

April 30, 2012

Volume 16, Issue 15

The WTO Appellate Body Outlaws Discrimination in U.S. Flavored Cigarette Ban

By Tania Voon



Introduction

On April 24, 2012, the World Trade Organization's Dispute Settlement Body ("DSB") adopted the panel and Appellate Body reports in one of the most controversial health-related disputes ever to arise in that organization: *US—Clove Cigarettes*.^[1] The dispute has polarized health advocates and international trade

law specialists alike. Discrimination is anathema to international trade law; can discrimination between types of cigarettes ever be justified on health grounds? The *Clove Cigarettes* case is of prime interest today, not only due to its implications regarding the relationship between trade and health, but also because of the clarifications it offers concerning the Agreement on Technical Barriers to Trade ("TBT Agreement")^[2] and the Marrakesh Agreement Establishing the World Trade Organization ("Marrakesh Agreement").^[3]

In *US—Clove Cigarettes*, Indonesia challenged a U.S. measure that prohibits cigarettes and component parts containing a flavor, herb or spice that gives a characterizing flavor to the product, except for menthol and tobacco.^[4] While menthol and "regular" cigarettes are thus exempt from the ban, clove cigarettes are caught by it.^[5] This *Insight* examines the three key substantive issues addressed in the appeal of *US—Clove Cigarettes*: the meaning of (i) "like products" and (ii) "treatment no less favourable" under Article 2.1 of the TBT Agreement, and (iii) the significance of a Ministerial Decision of the World Trade Organization ("WTO") in interpreting Article 2.12 of the TBT Agreement. TBT Article 2.1 is also at issue in two other ongoing WTO appeals: *US—Tuna II (Mexico)*^[6] and *US—COOL*.^[7]

TBT Article 2.1 requires WTO Members to ensure that, "in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products

RELATED ASIL INSIGHTS

[Cigarettes and Public Health at the WTO: The Appeals of the TBT Labeling Disputes Begin](#)

[Cigarettes and Public Health at the WTO: The Appeals of the TBT Labeling Disputes Begin](#)

[Australians Get Their First Taste of New Zealand Apples in Ninety Years](#)

[Orange Juice, Shrimp, and the United States Response to Adverse WTO Rulings on Zeroing](#)

[Trade Remedies and Non-Market Economies: The WTO Appellate Body's Report in United States—Definitive Antidumping and Countervailing Duties on Certain Products from China](#)

[The WTO EC - Aircraft Panel and Appellate Body Reports on Subsidies to Airbus](#)

[NAFTA Chapter 19 Panel Follows WTO Appellate Body in Striking Down Zeroing](#)

[The WTO Seal Products Dispute: A Preview of the Key Legal Issues](#)

[Court of Appeals for the Federal Circuit Announces Equal Protection Exception for Customs Cases: *Totes-Isotoner v. United States*](#)

[The Bush Administration and Democrats Reach a Bipartisan Deal on Trade Policy](#)

[The WTO Doha Round Negotiation: Suspended Indefinitely](#)

[The Free Trade Agreement of the Americas and Legal Harmonization June 1996](#)

[The WTO Seal Products Dispute: A Preview of the Key Legal Issues](#)

[Insights Archive>>](#)

DOCUMENTS OF NOTE

originating in any other country.” The panel in *US—Clove Cigarettes* held that the challenged U.S. measure is contrary to Article 2.1 of the TBT Agreement because it accords more favorable treatment to domestic menthol cigarettes than to like imported clove cigarettes.^[8] The United States unsuccessfully appealed this ruling. The panel also found the U.S. measure consistent with Article 2.2 of the TBT Agreement,^[9] which prohibits technical regulations that are “more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.” Indonesia did not appeal this finding, which therefore stands.

Non-Discrimination Under Article 2.1 of the TBT Agreement

In assessing the U.S. ban under TBT Article 2.1, the Appellate Body drew significantly from its previous jurisprudence regarding the national treatment obligation in Article III:4 of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”).^[10] The Appellate Body acknowledged the differences between these two agreements, including that the TBT Agreement has no general exceptions provision of the kind found in GATT Article XX.^[11] Nevertheless, the Appellate Body concluded that “the balance that the preamble of the *TBT Agreement* strikes between . . . the pursuit of trade liberalization and . . . Members’ right to regulate, is not, in principle, different from the balance that exists between the national treatment obligation of Article III and the general exceptions provided under Article XX of the GATT 1994.”^[12]

Against this background, it is not surprising that the Appellate Body rejected the panel’s reliance on regulatory purpose in assessing likeness under TBT Article 2.1,^[13] given that the Appellate Body has long rejected the so-called “aim-and-effect” test in the context of the GATT 1994.^[14] Instead, the Appellate Body suggested that “the regulatory concerns underlying a measure, such as the health risks associated with a given product,” are relevant in determining whether products are “like” only to the extent that these concerns affect the traditional criteria such as “physical characteristics” or “consumer preferences”^[15] or otherwise “have an impact on the competitive relationship between . . . the products.”^[16] The Appellate Body did examine regulatory concerns further under TBT Article 2.1 in assessing whether the challenged measure affords less favorable treatment to imported products.

Although the Appellate Body emphasized the competitive relationship between the products, its finding that menthol and clove cigarettes are like products^[17] did not rely heavily on an analysis of the actual market for these products as a whole. The two traditional likeness criteria at issue were “end-use” and “consumer tastes and preferences.”^[18] The Appellate Body disagreed with the panel “that the end-use of cigarettes is simply ‘to be smoked,’” accepting the more specific end-uses proposed by the United States of “satisfying an addiction to nicotine” and “creating a pleasurable experience.”^[19] However, the Appellate Body regarded as irrelevant that a particular use might represent the “principal or . . . most common end-use” of a product and therefore “[t]he fact that more ‘addicts’ smoke menthol than clove cigarettes,” what mattered to the Appellate Body were the end-uses that “a product is *capable* of performing.”^[20] Similarly, in connection with consumer preferences, the Appellate Body stated that “the mere fact that clove cigarettes are smoked disproportionately by youth, while menthol cigarettes are smoked more evenly by young and adult smokers does not *necessarily* affect the degree of substitutability between clove and menthol cigarettes.”^[21]

The Appellate Body held that the panel had wrongly excluded current adult smokers from its

[Appellate Body Report, United States—Clove Cigarettes Measures Affecting the Production and Sale of Clove Cigarettes](#)

[Panel Report, United States—Measures Affecting the Production and Sale of Clove Cigarettes](#)

[Panel Report, United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products](#)

[Panel Report, United States—Certain Country of Origin Labelling \(COOL\) Requirements Agreement on Technical Barriers to Trade](#)

[TBT Agreement](#)

[General Agreement on Tariffs and Trade 1994](#)

[Marrakesh Agreement Establishing the World Trade Organization](#)

[Agreement on the Application of Sanitary and Phytosanitary Measures](#)

[Vienna Convention on the Law of Treaties](#)

[ASIL EISIL>>](#)

ORGANIZATIONS OF NOTE

[ASIL International Economic Law Interest Group](#)

[World Trade Organization](#)

Copyright 2012 by The American Society of International Law ASIL

The purpose of ASIL Insights is to provide concise and informed background for developments of interest to the international community. The American Society of International Law does not take positions on substantive issues, including the ones discussed in this Insight. Educational and news media copying is permitted with due acknowledgement.

The Insights Editorial Board includes: [Cymie Payne](#), UC Berkeley School of Law; [Amelia Porges](#); and [David Kaye](#), UCLA School of Law. [Djordja Lazic](#) serves as the managing editor.

analysis and had given only “cursory treatment” to survey evidence provided by both parties concerning tobacco use in the United States.[22] Nevertheless, in concluding that the products in question are like, the Appellate Body relied on the panel’s factual finding that “from the perspective of young and potential young smokers, clove-flavoured cigarettes and menthol-flavoured cigarettes are similar for purposes of starting to smoke.”[23]

The Appellate Body went on to determine that the “treatment no less favourable” requirement in TBT Article 2.1 prohibits “both *de jure* and *de facto* discrimination against imported products, while at the same time permitting detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions.”[24] Significantly, the Appellate Body made clear that discrimination contrary to Article 2.1 does not arise simply because one imported product is accorded less favorable treatment than one domestic like product; rather, the national treatment obligation in Article 2.1 requires members “to accord to the group of imported products treatment no less favourable than that accorded to the group of like domestic products.”[25] Thus, the Appellate Body appears to acknowledge that a disparate impact on imports is a necessary but not sufficient element of a national treatment violation under Article 2.1.[26]

In applying this test to the case before it, the Appellate Body declared that “the design, architecture, revealing structure, operation, and application” of the challenged measure “strongly suggest that the detrimental impact on competitive opportunities for clove cigarettes reflects discrimination against the group of like products imported from Indonesia,” essentially because the “products that are prohibited . . . consist primarily of clove cigarettes imported from Indonesia, while the like products that are actually permitted under this measure consist primarily of domestically produced menthol cigarettes.”[27]

The United States maintained before the panel and Appellate Body that the menthol exemption aimed at minimizing: (i) the burden on the U.S. health care system in caring for millions of addicted menthol cigarette smokers with withdrawal symptoms; and (ii) the risk of a black market in menthol cigarettes developing. The Appellate Body responded that “it is not clear that the risks that the United States claims to minimize by allowing menthol cigarettes to remain in the market would materialize if menthol cigarettes were to be banned, insofar as regular cigarettes would remain in the market.”[28] In other words, the Appellate Body appears to be speculating that, if menthol cigarettes were banned, menthol cigarette smokers might turn to regular cigarettes. Upon adoption of the Appellate Body report by the DSB, the United States emphasized that the Appellate Body reached this conclusion without reference to any “facts on the record.”[29]

In 2011, the Tobacco Products Scientific Advisory Committee of the U.S. Food and Drug Administration recommended that “[r]emoval of menthol cigarettes from the marketplace would benefit public health in the United States.”[30] However, the practical impact of banning menthol cigarettes remains controversial.

Interpretative Value of WTO Ministerial Decisions

The panel in *US—Clove Cigarettes* found that by enforcing the flavored cigarette ban only three months after enactment, the United States had acted inconsistently with TBT Article 2.12,[31] which requires members to allow a “reasonable interval” between publication and entry into force of technical regulations, except in “urgent circumstances.”[32] In reaching this conclusion, the panel relied on a November 2001 WTO Ministerial Decision adopted by consensus at the Doha Ministerial Conference, which indicates in paragraph 5.2 that the

words “reasonable interval” in TBT Article 2.12 normally mean “not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.”^[33] The Appellate Body agreed for different reasons that paragraph 5.2 is relevant in interpreting TBT Article 2.12 and that the United States had failed to comply with Article 2.12.^[34] The Appellate Body’s reasoning on this point is of systemic importance, given the large number of WTO Ministerial decisions and declarations.

The Appellate Body first considered whether paragraph 5.2 of the Doha Ministerial Decision could constitute a multilateral interpretation of TBT Article 2.12, pursuant to Article IX:2 of the Marrakesh Agreement, which grants the WTO Ministerial Conference and the General Council “the exclusive authority to adopt interpretations” of the WTO agreements. The Appellate Body rejected this possibility, because paragraph 5.2 had not been adopted on the basis of a specific recommendation by the Council overseeing the functioning of TBT Agreement, as required by Article IX:2.^[35] This suggests that WTO Members must observe procedural formalities under Article IX:2 if they intend to adopt a multilateral interpretation. Similar considerations may apply to waivers under Article IX:3, amendments under Article X, and accessions under Article XII of the Marrakesh Agreement. The Appellate Body Report leaves open the question whether a Ministerial decision taken by consensus would be regarded as satisfying a provision that requires decision-making by a specified majority.^[36]

The Appellate Body then concluded that paragraph 5.2 of the Doha Ministerial Decision amounts to a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (“VCLT”)^[37] and therefore is “an interpretative clarification to be taken into account” in interpreting TBT Article 2.12.^[38] The Appellate Body determined that although multilateral interpretations pursuant to Article IX:2 of the Marrakesh Agreement are “most akin to” such “subsequent agreements,” decisions other than those adopted under Article IX:2 may also constitute “subsequent agreements.”^[39]

According to the Appellate Body, interpretations under Article IX:2 “clarify WTO law for all Members,” whereas interpretations developed by panels and the Appellate Body in WTO disputes—including interpretations based on “subsequent agreements” under the VCLT—“are binding only on the parties to a particular dispute.”^[40] On its face, this distinction seems unobjectionable. However, in practice it may be illusory. The Appellate Body has traditionally followed its own prior rulings and increasingly expects panels to follow those rulings as well.^[41] Thus, by identifying paragraph 5.2 of the Doha Ministerial Decision as a “subsequent agreement” for the purpose of interpreting Article 2.12 of the TBT Agreement in *US—Clove Cigarettes*, the Appellate Body has effectively signaled to all WTO Members that this interpretation will apply in future disputes. To avoid doubt, WTO Members should therefore ordinarily allow an interval of at least six months between publication and entry into force of their technical regulations.

Conclusion

The *Clove Cigarettes* case is likely to be taken to represent the WTO’s ability to accommodate health regulation. In this regard, the ruling that the U.S. measure is consistent with TBT Article 2.2 because it is not more trade-restrictive than necessary to fulfill its legitimate objectives indicates significant deference to domestic health priorities. Moreover, in finding a violation of TBT Article 2.1, the Appellate Body stated explicitly:

We do not consider that the *TBT Agreement* . . . is to be interpreted as preventing Members from devising and implementing public health policies . . . 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 . . . [W]e are not saying that a Member cannot adopt measures to pursue legitimate health objectives such as curbing and preventing youth smoking.[42]

Nevertheless, the ruling against the discriminatory elements of the U.S. measure may in practice be judged depending on how the United States implements the decision and the subsequent impact on public health. The United States could ban menthol cigarettes, but only after a lengthy regulatory process involving risk assessments and cost-benefit analyses; such a ban would eliminate trade discrimination without assisting Indonesian exports of clove cigarettes. The United States could repeal the current ban on cigarettes with flavoring other than menthol or tobacco, but this would require legislative action. The parties to the dispute will soon turn to discussions on the timetable for U.S. compliance and on U.S. compliance measures.

The recent consultations commenced by Ukraine and Honduras with Australia regarding Australia's measure for the mandatory "plain packaging" of tobacco products[43] may eventually provide another opportunity to demonstrate the WTO's receptiveness to health objectives. Significantly, that measure contains no obvious discrimination of the kind addressed in *US—Clove Cigarettes*.

About the Author:

Tania Voon, an ASIL member, is Associate Professor at Melbourne Law School, Editorial Board Member of the *Journal of International Economic Law*, and a former Legal Officer of the Appellate Body Secretariat of the WTO.

Endnotes:

[1] Appellate Body Report, *United States—Clove Cigarettes Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (Apr. 4, 2012) [hereinafter *US—Clove Cigarettes*]; see also Panel Report, *United States—Clove Cigarettes*, WT/DS406/R (Sept. 2, 2011).

[2] Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120, available at http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm.

[3] Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154, available at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

[4] Federal Food, Drug and Cosmetic Act (as amended by the Family Smoking Prevention and Tobacco Control Act 2009), § 907(a)(1)(A).

[5] Appellate Body Report, *US—Clove Cigarettes*, *supra* note 1, ¶¶ 222-224.

[6] Notification of an Appeal by the United States, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/10 (Jan. 24, 2012); Notification of an Other Appeal by Mexico, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/11 (Jan. 27, 2012).

[7] Notification of an Appeal by the United States, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/12, WT/DS386/11 (Mar. 28, 2012); Notification of an

Other Appeal by Mexico, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS386/12 (Apr. 2, 2012); Notification of an Other Appeal by Canada, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/13 (Apr. 2, 2012).

[8] Panel Report, *US—Clove Cigarettes*, *supra* note 1, ¶ 7.293.

[9] *Id.* ¶¶ 7.428, 7.432.

[10] General Agreement on Tariffs and Trade 1994, 1867 U.N.T.S. 187, available at http://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm.

[11] Appellate Body Report, *US—Clove Cigarettes*, *supra* note 1, ¶¶ 101, 180.

[12] *Id.* ¶ 109; see also *id.* ¶¶ 96, 174.

[13] *Id.* ¶ 112.

[14] Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 216, 241, WT/DS27/AB/R (Sept. 9, 1997).

[15] The four criteria are physical characteristics, end-uses, consumer tastes and habits, and tariff classification. Appellate Body Report, *US—Clove Cigarettes*, *supra* note 1, ¶ 104.

[16] *Id.* ¶¶ 117, 119.

[17] *Id.* ¶ 160.

[18] *Id.* ¶ 159.

[19] *Id.* ¶ 132.

[20] *Id.* ¶ 131 (original emphasis).

[21] *Id.* ¶ 144 (emphasis added).

[22] *Id.* ¶¶ 139, 145, 150, 153, 155.

[23] *Id.* ¶ 144.

[24] *Id.* ¶ 175.

[25] *Id.* ¶¶ 180, 193.

[26] Cf. Appellate Body Report, *US—Clove Cigarettes*, *supra* note 1, ¶ 166 (U.S. argument); Nicolas Diebold, *Standards of Non-Discrimination in International Economic Law*, 60 Int'l & Comp. L.Q. 831, 839-841 (2011).

[27] Appellate Body Report, *US—Clove Cigarettes*, *supra* note 1, ¶ 224.

[28] *Id.* ¶ 225.

[29] Mission of the United States to the WTO, *Geneva, Statements by the United States at the April 24, 2012, DSB Meeting*, available at <http://geneva.usmission.gov/2012/04/25/statements-by-the-united-states-at-the-april-24-2012-dsb-meeting/>.

[30] U.S. Food & Drug Admin., *Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations*, 225 (2011), available at <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf>; see also Daniel Pruzin, *Former U.S. Health Officials Call for Ban On Menthol Cigarettes to Comply With Ruling 29* Int'l Trade Rep. 667 (Apr. 26, 2012).

[31] Panel Report, *US—Clove Cigarettes*, *supra* note 1, ¶¶ 7.567, 7.575, 7.576, 7.595.

[32] Article 2.10 of the TBT Agreement elaborates on such circumstances.

[33] World Trade Organization, Ministerial Decision of 14 November 2001 on Implementation-Related Issues and Concerns, WT/MIN(01)/17, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_implementation_e.pdf.

[34] Appellate Body Report, *US—Clove Cigarettes*, *supra* note 1, ¶¶ 269, 298(b)(ii).

[35] *Id.* ¶¶ 251, 254, 255.

[36] *Id.* ¶ 252.

[37] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, *available at* http://www.oas.org/dil/Vienna_Convention_on_the_Law_of_Treaties.pdf.

[38] Appellate Body Report, *US—Clove Cigarettes*, *supra* note 1, ¶¶ 268, 269.

[39] *Id.* ¶¶ 257-258.

[40] *Id.* ¶¶ 259-260.

[41] *See, e.g.*, Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶¶ 160-161, WT/DS344/AB/R (Apr. 30, 2008).

[42] Appellate Body Report, *US—Clove Cigarettes*, *supra* note 1, ¶¶ 235-236.

[43] Request for Consultations by Ukraine, *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434/1, IP/D/30, G/TBT/D/39, G/L/985 (Mar. 15, 2012); Request for Consultations by Honduras, *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/1, IP/D/31, G/TBT/D/40, G/L/986 (Apr. 10, 2012).