.

<sup>19</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.487.

<sup>20</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.500.

<sup>21</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.506.

‘mediational’ model. The design of the TPP measures is based on three intermediary mechanisms that lead directly to proximal outcomes of changed attitudes and indirectly to distal outcomes of changed behaviors (**Figure 2**). Article 3, Subsection 2 of the TPP Act delineates the mechanisms of the TPP measures:

- (2) It is the intention of the Parliament to contribute to achieving the objects in subsections (1) by regulating the retail packaging and appearance of tobacco products in order to:
  - (a) reduce the appeal of tobacco products to consumers; and
  - (b) increase the effectiveness of health warnings on the retail packaging of tobacco products; and
  - (c) reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.

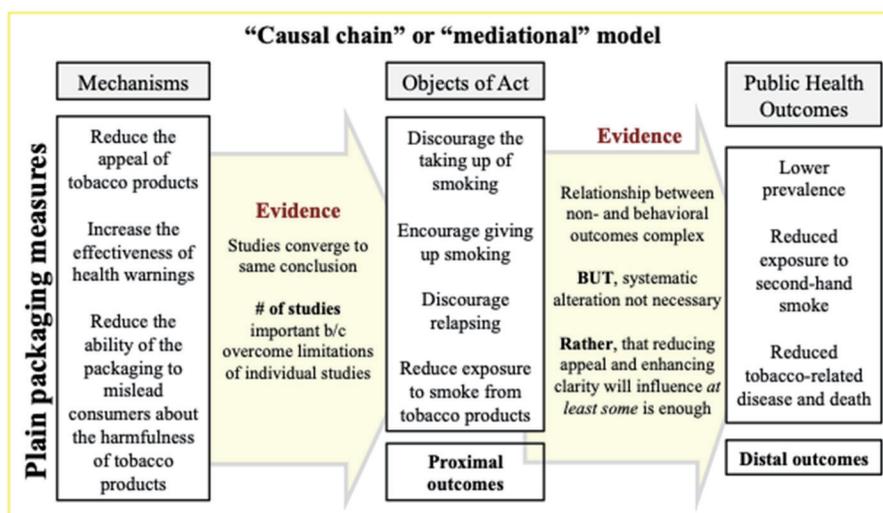
These mechanism lead to the proximal outcomes of

- (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,

- (iii) discouraging people who have given up smoking or who have stopped using tobacco products from relapsing; and
- (iv) reducing people’s exposure to smoke from tobacco products.<sup>22</sup>

Australia claimed that proximal outcomes have the capacity to reduce the appeal of tobacco products (i.e. change people’s attitudes), which in turn, influences real behavior (i.e. reduce smoking).

**Figure 2.** Contribution of TPP Measures to Public Health Objective



Source: Adapted from Panel Report, *Australia – Tobacco Plain Packaging*

<sup>22</sup> TPP Act, Article 3, Section 1.

### Available Evidence

The Panel emphasized the need “to determine the actual contribution of the measures, ‘as written and applied’, to [the] objective.”<sup>23</sup> Therefore, in order to learn whether the conceptual ‘design, structure and operation’ of the TPP measures do, in fact, contribute to its stated objective, the Panel assessed the available evidence.

Copious studies were introduced to affirm the potential impact of the TPP measures and its mechanisms on the proximal outcomes of reducing the attractiveness and positive perceptions on tobacco’s taste and its smokers. The complainants attempted to discredit the studies by pointing out their individual flaws. However, the Panel found that despite the limitation of each, the literature “converges to the conclusion that plain packaging of tobacco products has the capacity to reduce the appeal of tobacco products, increase the effectiveness of GHWs and reduce the ability of the pack to mislead consumers about the harmful effects of smoking.”<sup>24</sup>

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<sup>23</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.483.

<sup>24</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.1026.

More complex, however, entails the evidence covering the degree of contribution (if any) between the proximal and distal outcomes. The inseparability between attitudes and behaviors, and “a number of intervening factors [that] can influence the extent to which attitudes affect intentions and ultimately behavior in a given context”<sup>25</sup> muddies the former’s causal correlations. The complainants argued that the complexity and therefore, immeasurability of behavioral drivers, renders the assumed causal nexus between the proximal and distal outcomes, unfounded.

The Panel disagreed.

“[W]e do not understand Australia to argue that behavior would systematically be altered as a result of tobacco plain packaging, such that each and every individual would be similarly affected and modify their smoking behaviors. Rather, we understand Australia to rely on relevant research relating to the relationship between perceptions, attitudes and behavior, as well as evidence of the factors that are understood to influence smoking behaviors, to argue in essence that in the specific context of this intervention, it is reasonable to expect that reducing the appeal of tobacco products and enhancing clarity about their harmful

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<sup>25</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.1031.

effects will influence *at least some* consumers in their smoking behavior.”<sup>26</sup>

The Panel reasoned that the evidence demonstrates that the TPP measure do not have *no* influence; therefore, must have *some* influence (i.e. does contribute to the legitimate objective).

### Broader Context of Tobacco Control

Having established that the TPP measures contribute to the reduction of, and exposure to, tobacco products, the Panel relied on the broader context of Australia’s tobacco control policy to determine its extent. Australia’s broader tobacco regulatory context is characterized as ‘dark’ because of the existence of a general ban on its promotion and advertising. Such ban renders “tobacco packaging...the *only* opportunity to convey a positive perception of the product through branding,”<sup>27</sup> which fortifies the first mechanism of ‘reducing the appeal of tobacco products’ by suppressing the proliferation of promotional designs and tools on all fronts. The Australian government also introduced a parallel legislation to enlarge the size of graphic health warnings, which strengthens the effect of the second mechanism to ‘increase the effectiveness of health warnings.’

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<sup>26</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.1031.

<sup>27</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.1034.

Thus, the broader context of tobacco control within which the TPP measures work bolsters the effectiveness of its mechanisms.

The Panel concluded that the TPP measures are apt to, and do in fact, contribute to Australia's objective of reducing the use of, and exposure to, tobacco products.

## **1-2. Trade-Restrictiveness**

'Trade-restrictiveness' within the meaning of Article 2.2 of the TBT Agreement is understood to mean: having a 'limiting effect' on international trade.<sup>28</sup> In past Panels, and in the Appellate Body, its assessment has depended on a separate evaluation on the technical regulation's discriminatory nature. Hence, the question of 'trade-restrictiveness' has largely revolved around the 'limiting effect' of the technical regulation on the 'competitive opportunities' available to imported products.<sup>29</sup>

However, not all technical regulations scrutinized under Article 2.2 are also alleged to be in violation of Article 2.1 of the TBT Agreement ('Non-Discrimination'). Having referred to the TBT Committee's interpretation of

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<sup>28</sup> AB Report, *US – Tuna II (Mexico)*, para. 319.

<sup>29</sup> AB Report, *US – COOL*, para. 477.

‘significant effect on trade of other Members’ within the meaning of the *chapeau* of Article 2.9 of the TBT Agreement<sup>30</sup> to provide context to its own approach over the evaluation of ‘trade-restrictive’ technical regulations independent of Article 2.1 of the TBT Agreement<sup>31</sup>, the Panel decided that the existence and extent of *any* ‘limiting effect on international trade’ rather than an “alteration of the overall competitive environment on the market”<sup>32</sup> would suffice to warrant the TPP measures ‘trade-restrictive.’<sup>33</sup>

Despite several arguments presented by the complainants in support of their view of the ‘trade-restrictiveness’ of the TPP measures<sup>34</sup>, the Panel ruled the TPP

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<sup>30</sup> Article 2.9 of the TBT Agreement

“Whenever a relevant international standard does not exist or the technical context of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a *significant effect on trade of other Members* [emphasis added].…”

<sup>31</sup> The TBT Committee Recommendation provides that,

(ii) when assessing the significance of the effect on trade in technical regulations, the Member concerned should take into consideration such elements as:

- the value or other importance of imports in respect of the importing and/or exporting Members concerned, whether from other Members individually or collectively,
- the potential growth of such imports, and
- difficulties for producers in other Members to comply with the proposed technical regulation.

<sup>32</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.1166.

<sup>33</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.1075.

<sup>34</sup> Summary of the arguments presented by the complainants:

- (a) the effects of the TPP measures on the competitive environment in the Australian market;

measures are ‘trade-restrictive’ insofar as “plain packaging [decreases] demand, price and volume of imported tobacco products in the long term.”<sup>35</sup> Although seemingly a victory for the complainants, this ruling is interesting in its support for Australia as it renders the TPP measures ‘trade-restrictive’ only to the extent of its success. In other words, the presence and degree of the TPP measures’ ‘limiting effect’ are solely dictated by the reduction of tobacco consumption, which is necessary for the realization of its purpose. Thus, given that ‘trade-restrictiveness’, in and of itself, is permissible under Article 2.2 of the TBT Agreement so long as the ‘limiting effect on trade’ does not surpass what is ‘necessary’ for the fulfilment of its objective, the Panel rules the TPP measures ‘trade-restrictive’ but seems to suggest it so, up to the extent of its ‘necessity’.

### **1-3. Nature and Gravity of the ‘Risk of Non-Fulfilment’**

The ‘gravity of the consequence of non-fulfilment’ involves a two-prong identification of:

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- (b) the effects of the TPP measures on the level of trade in tobacco products;  
and
  - (c) the cost of complying with the regulatory requirements arising from the TPP measures.

<sup>35</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.1255.

- (1) the nature of the risk, which the Appellate Body in *US – COOL* assess as “those that would be created by the non-fulfilment of the ‘legitimate objective’ of the technical regulation at issue”<sup>36</sup>; and
- (2) the gravity of the consequence of non-fulfilment of the objective.

The first criterium is achieved by negating the ‘legitimate objective’ of the TPP measures. Simply, the nature of the risk of non-fulfilment is the unimprovement of public health as the use of, and exposure to, tobacco products, would not be reduced. The second criterium, subsequently measures the gravity of such risk.

Tobacco is a leading NCD risk factor, culprit to 71% of lung cancer-, 42% of chronic respiratory disease- and almost 10% of cardiovascular disease-related deaths (NCD Global Status Report, 2011)It prematurely kills over seven million people annually, from which six million is a direct result of tobacco use and 890,000, second-hand smoking (WHO Tobacco, 2018). “[It] is the only legal drug that kills many of its users when used exactly as intended by manufacturers” (WHO Report on Tobacco Trends, 2018), resulting in the death of half its users (WHO Tobacco, 2018). About one billion people smoke tobacco, an estimated six trillion cigarettes are consumed yearly (NCD Global Status Report, 2011).

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<sup>36</sup> AB Report, *US – COOL*, para. 5.277.

According to 2010 WHO Global Status Report on Noncommunicable Disease, “if no serious action is taken, annual tobacco-related deaths are projected to increase to 8 million by 2030, accounting for ten percent of all deaths.”

Considering the abovementioned public health crisis as a result of the lack of reduction of the use of, and exposure to, tobacco products, the Panel is of the opinion that the risks of non-fulfilment are ‘particularly grave’.

## **2. Comparative Analysis**

Having determined that the (2) trade-restrictive TPP measures (1) contribute to the realization of its objective, (3) taking into account the grave nature of its risk, the Panel must consider whether alternative measures that are *less* trade-restrictive are available, *ceteris paribus*, by conducting a ‘comparative analysis’.

The ‘comparative analysis’ is a conceptual tool that evaluates whether the challenged measure is ‘more...than’ within the meaning of the second sentence, and thereby, creates an ‘unnecessary barrier to trade’ within the meaning of the first sentence of the TBT Agreement. Complainant may make a *prima facie* case on the violation of the challenged measure by comparing it against alternative measures. However,

“[f]or a proposed alternative measure to form the basis of a determination that the challenged measure is more trade-restrictive than necessary, it would need to cumulatively satisfy all of the elements of the comparative analysis. It would thus need to be demonstrated that a proposed alternative measure would not only be less trade-restrictive than the challenged measure, but also that it would make at least an equivalent contribution to the objective being pursued through the challenged measure, and be ‘reasonably available’ to the Member as an alternative to the challenged measures.”<sup>37</sup>

In summary, for the TPP measures to be regarded as ‘*more* trade-restrictive than necessary’, alternative measures proposed by the complainants must be shown to:

- (a) be reasonably available;
- (b) be *less* trade-restrictive than the TPP measures; and
- (c) be able to achieve equivalent contribution to the objective taking into account the risk that non-fulfilment would create.

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<sup>37</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.1321.

The complainants offered four alternative measures:

- (1) Increase the Minimal Legal Purchase Age (MLA) of tobacco products from 18 to 21 years;
- (2) Increase taxation of tobacco products;
- (3) Improve the effectiveness of anti-smoking social marketing campaigns;  
and
- (4) Install a pre-vetting mechanism to individually assess the appearance of tobacco products and packaging.

The Panel rejected all proposed alternatives, rendered the TPP measures ‘not more trade-restrictive than necessary to fulfil a legitimate objective’; and thus, consistent with Article 2.2 of the TBT Agreement.

#### **IV. Case Study: Thailand’s Alcohol Health Warnings**

On 18 January 2010, Thailand’s Department of Disease Control under the Ministry of Public Health notified the TBT Committee of its intention to implement the *Notification of Alcoholic Beverage Control Re: Rules, Procedures, and Conditions for Labels of Alcoholic Beverages*, based on the Alcoholic

Beverage Control Act of 2008. The Draft Notification of Alcohol Beverage Control (Draft notification) introduced ‘health warnings for alcoholic beverages’ as a cost-effective measure to combat the surge of alcohol-related deaths, diseases and social issues in Thailand. It delineates the mandatory requirements for the labeling of both manufactured and imported alcoholic beverages: alcoholic beverages must display graphic and textual health warnings (**Figure 3**) that rotate at one thousand-package intervals and occupy at least thirty percent of the package. Thailand claimed:

“[m]iseries of life, disabilities and death, all depicted on the pictorial warnings are not exaggerating real impacts of alcohol consumption in Thai society. The frequency of which these impacts make front page news means the government cannot ignore these incidents.”<sup>38</sup>

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<sup>38</sup> G/TBT/M/52 of 10 March 2011 on *Thailand – Health Warnings for Alcoholic Beverages* [hereafter, Meeting Minutes 52, *Thailand – Alcohol Health Warnings*], para. 246.

**Figure 3.** Proposed Pictorial Label and Warning Statements of Thailand’s Draft on Alcoholic Beverage Control



Source: United States Department of Agriculture, 'Draft Regulation on Alcohol Graphic Warning Labeling' GAIN Report, 2010.

Following Thailand’s notification of its intention to implement the legislation to the WTO, numerous countries voiced their concerns regarding the Draft notification as a specific trade concern (STC) in the TBT Committee.

While most concerned member countries not only acknowledged the legitimacy, but also supported the objectives of Thailand's Draft notification to protect human health – especially, that of young adults – they nonetheless objected to the necessity of the extent to which the regulation implemented for such effort created obstacles to trade, given the availability of less-trade restrictive alternatives. The representative of New Zealand aptly summarized the concern of member countries:

“Thailand’s draft Notification on labeling of alcoholic beverages [is] directed toward a legitimate public health objective. However, the proposed requirements could be unnecessarily trade restrictive; alternative, less trade-restrictive approaches could be available to achieve the same objective.”<sup>39</sup>

The Draft notification was raised seven times as an STC in the TBT Committee between 2010 and 2012. Discussions halted on May 2012 after the representative of Thailand assured the Committee that the Draft notification would indefinitely remain a draft. Although the Draft notification was not implemented as law, it

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<sup>39</sup> G/TBT/M/51 of 1 October 2010 on *Thailand – Health Warnings for Alcoholic Beverages* [hereafter, Meeting Minutes 51, *Thailand – Alcohol Health Warnings*], para. 245.

represents an unprecedented step towards the control of alcohol consumption in order to tackle the growing NCD burden. It became the first country to transfer the concept of graphic health warnings, commonplace in tobacco product packages, onto alcoholic beverages.

Notwithstanding the fact that Thailand's Draft notification did not advance into a formal WTO dispute, much can be learned from its discussions in the TBT Committee as a case study to the implementation of future progressions in stricter alcohol-control regulations such as that of Thailand's graphic health warnings. This paper will transfer the approach and interpretation of the Panel in *Australia – Tobacco Plain Packaging* onto the Draft notification in order to analyze its legality, specifically its consistency with Article 2.2 of the TBT Agreement.

Before delving into the analysis of Article 2.2 of the TBT Agreement, it is noteworthy to mention that Thailand did not contest the applicability of the Draft notification in the TBT Agreement as a 'technical regulation' within the meaning of Annex 1.1. The Draft notification satisfies the three-prong criteria prescribed by the Appellate Body in *EC – Asbestos* in that it is a document that lays down the mandatory requirements for the marking, packaging and labeling (i.e. product

characteristics) of an identifiable product, alcoholic beverages. Therefore, the Draft notification falls within the scope of Article 2.2 of the TBT Agreement.

## **1. Degree of Contribution**

The ‘legitimate objective’ of the Draft to protect human health from the risks associated with alcohol consumption is claimed to take effect through three levels of impact:

- (1) Provide correct information and understanding concerning health risks and potential dangers at the time of purchase;
- (2) Increase knowledge, attention and awareness; and
- (3) Pictorial warning label is expected to spell out the non-ordinary characteristics of alcohol and caution people not to underestimate its impact.<sup>40</sup>

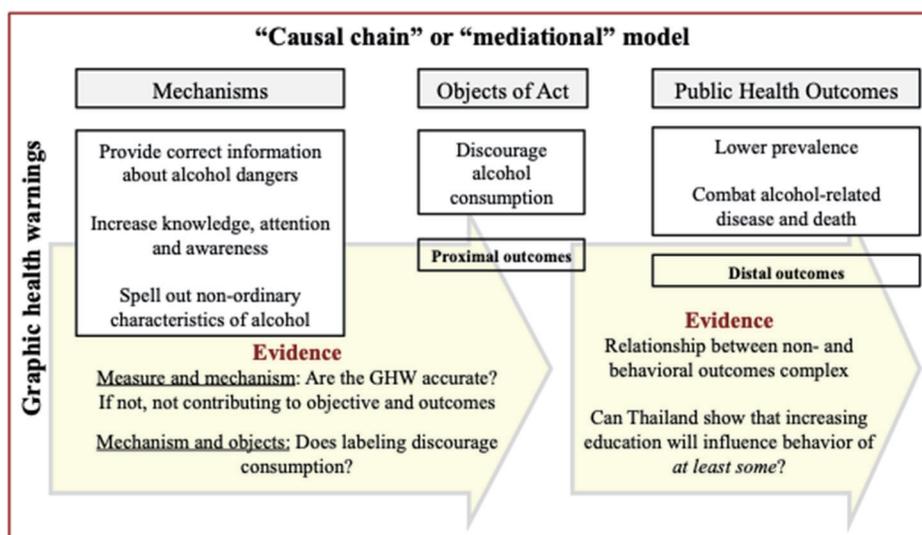
Adopting the ‘design, structure, and operation’ of the TPP measures, the Draft notification can also be interpreted under Australia’s ‘causal chain’ or ‘mediational’ model. The abovementioned mechanisms of the Draft notification will influence the perception of alcohol through the proximal outcome of adverse

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<sup>40</sup> Meeting Minutes 52, *Thailand – Alcohol Health Warnings*, para. 247.

attitudes towards alcohol consumption; which, in turn, will influence behavior to the public health end of lowered prevalence, and alcohol-related disease and death (Figure 4).

**Figure 4.** Contribution of Draft Notification to Public Health Objective



It is undisputed and held to be universally true that smoking is harmful. That, however, is not the case for drinking. In Thailand, where ninety-nine percent of the population is either Buddhist or Muslim, alcohol is considered a ‘non-ordinary’ commodity. Yet, in Chile, the consumption of alcohol, in particular wine, is a common practice backed by historical tradition and regarded as part of their lifestyle.

The contradicting view over the ‘ordinariness’ of alcohol is a major point of contention to the realization of the Draft notification’s ‘causal chain’ model because Clause 4 of the Draft notification mandates pictorial health labels be accompanied by the following statements:

- (a) Drinking alcohol causes the hypertension liver cirrhosis
- (b) Drunk driving causes disability or death
- (c) Drinking alcohol leads to unconsciousness and even death
- (d) Driving alcohol leads to sexual impotency
- (e) Drinking alcohol leads to adverse health effects and family problems
- (f) Drinking alcohol is a bad role model for children and young people

Concerned parties argued that the above warning statements counteract the Draft notification’s first mechanism of ‘providing correct information’ as it erroneously implies that drinking *per se* is hazardous. Several of the concerned parties maintained that moderate alcohol consumption is not dangerous and “could even have beneficial effects as demonstrated by many international studies.”<sup>41</sup> On the other hand, Thailand insisted that alcohol has no health benefits – at least, in Thailand – by arguing that the studies cited by the concerned

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<sup>41</sup> Meeting Minutes 51, *Thailand – Alcohol Health Warnings*, para. 243.

parties “indicate that moderate drinking might have health benefits for people with specific characteristics. However, the epidemiological evidence shows that no health benefits could be measured at the aggregate in countries with low prevalence of coronary heart disease, especially in low and middle-income countries like Thailand.”<sup>42</sup> Thailand further explained how the occurrence of alcohol-related disease in the country increased by forty percent from 1999 to 2004, accounting for over ten percent of its total health burden (twice the global average),<sup>43</sup> and that while only thirty percent of Thai adults are classified as drinkers, the average per capita consumption is double that of Western adults, signaling a Thai-specific culture of over-consumption.<sup>44</sup> As a result, Thailand maintained the mechanisms of the Draft notification are accurate in its domestic context.

In line with the sixth iteration of the Preamble of the TBT Agreement that “no country should be prevented from taking measures necessary to ensure the...protection of human...life or health...*at the levels is considers appropriate* [emphasis added],” Thailand’s argument adequately addresses the specific needs and rationales of its country given its unique circumstances. However, as

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<sup>42</sup> Meeting Minutes 51, *Thailand – Alcohol Health Warnings*, para. 248.

<sup>43</sup> Meeting Minutes 51, *Thailand – Alcohol Health Warnings*, para. 248.

<sup>44</sup> Meeting Minutes 52, *Thailand – Alcohol Health Warnings*, para. 245.

observed by the Panel in *Australia – Tobacco Plain Packaging*, the Draft notification must show “actual contribution of the measures, ‘as written and applied’, to [the] objective,” which Thailand did not do in terms of both sufficient converge in the evidentiary literature and broader regulatory context.

Thus, from the analysis of the Draft notification, it is evident that to strengthen the effort to combat alcohol-related NCD risks, a greater number of studies must be encouraged (and/or funded) and a more comprehensive policy strategy must be devised to maximize the degree of contribution of the measure to the realization of its objective. Specifically, the Panel in *Australia – Tobacco Plain Packaging* revealed (1) the importance of a greater number of studies that converge in conclusion in order to avail the individual flaws of each, and (2) the effectuality of creating a ‘dark’ market for NCD risk factors to strengthen the contribution of mechanisms aimed at killing allure.

## **2. Trade-Restrictiveness**

The applicability of the Panel’s ruling on the ‘trade-restrictiveness’ of the TPP measures on the Draft notification is tenuous because

“it is incumbent upon a panel to ‘adopt or develop a methodology that is suited to yielding a correct assessment’ in respect of the technical

regulation at hand. Depending on the circumstances of the case, such demonstration could be based on qualitative or quantitative arguments and evidence, or both, including evidence relating to the characteristics of the challenged measure as revealed by its design and operation.”<sup>45</sup>

Nonetheless, it is worth mentioning the Panel’s assessment on one particular argument introduced in *Australia – Tobacco Plain Packaging*. The concerned parties held that the proposed labeling requirements stipulated in the Draft notification would impose significant additional costs and administrative burdens to alcohol beverage producers. In more specificity, the representative of the United States remarked:

“Requirement to rotate the warning labels every thousand bottles would require a stop and a change in the production line every three to four minutes, which would be extremely difficult for suppliers to manage and very disruptive to the production process.”<sup>46</sup>

The complainants in *Australia – Tobacco Plain Packaging* maintained a similar argument, claiming that the cost to comply with the requirements of the TPP measures, namely, the appearance of trademarks, the format of packaging and

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<sup>45</sup> Panel Report, *Australia – Tobacco Plain Packaging*, para. 7.1076.

<sup>46</sup> Meeting Minutes 51, *Thailand – Alcohol Health Warnings*, para. 241.

individual tobacco products, and replacement of non-compliant package stock with plain-packaged stock, gives rise to ‘trade-restrictive’ effects.

With respect to the question of whether a technical regulation is ‘trade-restrictive’ because it imposes conditions that entail compliance costs, the Panel was of the view that although compliance costs may be so great as to cause a ‘limiting effect on trade’, the mere existence of *any* level of costs associated with initial compliance is not enough to, in and of itself, demonstrate ‘trade-restrictiveness’ within the meaning of Article 2.2. Therefore, the crux of the issue lies in the extent to which the potential or actual costs inhibit trade, a matter where the burden of proof rests with the concerned or complaining party.

Accordingly, the mere existence of compliance costs to the observance of the Draft notification, made known by the concerned parties, is insufficient to be deemed ‘trade-restrictive’. However, if the Draft notification imposes additional and perpetual costs that are significant enough to disrupt trade by, for example, engendering a “reluctance for exporters to service the Thai market”<sup>47</sup> as hypothesized by the representative of New Zealand, then it may have a ‘limiting effect on trade’.

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<sup>47</sup> Meeting Minutes 51, *Thailand – Alcohol Health Warnings*, para. 245.

Therefore, the successful implementation of strict alcohol-control laws, such as the Draft notification, depend on the simplification of superfluous details that impose high compliance costs. For instance, absent scientific evidence to back their inclusion, provisions such as Clause 4, “...picture[sic] shall be printed in 4 colors and 6 types of which one of them is required to be rotated at 1,000 package intervals,” that are (at least at face value) needlessly inflexible and marginally effective must be lightly weighed against the cost of efficiency and compliance.

### **3. Nature and Gravity of the ‘Risk of Non-Fulfilment’**

The nature of the risk of non-fulfilment of the Draft notification is unimproved public health as the consumption of alcohol would not be reduced, and the gravity of such risk would according to the WHO, which attributed the consumption of alcohol as a major NCD risk factor responsible for the death of over three million people annually, as a causal factor to over 200 diseases and injury conditions (WHO Alcohol, 2018), be grave. Alcohol accounts for nearly four percent of global deaths, “more than half of these deaths occurred as a result of NCDs, including cancers, cardiovascular disease and liver cirrhosis” (NCD Global Status Report, 2011). The harmful use of alcohol also indirectly leads to morbidity and mortality as a result of road traffic accidents and other incidental

injuries. In addition, the harmful use of alcohol is also associated with various social issues such as crimes, violence, unemployment and absenteeism.

The Panel's 'comparative analysis' of alternative measures to the TPP measures will not be further analyzed as the findings are inapplicable to the unique circumstances of the Draft notification.

## **V. Conclusion**

Two key finds from *Australia – Tobacco Plain Packaging* to the facilitation of future NCD-risk factor-control labeling measures entail: (1) the importance of evidence building to the satisfaction of the first criterium of the 'relational analysis', 'degree of contribution' and (2) of constructing comprehensive policy strategies to the tackling of NCD risk factors in order to not only maximize the measure's 'contribution', but also to minimize the availability of equally contributing, *less* restrictive alternative measures (i.e. 'comparative analysis').

In all, the upholding of Australia's TPP measures demonstrates the feasibility in the reconciliation of the public health and trade regime's divergent interests. Through the analysis of the Panel's interpretation of Article 2.2 of the TBT Agreement, this paper concludes that other NCD-risk factor-control measures,

such as Thailand's Draft notification aimed at curtailing the consumption of alcohol, can be compatible with WTO law and thus, should be more aggressively pursued to combat the growing perils of NCDs.

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# 논문 초록

만성 비감염성 질환(NCD)에 대한 책임과 자유 무역의 범위가 계속 증가함에 따라 국제공중보건과 무역 공동체 간의 입장이 계속해서 대치되고 있는 가운데, 담배 포장에 그 유해성에 대한 경고 문구 및 이미지를 삽입하도록 규정한 호주의 Tobacco Plain Packaging(이하 TPP)조치를 지지하는 WTO의 결정이 내려지면서, 두 집단의 이해관계를 조정할 수 있는 가능성이 넓어졌다. TBT 제 2.2 조에 따른 TPP 조치의 패널 결론을 면밀하게 분석한 결과, 이는 다른 NCD 위험 요소-제어 규정의 잠재적인 이행, 즉 알코올 음료에 대한 시각적 보건 경고에 유의미한 함의를 가질 수 있음을 보여준다.

**주요어:** WTO, WHO, NCD, 담배 단순포장, 보건 경고

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