The TBT Agreement and Tobacco Control Regulations

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ABSTRACT

The article analyses reports issued by the panel and the Appellate Body in the US – Measures Affecting the Productions and Sale of Clove Cigarettes dispute and attempts to assess their broader consequences for national tobacco control policies. Both reports are particularly important because they clarify the limits existing under WTO law, in particular the TBT Agreement, in this policy space. In this context, the article investigates whether the WTO dispute settlement bodies interpreted relevant rules of the TBT Agreement in a manner that provides countries with sufficient regulatory autonomy while ensuring at the same time that their technical measures do not create unnecessary obstacles to trade. It also examines the potential impact of standards established in these reports on other tobacco control measures that are either currently discussed in the TBT Committee (e.g., Canadian and Brazilian restrictions on the content of cigarettes) or already challenged in the formal WTO dispute settlement process (i.e. Australian plain packaging law).

KEYWORDS: WTO, clove cigarettes, tobacco control measure, tobacco and international trade, plain packaging

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I. INTRODUCTION

Tobacco consumption is one of the major sources of premature death in the contemporary world. At the same time, as with most life-style risks, the negative health consequences connected with smoking are to a large extent avoidable. Therefore, it is not surprising that a great number of new regulatory measures aimed at tobacco control have been put in place over last two decades. Although, in the majority of cases they serve legitimate objectives, there are also measures which are adopted to afford protection to local industry or which disproportionally affect imported products as compared to domestic counterparts. The system created by the World Trade Organization (“WTO”) aims to sort out such instances of de jure and de facto discrimination. Considering, however, the proliferation of tobacco control measures, one may be surprised by the very limited WTO jurisprudence in this area. Although there have been a number of international trade disputes relating to tobacco, they have concerned purely fiscal measures, without any apparent health protection aspect. Before 2012 – the year which saw the first WTO report on tobacco control regulation – the only real tobacco control dispute dated back to the 1980s and was resolved under the General Agreement on Tariffs and Trade (“GATT”) 1947. The WTO case was decided under the Agreement on Technical Barriers to Trade (“TBT Agreement”) and concerned the US ban on the use of certain flavouring additives in cigarettes.

The aim of this article is to analyse the reports of the panel and the Appellate Body, and to assess their broader consequences for national tobacco control policies. The article is, therefore, structured as follows: the first part very briefly summarizes the developments that have taken place over the last decades in the field of tobacco control. The second part turns to the US – Clove Cigarettes dispute and analyses the specific findings made by the panel and the Appellate Body. The last section builds upon the previous discussion and offers some observations on the general implications of these two reports. In this context, it examines their potential

impact on the tobacco control measures that are either currently discussed in the Committee on Technical Barriers to Trade (“TBT Committee”) or already under challenge in the formal WTO dispute settlement process (i.e., respectively, Canadian and Brazilian restrictions on the content of cigarettes, New Zealand plain packaging proposal and the Australian plain packaging law).

While this article is limited to analysis of the TBT Agreement, it should be stressed that other WTO agreements are also highly relevant when it comes to assessment of national tobacco control measures. This includes not only the GATT 1994 but also the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”) (e.g., plain packaging) or the General Agreement on Trade in Services (e.g., restrictions on cigarette advertising or regulation of tobacco branded services). These agreements, however, are left outside of the present analysis.

II. TOBACCO CONTROL REGULATIONS

Tobacco control regulations, as known today, are a relatively new phenomenon. Although anti-tobacco movement emerged as early as the late 19th century, the first tobacco control measures appeared only in 1960s and 1970s (e.g., the first ban on television advertisements in the US, which was introduced in 1964). This was preceded by unprecedented growth in the use of tobacco products in all developed countries (particularly cigarettes, following the introduction of the means of their mass production). During that time governments, rather than limiting consumption, supported local growers and producers of tobacco products. Both groups were seen as belonging to important sectors of the economy that provided a reliable source of income for a state. The real shift in tobacco policy, at least in developed countries, came about only in the 1980s and accelerated in the 90s. For example, in 1976 only about 30 countries had some form of

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5 For the purposes of this article, “tobacco control measures/regulations” encompass those regulatory instruments that aim at reducing tobacco use and exposure to tobacco smoke and thus contribute to higher level of public health, cf. PAUL CAIRNEY ET AL., GLOBAL TOBACCO CONTROL: POWER, POLICY, GOVERNANCE AND TRANSFER 14 (2012).

6 It might be noted that the first age limitation law for cigarette purchase was passed by the British Parliament as early as in 1908 but this should be seen as a rare exception. For good overview of historical developments, see generally Peter D. Jacobson et al., Historical Overview of Tobacco Legislation and Regulation, 53(1) J. SOC. ISSUES 75 (1997).

tobacco control legislation, while in 1995 this number had risen to 91\(^8\) (and this trend has continued in more recent years).

The change in the policy was primarily caused by the accumulation of scientific evidence showing the existence of serious risks connected with smoking and the increased awareness of the general public of this fact (e.g., due to activities of anti-tobacco movements), which were crystallized into concrete political demands. However, since tobacco use was so common (e.g., in the 1980s about half of the population in developed countries smoked cigarettes, either occasionally or regularly) and the economic interests at stake were so high (at least in the short-term perspective),\(^9\) the governments have tended to take a step-by-step approach, suppressing and constraining tobacco sale, marketing and use rather than instituting outright bans. The addictive character of nicotine has also supported such incremental type of policy. This remains true for the current state of affairs—to tobacco products are considered to be undesirable but legal goods. Although they are heavily regulated, total bans on marketing of tobacco products are extremely rare in the contemporary world (e.g., Bhutan\(^10\)). As a consequence of these developments, the level of consumption has significantly dropped in almost all developed countries. However, at the same time there has been an increase (both in absolute terms as well as per capita) in the use of tobacco products in developing parts of the world.\(^11\) Currently, countries such as China or India are the fastest growing markets for tobacco products.

Tobacco control measures can take various forms. They can be implemented as binding regulations (most frequently) or as voluntary undertakings of tobacco industry (e.g., different codes of conduct). In principle, they are divided into two broad categories: measures affecting the supply of tobacco products and measures influencing the demand for tobacco products. The first group includes measures designed to reduce the availability of tobacco products. This can be done by various means, such as eliminating illicit trade (e.g., requiring each pack of cigarettes to bear an official stamp confirming its legal origin), age restrictions on tobacco

\(^{8}\) CAIRNEY ET AL., supra note 5, at 54.

\(^{9}\) These include not only the interests of private operators (producers, growers, sellers), but also the interests of states. Tobacco taxes have always constituted an important revenue for governments, while the tobacco sector employed (either directly or indirectly) a significant part of the workforce. In long term, however, the benefits of strict regulation outweigh potential losses - e.g. reduced costs in national medical healthcare systems, lower mortality rates, etc. (cf. generally James Lightwood et al., Estimating the costs of tobacco use, in TOBACCO CONTROL IN DEVELOPING COUNTRIES 63 (Prabhat Jha & Frank J. Chaloupka eds., 2000).


purchase, reducing the number of points of sales (e.g., only in licensed premises), or limiting the varieties of available cigarettes (e.g., forbidding sales of specific types of cigarettes such as slims). Measures affecting the demand for tobacco products come in an even greater variety. The most common are those which increase the price of tobacco products (e.g., taxes). Other types of measures reducing demand include disclosure requirements relating to the specific characteristics of tobacco products (e.g., level of tar and nicotine in cigarettes emissions), packaging and labelling requirements (e.g., health warnings, plain packaging), and restrictions on advertising (including the general promotion of brands). The constraints on smoking in public places (e.g., schools, restaurants, airports, etc.) are also regarded as demand-type measures. These regulatory or voluntary instruments are supplemented with capacity building initiatives (e.g., funding research or supporting anti-tobacco pressure groups) and education activities (e.g., health campaigns).

Since the market for tobacco products was (and still is) highly globalized, it has become clear that purely national efforts can be only partially successful. The liberalization of international trade, the expansion of foreign direct investments in the tobacco sector, transnational tobacco advertising and sponsorship activities, as well as the illicit trade in tobacco products have all significantly compromised the capacity of individual countries to implement effective tobacco control measures. The initial international efforts in late 1970s proved unsuccessful and it was only the 2003 WHO Framework Convention on Tobacco Control (FCTC or the Convention) that took initiative in creating first international legal framework establishing certain standards for national tobacco control policies. The Convention regulates both demand and supply related measures (e.g., price measures, packaging and labelling, standards for content of tobacco products, as well as rules on tobacco advertising and sponsorship). Since the FCTC is a framework treaty, its provisions are rather general. They are made more specific though two mechanisms provided for in the Treaty: the adoption of additional protocols, and the development of guidelines for the implementation of its provisions. The

12 A number of studies show that this is actually one of the most effective ways to reduce tobacco use in a relatively short period of time. For a good summary of this research, see Frank Chaloupka & Kenneth E. Warner, The Economics of Smoking, in HANDBOOK OF HEALTH ECONOMICS 1541, 1550-56 (Anthony J. Culyer & Joseph P. Newhouse eds., 2000).


first type of instrument is legally binding on the parties which sign/ratify a particular protocol. The guidelines, on the other hand, are of a non-binding character and are adopted only to assist the Parties in the process of implementation of specific obligations envisaged by the Convention. In principle they are adopted by consensus, but majority voting is also possible. As of today, one protocol has been adopted and currently awaits the threshold number of ratifications.\textsuperscript{16} There are also seven guidelines which have been approved and three others in the process of elaboration. Among those which are already adopted, one should mention the Partial Guidelines for implementation of Articles 9 and 10 of the FCTC regulating contents of tobacco products and product disclosures, as well as the Guidelines for implementation of Article 11, which address the issue of packaging and labelling of tobacco products.\textsuperscript{17}


A. Introducing the TBT Agreement

The TBT Agreement sets certain disciplines for national technical regulations, standards and conformity assessments, except for sanitary and phytosanitary measures, which are covered by a separate agreement.\textsuperscript{18} In particular, the TBT Agreement aims at ensuring that national technical regulations do not create unnecessary obstacles to international trade or discriminate between like imported and domestic products (recitals no. 5 and 6). At the same time, the agreement confirms the regulatory autonomy enjoyed by WTO Members by acknowledging the right of each country to set its own regulatory objectives and the level of their enforcement (recital no. 6).

A technical regulation, the category most relevant for the purposes of the article, is defined by the TBT Agreement as “a document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which

\textsuperscript{17} All guidelines are available at the FCTC webpage: http://www.who.int/fctc/protocol/guidelines/adopted/en/.
\textsuperscript{18} Those measures fall exclusively under the Agreement on the Application of Sanitary and Phytosanitary Measures. On the relationship between these two agreements, see ŁUKASZ GRUSZCZYNSKI, REGULATING HEALTH AND ENVIRONMENTAL RISKS UNDER WTO LAW. A CRITICAL ANALYSIS OF THE SPS AGREEMENT 63-68 (2010).
compliance is mandatory.” The agreement also explains that this category may “include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.” What distinguishes technical regulations from “standards” is their binding character (i.e., “compliance is mandatory” while in case of standards it is voluntary). Conformity assessments are procedures used to check the compliance with either technical regulations or standards.

With regard to technical regulations, the TBT Agreement reaffirms the traditional GATT principles of national treatment and most favoured nation. In particular, Article 2.1 provides that “Members shall ensure that . . . products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.” Article 2.2 establishes a “least trade restrictive” requirement, by prohibiting technical regulations that are more trade-restrictive than necessary to fulfil a legitimate objective (often referred to as the “necessity requirement”). The list of such objectives is open-ended and includes, among other things, protection of human life and health. The TBT Agreement mandates, when assessing the necessity of regulations, the consideration of elements such as available scientific and technical information (in particular as to the existence of risks or efficiency of risk mitigation strategies when it comes of health related measures), related processing technology, and intended end-uses of products. So even a non-discriminatory measure, which applies equally to domestic and imported products, could violate Art. 2.2 if it lacks a sufficient scientific basis or does not constitute the least restrictive alternative. The TBT Agreement, unlike GATT 1994, does not contain any equivalent of Art. XX (i.e., general exception) that would allow for the justification of measures otherwise inconsistent with TBT provisions. Moreover, its necessity requirement, as explained above, is formulated as a positive obligation and not as an exception. The TBT Agreement also requires WTO Members to base their technical regulations on relevant international standards, unless in specific instances this would constitute an ineffective or inappropriate mean for the fulfilment of legitimate objectives (Art. 2.4). Those regulations which are in accordance with international standards and adopted or applied to one of the legitimate objectives enumerated in Art. 2.2 benefit from a rebuttable presumption that they do not create an unnecessary obstacle to international trade.

An important part of the agreement is dedicated to procedural obligations aimed at ensuring transparency in the process of adoption of

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19 TBT Agreement, supra note 3, Annex 1.1.
technical standards. In particular, Members are required to publish a draft of a proposed regulation at an early stage (Art. 2.9.1); notify other Members via the WTO Secretariat about products covered by a proposed technical regulation as well as about its objective and rational (Art. 2.9.2); grant other Members a reasonable period of time to make comments, discuss those comments and take them into account when adopting a final measure (Art. 2.9.4). The TBT Agreement also stipulates that a publication of technical regulations needs to be followed by a reasonable *vacatio legis* in order to allow producers in exporting WTO Members to make necessary adjustments (Art. 2.12).

**B. Facts of the Clove Case**

The *US – Clove Cigarettes* case arose in the context of Section 907(a)(1)(A) of the Federal Food, Drug and Cosmetic Act, which was added by the Family Smoking Prevention and Tobacco Control Act of 2009 ("FSPTCA"). The US measure restricted the use of certain characterizing flavours in cigarettes. In particular, it prohibited a number of additives in cigarettes or its component parts (e.g., filters or papers). The list of such substances was open-ended and included clove, cinnamon, vanilla, coconut and cherry, but excluded menthol. As regards the latter substance, the Federal Drug Administration ("FDA") was authorized by the Act to take in the future necessary regulatory actions (e.g., to ban or modify its use in cigarettes). At the same time, the FSPTCA instructed the newly established Tobacco Products Scientific Advisory Committee ("TPSAC") to deliver a report that would evaluate the impact of the use of menthol in cigarettes on the public health, thus providing a scientific basis for any subsequent regulatory decision. The report was indeed produced in 2011. It recommended extension of the flavour ban to menthol cigarettes, noting that “removal of menthol cigarettes from the marketplace would benefit public health in the United States.” At the same time the report acknowledged the potential for contraband trade in menthol cigarettes and suggested additional research.

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20 This act introduced number of restrictions on tobacco production, distribution and marketing, such as advertising requirements, the obligation to use graphic warning labels, and establishing a federal minimum age for the purchase of cigarettes.


22 *Id.* § 907(e)(1).


24 *Id.* at 227.
The objective of Section 907(a)(1)(A) is to protect public health by reducing the number of children and adolescents who smoke cigarettes. The FDA in its guidance also clarified that the measure was specifically introduced in order to remove those substances that make cigarettes more attractive to young consumers from the market (e.g., by masking the flavour of tobacco, which otherwise might be unpleasant for beginners or by creating false impression that they constitute a “healthier” alternative).

As a consequence of a series of settlement agreements concluded in the 2000s between US-based major tobacco companies and the US states, there was no significant domestic production of flavoured cigarettes. In fact, there was only one company that manufactured a small amount of clove cigarettes before the FSPTCA entered into force. On the other hand, there was a noticeable import of clove cigarettes from Indonesia. Overall, such cigarettes accounted for 0.1% of the market (as compared to 25% for the menthol version). This rate, however, was substantially higher for specific age groups (e.g., 12-21 years old).

On 20 July 2010, following unsuccessful consultations with the US, Indonesia requested the establishment of a WTO panel. Indonesia claimed that the US restriction violated Art. 2.1 (i.e., by providing less favourable treatment to clove cigarettes as compared to domestic menthols), Art. 2.2 (i.e., by being more trade restrictive than necessary), Art. 2.5 (i.e., by failing to explain the justification for the measure), Art. 2.8 (i.e., by formulating product requirements in terms of design or descriptive characteristics rather than performance) and Art. 12.3 (i.e., by creating an unnecessary barrier to trade for a developing Member). In addition, it also argued that the US conduct was inconsistent with the transparency obligations provided by Arts. 2.9 and 2.12 because the US failed to: (i) notify other Members of the proposed measure via the WTO Secretariat; (ii) provide particulars or copies of the proposed technical regulation; (iii) allow a reasonable interval between the publication and the entry into force of the contested measure. In parallel to the TBT claims, Indonesia made the arguments under GATT 1994, but the panel did not address them, relying on the principle of judicial economy. The panel’s report was issued on 24 June 2011. The panel found that the US measure violated Arts. 2.1, 2.9.2, 2.9.3 and 2.12. On the other hand, it held that Indonesia failed to demonstrate that the US acted inconsistently with Arts. 2.2, 2.5, 2.8 and 12.3.

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25 US – Clove Cigarettes Panel Report, ¶ 2.7.  
26 Id. ¶ 2.8.  
27 Id. ¶¶ 2.25, 7.388. (Note, however, that the parties to the dispute disagreed on the interpretation of survey evidence).  
28 Id. ¶ 8.1.
The US appealed, claiming that the panel erred in its findings that the US measure was inconsistent with Articles 2.1 and 2.12. Neither of the parties appealed the panel’s findings under Arts. 2.2, 2.5, 2.8 and 2.9, so this part of the report became final. The Appellate Body report was adopted by the Dispute Settlement Body on 24 April 2012. The section that follows will analyse the specific legal findings made in both reports in detail. Since from the point of view of national tobacco control regulations the most important findings were made in the context of Arts. 2.1 and 2.2, this article does not address other TBT provisions that were analysed by the panel and the Appellate Body.\(^{29}\)

\section*{C. Findings}

The panel held that Section 907(a)(1)(A) of the US Federal Food, Drug and Cosmetic Act was a technical regulation as defined by Annex 1.1 and therefore it fell within the scope of the TBT Agreement.\(^{30}\) This was a relatively straightforward finding, as none of the parties really contested such a qualification, nor was the issue appealed.

1. Article 2.1. — The panel enquiry was structured as a two-step analysis. Firstly, it investigated whether clove and menthol cigarettes were like products, and secondly, whether imported clove cigarettes were accorded less favourable treatment. In that context, the panel also inquired into whether the less favourable treatment was related to the national origin of the imports.

When analysing the “likeness”, the panel initially relied on the classical approach developed under Article III:4 of the GATT 1994 (which was, as observed by the panel, an important context for the TBT provision). This approach concentrates on the competitive relation between two products. In doing so, four elements are normally considered: (i) the property, nature and quality of 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.\(^{31}\) Although the panel recognized the relevance of these traditional criteria, it decided to interpret Article 2.1 as a provision in its

\(^{29}\) For analysis of other findings, see e.g., Tania Voon, Note on WTO Appellate Body Report in US – Clove Cigarettes, 106(4) A.J.I.L. 824, 827 (2012). As correctly noted by Voon, from the systemic point of view, the most important are findings made by the Appellate Body under art. 2.12 with regard to the legal status of Ministerial Decisions (they were eventually considered as a “subsequent agreement” in the meaning of the Vienna Convention on the Law of Treaties).

\(^{30}\) US – Clove Cigarettes Panel Report, ¶ 7.41.

own right. According to the panel, the regulatory objective sought by the US measure (i.e. protection of human health through reduction of youth smoking) had to be taken into account in making the determination of likeness. On that basis, the panel found that both types of cigarettes (i.e., menthol and clove) had to be regarded as like products (despite some physical differences and their only partial substitutability). In this context, the panel gave weight to the fact that both contained an additive which produced a distinguishing flavour that reduced the harshness of tobacco (which went to the core of the objective of the US measure). Similarly, when assessing consumer tastes and habits, it chose young smokers and those susceptible to become smokers as a reference group (rather than smokers in general), identifying them as the target group of the US regulation. It also concentrated on the ability of both types of cigarettes to satisfy the same consumer need (masking the taste of regular tobacco) rather than on their substitutability.

As far as the second part of the analysis under Article 2.1 is concerned, the panel, after finding that the two products, taken as a group, were treated differently to the detriment of the imported products (i.e., clove cigarettes), enquired whether the US decision to distinguish between clove and menthol cigarettes could be explained by factors or circumstances unrelated to the foreign origin of the product. The panel was not persuaded that a risk of illicit trade resulting from banning menthol cigarettes (which currently has more than a quarter of the market) or that the potential impact on the US health care system (the US postulated that people who would lose access to menthol cigarettes would seek medical help rather than switch to other types of cigarettes) could justify the different treatment of both types of cigarettes. In this context, it held that the main reason for excluding menthol cigarettes were the potential costs that might be incurred by the US if a ban was extended to this type of cigarettes. In other words, according to the panel, they were excluded not because they did not constitute a type of cigarette with a characterizing flavour that appeals to youth and masks the harshness of tobacco (or due to

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33 E.g., amount of additive (20-40% for clove cigarettes as compared to 1% for menthols); amount of tobacco (60-80% v. 99%). Id. ¶¶ 7.178-7.181.
34 Id. ¶ 7.175.
35 Id. ¶ 7.214.
36 Id. ¶ 7.232.
37 Note that this part of the analysis is similar to the examination performed under art. III:4 of the GATT 1994 (cf. EC – Asbestos Appellate Body Report, ¶ 100).
38 US – Clove Cigarettes Panel Report, ¶¶ 7.289-7.291.
other health related considerations), but because of the domestic costs associated with banning them.\[^{39}\]

The Appellate Body took a different stance. It rejected the purpose-based approach to the determination of likeness and explained that such an analysis should have been only concerned with competitive relations between the two products (similarly as required under Art. III:4). It also added that the regulatory concerns underlying a measure, such as health risk associated with a product, could be relevant when analysing the likeness of two products only if reflected in the product’s competitive relationship (\textit{e.g.}, under the physical characteristic criterion).\[^{40}\] According to the Appellate Body, the purpose of the measure was to be addressed when analysing the second element of the test under Article 2.1 (\textit{i.e.}, “less favourable treatment”). In its analysis of likeness, the Appellate Body concentrated on two specific aspects that were appealed by the US. First it found, although on different grounds than the panel, that both types of cigarettes were capable of performing similar functions (\textit{i.e.}, satisfying the addiction to nicotine and social experimentation function) and thus shared the same end-uses.\[^{41}\] Second, when analysing consumer preferences it decided to go beyond the group that had been identified by the panel as a point of reference (\textit{i.e.}, young and potential young smokers) and took into consideration all smokers. This, however, did not ultimately change the panel’s finding, as the Appellate Body held that “it [was] not necessary to demonstrate that the products are substitutable for all consumers or that they actually compete[d] on the entire market”.\[^{42}\] Since clove and menthol cigarettes were highly substitutable for some groups of consumers, the Appellate Body concluded that these two products were indeed “like products”.

With regard to less favourable treatment, the Appellate Body confirmed that this condition required ascertainment whether the measure changed the conditions of competition in the US market to the detriment of imported products (taken as a group) vis-à-vis domestic like products. The Appellate Body modified, however, the remaining part of the analysis. Rather than asking whether a distinction between products could be explained by factors and circumstances unrelated to foreign origin of the product, it enquired whether such detrimental impact “stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination

\[^{39}\] \textit{Id.} ¶ 7.289.

\[^{40}\] \textit{US – Clove Cigarettes} Appellate Body Report, ¶ 119.

\[^{41}\] \textit{Id.} ¶ 132.

\[^{42}\] \textit{Id.} ¶ 142.
against the group of imported products”. With regard to the second element, it emphasised that both products under comparison shared the same characteristics that were used to justify the prohibition on clove cigarettes (i.e., masking the harshness of tobacco and making cigarettes more attractive to smoke). At the same time, the Appellate Body was not persuaded by the arguments put forward by the US as a possible justification for its distinction between clove and menthol cigarettes. In particular, it doubted that the risks specified (i.e., risks to the US healthcare system and risk of development of a black market) would materialize if regular cigarettes were still available on the market. In this context, the Appellate Body added that “the addictive ingredient in menthol cigarettes is nicotine, not peppermint or any other ingredient that is exclusively present in menthol cigarettes.”

2. Article 2.2. — As noted above, neither of the parties appealed the panel’s findings under Article 2.2. The panel conceptualized this provision as providing for a two-step analysis: (i) examination on whether a measure pursues a legitimate objective; and (ii) examination on whether a measure is more trade restrictive than necessary to fulfil such an objective, taking into account the risks of non-fulfilment. With regard to first condition, the panel easily confirmed that the measure pursued legitimate objective, inasmuch as the reduction of youth smoking clearly qualified as a means to protect human life and health. Second, the panel analysed whether the ban on clove cigarettes was more trade restrictive than necessary. When enquiring into the necessity of the measure, it heavily drew from the GATT jurisprudence (particularly concerning Article XX(b)). The panel confirmed the applicability of the traditional weighing and balancing test in the context of Art. 2.2. This test requires an assessment of different factors, such as contribution made by a measure to the realization of objective(s) pursued, importance of the values sought to be protected, and restrictive impact of a measure on international trade. The panel apparently assumed that values at stake (i.e., protection of human health) were important to the

43 Id. ¶ 182; see also, Appellate Body Report, United States – Certain Country of Origin Labelling (COOL) Requirements, ¶ 271, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012).
44 US – Clove Cigarettes Appellate Body Report, ¶ 224.
45 Id. ¶ 225.
46 US – Clove Cigarettes Panel Report, ¶ 7.333.
47 Id. ¶ 7.350.
49 US – Clove Cigarettes Panel Report, ¶ 7.379.
highest degree, and after finding that the measure was highly restrictive, it moved to the question of contribution. In this context, the panel noted that such contribution had to be material, meaning that there must have been a genuine relationship between the objective pursued and the measure (and not merely a marginal or incidental connection). The panel found that the measure indeed made a material contribution to the identified objective, not only because there were a significant number of minors who smoked clove cigarettes, but also because the scientific evidence submitted by the US clearly showed a positive correlation between flavoured cigarettes (including cloves) and smoking rates among the youngest consumers.

As a subsequent step, the measure was compared with possible alternatives in order to establish whether there existed less restrictive measures that could have provided an equivalent result (i.e., assured the same level of health protection as the original measure). The panel explained that at this stage only the means, and not regulatory objectives, were to be examined. Consequently, a WTO Member could not be forced to adopt a measure with a lower level of protection in order to minimize negative trade effects. In the words of the panel “if an alternative means of achieving the objective . . . would involve greater ‘risks of non-fulfilment’, this may not be a legitimate alternative”. Ultimately, Indonesia did not pass this test, as it was unable to show that its proposed alternative measures could reduce the relevant risks to the same extent as the US measure. Overall, the panel seemed to be quite demanding with respect to identification of alternative measures.

The correctness of the panel’s findings was not reviewed in US – Clove Cigarettes. In another report, the Appellate Body, however, suggested that an examination under Art. 2.2 into whether a measure is more trade restrictive than necessary to fulfil legitimate objective does not include enquiry into importance of protected values but rather into the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the objective pursued by the Member through a particular measure. At the same time, the Appellate Body confirmed that such an examination involves a weighing and balancing process under which a number of elements need to be factored (e.g., the existence of a

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50 Id. ¶ 7.380.
51 Id. ¶¶ 7.389-7.391.
52 Id. ¶¶ 7.400-7.415.
53 Id. ¶¶ 7.418-7.419.
54 Id. ¶ 7.424.
55 Id.
56 Cf. also, WTO US – Tuna II (Mexico) Appellate Body Report, ¶ 321.
57 Id. ¶ 322. (In practice, this can make no difference, as the assessment of gravity of the consequences will depend on the importance of values at stake.)
legitimate objective, the degree to which a measure contributes to such an objective). A comparison of a contested measure with (reasonably) available alternatives is used as a conceptual tool for assessment of the relative necessity of such a measure. When performing comparison, a panel is obliged to respect the level of protection chosen by a WTO Member. This means that only those measures which attain the same level of protection can be regarded as available alternatives.

IV. US – CLOVE CIGARETTES: SETTING THE SCENE FOR THE FUTURE

A. General Remarks

Both reports should be seen as a significant contribution to the long discussion on the extent regulatory freedom retained by WTO Members under WTO law. They are important because they comprehensively explain the regulatory limits placed on national governments under the TBT Agreement. In principle, both reports confirm a broad discretion enjoyed by Members. The panel and the Appellate Body explicitly recognized that, as a matter of principle, tobacco control measures serve legitimate public health concerns that are respected by WTO law. The Appellate Body also added that the TBT Agreement, similarly as the GATT 1994, is not “to be interpreted as preventing Members from devising and implementing public health policies generally, and tobacco-control policies in particular, through the regulation of the content of tobacco products, including the prohibition or restriction on the use of ingredients that increase the attractiveness and palatability of cigarettes for young and potential smokers”. The Agreement does not require WTO Members to decrease their levels of human health protection or to mitigate national tobacco control measures in light of their trade impact. What was most problematic in the Clove dispute, from the point of view of WTO law was de facto discrimination between the US and Indonesia cigarettes, and not the policy choices made by the US with respect to banning flavouring additives in tobacco products. This means that a more comprehensive ban, covering both menthol and clove cigarettes equally, would arguably pass

58 Id.
59 Id. ¶ 323.
61 E.g., US – Clove Cigarettes Panel Report, ¶ 7.2.
62 US – Clove Cigarettes Appellate Body Report, ¶ 235.
the test under the TBT Agreement. Having said that, some findings of the panel and the Appellate Body may be nevertheless questioned as unnecessarily limiting the ability of WTO Members to effectively regulate tobacco products.

Probably the most important development in US – Clove Cigarettes is clarification as to the analytical framework applicable in the context of Art. 2.1. As noted above, a panel is expected to determine, in a two step-analysis, whether: (i) a measure modifies the conditions of competition in the relevant market to the detriment of imported like products; and (ii) whether such a detrimental impact stems exclusively from a legitimate regulatory distinction or reflects discrimination against the group of imported like products. The second step, which is absent in the traditional examination under Article III:4, is intended as a remedy for the lack of a GATT Art. XX-type of exception in the TBT Agreement. This second step is, therefore, supposed to operate as a type of safe harbour for those measures which discriminate for legitimate purposes. Such a design of the applicable analytical framework also indicates that measures found to be incompatible with TBT provisions cannot be saved under the GATT 1994 general exception (why otherwise introduce the second step?). Overall, the Appellate Body regarded Art. 2.1 as providing the extent of regulatory freedom equivalent to what is guaranteed by the combination of GATT Articles III and XX. In this context, it particularly noted that “the balance set out in the preamble of the TBT Agreement between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members’ right to regulate, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.” Overall, this seems to be a positive development. Measures, including tobacco control regulations, that serve some legitimate objectives, even if they are discriminatory, can still pass the requirements of the TBT Agreement.

However, the specific aspects of Appellate Body reasoning under Art. 2.1 may be not only praised, but also criticized. On the positive side, the Appellate Body appears to be more flexible than the panel when it comes to consideration of what may constitute the basis for a regulatory distinction. Note that the panel rejected the US arguments (i.e., negative impact on the domestic healthcare system and potential development of a black market),

64 US – Clove Cigarettes Appellate Body Report, ¶ 96.
holding that these reasons related to costs that might be incurred by the US and as such could not constitute a basis for a distinction.\textsuperscript{65} The Appellate Body, on the other hand, was prepared to recognize both concerns articulated by the US as legitimate grounds for the distinction (rightly in my opinion). Although at the end of the day it was not persuaded by the arguments advanced by the US, this resulted from the quality of evidence submitted by the US rather than any principled stance. The evidence offered was of a speculative nature, with weak support in empirical studies. This was even highlighted, outside the dispute, by the TPSAC, which prepared a report for the FDA. The Committee recommended, among the other things, “that FDA [should] consult with appropriate experts and carry out relevant analyses”\textsuperscript{66} before concluding that a risk of contraband menthol cigarettes exists. This weak evidentiary basis probably induced the Appellate Body to make, rather unfortunately, a statement on the cross-elasticity of menthol and regular cigarettes. It should be noted however that some studies indicate that menthol and non-menthol cigarettes are not regarded by menthol smokers as close substitutes (this phenomenon is less visible with respect to non-menthol smokers).\textsuperscript{67} Consequently, contrary to what was suggested by the Appellate Body, such smokers would not necessarily switch to regular cigarettes. This is also confirmed by a more recent study, which shows that about 25% of menthol smokers would, in the event of a total marketing ban, seek access to illicit menthol cigarettes rather than switch to other brands.\textsuperscript{68} In this context, one may also ask what level of scientific certainty and specificity should be required from WTO Members. The threshold is definitely lower than under the Agreement on the Application of Sanitary and Phytosanitary Measures, which requires scientific risk assessment that precisely evaluates the existence of risks. More general studies which merely suggest a correlation between the ban on menthol cigarettes and development of a black market (or increase in the burden on the US health care system), based on evidence of a general nature or indirect evidence relating to other countries, will most probably suffice. Minority scientific views are also acceptable. This would

\textsuperscript{65} US – Clove Cigarettes Panel Report, ¶¶ 7.289-7.291.

\textsuperscript{66} Tobacco Products Scientific Advisory Committee, supra note 23, at 227.


\textsuperscript{68} Cf. Richard J. O’Connor et al., What would menthol smokers do if menthol in cigarettes were banned? Behavioral intentions and simulated demand, 107 Addiction 1330, 1337 (2012).
correspond to the approach of the WTO dispute settlement bodies taken under the GATT 1994 in such cases as Brazil – Retreaded Tyres.69

On the negative side, one may wonder why the Appellate Body decided to formulate the relevant condition so narrowly. As noted above, it declared that a discriminatory measure could comply with Article 2.1 only if its detrimental impact on foreign products “stem[med] exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.”70 If the term “stems exclusively” is understood strictly, as the Appellate Body’s language suggests, a number of national measures may fall short of this requirement. The democratic regulatory process frequently requires governments to make certain concessions to different interest groups to ensure their support and the success of regulatory initiative. As a consequence, governments frequently need to decide whether to proceed with a compromise version of a proposal or remain altogether inactive. As nicely captured by Tucker, “domestic policy is driven by the art of the possible. Regulatory changes affecting small numbers of people are often more politically feasible than those affecting large numbers.”71 This is particularly true when it comes to such sensitive issues as tobacco control policies, which have been always implemented in incremental fashion. The Clove dispute is a good example of this. The initial proposal of the US government was to ban all flavouring agents, including menthol. This was changed (at least in a part) as a consequence of pressure from not only US tobacco companies, but also other interest groups, including trade unions and number of African-Americans organizations (the part of society with the highest rate of menthol cigarette usage).72 Therefore, the question that arose before the US regulator was whether to remove some risky products from the market or rather do nothing (i.e., since any political consensus on restrictions on menthol cigarettes is unachievable). In this context, the panel’s approach, at least at the textual level, that enquiries into whether the distinction between products could be explained by factors and circumstances unrelated to

70 US – Clove Cigarettes Appellate Body Report, ¶ 182.
71 Todd Tucker, One of These Things Is Not Like the Other’: Likeness and Detrimental Impacts in US – Clove Cigarettes, 5 TDM J. 3, 5 (2012).
foreign origin of the product seems to provide a greater flexibility (i.e., it does not ask for exclusivity).

A narrow reading of Article 2.1 is also problematic from the systemic point of view. As noted above, Art. 2.1 was conceptualized by the Appellate Body as equivalent of GATT Articles III and XX applied in combination. However, if the standard is relatively narrow, one may doubt whether the formulation “stems exclusively from” really corresponds to the “arbitrary or unjustifiable discrimination” language of Article XX. If it does not, a measure could be justifiable under Article XX (if a complaint choses to test a measure under the GATT regime) and yet be inconsistent with the substantive obligations of the TBT Agreement.

The above considerations strongly suggest that a degree of flexibility with regard to standard introduced by the Appellate Body is required. The mere fact that a measure is motivated by different concerns (including the protection of domestic interest groups) should not automatically evoke a finding that a violation of Article 2.1 has taken place. Instead some form of balancing and weighting would be preferable. If elements other than a legitimate regulatory distinction exist, but have only a marginal (or even small) connection with a detrimental trade impact, a measure should be regarded as compatible with the relevant requirement. Of course, it is not possible here to set any clear-cut threshold. Each case would need to be assessed individually.

It may be also argued that the panel’s approach to likeness – i.e., considering the regulatory objective as a relevant factor that impacts on the four classical criteria – leaves a greater room for manoeuvre to WTO Members as compared to the market-based analysis proposed by the Appellate Body. 73 Two products may be very similar in terms of their competitive relations and yet not be considered like because of legitimate concerns of the regulating states (e.g., protection of human health). If such two products are not like, there is no need to review a particular measure under the rest of Article 2.1. Under this approach, labelled by DiMascio and Pauwelyn as a regulatory context test, “what matters is not the positioning of those . . . [products] in relation to each other within the market (‘competition test’), but rather the factual support for the government’s distinction between the two when taking regulatory action.

73 Note however that the Appellate Body’s observation that “[m]oreover, we note that a purpose-based approach to the determination of likeness does not, necessarily, leave more regulatory autonomy for Members, because it almost invariably puts panels into the position of having to determine which of the various objectives purportedly pursued by Members are more important, or which of these objectives should prevail in determining likeness or less favourable treatment in the event of conflicting objectives” (US – Clove Cigarettes Appellate Body Report, ¶ 115).
One may also recognize here traces of the old aim-and-effect test that was applied under Article III by some past panels and which required that a measure be examined as to the existence of a bona fide regulatory purpose (i.e., other than the protection of domestic producers), and the effects of a measure on conditions of competition (i.e. whether it created a protective advantage in favor of domestic products). Although the regulatory objective is still relevant under the framework proposed by the Appellate Body, it only appears in the second step of the analysis (i.e., whether the detrimental impact stems exclusively from a legitimate regulatory distinction), with the burden of proof on a defendant rather than the complainant. Although in practice that difference may be of limited importance, at least on its face, it seems to make the task of a defendant more difficult (e.g., by shifting the burden of proof).

On the other hand, one may see the panel’s approach to the problem of relative toxicity of menthol and clove cigarettes as problematic. In the part that was not appealed by the US, the panel held that relative toxicity was irrelevant when determining likeness of menthol and clove cigarettes. The US claimed that due to the presence of specific chemical substances (i.e., eugenol and coumarin), clove cigarettes might cause some additional health problems. The panel, however, observed that “regardless of whether eugenol and coumarin might allegedly cause further health problems, the principal reason why cigarettes create health risks is the inhalation of combusted substances, which may cause different types of . . . disease.”

The US also submitted that clove cigarettes might deliver more tar, nicotine and carbon monoxide, which again make them more risky. This argument was rejected as well without any deeper analysis. It is difficult to agree with these finding. The fact that both products pose a certain health risk which is similar should not release the panel from conducting an analysis into any additional risks connected with the products under examination. In fact, the extent of risk is one of the crucial factors in the process of determination of likeness. Although in this specific case the failure of the panel to consider the relative toxicity was not fatal, the general pronouncement made by the panel (“all . . . cigarettes are harmful to health

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75 R. Hudec, supra note 60, at 626-33.
76 Cf. WTO US – Tuna II (Mexico) Appellate Body, ¶ 215.
77 US – Clove Cigarettes Panel Report, ¶ 7.184.
78 Id. ¶ 7.185.
79 Id. ¶ 7.186.
80 The aim of the US was to prohibit flavoured cigarettes not because of their higher toxicity, but because of their ability to mask the harshness of tobacco (which facilitated its use among younger consumers).
and may cause death”) may have far reaching consequences. As noted below, one of the measures discussed in the TBT Committee is Brazilian ban on additives in cigarettes (based not only on the fact that fact that additives make the products either more attractive or palatable but also on the assumption that some additives pose additional health risk). If regular cigarettes, i.e., without additives, pose health risks (which they certainly do), then based on the panel’s methodology the Brazilian measure may be required to go through the whole examination under Article 2.1, despite the fact that there is no such need if one of the products poses a higher risk than the other, thus making them unlike. The panel’s approach also resembles the reasoning in the old GATT case Thailand – Cigarettes, where the panel simply disregarded argument that US cigarettes, due to the presence of additives and the specific processes used in their production, were more harmful than Thai ones. 81

As far as Art. 2.2 is concerned, it is worth recalling the panel’s finding that national measures as such do not need to fully achieve a specific regulatory objective. Rather, the degree to which a measure contributes to such a legitimate objective is one of the elements in the balancing process that takes place under this article. Deciding whether a challenged measure makes a material contribution requires examining it on its own terms, and does not involve a comparison with alternative measures. 82 Moreover, other measures used for the comparison, in order to be regarded as available alternatives, need to make an equivalent contribution to the relevant objective (i.e., protection of human health). 83 The burden of making a prima facie case that a violation of the above elements has taken place is on the complainant. If one adds to this the relatively high threshold of specificity required from a complainant when identifying less-restrictive measures, a standard elaborated by the panel seems to be rather sympathetic to national governments (and to great extent compatible with the relevant GATT jurisprudence).

The reports discussed herein may be however criticized when one considers possible implementation scenarios. The United States and Indonesia agreed that reasonable period of time for complying with the report of the Appellate Body should be 15 months (i.e., until 24 July 2013). 84 The US has a number of available options. It may revoke its measure altogether, or amend it in order to allow the marketing of clove cigarettes, both of which would be a questionable result from the public

82 US – Clove Cigarettes Panel Report, ¶ 7.397.
83 Id. ¶ 7.422.
84 United States – Measures Affecting the Production and Sale of Clove Cigarettes, Agreement under Article 21 3(b) of the DSU (June 19, 2012).
health perspective. At the same time, the chances of such a move seem to be limited, in the first instance because this would require the intervention of the US Congress, where apparently there is not a sufficient majority to back up such an amendment. The US could also extend the ban to include menthol. From the technical point of view, this seems to be a relatively easy task, as it only requires an intervention of the FDA. In practice, however, this option is not very likely.\(^85\) Tobacco companies have already successfully challenged the FDA, trying to block it from even using the TPSAC’s report because of alleged conflicts of interest (i.e., on the ground that some members of the TPSAC have testified as experts in lawsuits against tobacco companies).\(^86\) There also seems to be no political willingness on the side of the US administration to proceed with the ban on menthols. Apart from additional costs discussed above that may arise from the extension, there are also some worries as to potential consequences for the US labour market (i.e. the closure of factories that produce menthol cigarettes, job cuts in tobacco cultivation sector).\(^87\) The US could also maintain the measure as it stands now and face the retaliatory actions from Indonesia. As a consequence of the last option, however, more international trade would be distorted, with no compensation for Indonesian producers and farmers, the original victims of the US ban. In this context, Rob Howse has argued that the US could legally maintained the current ban by simply producing additional evidences that would show that its distinction between clove and menthol cigarettes stems exclusively from legitimate regulatory considerations, and subsequently presents such new data in the course of an Article 21.5 compliance proceeding.\(^88\) In particular, the US could show the existence of risks to the US health care system related an uncontrolled inflow of patients who couldn’t cope with a ban on menthol cigarettes, or underscore the risk of developing a black market for such cigarettes. The research studies, referred to above, may provide the US with strong arguments in such a proceeding. Other commentators, however, remain skeptical about the feasibility of this option.\(^89\)

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\(^86\) Lorillard, Inc. v. US Food and Drug Administration, 1:11-cv-00440-RJL (2011). (the judgement was appealed by the FDA to the US Court of Appeals in Washington and it is still pending).  
\(^87\) This argument is frequently advanced by tobacco workers trade unions and association of tobacco growers. Cf. Shiferaw Tesfaye Fekede et al., *The Use of Menthol in Cigarettes*, http://tobaccogrowerresearch.com/articles/MentholUseCig.pdf. To the knowledge of author, no independent study is available which would confirm these allegations.  
\(^89\) Todd Tucker, *supra* note 71, at 9. (Observing that “it is a calculated gamble that by doing nothing but proving more, the WTO can be convinced to backtrack. The alternative has no precedent in the compliance case history”). Note, however, that similar situation already occurred
B. So What Comes Next?

As mentioned at the beginning, there are other tobacco control measures that are currently either discussed in the TBT Committee or already contested in a formal WTO dispute settlement proceeding. The first is the Cracking Down on Tobacco Marketing Aimed at Youth Act adopted by Canada in 2009. The goal of the regulation is to reduce the attractiveness of tobacco products for young and first-time consumers. To this end, it prohibits the use of certain additives in tobacco products. The list of prohibited additives is very broad and currently covers more than 5,000 substances. However, as discussed below, the list includes not only substances with flavouring properties or those which reduce harshness of tobacco smoke, but also other additives that do not impart flavour of tobacco products. On the other hand, menthol is excluded. The reason that stands behind this decision is not entirely clear. The government informs on its official webpage that the Act was “designed to protect children and youth by focussing on new or emerging fruit- and candy-flavoured tobacco products . . . that may induce youth to smoke,” while menthol flavoured cigarettes have been available on the market since the 1920s. This statement, however, seems to be incompatible with the broad scope of the list of prohibited substances, which covers different types of additives and not only novel.

The Canadian measure has been contested by a number of WTO Members at the various meetings of the TBT Committee. Members are particular concerned with the scope of the Act, as it covers substances that are essential components of traditional blended cigarettes but which do not influence the taste of a final product. In this context, Members have

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in US/Canada - Continued Suspension of Obligations in the EC - Hormones Dispute, where the EC compliance consisted in showing a existence of risk.

90 See Technical Barriers to Trade Committee, Minutes of the Meeting 3–4 November 2010, Note by the Secretariat, ¶ 203-28, G/TBT/M/52 (Mar. 10, 2011); Technical Barriers to Trade Committee, Minutes of the Meeting 24–25 March 2011, Note by the Secretariat, ¶ 220-21, G/TBT/M/53 (May 26, 2011); WORLD TRADE ORGANIZATION, MEMBERS AIM TO REDUCE TRADE OBSTACLES BY STREAMLINING WORK ON TECHNICAL BARRIERS, http://www.wto.org/english/news_e/news12_e/tbt_30nov12_e.htm (last visited Feb. 2, 2013).

91 Cracking Down on Tobacco Marketing Aimed at Youth Act (Bill C-32), S.C.2009 c. 27.

92 Technical Barriers to Trade Committee, supra note 90, ¶ 226, G/TBT/M/53.

93 Technical Barriers to Trade Committee, Minutes of the Meeting 24–25 March 2010, Note by the Secretariat, ¶ 205, G/TBT/M/50 (May 28, 2010).


95 Technical Barriers to Trade Committee, supra note 90, ¶ 209, G/TBT/M/52. Note that blended cigarettes are produced by mixing different types of tobacco (e.g. Burley, Oriental). The traditional blending process requires the addition of certain chemical substances (additives) to the mix in order
questioned the compatibility of the measure with the obligations of Article 2.2. Their arguments address both aspects of necessity: (i) i.e., whether sufficient scientific evidence exists to establish a connection between such additives (i.e., additives that do not impart taste of cigarettes) and higher attractiveness of specific tobacco products to young and first-time consumers; and (ii) the existence of less trade restrictive alternatives (e.g., controlled used, setting specific thresholds for additives, banning only cigarettes with fruit flavours). Although no violation of Article 2.1 has been yet postulated in the Committee, one may expect that any dispute settlement request will also include such a claim. For example, a WTO Member may argue that cigarettes with specific additives prohibited by Canada are like cigarettes that do not contain such additives (i.e., blended v. unblended, menthols v. other flavoured cigarettes). As a second step, it will need to show that the two categories of products are treated differently to the detriment of imported products. If the argument is successful, it will then be Canada’s burden to demonstrate that any identified detrimental impact “stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products”. 

A similar measure discussed in the TBT Committee is the Brazilian ban on the use of additives. The regulation is even stricter than the Canadian law, as it only permits ingredients such as tobacco itself, water and sugar. Menthol is a prohibited substance. The act does not explicitly state its objective(s) but the minutes of the TBT Committee meeting can be helpful in this regard. Brazil explained during one of the meetings that the goal of the regulation is to protect public health through the reduction of cigarettes attractiveness. It also added that the government was concerned with the fact that some additives can make cigarettes more additive (e.g., acetaldehyde, levulinic acid, gamma-valerolactone and ammonia) or dangerous (e.g., sugar, which was eventually approved as permissible additive). This seems to indicate that there might be a second objective of eliminating those additives which are either harmful in nature or allow tobacco products to be more addictive. The concerns expressed by WTO

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96 Technical Barriers to Trade Committee, supra note 93, ¶ 184.
97 Cf. US – Clove Cigarettes Appellate Body Report, ¶ 182.
98 Technical Barriers to Trade Committee, Minutes of the Meeting of 20–21 March 2012, ¶ 114, G/TBT/M/56 (May 16, 2012); the final version of the act was published on Mar. 16, 2012 as the National Health Surveillance Agency (ANVISA) Resolution14/2012.
99 Technical Barriers to Trade Committee, supra note 90, ¶ 57, G/TBT/M/53. Of course the importation and sale of cigarettes based on a single type of tobacco (e.g. Virginia) or blended versions without additives (which would be quite a new invention, as the traditional blending method requires adding a number of additives) will be still permitted under the Brazilian law.
100 Id. ¶ 59.
Members are similar those which are articulated with regard to the Canadian measure. In particularly, it is feared that, due to its comprehensive scope, the law will eliminate from the Brazilian market almost all blended cigarettes (unless cigarette producers will be able to develop and implement new production methods), which currently account for almost 100% of all cigarettes sold in Brazil. In this context, the measure is criticized as being an unnecessary obstacle to trade without sufficient scientific foundation (e.g., as to the connection between additives used in blended cigarettes and attractiveness of tobacco products), and therefore in violation of Article 2.2. Malawi, one of the least developed countries, has stressed that the measure, if adopted by other WTO Members following the Brazilian example, could affect more than 700,000 Malawian farmers who cultivate Burley tobacco (which can be used only for blended versions). One WTO Member has also indicated that “depending on market conditions, the prohibition on the use of components may be incompatible with [Article 2.1] because it would be a de facto prohibition of traditional US-blend cigarettes, whereas Virginia-type cigarettes would not be similarly affected.”

The compatibility of measures with Art. 2.1 will be probably more problematic for Canadian law, as it explicitly excludes menthol from the list of prohibited additives. Since any future panel will most likely consider menthol cigarettes (either domestic or imported from some of the WTO Members) to be like other flavoured cigarettes, it will be the task of Canada to come up with arguments to show that the detrimental impact (i.e., ban) on imported cigarettes stems exclusively from some legitimate regulatory distinction(s) (e.g., higher risks connected with specific types of additive). The reasons provided by Canadian government until now do not seem to be very persuasive (i.e., a historically traded good). Note also that since the market share of menthol cigarettes is very small (app. 2%), it will difficult for Canada to make arguments similar to those which were advanced by the US (i.e., risk to domestic health care system and risk of developing black market). On the other hand, the Brazilian measure, as being more consistent, will be easier to defend. In fact, if Brazil is able to present sufficient scientific evidence on the relative toxicity of blended and unblended cigarettes, a panel may find that these two products are not like (e.g., because of physical difference between the products, including higher

\(^{101}\) Id. ¶ 7.

\(^{102}\) Id. ¶¶ 12, 13.

\(^{103}\) Id. ¶ 9.

\(^{104}\) Technical Barriers to Trade Committee, supra note 98, ¶ 116.

\(^{105}\) Technical Barriers to Trade Committee, Minutes of the Meeting of 23–24 June 2010, ¶ 223, G/TBT/M/51 (Oct. 1, 2010).
risks associated with blended cigarettes due to the presence of additives).\textsuperscript{106} This then would not require the panel to go to the second step of the analysis under Article 2.1. Of course, the decisive factor here will be whether the available scientific evidence confirms the assertions made by Brazil. Even if a panel will go further with its analysis, determination of whether a measure modifies the conditions of competitions to determined of imported products will require to ascertain the market situation prior to the ban (\textit{i.e.}, whether the ban afforded protection to domestic industry). This is not necessary the case as almost all cigarettes produced in Brazil are of blended type. In addition, Brazil is a significant producer of Burley tobacco that is conventionally used for blending.\textsuperscript{107} Moreover, Brazil can also show that distinction between blended and unblended cigarettes stems exclusively from the some legitimate regulatory distinction. Here again the scientific evidence on toxicity of additives may be highly pertinent if Brazil choses the argument on relative toxicity of two products as a basis for its distinction.

Due to the panel’s and Appellate Body’s generous reading of Article 2.2, it may not be easy to find a violation of this provision. Note that both measures pursue legitimate objectives. The second condition (\textit{i.e.}, whether a measure is more trade restrictive than necessary to fulfil such an objective, taking account of the risks non-fulfilment would create) is probably more problematic. While part of the respective measure that relates to various flavouring additives will easily pass this test, there might be some doubts as to the necessity of banning those additives that do not impart the taste of final product (\textit{e.g.}, substances used in the blending process). To the knowledge of the author there are currently no studies that would show any connection between these types of additives and increased attractiveness of cigarettes to young and first-time smokers. The situation may look different if the objective of the regulations is not limited to protection of young and first-time smokers and extends to elimination of additives, which are either harmful in nature or allow tobacco products to be more addictive. There is actually growing body of scientific research, which shows that additives may pose their own risks.\textsuperscript{108} As a consequence, it may be easier to show that their elimination is necessary for the protection of public health because they pose risk \textit{per se}.

\textsuperscript{106} Note however that will not sit easy with the finding of the panel in US – Clove Cigarettes.
The last tobacco control measure discussed in the TBT Committee is the Australian plain packaging law.\(^{109}\) It requires all tobacco products to be marketed in standardized packs and prohibits the use of any trademarks or other marks on the retail packaging of tobacco products except for “the brand, business or company name for the tobacco products, and any variant name for the tobacco products” provided in a form prescribed by the law.\(^{110}\) As a consequence, producers are prohibited from using logos and stylized brand names as well as the graphical design of packs and use of colour (including those which are associated with particular brands). Australia maintains that plain packaging requirements diminish the attractiveness of cigarettes (particularly to young people) and make the health warnings more visible, thus increasing their deterrence effect. Opponents question the effectiveness of the policy (e.g., lack of relevant scientific evidence) and indicate that the regulation seriously interferes with the property rights of trademark holders (i.e., to use its trademark on lawfully marketed products). Although the main concerns with respect to plain packaging regulation arise under the TRIPS Agreement,\(^{111}\) the TBT Agreement has also attracted the attention of WTO Members. In particular, the three Members that have already initiated formal dispute settlement proceedings (i.e. Ukraine, Honduras and the Dominican Republic) claim that Australian measure violates Articles 2.1 and 2.2 (although the Dominican Republic is claiming only a violation of Article 2.2).\(^{112}\) Out of those three countries it was Ukraine, which decided in August 2012 to submit a request for formal consultations. The panel was subsequently established in September but the selection process for its individual members, as of December 2012, is still going on.

\(^{109}\) Tobacco Plain Packaging Act 2011, No. 148 § 3 (2011), an Act to discourage the use of tobacco products, and for related purposes. Note also that the last meeting of the Committee (27–28 November 2012). Members also discussed a New Zealand draft proposal of plain packing law. The expressed concerns are similar to those which are raised in the context of the Australian measure.

\(^{110}\) Id. § 20.


It seems that the task of the complainant will be quite difficult under Article 2.1, as the Australian measure does not distinguish between domestic and imported cigarettes (or between cigarettes imported from different WTO Members). Ukraine will probably try to prove de facto discrimination between those cigarettes that are already established on the Australian market (and as a consequence are known to consumers) and those which could be introduced in the future. It may be argued that due to comprehensive restriction on advertising of tobacco products already in place in Australia, any new product would face a de facto barrier in entering the market. The question in front of the panel therefore would be whether Article 2.1 can refer to future market access for foreign products, or is limited to actual discrimination (which is arguably the case). The challenge for the complainant under Article 2.2 is probably even greater. The basic issue in the context of this provision is whether the Australian measure is more trade restrictive than necessary to fulfil the legitimate objective of human health protection. Since a number of scientific studies (including those which formed a basis for the official position taken by the World Health Organization) indicate that “plain packaging on tobacco products would increase the impact of health warnings, . . . and reduce the attractiveness of products to segments of the population specifically targeted by tobacco companies,” it may be extremely difficult to show that the measure is not necessary or that there are other alternatives that provide the same level of protection. This is particularly true if one recognizes that Australia already maintains, as mentioned above, a quite comprehensive ban on advertising cigarette products.

To summarize, out of the three measures mentioned above, the most problematic is the Canadian law on additives. The Brazilian ban and Australian plain packaging act have quite high chances of being upheld by panels and the Appellate Body. If WTO dispute settlement bodies find a violation, it will most probably relate to Article 2.1 of the TBT Agreement, while establishing a violation of Article 2.2 seems less probable. Overall, the judgements in these cases will clarify more precisely (as compared to the current situation) the extent of regulatory autonomy enjoyed by WTO Members in the field of tobacco control.

113 Cf. Tania Voon et al., Consumer Information, Consumer Preferences and Product Labels under the TBT Agreement, in RESEARCH HANDBOOK ON THE WTO AND TECHNICAL BARRIERS TO TRADE (Michael J Trebilcock & Tracey Epps eds., forthcoming 2013).
114 TBT Committee, Minutes of the Meeting of 15–16 June 2011, ¶ 15, G/TBT/M/54 (Sept. 20, 2011).
115 Id. ¶¶ 34, 35. See generally CRAWFORD MOODIE ET AL., PLAIN TOBACCO PACKAGING: A SYSTEMATIC REVIEW (2011).
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