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ABSTRACT

The article analyses the compatibility of various regulatory mechanisms provided by the new Tobacco Products Directive (TPD) with the requirements of WTO law, in particular those included in the TBT and TRIPS Agreements. After introducing basic provisions of the directive and summarizing the concerns raised by some WTO Members during meetings of the TBT Committee and the TRIPS Council, the article discusses in more detail the merits of those claims. It finds that concerns expressed by the WTO Members are generally overstated, as most TPD provisions, except for the temporal menthol exception, are WTO-compatible. The article also notes that significance of its conclusions goes beyond the specific context of the EU measure. The TPD introduces many progressive regulatory solutions which, although not being entirely original, are still at the forefront of contemporary tobacco control policies and will be adopted in the future in other jurisdictions. On that basis, the article concludes that WTO law, while imposing certain standards, generally does not stand against genuine tobacco control policies that are adopted in a non-discriminatory manner.

KEYWORDS: European Union, TBT Agreement, tobacco and international

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trade, tobacco control, Tobacco Products Directive, TRIPS Agreement, WTO
I. INTRODUCTION

When press agencies reported on 16 October 2012 about the forced resignation of European Union (hereinafter “EU”) Commissioner John Dalli due to alleged irregularities in the drafting process of a new EU tobacco control law, many believed that this was the end of the ambitious initiative. Despite this development, a draft of the directive was nevertheless published by the EU Commission two months later.

The resignation of the EU Commissioner was, however, only one of the many obstacles encountered by the initiative. At the beginning, the public consultations were overflowed with industry-inspired submissions. Intense lobbying took place, both at the European and national levels, and was directed at the EU Commission, the European Parliament and the governments of specific EU Member States. At the international level, the World Trade Organization (hereinafter “WTO”) became the main forum for contestation. Many WTO Members criticized various solutions proposed by the Commission in its initial draft and continued to raise their concerns throughout the regulatory process. According to them, both the proposal as well as the final version of the directive violated various requirements of WTO law, in particular those included in the Agreement on Technical Barriers to Trade \(^1\) (hereinafter “TBT Agreement”) and the Agreement on Trade-Related Aspects of Intellectual Property Rights \(^2\) (hereinafter “TRIPS Agreement”).

This article concentrates on the compatibility of various provisions of the Tobacco Products Directive (hereinafter “TPD”) \(^3\) with WTO law. The significance of such an exercise goes, however, beyond the specific context of the EU measure. The TPD introduces many progressive regulatory solutions which, although not being entirely new to the international community, are nonetheless at the forefront of contemporary tobacco control policies. Therefore, any decision by a panel and/or the Appellate Body, if the TPD is contested within the WTO dispute-settlement system, may have an impact on future developments in this area in other jurisdictions as well.

The first part of this article (the following Section II) introduces the basic provisions of the TPD, concentrating on those aspects that subsequently proved to be the most controversial, and briefly compares

\(^1\) Agreement on Technical Barriers to Trade [hereinafter TBT Agreement], Apr. 15, 1994, 1868 U.N.T.S. 120.


them with the requirements of the World Health Organization (hereinafter “WHO”) Framework Convention on Tobacco Control (hereinafter “FCTC”). Section III summarizes the concerns raised by WTO Members during meetings of the TBT Committee and the TRIPS Council. Section IV discusses in more detail the merits of those concerns, examining the compatibility of the TPD with the requirements of both the TBT Agreement (Section IV.2) and the TRIPS Agreement (Section IV.3). The final Section is comprised of conclusions.

II. THE NEW TOBACCO PRODUCTS DIRECTIVE

Tobacco products are currently regulated at the EU level by various pieces of legislation. A central place in this regulatory framework is occupied by Directive 2001/37/EC, which partially harmonizes the rules about the content, presentation and sale of tobacco products (e.g. size and form of mandatory health warnings) across the Union. Other EU acts introduce an EU-wide ban on advertising and sponsorship of tobacco products in the press and on the radio and internet, and harmonize the structure and rates of excise duties applicable to tobacco products. In addition, there are a number of recommendations, guidelines and other non-binding documents. Outside the areas regulated by EU law, Member States enjoy regulatory freedom — they may adopt their own tobacco control measures (e.g. bans on the public display of tobacco products at points of sale) unless they violate other rules under EU law (e.g. those relating to the free movement of goods).

The work on the TPD was initiated as early as in 2009 with a series of studies commissioned by the EU Commission and via public consultations. The publication of the draft was, however, delayed, partially because of the high participation of stakeholders in the consultation process and partially because of lobbying activities by international tobacco companies. The draft was eventually made public on 19 December 2012. In the explanatory note, the Commission justified the adoption of the new directive by the need to improve the functioning of the internal market with respect to tobacco products and to respond to scientific and international legal

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7 See generally Council Recommendation of 30 November 2009 on Smoke-Free Environments, 2009 O.J. (C 296/02).
developments that had occurred since the adoption of the previous act. In particular, the EU Commission referred this context to the FCTC and the risk of divergent national transposition of the obligations provided by the Convention.\footnote{Proposal for a Directive of the European Parliament and of the Council on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Manufacture, Presentation and Sale of Tobacco and Related Products [hereinafter Proposal for a Directive], at 2, COM (2012) 788 Final (Dec. 19, 2012).}

The proposal, in order to become law, had to receive consent from the Council of the European Union (a congregation of the representatives of all EU Members) and the European Parliament (hereinafter “EP”). The first body accepted the directive (with some important changes compared to the draft published by the Commission) on 21 June 2013, while the EP followed a couple of months later on 8 October 2013 (also with significant changes). Since the positions of both institutions differed in many important aspects, a new compromise version was agreed on 18 December 2013, with the EP approving the final text in February 2014, followed by the Council in March of the same year. The TPD was published in the official journal of the EU in April 2014, and EU Members were granted two-years for implementation (until 20 May 2016).

The TPD establishes a fairly stringent and progressive tobacco control regime. It repeats the maximum emission levels for tar, nicotine and carbon monoxide provided in the previous directive and recognizes the right of Members to set additional levels for other substances.\footnote{TPD, supra note 3, art. 3.} In this context, the directive introduces a reporting system for ingredients and emissions that applies to all manufacturers and importers of tobacco products. Apart from providing information about the quantities of specific ingredients, manufacturers and importers also need to explain the reasons for their inclusion and present relevant toxicological data. All of these data will be made publicly available, but manufacturers and importers may request they not be disclosed based on a trade secret privilege. In addition, manufacturers and importers are obliged to submit market research studies available to them on the preferences of various consumer groups (including young people) related to ingredients and emissions.\footnote{Id. art. 5.} The enhanced reporting obligations apply to additives in cigarettes and roll-your-own tobacco that are included in a priority list (yet to be issued by the Commission and determined on the basis of criteria set out in the directive, such as the contribution to the toxicity or addictiveness of the products concerned).\footnote{Id. art. 6.}

The directive prohibits marketing of tobacco products with characteristic flavours (i.e. flavours that alter the regular taste of tobacco,
such as clove or menthol), irrespective of whether such a flavour results from an additive or because of specific features of the filters, papers or packages. On the other hand, the directive does not ban additives used in the manufacture of tobacco products as long as they do not result in a product with a characteristic flavour. In this context, the Commission is instructed to adopt more detailed rules for determining whether a particular product falls within this category. Products other than cigarettes and roll-your-own tobacco are generally exempted from the prohibition, with the EU Commission retaining the right to withdraw the exemption if there is a substantial change of circumstances (e.g. patterns of consumption). The distinction between cigarettes/roll-your-own tobacco and other tobacco products (e.g. cigars and cigarillos) is based on the fact that the latter category constitutes only a fraction of the market and is generally used by older consumers; thus it rarely contributes to the initiation of smoking.\textsuperscript{12} Moreover, the directive stipulates that the above rules will apply only to products whose Union-wide sales are equal to or more than 3\% of the market from 20 May 2020.\textsuperscript{13} In practice, this excludes menthol tobacco products from these provisions. On the other hand, there is a general marketing prohibition for all tobacco products that contain certain pre-specified additives, such as vitamins, caffeine, taurine or other stimulant compounds associated with energy and vitality, as well as additives that increase the toxic or addictive effects, or which have carcinogenic, mutagenic or reprotoxic properties at the stage of consumption to a significant or measureable degree.

The directive provides detailed rules on the labelling and packaging of tobacco products. It requires health warnings composed of both text and pictorial warning, placed in specific parts of the packets (an upper part) that cover 65\% of both the external front and back surface of an individual packet. The Commission maintains the right to define the text in the warnings and the type of pictures to be placed on the packets.\textsuperscript{14} The labelling requirements for tobacco products for smoking other than cigarettes, roll-your-own tobacco and water pipe tobacco, such as pipe tobacco, are less demanding (e.g. Member States may exempt such products from the requirement of the combined health warnings, while the size of the warning may be smaller — between 30\% to 45\% of the surface area). As with the flavours ban, the Commission may withdraw exemptions if there is a substantial change of circumstance. Apart from the requirement on health warnings, the TPD also restricts the use of any element on a

\textsuperscript{12} Statement of the European Union during the meeting of the TBT Committee. TBT Committee, Minutes of the Meeting of 6-7 March 2013, Note by Secretariat [hereinafter Minutes], ¶ 2.79, G/TBT/M/59 (May 8, 2013).

\textsuperscript{13} TPD, supra note 3, art. 7.14.

\textsuperscript{14} Id. art. 10.1.
package that, for example, “suggests that a particular tobacco product is less harmful than others or aims to reduce the effect of some harmful components of smoke or has vitalising, energetic, healing, rejuvenating, natural, organic properties or has other health or lifestyle benefits”, or “refers to taste, smell, any flavourings or other additives or the absence of them”. As clarified in Art. 13.3, prohibited elements and features include text, symbols, names, trademarks, or figures or other signs. Labels can neither include any information on the nicotine, tar or carbon monoxide emissions of a tobacco product. A unit packet of cigarettes or roll-your-own tobacco has to be in a specific shape (i.e. cuboid for cigarettes, cylindrical or in the form of a pouch for roll-your-own tobacco) and size (at least 20 cigarettes or 30g of tobacco). Overall, the TPD provides a high level of standardization in the appearance, including a shape, of cigarette packets.

The new directive introduces a new mandatory traceability system. It requires all unit packets to be marked with a unique identifier and specifies types of information that need to be determinable using the identifier (e.g. the manufacturing facility, date and place of manufacturing). In addition, all entities involved in the supply chain of tobacco products are obliged to keep records of relevant transactions.

The directive also includes other provisions, which are, however, less interesting from the point of view of WTO law (at least if one looks at the concerns raised by WTO Members at the meetings of two WTO committees). It reiterates a ban on snus with a tradition exemption for Sweden; it sets conditions on the cross-border distance of sales of tobacco products; it establishes a notification system for novel tobacco products (which can be accompanied by an authorization system at the national level) and electronic cigarettes. With respect to the last category of products, the TPD imposes some additional requirements as to the maximum size of the liquid containers, the levels of nicotine and certain safety features. It also prohibits any form of advertising of such products.

The TPD does not contain plain-packaging requirement. Despite attempts at the EP level, no such obligation was included in the final version of the directive. It only provides in the preamble that EU Member States retain the power to impose additional requirements necessary to protect public health, in particular with respect to packaging of tobacco products. In this context, the preamble makes an explicit reference to

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15 Id. arts. 13.1(b), (c).
16 Id. art. 14.1.
17 Id. art. 15.
standardization of packaging as an example of such requirements. It also requires that any such rules are compatible, among other things, with relevant WTO obligations.19

As mentioned above, one of the reasons behind the adoption of the TPD was the need to ensure a consistent implementation of the FCTC provisions across the Union.20 As a consequence, a lot of effort was put in ensuring that the new directive fully reflects the requirements of the Convention.21 At the same time, in most instances, the TPD goes beyond the minimum standards set by the FCTC (as detailed in its guidelines), selecting stricter measures from the repertoire provided by the Convention. For example, the directive literally repeats the FCTC requirements (again as explained in the partial guidelines for implementation of Arts. 9 and 10) with respect to ingredients in tobacco products (i.e. ingredients that may be used to increase the palatability of tobacco products, ingredients that have colouring properties, ingredients that may create the impression that they have a health benefit and ingredients associated with energy and vitality),22 choosing however full prohibition rather than mere restrictions on their use, thus following the stricter option identified in the guidelines. The same strategy is taken with respect to labelling obligations. The TPD goes beyond the minimum requirement provided by Art. 11 of the FCTC (i.e. 30% of a surface) and mandates health warnings which cover 65% of a surface of an individual packet, and which combines a textual message with a picture (the latter of which is just an option under the Convention).23

Other labelling recommendations proposed by the guidelines are also respected.24 The TPD requires information on the cessation of smoking on tobacco packaging, mandates health warnings on both sides of a pack, and prohibits the display of quantitative or qualitative information on the level

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19 TPD, supra note 3, Preamble ¶ 53.
20 Note also that the EU being a party to the FCTC also has an international law obligation to ensure that the TPD provisions comply with the FCTC; see Commission Staff Working Document, The Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Manufacture, Presentation and Sale of Tobacco and Related Products, at 20, SWD (2012) 452 Final (Dec. 19, 2012).
21 For a useful chart that compares the specific TPD obligations with the requirements of the FCTC and the recommendations provided by the guidelines. Id, at Annex A. 3.2.
22 See WHO, Partial guidelines for implementation of Articles 9 and 10 of the WHO Framework Convention on Tobacco Control, ¶¶ 3.1.2.2 (i), (ii), (iii), (iv), FCTC/COP4(10) (Nov. 20, 2010) [hereinafter Partial guidelines for implementation of Arts. 9 and 10]. The TPD, again in accordance with the guidelines, excludes from prohibition those ingredients which are indispensable for the manufacturing of tobacco products and not linked to attractiveness.
23 This still remains within the parameters set by the Convention. The FCTC provides that health warning should cover 50% or more of the principal display areas but shall be no less than 30% of the principal display areas. Art. 11.1, under (b)(v) also stipulates that a warning may be in the form of or include pictures or pictograms.
of tar, nicotine and carbon monoxide emissions. As noted above, it also forbids promotional elements on packaging that refer to taste, smell, any flavourings or other additives or the absence of such. Although the TPD does not require plain packaging (consideration of which is recommended by the guidelines to Arts. 11 and 13)\(^ {25} \), it nevertheless leads to a highly standardized packaging of tobacco products. The same is true for other obligations. In addition, the mandatory traceability system reflects the requirements of the WHO Protocol to Eliminate Illicit Trade in Tobacco Products.\(^ {26} \)

The adoption of the directive has brought the EU back into the group of world leaders in the area of tobacco control. For example, a more comprehensive ban on flavoured cigarettes is only applied in Brazil (Canada and the United States also ban the marketing of flavoured cigarettes, but both of them make an exception for menthol cigarettes), larger health warnings are used only in few countries (e.g. Australia and Uruguay), while the highly standardized packages envisaged by the TPD come quite close to the ground-breaking Australian plain packaging law. Despite the fact that none of the specific measures introduced by the TPD are entirely new to the international public health community, overall the regulatory scheme established by the directive is one of the most progressive (and strictest) in the world.

### III. THE TPD IN THE WTO COMMITTEES

The draft of the TPD was presented to the WTO on 18 January 2013\(^ {27} \) and WTO Members had 90 days to comment on the proposal. Almost immediately the new TPD became a standing item at every meeting of the TBT Committee. A number of WTO Members (i.e. Malawi, Cuba, Nicaragua, Indonesia, Guatemala, Honduras, Zambia, Nigeria, Zimbabwe, Mozambique and, later, Ukraine), while recognizing the right of the EU to regulate on health protection matters, expressed concerns about the compatibility of various provisions of the new directive with the

\(^ {25} \) WHO, Guidelines for implementation of Article 13 of the WHO Framework Convention on Tobacco Control, ¶ 17, FCTC/COP3(12) (Nov. 22, 2008); providing that “[p]arties should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging”.

\(^ {26} \) See generally WHO, The Protocol to Eliminate Illicit Trade in Tobacco Products, FCTC/COP5(1) (Nov. 12, 2012). As of 12 January 2015, the Protocol has been signed by 54 countries, while five parties have already concluded the ratification process. The Protocol will enter into force 90 days following the date of deposit of the 40th ratification (art. 45). For more detailed analysis of the specific requirements of the Protocol, see generally Łukasz Gruszczynski, The WHO Protocol to Eliminate Illicit Trade in Tobacco Products: A Next Step in International Control of Tobacco Products, 1 EUR. J. RISK REG. 91 (2013).

\(^ {27} \) See generally TBT Committee, Notification of the European Union, G/TBT/N/EU/88 (Jan. 18, 2013).
requirements of the TBT Agreement. On the other hand, the EU was supported by Australia, New Zealand, Norway and Canada. The TPD was also discussed during TRIPS Council meetings, with many WTO Members arguing that it violated intellectual property obligations.

In particular, WTO Members argued in the TBT Committee that specific provisions of the TPD are more trade restrictive than necessary to achieve the EU health objective and therefore violate Art. 2.2 of the TBT Agreement. In this context, the following aspects of the TPD were identified as potentially inconsistent with this article:

1) **Prohibition on marketing tobacco products with characteristic flavours:** Some Members believed that the prohibition lacks sufficient scientific basis, i.e. evidence that would show that “ingredients bans will actually contribute to lower rates of smoking initiation by young people.”\(^{28}\) In this context, Malawi also added that the main reason behind the initiation of smoking is peer pressure and not the availability on the market of tobacco products with characteristic flavours.\(^{29}\) In addition, Nicaragua argued that there was no evidence showing that flavouring additives are harmful by themselves.\(^{30}\)

2) **Prohibition on the use of certain additives irrespective of whether they affect flavour:** Nicaragua also contested the scientific basis for a ban on certain additives that do not impart a flavour to tobacco products. In particular, it claimed that there is no scientific evidence that would show that such additives increase the toxicity or dependency on the product in question.\(^{31}\)

3) **Labelling requirements:** The main two concerns expressed by some WTO Members related to the increased size of health warnings on individual packets and the mandatory pictorial warnings. As in the case of flavouring additives, these Members questioned the scientific basis underlying this regulatory measure, claiming that there is no connection between enhanced health warnings and the behaviour of customers (i.e. deciding not to start smoking or quitting an addiction).\(^{32}\) In this context, Malawi in particular claimed that the EU’s approach was based on two incorrect assumptions, that is, the lack of knowledge among consumers on the health consequences of smoking and the impact of enhanced warnings on their decisions about smoking, including starting.\(^{33}\) Nicaragua also argued that in order to satisfy the

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29 Id.
30 Id. Minutes, supra note 12, ¶ 2.60.
31 Id.
32 Id. supra note 28, ¶ 1.10.
33 TBT Committee, *Statement of Malawi to the Committee on Technical Barriers to Trade at its*
requirements of Art. 2.2, the EU would need to show the “material and quantifiable contribution of its new labelling requirement to the objective of protecting human health” (or in other words, “direct causality”).

This concern was again repeated, even after the size of the health warnings was reduced in the final version of the TPD from 75% of the front side of a package to 65%.

(4) Packaging requirements: WTO Members also questioned provisions of the TPD that require unit packets of cigarettes to be cuboid in shape, to include at least 20 cigarettes (or a minimum 30g for roll-your-own tobacco packages) and have a specific way to open the packet. In this context, Members argued that there is no connection between those requirements and protection of human health (i.e. reducing smoking rates). In addition, Malawi claimed that the packaging requirements also breach Art. 2.8, which requires Members to “specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.”

(5) Disclosure requirements: Nicaragua criticized disclosure requirements that form part of the reporting system. In particular, it contested the rationale of different reporting obligations, such as those relating to ingredients, toxicological data, marketing studies and sales data. Nicaragua was also concerned with the scientific basis for a distinction made in this context by the TPD between cigarettes/roll-your-own tobacco and other tobacco products.

(6) Traceability requirements: Malawi questioned the new mandatory traceability system, arguing that it is more trade restrictive than necessary. In this context, it added that 95% of EU cigarette sales were already covered by a voluntary scheme (established through agreements concluded between the EU and tobacco companies) and that there was no scientific evidence that supports a mandatory system would be more effective.

Meeting of 19-20 June 2013, European Union – Tobacco Products, Nicotine Containing Products and Herbal Products for Smoking, Packaging for Retail Sale of any of the Aforementioned Products, ¶ 6(b), G/TBT/W/369 (July 2, 2013).

34 Minutes, supra note 12, ¶ 2.61.

35 TBT Committee, Statement by Malawi to the Committee on Technical Barriers to Trade at its Meeting of 30-31 October 2013, European Union – Tobacco Products, Nicotine Containing Products and Herbal Products for Smoking, Packaging for Retail Sale of any of the Aforementioned Products [hereinafter Statement by Malawi in Oct. 2013], at 2, G/TBT/W/376 (Nov. 6, 2013).

36 Statement by Malawi in Mar. 2013, supra note 28, ¶ 1.12. See also Minutes, supra note 12, ¶ 2.61.


38 Minutes, supra note 28, ¶ 2.59.

39 Id. ¶ 2.61.

40 Statement by Malawi in Oct. 2013, supra note 35.
WTO Members also criticized other aspects of the TPD, such as the ban on the sale of slim cigarettes, but since those requirements were not included in the final version of the directive they are not discussed here. What is also striking is that only one country (Zimbabwe) claimed that the TPD creates unjustifiable discrimination between like products from different WTO Members and therefore violates Article 2.1 of the TBT Agreement. At the same time, it neither specified any particular provisions of the TPD that would lead to discrimination nor any products that should have been regarded as like.

Outside the TBT Committee, the TPD proposal was discussed in the TRIPS Council. Some WTO Members argued that the new directive imposes a number of requirements that collectively or individually violate the TRIPS Agreement. In particular, Nicaragua claimed that the TPD unjustifiably prevents the use of trademarks (and therefore violates Art. 20 of the TRIPS Agreement) by requiring enhanced health warnings on individual packets, imposing restrictions on the use of information relating to the product (including trademarks) and introducing packet standardization (i.e. shape and size of packets). A similar opinion was expressed by the Dominican Republic, which argued that:

[union the proposed Directive, the “use” of a trademark relating to tobacco products would be encumbered by “special requirements”. The packaging restrictions require the use of trademarks “in a special form” and in a manner “that is detrimental to the trademark’s capability to distinguish the goods of one undertaking from those of other undertakings”. Furthermore, these encumbrances on the use of trademarks are unjustified. The European Union has been incapable of providing credible and solid evidence that these packaging requirements would truly contribute to the public health objective that it pursues. Nor has it been able to consider whether it might adopt less restrictive measures as regards the use of trademarks.

In this context, the Dominican Republic was particularly concerned

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41 See, e.g., Minutes, supra note 12, ¶ 2.61.
42 TBT Committee, Statement by Zimbabwe to the Committee on Technical Barriers to Trade at its meeting of 19-20 June 2013, European Union – Tobacco Products, Nicotine Containing Products and Herbal Products for Smoking, Packaging for Retail Sale of any of the Aforementioned Products, ¶ 4, G/TBT/W/370 (July 2, 2013).
44 Id. ¶¶ 466-67.
with the ban on descriptive elements on unit packets that suggest a particular type of product is less harmful than others, describe the product as natural or organic, or convey information on the flavour or taste of a product. According to the Dominican Republic, since the ban applies even if such statements are true, it cannot be regarded as beneficial to public health (since consumers would not be misled if the statements remained). Moreover, it also added that the prohibited elements frequently form part of a trademark\(^{45}\) (e.g. Marlboro Lights).

It is also worth adding that similar arguments about the incompatibility of the TPD with WTO law were advanced in the context of various submissions by the industry at both the European and domestic levels. For example, British American Tobacco (hereinafter “BAT”) claimed in its submission to the UK Department of Health that the TPD labelling and packaging requirements violate Art. 2.2 of the TBT Agreement as they are more trade restrictive than necessary to achieve the health objective (based on a lack of relevant scientific evidence and because other less restrictive alternatives are available). BAT also argued that the labelling requirements violate the TRIPS Agreement.\(^{46}\)

**IV. THE TPD AND WTO LAW: LEGAL ANALYSIS**

This section is divided into three parts. The first discusses a preliminary issue of the relevance of the FCTC and its guidelines under the TBT Agreement. The second analyses the compatibility of the TPD with this agreement, while the third part undertakes the same task with respect to the TRIPS Agreement. Due to space limitations, the article examines only those concerns raised by WTO Members which attracted the most attention. This particular group includes: (i) the prohibition on marketing of tobacco products with characteristic flavours and other additives; (ii) labelling requirements (i.e. enhanced health warnings); and (iii) packaging requirements (i.e. shape and size). While a potential complaint may relate to other aspects of the TPD (or use arguments different from those which were advanced by the Members during the committee meetings), the approach taken here seems to be justified. In practice, claims that are raised in the course of a formal dispute settlement process closely correspond with the specific trade concerns discussed previously at the meetings of various WTO committees. It is therefore rational to assume that any potential formal dispute will most likely concern the issues addressed here.

\(^{45}\) Id. ¶ 468.

A. The FCTC and its Guidelines under the TBT Agreement

Before analysing the substance of the concerns raised by WTO Members, it is worthwhile to look at the relevance of the FCTC and its guidelines under the TBT Agreement, in particular with respect to Art. 2.2 obligations. As I argued elsewhere, most of the FCTC provisions and guidelines can be regarded, for the purpose of the TBT Agreement, as international standards. This also means that if a particular measure is in accordance with such standards, a rebuttable presumption of conformity with Art. 2.2 arises, and there is no need to examine such a measure with respect to its trade restrictiveness.

Although, the TBT Agreement does not explicitly state what should be considered as an international standard, the Appellate Body in *US–Tuna II (Mexico)* shed some light on that issue by identifying various criteria that are relevant in this context. Below I briefly examine how the FCTC and its guidelines fit these conditions.

First, both the FCTC and the guidelines were adopted by bodies with recognised activities in standardization (respectively by the WHO and the Conference of the Parties to the Convention (hereinafter “COP”). In this context, it is important to stress that the non-binding character of guidelines is irrelevant under the TBT Agreement. In fact, standards are specifically defined as non-binding documents, and it is only the agreement which confers on them a quasi-normative authority by recognising them as a reference point for national regulatory measures. Second, many FCTC provisions and guidelines relate to characteristics for products (e.g. provisions that require the State Parties to prohibit or restrict certain

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48 TBT Agreement, *supra* note 1, art. 2.5. Note also that in order to benefit from the presumption, such a measure also needs to be prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in art. 2.2 (e.g., protection of human health).


50 The Appellate Body did not require a body to be an international organisation. It could be any “legal or administrative entity that has specific tasks and composition”; *US – Tuna II (Mexico)* Appellate Body Report, *supra* note 49, ¶¶ 355-56.

51 “Standardization activity” was understood by the Appellate Body as the establishment of provisions for common and repeated use. According to the Appellate Body such provisions can take the form of rules, guidelines or characteristics for products or related process and production methods. *US – Tuna II (Mexico)* Appellate Body Report, *supra* note 49, ¶ 360. Arguably, the activities of the COP consist of establishment of provisions (in the form of guidelines) for common (i.e. by all State Parties) and repeated use. The same conclusion can be reached with respect to activities of the WHO.
ingredients in tobacco products). Third, the standardization activities of the WHO and the COP are recognized by the WTO Members. As explained by the Appellate Body, a high level of participation may be a useful indicator here. The WHO has 194 members and includes almost all WTO Members, while 180 states are parties to the FCTC (again a great majority of them being WTO Members). Fourth, both bodies are open to WTO Members – in principle there are no pre-conditions for accession to the WHO or becoming a party to the FCTC. Although neither of them accepts non-state territorial entities (e.g. Taiwan), which can be (and actually are) WTO Members, this is not necessarily fatal to qualifying the FCTC and its guidelines as international standards. For pragmatic reasons, the requirement of “openness” should be interpreted liberally, as a narrow reading would remove the majority (if not all) international standardising bodies from the scope of the TBT Agreement. Fifth, the standard setting process, both within the WHO and the COP, is transparent, impartial and based on consensus (in the sense that the views of all parties are taken into account and conflicting arguments are reconciled). Sixth, the Convention and guidelines respond to the regulatory and market needs of WTO Members (which is evidenced by, for example, the high level of participation of countries in the activities of various working groups established by the COP). They are based on solid scientific evidence (for further discussion see below) and can be reviewed in response to scientific or factual developments. Seventh, the standardising process run by the WHO and the COP does not appear to be incompatible with the work of other standardising bodies. Last but not least, both the WHO and the COP undertake various actions to ensure the effective participation of

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52 Note, however, that some provisions of the FCTC and some guidelines will not meet this criterion. For example, art. 5.3 and the corresponding guidelines concern protection of public health policies from commercial and other vested interests of the tobacco industry and do not relate to characteristics for products.
55 Cf. Constitution of the WHO, art. 4, July 22, 1946, 14 U.N.T.S. 185; FCTC, supra note 4, art. 35.
56 Note also that in practice World Trade Organization [hereinafter WTO] Members recognize ISO/Codex standards as relevant international standards, yet Taiwan is not a member of either of them.
57 In fact, both the Convention and all its guidelines were adopted unanimously. Cf. FCTC, RULES OF PROCEDURE OF THE CONFERENCE OF THE PARTIES, 14 (rules 50.2, 50.3) (2014).
58 The WHO FCTC provides that it has to be reviewed if the parties consider it to be obsolete, inappropriate or ineffective, FCTC, supra note 4, art. 28.1. The guidelines also stress “[its] provisional nature . . . and the need for periodic reassessment in light of the scientific evidence and country experience”. Partial guidelines for implementation of Arts. 9 and 10, supra note 22, Preamble.
59 Cf. FCTC, supra note 4, art. 24.3(e); which requires the Convention Secretariat to ensure necessary coordination with other international and regional organizations.
developing countries in the development of standards and maintenance of the communication channels with the WTO.

In order to take advantage of the presumption envisaged by Art. 2.5, a national measure needs to be “in accordance with” a relevant standard. Although on the textual level this requires a stronger relationship than the obligation to merely base a measure on international standards (cf. Art. 2.4 of the TBT Agreement), the rather general formulation of the FCTC provisions and the flexibilities inherent in the language used by the guidelines make the establishment of such a relationship relatively easy. For example, Partial guidelines for the implementation of arts. 9 and 10 recommend the prohibition or restriction of various ingredients in tobacco products. As discussed above (see Section II), since those recommendations are fully reflected in the TPD, the relevant provisions of the directive can be easily qualified as being in accordance with the applicable standard (they are actually exactly the same). The same is true for other measures provided by the TPD, such as labelling and packaging requirements.

Although there are strong reasons to consider certain provisions of the FCTC and some of the guidelines as international standards, the WTO dispute settlement bodies have not yet endorsed such a conceptualization, and it remains unclear whether this will actually be done in the future. However, even if the FCTC and its guidelines will not receive such a recognition, they are still relevant for making factual determinations relating to health risks connected with tobacco use and the efficiency of various tobacco control policies. As correctly noted in a recent WHO study, the FCTC and the guidelines may be used as a “fact” that will help to confirm the “existence of certain risks to health (or of a consensus that such risks exist); regulatory goal underlying a measure; contribution a measure makes to achievement of a State’s regulatory goal, [and] importance of the regulatory goal pursued.” Such an approach would be fully compatible

60 For example, participation of the delegates from developing countries in the COP meeting is financed from the FCTC budget.
61 For example, the WHO enjoys observer status in various WTO committees, while a representative of the WTO is always present at the meetings of the COP.
62 See Partial guidelines for implementation of Arts. 9 and 10, supra note 22. The TPD, again in accordance with the guidelines, excludes from the prohibition those ingredients which are indispensable for the manufacturing of tobacco products and not linked to attractiveness.
63 For a more detailed description of the specific recommendations included in the relevant guidelines, see infra Section IV.B.
64 WHO, CONFRONTING THE TOBACCO EPIDEMIC IN A NEW ERA OF TRADE AND INVESTMENT LIBERALIZATION 73 (2012). See also JANE KELSEY, INTERNATIONAL TRADE AND TOBACCO CONTROL-TRADE AND INVESTMENT LAW ISSUES RELATING TO PROPOSED TOBACCO CONTROL POLICIES TO ACHIEVE AN EFFECTIVELY SMOKE-FREE NEW ZEALAND BY 2025 18 (2012); claiming that the FCTC could be cited as factual evidence of the legitimate objectives of tobacco control policies and the validity of certain policies in pursuing those health objectives; Tania Voon & Andrew D. Mitchell, IMPLICATIONS OF WTO LAW FOR PLAIN PACKING OF TOBACCO PRODUCTS, in PUBLIC
with the established practice of WTO dispute settlement bodies, which frequently relies on various international instruments (of varying legal status\textsuperscript{65}) either as a factual reference or as an aid in determining the ordinary meaning of terms in WTO provisions.\textsuperscript{66}

In this context, it is worth recalling that that both the WHO’s FCTC and its guidelines are based on reliable and up-to-date scientific evidence, reflecting the best available research (and certain factual states). The foreword of the Convention clearly states that “the FCTC is an evidence-based treaty that reaffirms the right of all people to the highest standard of health”,\textsuperscript{67} while the preamble stresses that the parties to it are “[d]etermined to promote measures of tobacco control based on current and relevant scientific, technical and economic considerations.”\textsuperscript{68} The guidelines contain similar language. For example, the WHO Partial guidelines for implementation of arts. 9 and 10 of FCTC state that they draw on the best available scientific evidence and the experience of the Parties.\textsuperscript{69} This science-based character of FCTC and its guidelines was actually recognized by the Panel in \textit{US – Clove Cigarettes}, which regarded them as evidence of growing scientific consensus within the international community as to the existence of certain risks and the desirability of specific regulatory actions.\textsuperscript{70} This helps a panel to assess the probative value of various claims made by the parties to the dispute. This last aspect will be addressed in more detail when analysing specific regulatory solutions proposed by the TPD.


\textsuperscript{67} FCTC, \textit{supra} note 4, Foreword.

\textsuperscript{68} \textit{Id.}, Preamble, ¶ 22

\textsuperscript{69} \textit{Partial guidelines for implementation of Arts. 9 and 10, supra note 22, ¶ 1.1.}

\textsuperscript{70} \textit{See, e.g.}, \textit{US – Clove Cigarettes Panel Report, supra note 66, ¶ 7.414.}
B. The TBT Agreement

Art. 2.2 remains a central point of reference for most of the WTO Members raising concerns about the TPD at the TBT Committee meetings. The article provides, in the relevant part, that:

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

The Appellate Body in its TBT case law identified various elements that need to be assessed when analysing a claim under Art. 2.2. First, a panel needs to determine whether a measure constitutes an obstacle to international trade (i.e. it restricts trade). 71 Second, it has to identify the objective pursued by a WTO Member and ascertain whether such an objective is legitimate (i.e. justifiable or proper). Third, the panel is expected to decide whether (and to what extent) a measure is actually able to fulfil that objective. In this context, the Appellate Body observed that “the degree of achievement of a particular objective may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure.” 72 In *Brazil – Retreaded Tyres*, it also explained that a “contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue.” 73 In this context, one has to stress that the required level of contribution between a measure and an objective is not absolute and depends on two other variables, namely trade-restrictiveness of a technical regulation under examination and the risk non-fulfilment would create 74 (i.e. “the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure”). 75 In the same vein, the

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75 Id., ¶ 322.
Panel in US – Clove Cigarettes stated that only when a measure is a complete ban (thus exhibiting high trade-restrictiveness), should the required contribution be material.\textsuperscript{76} Scientific evidence is relevant for two parts of the above analysis. It not only helps to determine whether a measure is able to make a contribution to the stated objective\textsuperscript{77} but it also should be taken into account when examining the risk(s) that non-fulfilment would create (cf. Art. 2.2, second sentence).

In most cases, a panel will also compare a challenged measure with possible alternatives to determine whether a WTO Member chose the least-trade restrictive one. As observed by the Appellate Body in US – Tuna II (Mexico), this step is not necessary in at least two instances: when a measure does not have any trade-restrictive effect and if a measure does not make any contribution to the achievement of the legitimate objective.\textsuperscript{78}

Last but not least, the burden of making a prima facie case of inconsistency with Art. 2.2 traditionally rests with a complainant.

If one looks at the minutes of the TBT Committee meetings, it is not entirely clear whether WTO Members are only concerned with the internal legitimacy of the EU measures (i.e. whether and to what extent measure fulfil the legitimate objective) or whether they also argue that that there are other less trade-restrictive alternatives. Sometimes, as described in Section II above, the WTO Members indicated that their main concern related to a lack of scientific basis that would demonstrate the effectiveness of the specific regulatory solution provided in the TPD, though in other cases they only limited their observation to a statement that the measure is more trade-restrictive than necessary.

As far as trade restrictiveness of a measure is concerned, the panel in US – COOL, following the traditional approach of the General Agreement on Tariffs and Trade 1994 (hereinafter “GATT 1994”) case law,\textsuperscript{79} stated that the concept should be understood broadly and that there is no need to assess the actual impact on imports (e.g., by showing a decrease). Consequently, the mere existence of a potential or hypothetical impact (e.g. prohibiting the import of flavoured cigarettes from another WTO Member) is sufficient to establish restrictiveness. This is not a demanding task and it

\textsuperscript{76} US – Clove Cigarettes Panel Report, supra note 66, ¶ 7.380, quoting Brazil – Retreaded Tyres Appellate Body Report, supra note 65, ¶ 150. Note that the Panel did not address the third element of the test and it is not clear to what extent it can mitigate the required threshold for contribution.

\textsuperscript{77} US – Clove Cigarettes Panel Report, supra note 66, ¶ 7.400 et seq. examining whether the available scientific evidence shows that banning clove cigarettes will do little to deter youth from smoking.

\textsuperscript{78} US – Tuna II (Mexico) Appellate Body Report, supra note 49, fn 647.

seems that the threshold will be met for most of the specific regulatory mechanisms envisaged by the TPD (if not all of them).  

As a second step, following the analytical model presented above, it is necessary to identify the objective pursued by the EU. A proper determination of the objective of the measure is important, as “the relevant objective is the benchmark against which a panel must assess the degree of contribution made by a challenged technical regulation, as well as by proposed alternative measures.” What superficially appears to be an easy task becomes more complicated when one looks at the preamble statements of the TPD and the Explanatory Memorandum that accompanied its draft. The directive appears to pursue several different objectives, with health protection, at least formally, not being the major one. Accordingly, the directive states that certain “obstacles [to the smooth functioning of the internal market] should be eliminated and, to this end, the rules on the manufacture, presentation and sale of tobacco and related products should be further approximated,” while the Explanatory Memorandum explicitly provides that “the overall objective of the revision is to improve the functioning of the internal market.” On the other hand, recital no. 7 to the TPD confirms that adoption of the directive was required in order to implement various provisions of the FCTC (to which both the EU and all of its Members States are parties). Since the objective of the FCTC is protection of human health against risks arising from tobacco use (cf., the first preamble statement of the FCTC), this also implies that the same objective should be ascribed to the directive. This conclusion is reinforced by the subsequent recital, which stipulates that “tobacco products are not ordinary commodities and in view of the particularly harmful effects of tobacco on human health, health protection should be given high importance, in particular, to reduce smoking prevalence among young people” (emphasis added). Similar language is contained in the Explanatory Memorandum, which provides:

Tobacco is the most significant cause of premature death in the EU, responsible for almost 700,000 deaths every year. The proposal focuses on initiation of tobacco consumption, in particular by young people . . . This is also reflected in the selection and focus of the proposed policy areas and the products primarily targeted (cigarettes, roll-your-own and

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82 Tobacco Products Directive, supra note 3, Preamble ¶ 5.
83 Proposal for a Directive, supra note 8.
smokeless tobacco products) . . . Finally, all smokers should benefit from measures contained in the TPD (e.g. health warnings and ingredients regulation).

From a broader perspective, the revision will contribute to the overall aim of the EU to promote the well-being of its people (TEU Art. 3) and the Europe 2020 strategy, as keeping people healthy and active longer, and helping people to prevent avoidable diseases and premature death, will have a positive impact on productivity and competitiveness (Emphasis added).84

Such mixed formulation of TPD’s objectives is not accidental and results from EU internal institutional arrangements. The directive is based on Art. 114 of the Treaty on the Functioning of the European Union (hereinafter “TFEU”) which grants the Union the competence to approximate the rules of the Member States for the purpose of the establishment and functioning of the EU internal market. On the other hand, the EU competence in the area of health policy (including measures that have as their direct objective protection of public health regarding tobacco) is very limited and consists only of supporting, coordinating or supplementing the actions of the Member States. At the same time, one may observe a tendency in EU legal practice to “abuse” Art. 114 of TFEU and adopt measures that pursue other goals (such as health protection) and which are only loosely connected with the establishment and improvement of the functioning of the internal market.85 It is not clear whether WTO dispute settlement bodies will go into these nuances of EU law in order to determine the “real” objective of the TPD.

In any case, the TBT case law accepts that a measure may pursue different objectives, and in such a case a panel is obliged to perform its analysis under Art. 2.2 separately for each of them.86 Since it is easier to defend the TPD under the health protection label, one may expect that in case of a WTO dispute the EU will put the emphasis on this aspect. Even if some parts of the TPD could be found to be more trade restrictive than necessary to improve the functioning of the internal market, they will still need to be analysed under the health protection objective. This is also a

84 Id. at 3.
85 See, e.g., Case C-491/01, The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd. and Imperial Tobacco Ltd., 2002 E.C.R. I-11453. For the critique of this approach, see generally Han-Wei Liu, Harmonizing the Internal Market, or Public Health? — Revisiting Case C-491/01 (British American Tobacco) and Case C-380/03 (Tobacco Advertising II), 15 COLUM. J. EUR. L. 41 (2009).
reason why the subsequent analysis concentrates only on this dimension of the TPD.

Protection of human health is explicitly recognized by the preamble of the TBT Agreement and by Art. 2.2, as an example of a legitimate aim that may be served by technical regulations.

As far as the internal legitimacy of the TPD is concerned, each specific tobacco control measure needs to be analysed separately:

1. **Prohibition on marketing of tobacco products with characteristic flavours and certain other additives.** — there is a consistent and relatively extensive body of scientific research that provides support for such a ban. For example, a report prepared upon the request of the EU Commission by the Scientific Committee on Emerging and Newly Identified Health Risks concluded that while there are no studies that establish that some additives are addictive in and of themselves (so in this sense Nicaragua is correct), there is evidence that suggests specific additives can enhance the addictiveness of nicotine either directly (e.g. sugars and their derivatives) or indirectly (e.g. menthol, by facilitating deeper inhalation). In addition, some additives can also increase the attractiveness of tobacco products by “changing the appearance of the product and the smoke, decreasing the harshness of the smoke, and inducing a pleasant experience of smoking” (e.g. fruit and candy flavours) or increasing the smoothness of the smoke, thus making initiation easier. This also allows tobacco companies to target specific consumer groups (e.g. young people, women) with different types of products. These findings are also confirmed by more recent studies.  

Partial guidelines to Art. 9 of FCTC, which deals with additives in tobacco products, contain similar findings. In particular, they recognize that certain additives are used to make tobacco products more attractive, and as a consequence encourage use. The guidelines identify various ingredients that fall into this category, including: (i) flavouring ingredients used to increase the palatability of tobacco products by reducing the harshness and irritating character of tobacco smoke and therefore removing an important barrier to their initial use (e.g. benzoaldehyde, maltol, menthol and vanillin, spices and herbs); (ii) ingredients used to create the impression that products have health benefits or that they present reduced health hazards  

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(e.g. vitamins or essential fatty acids such as omega-3); and (iii) ingredients associated with energy and vitality (e.g., caffeine, guarana, taurine).[^89]

It is also worth adding that similar conclusions with respect to the risk posed by additives were reached by the WTO Panel in the *US – Clove Cigarettes* dispute. The Panel, after reviewing the submitted documents, came to the conclusion that “there is extensive scientific evidence supporting the conclusion that banning clove and other flavoured cigarettes could contribute to reducing youth smoking.”[^90]

2. **Labelling requirements.** — contrary to what Malawi and the other Members claim, there is a considerable amount of scientific evidence showing that enhanced health warnings (i.e. large warnings that combine text and pictures) on packages affect the behaviour of current and potential consumers.[^91] The studies confirm that pictorial warnings are generally easier to understand and remember than mere textual information and that they are particularly effective among youth.[^92] Building on that evidence, FCTC in its Art. 11 provides that health warnings on a unit packet and the package of a tobacco product should cover 50% or more of its surface, but not less than 30% of the principal display area. The FCTC also permits the use of health warnings in the form of pictures or pictograms. The guidelines elaborating on this provision state that the “evidence demonstrates that the effectiveness of health warnings and messages increases with their prominence” and enumerate some of the advantages of larger warnings with pictures compared to regular text-only messages (e.g. “more likely to be noticed, better communicate health risks, provoke a greater emotional response and increase the motivation of tobacco users to quit and to decrease their tobacco consumption”, “particularly effective in communicating health effects to low-literacy populations, children and young people”).[^93] The guidelines also suggest that “given the evidence that the effectiveness of health warnings and messages increases with their size, Parties should consider using health warnings and messages that cover

[^89]: Partial guidelines for implementation of Arts. 9 and 10, supra note 22, ¶ 3.1.2.2.

[^90]: *US – Clove Cigarettes* Panel Report, supra note 66, ¶ 7.415.

[^91]: See generally SAMBROOK RESEARCH INTERNATIONAL, A REVIEW OF THE SCIENCE BASE TO SUPPORT THE DEVELOPMENT OF HEALTH WARNINGS FOR TOBACCO PACKAGES (May 18, 2009) (and literature cited there).

[^92]: See generally Andrew A. Strasser et al., Graphic Warning Labels in Cigarette Advertisements: Recall and Viewing Patterns, 43 AM. J. PREVENTIVE MED. 41 (2012); KATRIN SCHALLER ET AL., IMPROVEMENT OF YOUTH AND CONSUMER PROTECTION BY REVISION OF THE EU TOBACCO PRODUCT DIRECTIVE 2001/37/EC 22 (2010) (and literature cited there); for newer studies, see generally Jennifer Cantrell et al., Impact of Tobacco – Related Health Warning Labels across Socioeconomic, Race and Ethnic Groups: Results from a Randomized Web-Based Experiment, 8 PLOS ONE 1 (2013) (and literature cited there).

[^93]: Guidelines for implementation of Art. 11, supra note 24, ¶¶ 7, 14-15.
more than 50% of the principal display areas and aim to cover as much of the principal display areas as possible.” (Emphasis added).\textsuperscript{94}

Another argument made by Nicaragua also appears to be misplaced. The country argued that in order to satisfy the requirement of Art 2.2 the EU would need to show a “material and quantifiable contribution of its new labelling requirement to the objective of protecting human health”.\textsuperscript{95} This seems to be an overly high threshold, as the Appellate Body has required only highly restrictive measures, such as bans, to show a material contribution. Labelling requirements, which only establish certain standards for labels that need to be included on the packaging of a product, being less restrictive measures, definitely calls for a less stringent test.

3. Packaging requirements. — independent empirical studies showing a connection between the size of a tobacco product package, its shape, as well as specific type of opening and the behaviour of consumers are more limited compared to labelling.\textsuperscript{96} Nevertheless, they demonstrate, among other things, that female and young consumers associate some types of packages with lower health risks, while specific shapes of a package and its opening may increase the attractiveness of the product (as the packaging may influence the perception of product quality).\textsuperscript{97} Other studies have shown that the shape of a package and opening can distract from health warnings\textsuperscript{98} and decrease the perception of harm (e.g. slim and perfume-type packages for younger and women consumers).\textsuperscript{99} At the same time, there are no studies that assess the impact of package design on the initiation of smoking.

An interesting insight is provided by industry internal documents. Kotnowski and Hammond, who reviewed documents available in the Legacy Tobacco Documents Library, showed that marketing studies commissioned by the industry indicated that packet shape (e.g. those with rounded corners) can influence health-related perceptions of a product. In particular slim, round edges, octagonal packages and slide openings, were shown to increase the perception of lightness.\textsuperscript{100} Packaging (in a broad sense, meaning also the shape and size of a package as well as its opening method), was recognized as a factor that created (or contributed to the creation of): (i) a positive impression of brand imagery and (ii) perception

\begin{thebibliography}{99}
\bibitem{94} Id. ¶ 12
\bibitem{95} Minutes, supra note 12, ¶ 2.61.
\bibitem{96} See generally Ron Borland et al., \textit{The Impact of Structural Packaging Design on Young Adult Perceptions of Tobacco Products}, 22 \textit{Tobacco Control} 97 (2013); \textit{The Centre for Tobacco Control Research, University of Stirling, The Packaging of Tobacco Products} (2012).
\bibitem{97} Schaller et al., supra note 92.
\bibitem{98} Borland et al., supra note 96.
\bibitem{100} Kathy Kotnowski & David Hammond, \textit{The Impact of Cigarette Pack Shape, Size and Opening: Evidence from Tobacco Company Documents}, 108 \textit{Addiction} 1658, 1663 (2013).
\end{thebibliography}
of added-value and the premium quality of a product, or affected the perception of (iii) product strength \(^{101}\) and (iv) product taste.\(^{102}\)

FCTC addresses the problem of packaging only generally. It requires the state parties to ensure that “tobacco product packaging and labelling 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.”\(^{103}\) These requirements correspond with the research results presented above.

Overall it seems that the EU has sufficient scientific arguments to demonstrate a connection between packaging requirements and protection of human health (e.g. reducing the attractiveness of tobacco products and ensuring that they do not mislead consumers).

As noted above, the necessity requirement of Art. 2.2. calls for the balancing and weighing of a series of factors, such as the level of contribution, trade restrictiveness of the measure and the gravity of the consequences that would arise from non-fulfilment of the objective(s) pursued by the member through the measure. As the previous discussion demonstrates, scientific evidence clearly shows a genuine relationship between specific requirements of the TPD and protection of human health. Although in same instances the TPD is highly trade restrictive (e.g. the marketing ban on cigarettes with specific flavours or other specified additives), the level of contribution seems to be sufficiently high while the risk arising from non-fulfilment so grave (i.e. death or serious illness of consumers) that the existing trade restrictiveness appears to be justified.\(^{104}\)

As far as possible alternative measures are concerned, the TBT case law makes it clear that an alternative, in order to be acceptable, not only needs to be less trade restrictive but also able to achieve the objective sought by a contested measure. In other words, it has to make an equivalent contribution (e.g. reaches the same level of health protection as the original measure). In addition, such an alternative needs to be reasonably available.\(^{105}\)

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101 Kotnowski and Hammond, for example, noted that “Salem brand introduction of an innovative slide opening was found to reduce strength perceptions compared to the flip-top version”. Id. at 1661; referring to STEVE PERRY & BETSY SUTHERLAND, SALEM A&A STUDY (Apr. 3, 2002), available at http://legacy.library.ucsf.edu/tid/ssd87h00.

102 Kotnowski and Hammond observed that “pre-market research from Philip Morris reported that ratings for smooth taste were increased when rounded corners were added to the Virginia Slims and Merit box, as well as when an octagonal packing was tested for Parliament” (footnotes omitted); id.

103 FCTC, supra note 4, art. 11.1(a).

104 For a similar conclusion with respect to the ban on flavoured cigarettes, see US – Clove Cigarettes Panel Report, supra note 66, ¶¶ 7.379-417.

105 US – COOL Appellate Body Report, supra note 81, ¶ 471; see also Brazil – Retreaded Tyres Appellate Body Report, supra note 65, ¶ 156. As noted by the Panel in US – COOL, the examination of least trade restrictive alternatives under art. 2.2 of the TBT Agreement is closer to the test developed under art. XX of the GATT 1994 rather than art. 5.6 of the Agreement on the
Although no alternative measures were identified by Members raising concerns during the meetings of the TBT Committee (which by itself can indicate that such identification will not be easy), one may rationally expect that they will correspond to those which were put forward by the tobacco companies in the course of the public consultations preceding the adoption of the directive. For example, Japan Tobacco International (hereinafter “JTI”) listed a number of alternatives with respect to the commencement of smoking by minors that are, according to the company, less restrictive than various measures provided by the TPD. These included: (i) criminalising or imposing administrative sanctions for the proxy purchase of tobacco; (ii) criminalising or imposing administrative sanctions for the under-age purchase of tobacco; (iii) criminalising or imposing administrative sanctions for the consumption of tobacco products by minors; (iv) negative licensing (sanctioning retailers that sell tobacco products to minors); (v) reinforcing retail access prevention measures; (vi) dedicating greater resources and manpower for effective, targeted enforcement strategies; and (vii) launching targeted public information campaigns.  

There are a number of standards elaborated by the WTO dispute settlement bodies, both in the GATT 1994 Art. XX and the TBT case law, which make the task of a potential complainant very difficult. First, alternative measures need to achieve the EU’s desired level of protection (which can be characterized as very high). Although, in order to determine this aspect one would need to run a separate and detailed analysis for each measure provided by the TPD and each alternative offered by a complainant, intuitively it seems that the regulatory solutions proposed by JTI fall short of the level of protection sought by the European Union. They only relate to the problem of smoking initiation by minors while the TPD seeks to provide more general solutions that are relevant and applicable to all current and potential smokers. Although, the protection of minors is central to the directive (note however that the TPD refers to young people which is a broader category than minors), it also aims at discouraging adult non-smokers from taking up smoking and encouraging current smokers to shed their addiction. None of the alternatives proposed by JTI is able to ensure the required level of protection for these groups. In addition, some of the measures indicated by the company are already required in the EU (by specific Member States). Hence the TPD can be seen as aiming at an even higher level of protection.

Application of Sanitary and Phytosanitary Measures, as it is not necessary for a complainant to provide a less trade-restrictive alternative measure which is significantly less trade-restrictive. US– COOL Panel Report, supra note 71, fn. 882.

Second, the WTO dispute settlement bodies accept that complementary measures cannot be considered as alternatives and recognize that “certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures.”\(^{107}\) In this context, the Appellate Body also explained that in some cases “substituting one element of this comprehensive policy for another [can] weaken the policy by reducing the synergies between its components, as well as its total effect.”\(^{108}\) The measures introduced by the TPD (in combination with other relevant EU laws) arguably constitute one comprehensive regulatory response of the Union to the problems posed by tobacco consumption. They intend to influence the behaviour of current and potential consumers through different but interacting measures.\(^{109}\) This conclusion on the complementary, rather than alternative, nature of various tobacco control measures is also reinforced by the FCTC itself. The Convention, for example, requires States to implement “comprehensive multisectoral national tobacco control strategies” (Art. 5.1 entitled “General Obligations”), and recognizes that “comprehensive non-price measures are an effective and important means of reducing tobacco consumption” (Art. 7, emphasis added). States are obliged to comply with all its obligations (covering different measures) and in principle cannot simply pick and chose from the catalogue provided by the FCTC. Consequently, as correctly noted by McGrady, “in a regulatory sense, the measures [provided by the Convention] are complementary and are intended to be used in a mutually supportive manner.”\(^{110}\) The WTO case law implicitly also recognizes that various measures indicated by the FCTC (as developed further in its guidelines) are complementary to each other. In particular, the Panel in US – Clove Cigarettes noted that since the ban on flavoured cigarettes was recommended by the guidelines, the measures that were identified by Indonesia could not be regarded as possible alternatives.\(^{111}\) As discussed above, most (if not all) of the tobacco control


\(^{108}\) Brazil – Retreaded Tyres Appellate Body Report, supra note 65, ¶ 172.


\(^{111}\) US – Clove Cigarettes Panel Report, supra note 66, ¶ 7.427.
measures introduced by the TPD are required by the Convention or recommended by its guidelines. In this context, it is also worth adding that measures which are already in place cannot be regarded as alternatives.\textsuperscript{112} Since the currently existing EU regulatory framework is already quite comprehensive, it might be difficult to identify reasonably available alternatives that would ensure the level of protection sought by the TPD.

Third, the panels and Appellate Body require from a complainant a relatively high level of specificity when identifying alternative measures under Art. 2.2 of the TBT Agreement. A mere indication or listing of a hypothetical measure that could serve as an alternative is not sufficient and a complaint needs to show how such measures would make an equivalent contribution to the achievement of the objective at the level of protection sought by a defendant as well as their reasonable availability. This task has proved to be very difficult in all the recently decided TBT cases.\textsuperscript{113}

Due to the enigmatic character of Zimbabwe’s statement, it is difficult to assess the merits of any discrimination claim under Art. 2.1 of the TBT Agreement. The two most obvious cases would include potential de facto discrimination between menthol cigarettes and all other flavoured cigarettes and discrimination between cigarettes/roll-your-own tobacco on the one hand and other tobacco products (e.g. cigars, pipe tobacco) on the other. Both situations are discussed briefly below.

The analysis under Art. 2.1 consists of two steps. First, a panel should investigate whether two products identified by a complainant (e.g. cigarettes v. cigars) are alike. In assessing the likeness of the products, the panel relies on traditional GATT 1994 factors such as: (i) the properties, nature and quality of the products (physical characteristics), which also include the existence of health risks; (ii) the end-uses of the product(s); (iii) consumer tastes and habits; and (iv) the tariff classification of the product(s) under examination.\textsuperscript{114} While it might not be easy to establish that cigars or pipe tobacco are like cigarettes (e.g. there is a considerable difference in terms of consumer tastes and habits), this will not be difficult, as both reports in the \textit{US – Clove Cigarettes} case show, for menthol and other flavoured cigarettes.

\textsuperscript{112} See, e.g., id. ¶ 7.425. A similarly strict approach was taken by the \textit{US – Tuna II (Mexico)} Appellate Body Report, supra note 49, ¶ 330. See also Tania Voon et al., \textit{Consumer Information, Consumer Preferences and Product Labels under the TBT Agreement}, in \textsc{Research Handbook on the WTO and Technical Barriers to Trade}, 454, 483 (Tracey Epps & Michael J. Trebilcock eds., 2013).


\textsuperscript{114} \textit{US – Clove Cigarettes} Panel Report, supra note 66, ¶ 7.148 et seq.
Assuming, for the purpose of the subsequent discussion, that all of these products (menthol v. flavoured cigarettes, and/or cigarettes/loose tobacco v. other tobacco products) are indeed alike, a panel needs to enquire, as a second step of its analysis, whether imported tobacco products are accorded less favourable treatment than similar domestic products. In this context, a panel will ask whether a measure modifies the conditions of competition in the relevant market to the detriment of imported, like products. As explained above, this requirement is interpreted broadly, and arguably all contested provisions of the TPD will pass it quite easily (e.g. the ban on marketing of flavoured cigarettes v. no restriction for other tobacco products and a time-limited exception for menthol cigarettes; strict labelling requirements for loose tobacco, and regular cigarettes v. more lenient obligations for other tobacco products). In addition, a panel also needs to determine (but only if a technical regulation does not discriminate de jure as in the case of the TPD) whether a detrimental impact on imported, like products stems exclusively from a legitimate regulatory distinction or rather reflects discrimination against the group of such products.115 This condition operates as a type of safe harbour for those measures that discriminate for some legitimate purposes and compensate for a lack of Art. XX GATT-type of exception under the TBT Agreement.

On the one hand, there seem to be relatively strong arguments for distinguishing between cigarettes/roll-your-own tobacco and other tobacco products. As has already been mentioned, the TPD aims to minimize the initiation of tobacco consumption and this objective is reflected in the selection of products primarily targeted by its provisions. Tobacco products, other than roll-your-own and regular cigarettes, are predominantly consumed by older consumers, and many of the restrictions introduced by the directive would be of little use.116 At the same time, the TPD provides that those exceptions are conditional and may be withdrawn if there is a substantial change of circumstances in terms of sales volumes or consumption patterns among young people.117 On the other hand, the position of the EU is much weaker when it comes to the distinction between menthol and other flavoured cigarettes. The initial draft did not contain any special provisions on menthol, and banned all flavouring products altogether. This only changed in the course of the regulatory process in response to opposition from a number of EU Member States. A longer implementation period for the ban was seen as a compromise to secure the necessary support for the directive. Obviously, it is not possible

116 Proposal for a Directive, supra note 8, at 2, 5. See also TPD, supra note 3, Preamble ¶¶ 19, 26.
117 See, e.g., TPD, supra note 3, art. 7.12.
for the EU, in a trade dispute, to put forward such an argument in support of its distinction. It is also doubtful that the EU will be able to justify the distinction by invoking the needs of industry to have enough time to make necessary adjustments. First, the two-year period envisaged for the implementation of the directive seems to be sufficient. Second, the WTO generally does not accept this type of justification.\textsuperscript{118} It is also worth noting that the Appellate Body was not persuaded by the arguments put forward by the United States in the \textit{Clove Cigarettes} dispute that a similar menthol exemption in the US law was justified by potential risk to the American healthcare system and risk of the development of a black market.\textsuperscript{119} Although the EU exemption is time-limited (it applies until 2020), this arguably does not change the above conclusion.

\textbf{C. TRIPS Agreement}

Another important benchmark in the assessment of the TPD is Art. 20 of the TRIPS Agreement, which stipulates that:

\begin{quote}
[t]he use of a trademark in the course of trade shall not be unjustifyably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.
\end{quote}

This provision, unlike other articles in the TRIPS Agreement, explicitly concerns the use of trademark. While one cannot exclude that the labelling and packaging requirements of the TPD will be contested, similarly to Australia’s plain packaging law, under other provisions of the agreement (e.g. the directive prohibits any elements on a package that suggest certain properties of the product, such as organic or natural origin, and this prohibition also covers trademarks),\textsuperscript{120} the concerns raised by

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{118} See, e.g., \textit{US – Clove Cigarettes} Panel Report, supra note 66, ¶ 7.289.
\item\textsuperscript{119} \textit{US – Clove Cigarettes} Appellate Body Report, supra note 115, ¶ 225.
\item\textsuperscript{120} But only if one assumes that the various provisions of the TRIPS Agreement concerned with the registration implicitly provide for the right of the trademark owner to use it (as registration of a trademark is rendered nugatory if there is no right to use it). For this position, see generally DANIEL J. GERVIA\textsuperscript{S}, \textit{Analysis of the Compatibility of Certain Tobacco Product Packaging Rules with the TRIPS Agreement and the Paris Convention} (Nov. 30, 2010), http://www.smoke-free.ca/trade-and-tobacco/Resources/Gervais.pdf; Susy Frankel & Daniel J. Gervais, \textit{Plain Packaging and the Interpretation of the TRIPS Agreement}, 46 VAND. J. TRANSNAT’L L. 1149, 1184 et seq. (2013). For the opposite view, Voon & Mitchell, supra note 64, at 113–19; see generally Mark Davison, \textit{Plain Packaging and the TRIPS Agreement: A Response to Professor Gervais}, 23 AUSTL. INTELL. PROP. J. 160 (2013); Mark Davison & Patrick Emerton, \textit{Rights, Privileges, Legitimate Interests, and Justifiability: Article 20 of TRIPS and Plain Packaging of Tobacco}, 29(3) AM. U. INT’L L. REV. 505 (2014).
\end{itemize}
\end{footnotesize}
WTO Members until now have been limited to Art. 20. Consequently, the part that follows only addresses this aspect of the TPD.

Since Art. 20 of the TRIPS Agreement has not yet been tested by WTO dispute settlement bodies, the nature and scope of its obligations remain ambiguous. What remains clear is that it provides an open-ended enumeration of possible encumbrances on the use of trademark. The WTO Members argued that strict labelling obligations that require large combined (textual and pictorial) health warnings and which prohibit the use of certain elements on a package (individually or in combination) constitute an encumbrance that falls within the scope of either the second example enumerated by the article (“use in a special form”) or the third (“use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings”).

Labelling requirements arguably constitute a form of encumbrance on the use of the trademark. At the same time, while it seems to be relatively easy for a complainant to establish that those obligations should be regarded as falling within the scope of the second example, i.e. standardization of package shape and appearance (including combined health warnings), location of a trademark on a package (bottom of the package) and a size of a packets, it may be argued that the standardization has not reached a level that affects the capability of a trademark to distinguish between the goods of one producer and another (at the end of the day, all packages will still have word and non-word trademarks).

Assuming for the purpose of subsequent analysis that the various labelling and packaging requirements of the TPD indeed constitute an encumbrance on the use of trademark, the next question that needs to be answered is whether such an encumbrance can be justified. The prohibition provided by Art. 20 is not absolute as it only intends to eliminate those

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121 Most of the issues discussed in this section will probably be decided in the currently pending dispute over the Australian plain packaging law; see Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, Request for Consultations by Ukraine (WT/DS434), Honduras (WT/DS435), the Dominican Republic (WT/DS441), Cuba (WT/DS458) and Indonesia (WT/DS467). The Panel’s report is expected in 2016.

122 For a discussion on the meaning of “an encumbrance” and “in the course of trade”, see, e.g., Mark Davison, The Legitimacy of Plain Packaging under International Intellectual Property Law: Why There is no Right to Use a Trademark under either the Paris Convention or the TRIPS Agreement, in PUBLIC HEALTH AND PLAIN PACKAGING OF CIGARETTES: LEGAL ISSUES 81, 106-11 (Tania Voon et al. eds., 2012); claiming that a plain packaging law cannot be regarded as a relevant “encumbrance” because: (i) prohibition on the use of trademark goes beyond a mere encumbrance and (ii) it is primarily aimed at preventing the use of packaging in social settings, outside the course of trade; for a contrary, and probably more persuasive, opinion, see Frankel & Gervais, supra note 120, at 1171-77. Whatever the merits of this argument are, this issue seems to be less important in the case of the TPD compared to the Australian plain packaging law. The directive does not prohibit the use of a trademark. It neither provides for a display ban at points of sale nor on packages normally visible to consumers. As a consequence, it is more difficult to argue that there is no encumbrance on the use of trademark in the course of trade.
restrictions on the use of trademark that are unjustifiable. Although the provision does not explain what reasons may serve as a possible justification, it will be difficult to argue that protection of public health cannot perform such a function. The Appellate Body and panels have consistently acknowledged that under various WTO agreements protection of public health is a legitimate goal which can be pursued by Members. In a recent report, the Appellate Body explicitly stated that “we do not consider that the TBT Agreement or any of the covered agreements [which also includes the TRIPS Agreement – LG] is to be interpreted as preventing Members from devising and implementing public health policies generally, and tobacco-control policies in particular.” Additional support for this conclusion can be also found in the TRIPS Agreement itself. For example, Art. 8 recognizes the right of Members to adopt measures necessary to protect public health (albeit in a manner that is not inconsistent with the obligations of the agreement). In addition, one may also refer to the Doha Declaration on TRIPS and Public Health (hereinafter “Doha Declaration”), which provides that “the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health.”

Both elements (i.e. Art. 8 and the Doha Declaration) are also relevant to the interpretation of Art. 20 more generally (e.g. in deciding on the threshold required for justifiability). Panels and Appellate Body are obliged, on the basis of Art. 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, to read the WTO provisions in accordance with customary rules of interpretation of public international law. This means that they need to take into account the context of the provision as well as any agreement relating to the treaty (as provided by Art. 31 of the Vienna Convention on the Law of Treaties, a provision conventionally regarded as codifying rules of international customary law), which was made between all the parties in connection with the conclusion of the treaty. Art. 8 as well as the Doha Declaration should be regarded as elements of this type when it comes to interpretation of Art.

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123 US – Clove Cigarettes Appellate Body Report, supra note 115, ¶ 235.
125 Id. at 4.
20 of the TRIPS Agreement (i.e. respectively as context and an agreement relating to the treaty). Those elements will obviously weigh in the direction of a health-friendly reading of the provision.

This means that a panel’s task under Art. 20 of the TRIPS Agreement will primarily consist of examining whether the EU labelling and packaging requirements are sufficiently substantiated by scientific evidence that show specific health risks and the effectiveness of the measure in addressing those risks. What remains unclear is what precise analytical framework will be adopted by WTO dispute settlement bodies with respect to justification. Will they opt for a type of analysis similar to Art. XX(b) of the GATT 1994 (e.g. a weighting and balancing process or less trade-restrictive alternative requirement) or rather apply some sui generis test limited to the internal (scientific) legitimacy of a measure? Some authors indeed argue that Art. 20 of the TRIPS Agreement provides for a more flexible standard, which calls for an additional degree of discretion to WTO Members and does not require identification of other less trade-restrictive alternative measures. Others accept, either explicitly or implicitly, that WTO dispute settlement bodies may eventually apply an XX(b)-type of analysis. However, whatever approach is taken it seems that the position of the EU is equally strong. As discussed in Section IV.B of this article, and contrary to the statements made by WTO Members at the meetings of the TRIPS Council, the results of scientific research actually back the TPD labelling requirements (both with respect to the existence of risk and effectiveness of the specific measures). Additional support is also provided by the guidelines to Art. 11 of FCTC, which, as indicated above, may be regarded as an important source of information for making factual findings. As far as the availability of other less trade-restrictive

129 See generally Tania Voon & Andrew D. Mitchell, Face Off: Assessing WTO Challenges to Australia’s Scheme for Plain Tobacco Packaging, 22 PUB. L. REV. 218 (2011); Davison & Emerton, supra note 120, 542-49. Most of the arguments discussed in this literature is also relevant to the strict labelling requirements such as those provided by the TPD.
131 See, e.g., Voon, supra note 129; Kelsey, supra note 64, at 30; Philip Morris (New Zealand) Limited, Plain Packaging of Tobacco Products will not Reduce Smoking Rates, and will Violate New Zealand’s International Trade Obligations A Response to the Ministry of Health Consultation on Plain Packaging of Tobacco Products 110-11 (Aug. 31, 2012), available at http://www.pmi.com/eng/tobacco_regulation/submissions/documents/philip_morris_new_zealand_limited_submission_on_plain_packaging_final.pdf. A similar opinion was expressed by the Dominican Republic during a meeting of the TRIPS Council. See Section III.
132 A similar argument is made in the context of the Australian plain packaging law (see McGrady, supra note 126, at 6; Voon, supra note 129, at 400-01; for a more critical account, see Phillip
alternatives and the weighting and balancing process are concerned, the observation made supra Section IV.B also applies here. In particular, it should be stressed that effective tobacco control policy requires comprehensive measures, with many alternatives being simply supplementary rather than competitive regulatory solutions. Although the labelling and packaging requirement are trade-restrictive (albeit to a lesser extent than a trade ban or plain packaging) this is outweighed by the contribution of the measure to the health objective sought by the EU and the gravity of the consequences that would arise from non-fulfilment of the objective(s).

V. CONCLUSIONS

The analysis presented here clearly shows that the arguments in support of the TPD, contrary to the claims made by some Members during meetings of various WTO committees, are relatively strong, both under the TBT and TRIPS Agreements. The EU has adopted a genuine health-related measure(s), which is supported by extensive scientific evidence and which forms part of a comprehensive policy aimed at reducing health risks from tobacco use. Although some of its parts are highly trade-restrictive, this is outweighed by the genuine connection that exists between the means and ends as well as the gravity of the risks that would otherwise materialize. The high level of specificity required from a complainant under Art. 2.2, combined with the comprehensive nature of the EU tobacco control regime, makes identification of reasonably available alternatives very difficult. Similarly, while labelling requirements can be regarded as a form of encumbrance on the use of a trademark, they are sufficiently supported by scientific evidence and are therefore justified.

What remains problematic is the temporary exclusion of menthol cigarettes from the general ban on flavoured cigarettes. The exclusion was made for political reasons, as a concession to some EU Member States, rather than for some compelling health or other legitimate reasons. As the reports in *US – Clove Cigarettes* show, unless the EU is able to produce some persuasive evidence, the differentiation of those two groups of products will fail the scrutiny of the WTO dispute settlement bodies as not stemming exclusively from a legitimate regulatory distinction (and therefore violating Article 2.1). Although as I’ve argued elsewhere,133 this

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is not a perfect approach (a democratic regulatory process frequently requires governments to make certain concessions to different interest groups to ensure their support and the success of a controversial regulatory initiative such as the TPD), it nonetheless remains an applicable standard under Art. 2.1. In this context, it is worth noting that failing the Art. 2.1 test is not necessarily a negative outcome from the perspective of the EU Commission. As mentioned above, the proposal did not include any exemption for menthol cigarettes. At the same time, the Commission was too weak to ensure that the initial proposal survived intact the whole regulatory process. Having a WTO decision that condemns the menthol exception will provide the Commission with the external authority to introduce the necessary changes. In any case, the problem will disappear by its own in 2020 when the exception expires. Considering that WTO dispute settlement is a rather lengthy process with many possibilities to prolong it at different stages, other WTO Members may not have enough incentives to start costly and time-consuming proceedings as potential gains from access to the EU market will be limited.

Overall it seems that the concerns expressed by the WTO Members are overstated and almost all of the disputed TPD provisions are WTO-compatible. Although the above analysis was performed with respect to the specific measure, many observations made here may be generalized and extended to similar measures adopted by other WTO Members. This allows the conclusion that WTO law, while imposing certain standards, generally does not stand against genuine tobacco control polices that are adopted in a non-discriminatory manner.
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