

# The ramifications of the Appellate Body Ruling in *United States – measures affecting the production and sale of clove cigarettes* on consumer protection measures at international trade level

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## OPSOMMING

### Die gevolge van die Appèlligaam Beslissing in *United States – measures affecting the production and sale of clove cigarettes* op verbruikersbeskerming op internasionale handelsvlak

Die Wêreldhandelsorganisasie (WHO) is in 1995 gestig met 'n duidelike handelsgeoriënteerde filosofie. Die primêre fokus van die WHO se institusionele raamwerk is dus te verstaan op produkte en dienste eerder as op verbruikers. Sonder om hierdie benadering noodwendig te bevraagteken, is dit 'n bron van kommer dat die WHO se implementering van sy mandaat en ooreenkomste tog negatief inwerk op sosiale belange wat die regte van verbruikers insluit. 'n Onlangse en historiese ondersoek na die WHO/'GATT' dispuutoplossing wys na talle besluite wat algemeen is terwyl dit die verbruiker se gesondheid en veiligheid ondermyn, ten gunste van kommersiële belange. Die verwerping van die VSA se gesondheidsbeleid algemeen bekend as die 'youth anti-smoking law', gebaseer op die 'Family Smoking Prevention and Tobacco Control Act' van 2009, deur die Appelraad in 'Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R (April 4, 2012)' is maar een van baie besluite wat gedurig debatte sal ontlok of die WHO enigsins sensitief is vir verbruikersbelange, of is sulke belange net te ver verwyder van dit waarvoor hulle staan.

## 1 Introduction

The World Trade Organization (hereinafter WTO)'s approach to trade liberalisation is *unapologetically, and perhaps unreflectively, producer-oriented*. It prioritises ensuring that goods and services can be offered across borders with the least amount of discrimination and administrative barriers. It assumes that consumers necessarily benefit from free trade because they will have access to a greater variety of goods and services at a cheaper price. While such benefits have, indeed, materialised in a number of ways, they do not reflect the full spectrum of

consumer interests. *Other interests ... are only marginally or imperfectly addressed by the trade regime.*<sup>1</sup>

Upton Sinclair's 1905 novel *The Jungle*, is regarded as one of the pre-1960 game-changers for the United States consumer protection regime. Sinclair's novel sought to expose the deplorable working conditions in the meat packing industry in the United States. Sinclair's exposé was followed by a wave of investigations by many others, and eventually led to, amongst others effects, the formation of the Food and Drug Administration (hereinafter FDA) and enactment of laws designed to promote and protect consumer interests. This historical legacy of strong advocacy and jurisprudence in American consumer protection continues to resonate even today, and has the country undergoing a wide-ranging overhaul of consumer protection laws.<sup>2</sup> Currently, the United States Federal Trade Commission (hereinafter FTC) is the primary independent federal agency which, alongside other federal authorities, is responsible for the administration of numerous consumer protection laws.<sup>3</sup> Amongst this legislation is the Comprehensive Smokeless Tobacco Health Education Act of 1986,<sup>4</sup> which was amended by the Family Smoking Prevention, and Tobacco Control Act of 2009.<sup>5</sup> In general, there is a multiplicity of policies, regulations, and laws in the United States aimed at affording a variety of protections to consumers – at both Federal and State level.<sup>6</sup>

The issue of tobacco regulation has also been one of the contentious issues at the international level, under the auspices of the General

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1 Rolland 'Are consumer-oriented rules the new frontier of trade liberalization?' 2014 *Harvard International Law Journal* 316, at 361 – 362. *My own emphasis.*

2 Cohen 'Warne Lecture: is it time for another round of consumer protection? The lessons of twentieth-century U.S. history' 2010 *Journal of Consumer Affairs* 234-246.

3 United States Federal Trade Commission (FTC). The consumer protection authority of the FTC, which is intended to protect consumers from fraudulent, deceptive, and unfair business practices, is derived from section 5(a) of the Federal Trade Commission Act (FTC Act), which prohibits 'unfair or deceptive acts or practices in or affecting commerce'. See Federal Trade Commission Act 15 U.S.C. § 5(a)(1). The FTC is assisted by several divisions of its Bureau of Consumer Protection (BCP) that include the divisions on: Advertising Practices, Consumer and Business Education, and Enforcement. Relevant to this paper is the Division of Advertising Practices that combats false advertising claims, and those advertising claims that compromise the health of consumers and others.

4 15 U.S.C. §§ 4401-4408.

5 ACT. 111 P.L. 31; 123 Stat. 1776.

6 At State level the State Attorneys General of most of the States bear the responsibility of enforcing state consumer protection laws, the responsibility which to a certain degree is facilitated by the National Association of Attorneys General (NAAG) to ensure effectiveness of their protection measures and to support amongst others consumer protection litigation initiated by the Attorneys General. See Pridgen and Alderman *Consumer Protection and the Law* (2009) for a narrative of consumer protection laws at State level.

Agreement on Tariffs and Trade 1947 (hereinafter GATT 1947),<sup>7</sup> the predecessor of the World Trade Organisation (hereinafter WTO), in several disputes involving the United States tobacco regulation.<sup>8</sup> According to Voon the tension between free trade regulation and the sovereignty of State Parties to introduce measures to regulate tobacco in the interest of the public has always existed.<sup>9</sup> The ramifications to members of the WTO<sup>10</sup> of the disputes settlement body's panels and the Appellate Body rulings in *Measures Affecting the Production and Sale of Clove Cigarettes*<sup>11</sup> (hereinafter *US – Clove Cigarettes*) on consumer protection and health issues<sup>12</sup> is the focus of this article. Both the Panel and the Appellate Body ruled the United States Family Smoking Prevention and Tobacco Control Act<sup>13</sup> (hereinafter FSPTCA) ban of the sale of flavoured cigarettes except menthol cigarettes, to be inconsistent with the WTO laws in particular the Agreement on Technical Barriers to Trade.<sup>14</sup>

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- 7 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947]. Reprinted in (1969) 44 B.I.S.D 1 [GATT 1947].
  - 8 See for example, Panel Report, *United States–Measures Affecting the Importation, Internal Sale and Use of Tobacco*, ¶¶ 12-46, DS44/R (Aug. 12, 1994). See also Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶¶ 6, 63, DS10/R-37S/200 (Oct. 5, 1990) (GATT) [hereinafter Panel Report, *Thailand – Restrictions*]. For general discussions of the ruling see, for example, Warikandwa and Osode 'Managing the trade-public health linkage in defence of trade liberalisation and national sovereignty: an appraisal of United States – Measures Affecting the Production and Sale of Clove Cigarettes' 2014 *PELJ* 1262.
  - 9 Voon 'Flexibilities in WTO law to support tobacco control regulation' 2013 *American Journal of Law & Medicine*, 199-217 at 199.
  - 10 The World Trade Organisation (WTO) was established pursuant to the Marrakech Agreement Establishing the World Trade Organization, April 15, 1994: The Legal Texts – The Result of the Uruguay Round of Multilateral Trade Negotiations 4 (1999) 1867 U.N.T.S. 154, reprinted in (1994) 33 ILM 1144–52.
  - 11 Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (hereinafter Appellate Body Report, *US – Clove Cigarettes*) WT/DS406/AB/R, adopted Apr. 24, 2012. See also the WTO Panel Report, *US – Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R (September 2, 2011) (hereinafter referred to as Panel Report, *US – Clove Cigarettes*).
  - 12 Other cases include, for example, Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶¶ 1-6, 21-22, WT/DS302/AB/R (Apr. 25, 2005); Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶¶ 8.1-8.3 WT/DS302/R [hereinafter Panel Report, *Dominican Republic Cigarettes*]; Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R (June 17, 2011); Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R (Nov. 15, 2010).
  - 13 Family Smoking Prevention and Tobacco Control Act § 910(a)(1), Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009) (hereinafter FSPTCA).
  - 14 Agreement on Technical Barriers to Trade (1995) (hereinafter TBT Agreement) and the Marrakech Agreement Establishing the WTO (1994).

In a rather ironic way, smokeless cigarettes, are said to be in the class of ‘toxic, carcinogenic, and addictive products’<sup>15</sup> and at the same time punted as ‘tobacco harm-reduction strategy’ due to the fact that ‘these products convey a substantially lower risk from morbidity and mortality than does cigarette smoking.’<sup>16</sup>

This article argues in the main that both regulations and decisions of the WTO bodies must have due regard for the protection of consumer interests as far as possible, and particularly those consumer protection measures in the jurisdictions of State Parties. The article’s contextualisation provides a historical account of tobacco legislation in the United States; and alludes to the fact that cigarettes smoking counts for the majority of deaths in the United States, despite the myriad of regulatory measures in place. It also discusses the factual scenario of the cloves cigarettes disputes and findings of the WTO panels and Appellate Body. The article further enquires whether the United States had a justifiable defence within WTO jurisprudence, including the possibility to have used Article XX of GATT 1947. The producer-centred bias approach of the ruling, it is argued, neglects consumer interests. However, it is appreciated that the positives of the ruling in a form of the newly created exception-like deference to regulatory sovereignty in favour of consumer interests should not be overlooked.

## 2 Attempts at Tobacco Industry Regulation

At the outset, it is useful and enlightening to take stock of the problem of smoking in the United States and provide a historical account of the tobacco industry laws in the United States. Tobacco products control in the United States has an interesting evolution that spans over different eras. The first notable period, as indicated above, includes the expose by Sinclair that led to the creation of the FDA. The FSPTCA was signed into law by President Obama on 22 June 2009, giving the FDA the authority to regulate tobacco products<sup>17</sup> – the manufacturing, marketing and sale of tobacco products, pursuant to the Federal Food, Drug, and Cosmetic

15 According to Tomar *Ibid* at 388, a study conducted in India of the health effects of smokeless tobacco pointed to these tobacco products having a substantial risk of oral cancers.

16 Tomar *Ibid* at 390. The harmful nature of tobacco has been a concern even at international level with the World Health Organisation (hereinafter WHO) introducing the *Framework Convention on Tobacco Control* (FCTC) in 2015.

17 For historical information on tobacco regulation in the United States, and more information on the FSPTCA see generally Weiner ‘The Family Smoking Prevention and Tobacco Control Act: An early evaluation (March 2010)’ 2014, available from <https://dash.harvard.edu/handle/1/8591097> (accessed 2014-06-22). See also Lee., Baker., Ranney., and Goldstein ‘Neighborhood inequalities in retailers’ compliance with the Family Smoking Prevention and Tobacco Control Act of 2009’ 2015 *Prev Chronic Dis* 150 (for a study with findings that compliance is not adhered to in certain communities, and that visible inspection is necessary); Walker ‘When will the Tobacco Control Act be considered a failure?’ 2014 *Austin J Pulm Respir Med* 1 -2 (on the successes of the Act).

Act (hereinafter FFDCA).<sup>18</sup> This law became one of the important legislation in the US regime of tobacco control, and perhaps a blow to the tobacco industry<sup>19</sup> which tasted some victory when the Supreme Court in 2000 restricted the FDA's authority to regulate the cigarettes industry in *FDA v Brown and Williamson Tobacco Corporation*.<sup>20</sup> The significance of the FSPTCA was also evident from the fact that a large majority of the senators voted in favour of the Bill.<sup>21</sup> For the purposes of this article section 101 of the FSPTCA is important. Section 101 inserted a new provision to the FFDCA, section 907(a)(1)(A), which was described as instrumental in the United States' endeavour to protect public health, including the reduction of smoking among youths.<sup>22</sup>

In this respect, cigarettes that are regarded as containing characterising flavours – such as 'an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee' are considered adulterated and prohibited under section 907(a)(1)(A) of the FDC Act, as amended.<sup>23</sup> Stiff penalties are imposed for these cigarette products and/or sale thereof including seizure, criminal prosecutions and civil penalties.

Cigarettes smoking accounts for the majority of deaths in the United States,<sup>24</sup> thus the United States introduced a ban on certain classes of tobacco and other similar preventative interventions. For the purposes of this article, I would like to note the finding of the Congress in section 2(1) of the FSPTCA that '[t]he use of tobacco products by the Nation's children is a pediatric disease of considerable proportions that results in new generations of tobacco-dependent children and adults.' In fact the Congress in the FSPTCA was at pains to fully explain the effects of

18 The Federal Food, Drug, and Cosmetic Act, United States Code, Title 21 (FFDCA). See FT 101(b)(3) giving the FDA the authority to regulate the tobacco products industry.

19 This landmark law ended the special protection from regulation that the tobacco industry enjoyed for decades and represents a milestone in protecting America's children and health from the devastating consequences of tobacco use.

20 *FDA v Brown and Williamson Tobacco Corporation* 529 US 120 161 (2000). The Court held that the US Congress did not intend to allow the FDA to independently regulate tobacco products.

21 On June 11, 2009, the U.S. Senate voted 79-17 to approve the bill, H.R. 1256/S. 982.

22 See the US House Report to the WTO Panel Exhibit 67, 37, 2011.

23 The relevant part, section 907(a)(1)(A) of the FDC Act, states that: '... a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke.'

24 Tomar 'Epidemiologic perspectives on smokeless tobacco marketing and population harm' 2007 *Am J Prev Med* 387–397 at 389. See generally Proctor *Golden Holocaust: Origins of the Cigarette Catastrophe and the Case for Abolition* (2011) 553.

tobacco particularly on children as clearly illustrated in the provisions below:

- (13) Tobacco use is the foremost preventable cause of premature death in America. It causes over 400,000 deaths in the United States each year, and approximately 8,600,000 Americans have chronic illnesses related to smoking.
- (14) Reducing the use of tobacco by minors by 50 percent would prevent well over 10,000,000 of today's children from becoming regular, daily smokers, saving over 3,000,000 of them from premature death due to tobacco-induced disease. Such a reduction in youth smoking would also result in approximately \$75,000,000,000 in savings attributable to reduced health care costs.
- (15) Advertising, marketing, and promotion of tobacco products have been especially directed to attract young persons to use tobacco products, and these efforts have resulted in increased use of such products by youths. Past efforts to oversee these activities have not been successful in adequately preventing such increased use.
- (16) In 2005, the cigarette manufacturers spent more than \$ 13,000,000,000 to attract new users, retain current users, increase current consumption, and generate favorable long-term attitudes toward smoking and tobacco use.
- (17) Tobacco product advertising often misleadingly portrays the use of tobacco as socially acceptable and healthful to minors.
- (18) Tobacco product advertising is regularly seen by persons under the age of 18, and persons under the age of 18 are regularly exposed to tobacco product promotional efforts.
- ...
- (23) Children are more influenced by tobacco marketing than adults: more than 80 percent of youth smoke three heavily marketed brands, while only 54 percent of adults, 26 and older, smoke these same brands.
- ...
- (26) Restrictions on advertising are necessary to prevent unrestricted tobacco advertising from undermining legislation prohibiting access to young people and providing for education about tobacco use.

### 3 Precis of the *US – Clove Cigarettes* Dispute

#### 3 1 Key Facts in Brief

The *United States – Clove Cigarettes* dispute involved a complaint by Indonesia challenging section 907(a)(1)(A) of the FFDCA that had the effect of banning the importation and marketing of clove cigarettes from Indonesia. The formal request for consultation with the United States was made by Indonesia on 7 April 2010.<sup>25</sup> The US imposed a ban on the importation and sale of flavoured cigarettes in the aftermath of the

<sup>25</sup> See Request for Consultations by Indonesia, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/1

promulgation of the FSPTCA, and argued that the measures were introduced to protect the youth from the harmful effects of tobacco. Indonesia reacted by requesting the establishment of a WTO Panel to determine whether or not the ban imposed by the US was inconsistent with its obligations as contained in the TBT Agreement. According to Indonesia the ban discriminated against clove cigarettes that are primarily produced in Indonesia, which was also the largest exporter of clove cigarettes into the United States,<sup>26</sup> in favour of menthol cigarettes which are 'primarily produced in the United States'.<sup>27</sup> The crux of Indonesia's argument was that the ban violated both Articles 2.1 and 2.2 of the TBT Agreement and GATT Article III: 4 in that imported clove cigarettes were treated less favourably than domestic menthol cigarettes.

Article 2.1 states:

Members shall 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 originating in any other country.

In essence Article 2.1 has elements of both the principles of Most-Favoured-Nation as well as National Treatment which are the equality clauses and fundamental principles of the WTO.

Article 2.2 reads in part:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety;<sup>28</sup> animal or plant life or health, or the environment.

Before the Panel, the United States argued that banning menthol cigarettes was not favoured, as it would, among other things, create a

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(Apr. 14, 2010). (Hereinafter Panel Request, *US – Clove Cigarettes*). For more on the complaint see Ballet 'Losing flavour: Indonesia's WTO complaint against the U.S. ban on clove cigarettes' 2011 *American University International Law Review* 515-541.

26 Indonesia claimed loss due to the complete cessation of imports into the United States of kretek (clove) cigarettes amounting to \$15.2 million in value in 2008 with 99% of the imports originating from Indonesia.

27 See Mitchell and Voon 'Regulating tobacco flavours: implications of WTO Law' 2011 *Boston University International Law Journal* 383 at 387 (Alluding to the fact that there are other countries having flavouring measures, and referring in particular to Austria, Canada, France; and that both the 'United States and Canadian measures typically exclude menthol (as well as tobacco) from the restrictions, as well as other specific additives in some instances').

28 Own emphasis.

black market for menthol cigarettes.<sup>29</sup> However, the United States conceded that the said risks had not been ‘sufficiently evaluated’.<sup>30</sup>

The reaction in the United States against the Appellate Body ruling was that the WTO is over-reaching its judicial power, and also for undermining the legitimacy of the multilateral trading system in general.<sup>31</sup> Warikandwa and Osode criticised the ruling as a lost opportunity for the Panel and Appellate Body ‘to address the special development needs of developing Member States’; and to ‘develop a credible reputation as a forum for effective dispute resolution in matters where trade inter-connects with non-trade matters’.<sup>32</sup> I will not delve into this criticism, as it is not an important discussion point of this article.<sup>33</sup>

### 3.2 Findings of the Panel and the Appellate Body

In *US – Clove Cigarettes*, the Panel found the United States measure consistent with Article 2.2 of the TBT Agreement.<sup>34</sup> Indonesia did not appeal this finding, however. Both the Panel and the Appellate Body found the United States’ flavoured cigarette ban is a technical regulation contrary to Article 2.1 of the TBT Agreement, although the reasons of the Appellate Body were different from those proffered by the Panel.<sup>35</sup> It is important to note that this was the first time that a case dealt specifically with Article 2.1.<sup>36</sup>

The Appellate Body observed that ‘the design, architecture, revealing structure, operation, and application of Section 907(a) (1) (A) impacted negatively on the competition and discriminated against like cigarettes from Indonesia’.<sup>37</sup> Both the Panel and the Appellate Body observed that the United States law in question expressly identified the products it covered, ‘cigarettes and any of their component parts;’ it identifies

29 Panel Report, *US – Clove Cigarettes*, *supra* n11, ¶ 7.57.

30 Panel Report, *US – Clove Cigarettes*, *idem*.

31 See generally Shlomo-Agon ‘Clearing the smoke: the legitimization of judicial power at the WTO’ 1 at 2fn7 available at <http://law.huji.ac.il/upload/ClearingtheSmoke.pdf> (accessed on 2016-10-27), making reference to the US’s statement pending the adoption of the AB report in *US-Clove Cigarettes*, Minutes of DSB Meeting, WT/DSB/M/315, 24 April 2012, para. 75.

32 Warikanwa and Osode, *supra* n8 at 1281.

33 However, I disagree with the argument of Warikandwa and Osode that the ruling should have been made in such a way as to allow a special and differential treatment of developing countries in the tobacco industry. This was more about health issues, which the developing countries are struggling with.

34 Panel Report, *US – Clove Cigarettes*, *supra* n11 ¶ 7.3.2.

35 See Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶ 234.

36 See Panel Report, *US – Clove Cigarettes*, *supra* n11 ¶ 7.80.

37 Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶ 224.



product characteristics in the negative form: ‘a cigarette ... shall not contain;’ and it was mandatory.<sup>38</sup> The choice of words by the Panel immediately points to the Appellate Body’s decision in *EC – Asbestos*,<sup>39</sup> particularly the phrase ‘objectively definable features’. The Appellate Body was critical of the claim made before the Panel by the United States that banning menthol cigarettes will encourage a black market for menthol cigarettes, with consequent risks. According to the Appellate Body the risk argument was unclear and unconvincing.<sup>40</sup> Hence, the Appellate Body rejected the argument that the Panel ‘erred in ultimately finding that Section 907(a)(1)(A) is inconsistent with Article 2.1.’<sup>41</sup>

### 3 3 Key Aspects of the Clove Cigarettes Rulings

#### 3 3 1 Was the Measure a Legitimate Regulatory Purpose?

In cases like this, the legitimacy of the purpose of the regulatory measure in question is important to determine whether the like products have been treated fairly and even-handedly. Also relevant is the regulatory purpose of a measure in question in determining whether similar imported products have been treated less favourably. Article 2.2 of the TBT Agreement refers to both the ‘legitimate objectives’ and the legitimate objective of ‘protection of human health’. In this case, the regulatory purpose of the tobacco control measure instituted by the United States was to protect human life and health. It was thus not a difficult task for both the Panel and the Appellate Body to find the United States flavoured cigarette ban consistent with Article 2.2 in *U.S. – Clove Cigarettes*, even though it was found inconsistent with Article 2.1.

#### 3 3 2 Non-Discrimination, Balance, and Even-Handedness

As noted in 3.2 above, the United States cigarettes ban was found to be inconsistent and in violation of Article 2.1 of the TBT Agreement, despite the intended regulatory purpose of the measure in question being found to be consistent with Article 2.2. Paragraph 6 of the TBT Agreement’s preamble is important in interpreting and applying the provisions of Article 2.1. Therefore, the Appellate Body noted that members

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38 See Panel Report, *US–Clove Cigarettes*, *supra* n11 ¶¶ 7.27–28, 7.31–32, 7.39–41; Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶¶224.

39 Appellate Body Report, *EC – Asbestos* WT/DS135/AB/R (adopted 5 April 2001). The Appellate Body in *EC – Asbestos* set out three requirements for a measure to be a technical regulation for the purposes of the provisions of TBT Article 2. The measure must apply to identifiable products; it must, in the words of TBT Annex 1.1 ‘lay down product characteristics or their related processes and production methods, including the applicable administrative provisions’ (or else it must be about labeling and identification); and compliance with the measure must be mandatory.

40 Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶ 225.

41 Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶ 222. According to Cohen, *US – Clove Cigarettes* marked the first time in the history of the WTO that the Panel invalidated a technical regulation under Article 2.1 of the TBT Agreement. See Cohen *supra* n2 at 115.

committed in Paragraph 6 that ‘... no country should be prevented from taking measures necessary ... for the protection of human, animal or plant life or health ... at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of [TBT Agreement].’<sup>42</sup>

This, in my view, is a small victory for WTO members intending to introduce measures such as tobacco control for consumer or human protection objectives that the Appellate Body viewed Paragraph 6 as ‘counterbalancing the trade-liberalization objective’<sup>43</sup> in Paragraph 5 of the preamble. Most important is the description of Paragraph 6 of the Preamble, as expressing the members’ ‘right to regulate’ which must not be ‘constrained’, even if it is a ‘technical regulation in pursuit of legitimate objectives’.<sup>44</sup> The only proviso issued by the Appellate Body is that such technical regulation must be implemented in an ‘even-handed manner’.<sup>45</sup> The Appellate Body ruling points to concerns of lack of balance and uneven-handedness of the ban, which one must admit were patently there for everyone to see, and which tipped the scales in favour of the conclusion that the clove cigarettes ban amounted to an unfair discrimination of imported cigarettes – contrary to the provisions of Article 2.1 of the TBT Agreement.

The legality of the measure was not an issue, as far as Article 2.2 of the TBT Agreement is concerned, but the ban itself was discriminatory and not applied even-handedly. This should have been a winnable case from the perspective of a public health proponent, in my view. The United States should in part have itself to blame in the manner the case was defended and the presence of other factual circumstances that did not speak in favour of the ban. First, there seemed to be an internal conflict between the FFDCA and the FSPTCA. The FFDCA does not exempt menthol cigarettes from any new regulations. However, section 907(e) of the FFDCA requires the US Scientific Advisory Committee<sup>46</sup> to issue a report on the impact of menthol cigarettes on public health. On the other hand, section 907(a)(1)(A) of the FSPTCA exempts menthol cigarettes from the ban imposed on the sale of cigarettes that contain an herb or spice that is a ‘characterizing flavour of the tobacco product’. Inherently contradictory in the FSPTCA itself is that the exemption goes against the very objective of the FSPTCA to provide ‘... the Secretary with proper

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42 Appellate Body Report, *US – Clove Cigarettes*, *supra* n11, ¶ 94.

43 Appellate Body Report, *US – Clove Cigarettes*, *ibid* ¶ 95.

44 Appellate Body Report, *US – Clove Cigarettes*, *ibid* ¶ 95.

45 Appellate Body Report, *US – Clove Cigarettes*, *ibid* ¶ 95.

46 The US Scientific Advisory Committee was established in 1951 by President Harry S. Truman of the United States. The Committee reviews and evaluates safety, dependence, and health issues relating to tobacco products and provides appropriate advice, information and recommendations to the Commissioner of Food and Drugs.

authority over tobacco products in order to protect the public health and to reduce the number of individuals under 18 years of age who use tobacco products'. Interestingly bizarre was the argument of the United States before the Panel intended to justify the exclusion of menthol cigarettes from the ban. The United States, as referred to in the Appellate Body report, argued that:

the exemption of menthol cigarettes from the ban on flavoured cigarettes is unrelated to the origin of the products, because it addresses two distinct objectives: one relates to the potential impact on the US health care system associated with the need to treat 'millions' of menthol cigarette addicts with withdrawal symptoms; and the other relates to the risk of development of a black market and smuggling to supply the needs of menthol cigarette smokers.<sup>47</sup>

According to the Appellate Body, the reason for excluding menthol cigarettes is rather strange if the purpose is to dissuade youths from smoking, and reduce smoking as stated in the objective of Section 907(a)(1)(A). The Appellate Body particularly highlighted the fact that menthol cigarettes, like clove cigarettes, has flavouring characteristics that are appealing to young smokers, making tobacco more pleasant, and masking the harshness of tobacco.<sup>48</sup> Thus, the ground for the justification of the ban on clove cigarettes are equally applicable to menthol cigarettes.<sup>49</sup>

Secondly, the United States' admission that no sufficient or substantive assessment of associated risks for banning menthol cigarettes was undertaken did not do its case any favour either.<sup>50</sup> The United States may have probably satisfied the provisions of Article 2.1, or rather not readily have been found to have acted inconsistently with the provisions of Article 2.1 of the TBT Agreement had it secured sufficient evidence supporting the justifiable discrimination between clove and menthol cigarettes, based on public health considerations. More evidence was needed to justify these regulatory distinctions.<sup>51</sup>

Of concern, in my view, is the tendency of the Appellate Body to introduce unexplained concepts. For example, the Appellate Body has not applied itself to the meaning of 'even-handedness'. To understand this concept better one will have to look to other decisions for guidance. In *US – Tuna II*, for example, it was observed that even-handedness

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47 See Appellate Body Report, *US – Clove Cigarettes*, *ibid* ¶ 216.

48 See Appellate Body Report, *US – Clove Cigarettes*, *ibid* ¶ 225.

49 See Appellate Body Report, *US – Clove Cigarettes*, *ibid* ¶ 225.

50 More information on the risks in general could have been obtained from the submissions by the World Health Organisation (WHO), but the Panel was of the view that such submission was unnecessary because of 'the fact that the parties had placed a considerable amount of materials regarding WHO legal instruments and the WHO's work in the area of tobacco control on the Panel record'. See Appellate Body Report, *Clove Cigarettes*, *ibid* ¶ 11.

51 In fact the United States was found in many respects not to have provided adequate evidence to convince the Panel otherwise. See Appellate Body Report, *US – Clove Cigarettes*, *ibid* ¶ 200 for example.

involves addressing the question whether the measure is ‘calibrated’, ‘fair’ and ‘non-discriminatory’.<sup>52</sup>

### ***3.3.3 The New Exception-like Deference to Regulatory Sovereignty***

Numerous issues may be raised against the direction of the WTO’s implementation of the TBT Agreement, and in particular against the *US – Clove Cigarettes* ruling itself. It is not controverted that the violation of Article 2.1 of the TBT Agreement does not necessarily implicate Article 2.2. Does the United States really need to bother itself with compliance with the ruling? Unfortunately, the answer is yes. Failing to comply may expose the United States to retaliatory trade actions from Indonesia. Inescapably, such a retaliatory action may also hurt the same consumers that the United States wanted to protect in the first place. It is a catch-22-situation. One can find solace in the fact that the WTO in *US – Clove Cigarettes* adopted an exception-like deference to national regulatory sovereignty instead of casting in stone a ready approach to the finding of discrimination by adding a necessity test to Article 2.1 of the TBT Agreement.<sup>53</sup> In laying out this test, the Appellate Body stated:

[T]he existence of a detrimental impact on competitive opportunities in the relevant market for the group of imported products vis-à-vis the group of domestic like products is not sufficient to establish a violation of the national treatment obligation contained in Article 2.1 of the *TBT Agreement*. Where the technical regulation at issue does not *de jure* discriminate against imports, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflects discrimination against the group of imported products.<sup>54</sup>

One other important pronouncement from the Appellate Body is that showing the detrimental impact of the measure on imports alone is not sufficient to establish a violation of Article 2.1 of the TBT Agreement.<sup>55</sup> The *US – Clove Cigarettes* ruling ‘reflect[s] a step toward practical reconciliation between market efficiency and regulatory autonomy’, argued Gaul.<sup>56</sup> In my view, the new jurisprudence of deference is not something to celebrate as a victory for consumer protection jurisprudence. It is a win and lose regime.

The Appellate Body’s exception-like deference has difficulties in its application, and the following are serious points of consideration, if not

52 *US – Tuna II*, see ¶ 285-286.

53 See generally Cohen, *supra* n2 above.

54 Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶ 215.

55 Appellate Body Report, *US – Clove Cigarettes*, *ibid* ¶ 208.

56 Gaul ‘The Technical Barriers to Trade Agreement: A reconciliation of divergent values in the global trading system’ 2016 *Chi.-Kent. L. Rev.* 267 – 294, at 268.

contention. First, there is nowhere in the Appellate Body Report where it is clear as to what is meant by the phrase 'legitimate regulatory distinction' in the light of reference to the phrase 'legitimate objectives' in Article 2.2. In the case under discussion, the Appellate Body agreed with the Panel that the United States failed to show that the reasons for the distinction between clove and menthol cigarettes are based on 'legitimate regulatory distinctions'.<sup>57</sup> Second, the Appellate body does not give directions as to what is meant by the requirement that the detrimental impacts on imports stem 'exclusively' from a legitimate regulatory distinction. It is submitted that it becomes a much simpler test or rather stricter, though complicated, requirement, if what is intended by the use of the word 'exclusively' is that the measure must be the whole or rather the one and only reason for the detriment. In the ordinary cause of events, it must then mean that any technical regulation that discriminates between like products with consequent detrimental impacts on the said like product, may not be in violation of the TBT Agreement if it is not the one and only cause of such detrimental impact. Lastly, the Appellate Body read into the TBT Agreement the requirement of necessity thus making it more difficult to make a case that the measure is justifiable. Following this, WTO members will have to make a very difficult and calculated decision whether their claims must be based on necessity pursuant to Article 2.2 or on discrimination pursuant to Article 2.1.<sup>58</sup>

### ***3 3 4 Further Clarification on Application of the Concept of Non-Discrimination***

Commendable of the *US – Clove Cigarettes* ruling is the clarification of the application of the requirement of discrimination under the TBT. The position now is that a regulation that seeks to change or modify the terms and conditions of competition unfavourably for the imported goods may not readily be regarded as discriminatory the unfavourable consequences on imported goods results wholly from such a legitimate regulatory distinction.' This new development opens up a window of opportunity for incremental regulation. For example, the ban on flavoured tobacco may start with clove cigarettes and then later on extend to menthol cigarettes. Unfortunately, the idea of incremental regulation was not favourably received by both the Panel and the Appellate Body in the clove cigarettes dispute.

## **4 Recourse to GATT Article XX**

The Indonesian claim based on Article III: 4 of the GATT 1994 and its

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57 Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶ 225.

58 Cohen, *supra* n2 at 138.

opposition to the United States' defence under Article XX (b) of the GATT 1994 were declined by the Panel.<sup>59</sup> On appeal, the United States argued against the Panel using as authority the jurisprudence developed under Article XX (b) of the GATT 1994 to assess Indonesia's claims under Article 2.2 of the TBT Agreement.<sup>60</sup> As part of its complaint, Indonesia had argued that the United States failed to make a case for the measure to be allowed on an exceptional basis pursuant to GATT Article XX.<sup>61</sup> In my view, the United States' objection makes sense, particularly since the Panel denied the United States reliance on Article XX as a defence. The Appellate Body conceded that the TBT Agreement does not have a provision equivalent to Article XX of GATT.<sup>62</sup> It did, however, express the view that there is functional equivalency between the relevant provisions of the TBT Agreement and GATT Article XX in respect of the members' rights to regulate.<sup>63</sup>

Although the defence based on Article XX of GATT was declined by the Panel and only addressed in passing by the Appellate Body, it is, in my view, important for the purposes of this article to also discuss the application of GATT Article XX to the dispute in question, albeit briefly. It is also useful to highlight other relevant provisions of the GATT to enable one properly contextualise discussions around article XX. GATT Article III:4, for instance, prohibits WTO members from treating imports 'less favorably' than domestic like products after passage through customs as regards 'regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products ...' so as to protect domestic products.<sup>64</sup>

Article XX<sup>65</sup> of the GATT 1994 states in part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) ...;
- (b) Necessary to protect human, animal or plant life or health; ...

59 *Panel Report, US – US – Clove Cigarettes, supra* n11. See also, Appellate Body Report, *Clove Cigarettes, supra* n11 ¶ 3.

60 See Appellate Body Report, *US – Clove Cigarettes, ibid* ¶ 9.

61 See Ballet, *supra* n25 at 517.

62 See Appellate Body Report, *US – Clove Cigarettes, supra* n11 ¶ 101.

63 See Appellate Body Report, *US – Clove Cigarettes, ibid* ¶ 109.

64 See General Agreement on Tariffs and Trade 1994 art. III: 1, (2), (4), Apr 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 190.

65 See Harris and Moon 'GATT Article XX and human rights: what do we know from the first 20 years?' 2015 *Melbourne Law Review* 1; and Sibanda 'Human rights approach to WTO trade policy: another medium for the protection of human rights in Africa, and elsewhere' 2005 *African Journal of Human Rights* 387 – 405 (for a general discussion of GATT Article XX and human rights).

The TBT Agreement has no 'general exceptions' clause corresponding to Article XX of the GATT 1994.<sup>66</sup> The listed exceptions, according to the Appellate Body Report in the *United States – Import Prohibition of Certain Shrimp and Shrimp Products*,<sup>67</sup> embody domestic policies that are proven to be 'important and legitimate in character'. A member invoking GATT Article XX does not have to justify itself to the WTO unless other members challenge a measure taken pursuant to Article XX. It is only once the measure is challenged that the burden of proof will fall on the member invoking GATT Article XX.<sup>68</sup> To this end, GATT Article XX can be said to represent an important 'soft law' approach in favour of human rights.

For the purposes of this article, the relevant part is Article XX(b), which allows for an exceptional application of a discriminatory measure when such measures are 'necessary to protect human, animal or plant life or health.' Indonesia was very quick to point out that Article XX(b) is not applicable in favour of the United States, arguing that the measure is arbitrary and unjustifiably discriminates against imported products.<sup>69</sup>

The United States had argued that the ban on clove cigarettes was designed to protect the country's children from the effects of smoking, as opposed to menthol which was allegedly used primarily by adults.<sup>70</sup> The ban *prima facie* was designed to protect human health. Thus, it may be argued at face value that GATT Article XX may be used as an exception to an obligation not to discriminate against imported products. The point of departure may be reference to the Panel ruling in *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*<sup>71</sup> [hereinafter, Panel Report, Thailand – Cigarettes] that smoking is risky and dangerous to human life and health, and that policies aimed at reducing smoking will fall under the scope of Article XX(b).<sup>72</sup> Ballet

66 See Appellate Body Report, *US – Clove Cigarettes*, *supra* n11 ¶ 101.

67 *Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 121, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter U.S. – Shrimp].

68 See, for example, *Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline*, 20-21, WT/DS2/9 (May 20, 1996) [hereinafter Appellate Body Report, U.S – Reformulated Gasoline]. In this dispute the burden of proof was placed on the United States to show justification of discrimination against imported gasoline based on Article XX.

69 But the United States rejected this assertion as amongst others premature at the time it was raised. See Press Release, World Trade Org. [WTO], *U.S. Blocks Indonesian Request for Panel on Clove Cigarettes* (June 22, 2010) [hereinafter U.S. Blocks Indonesian Request], available at [http://www.wto.org/english/news\\_e/news10\\_e/dsb\\_22jun10\\_e.htm](http://www.wto.org/english/news_e/news10_e/dsb_22jun10_e.htm) (accessed 2016-01-12).

70 See First Written Submission of the United States, *United States–Measures Affecting the Production and Sale of Clove Cigarettes*, 148–150, WT/DS406 (Nov. 16, 2010).

71 Panel, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R – 37S/200 (Nov. 7, 1990) [Panel Report, Thailand – Cigarettes].

72 Panel Report, *Thailand – Cigarettes* *ibid* ¶¶ 73-74.

argues in an article<sup>73</sup> which thoroughly traversed the Article XX exception defence, however, that the United States' measure in respect of clove cigarettes cannot pass muster in terms of the required standards, test and requirements of Article XX,<sup>74</sup> particularly the requirements of Article XX's chapeau.<sup>75</sup> Of concern is that the measure, although based on policy as required by Article XX is not the only exclusive measure that could have been used, nor can it be said that it was the most 'necessary' measure to meet the balancing test of Article XX when considering other possible measures;<sup>76</sup> and that the ban is merely an arbitrary and unjustifiable discrimination against imported clove cigarettes when the 'same conditions prevail' between countries, contrary to the provisions of the chapeau.<sup>77</sup>

I support the sentiments of Ballet, in part, regarding the difficulty of the United States meeting the requirements of GATT Article XX. But, a case may still be made to rely on Article XX as part of the arguments provided that the United States can sufficiently discharge the requirements.<sup>78</sup> In *Korea - Various Import Measures on Fresh, Chilled and Frozen Beef*, (Korea-Beef) held that a not 'indispensable' measure may be 'necessary. Apart from failing to meet the requirements of the chapeau, the United States would have found it difficult to show that it could not reasonably be expected to have employed an alternative measure that is WTO/GATT consistent or less inconsistent with WTO/GATT law. At best the United States may have been found to be engaging in 'disguised restriction' or 'disguised discrimination' that does not comply with the requirements of Article XX. Or, put differently, that the discrimination between clove and menthol cigarettes amounted to 'arbitrary or unjustifiable discrimination'.<sup>79</sup>

73 Ballet, *supra* n25 at 515-541.

74 Ballet, *ibid* at 529.

75 Ballet, *ibid* at 530. For more on this argument see Ballet at 530- 538.

76 Ballet, *ibid* at 532 - 35. The word 'necessary' entails that the measure must be essential, but not 'indispensable' or 'inevitable'. See generally *Korea - Various Import Measures on Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan 10, 2001), ¶¶ 161 - 164 (holding that a not 'indispensable' measure may be 'necessary').

77 Ballet, *ibid* at 535, 538 & 541.

78 That (a) *necessity of the measure*, which requires that the measure must be essential, but not 'indispensable' or 'inevitable'. The measure must 'entail the least degree of inconsistency' with core obligations in WTO agreements. See *Korea - Various Import Measures on Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan 10, 2001), paras 161 - 164 held that a not 'indispensable' measure may be 'necessary' - the implementation of which must be reasonable and proportional. Thus the members having recourse to GATT Article XX must weigh and balance factors that give content to the requirement of necessity.

79 See *Appellate Body Report, US - Reformulated Gasoline*, *supra* n68 ¶ 629.



## 5 The WTO and the Bad Boy Image Regarding Public Interests and Consumer Protection Issues

The *US- Clove Cigarettes* dispute is one of the three 2012 cases in which the WTO ruled against a United States' regulation designed with well-intended objectives of protecting consumers as inconsistent with Article 2.1 of the TBT Agreement. The other two rulings are the Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (hereinafter '*US – Tuna II (Mexico)*')<sup>80</sup> – dealing with the regulation protecting dolphins, and the Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) requirements*<sup>81</sup> – dealing with providing consumers with national origin information for meat products.<sup>82</sup>

I will not address in-depth the other two cases here, as they are extensively discussed elsewhere,<sup>83</sup> except to mention that the rulings are, in part, indicative of the rigid nature of the implementation of WTO agreements, and the fact that consumer protection is still taking the backseat at the WTO, and, likewise, so also is the continuation of 'the disjuncture between the legal protections given to consumers and trade liberalism'.<sup>84</sup> Jonathan Carlone takes a different view by hailing these three cases as most welcome 'because together they provide needed context for interpreting the TBT Agreement'<sup>85</sup> and attempted to address some ambiguities in the TBT Agreement jurisprudence.

80 Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (hereinafter '*US – Tuna II (Mexico)*'), WT/DS381/AB/R, adopted June 13, 2012. The Appellate Body ruled in favour of Mexico stating that the United States labeling scheme was trade-restrictive because it structurally prevented Mexican fisheries from gaining access to the label.

81 Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) requirements*, WT/DS384/AB/R, WT/DS386/AB/R (29 June 2012).

82 See generally Carlone 'An Added Exception to the TBT Agreement after *Clove, Tuna II, and Cool*' 2014 B.C. *Int'l & Comp. L. Rev.* 103.

83 On COOL see generally Sibanda 'WTO Appellate Body ruling in *United States – Certain Country of Origin Labeling Requirements*: trading away consumer rights and protections, or striking a balance between competition-based approach in trade and consumer interests?' 2015 *De Jure* 136-148. For further discussion of both *United States – COOL* and *United States – Tuna* see Lowe 'Technical regulations to prevent deceptive practices: can WTO Members protect consumers from [UN] fair-trade coffee and [less-than] free-range chicken?' 2014 *Journal of World Trade* 593, at 609 – 616. See also Silveira and Obersteiner 'The scope of the TBT Agreement in light of recent WTO case law' 2013 *Global Trade and Customs Journal* 112-120; Partiti 'The Appellate Body Report in *US – Tuna II* and its impact on eco-labeling and standardization' 2013 *Legal Issues of Economic Integration* 73-94; McGivern 'The TBT Agreement meets the GATT: the Appellate Body decision in *US – Tuna II*' 2012 *Global Trade and Customs Journal* 350-354.

84 Sibanda *ibid* at 138.

85 Carlone *supra* n23 at 104.

While I agree with the observation of Carlone that the Appellate Body rulings provide clarity and context for interpreting the TBT Agreement, as did the *Appellate Body Report, US - Clove Cigarettes*, I take issue with any simplistic acceptance of the rulings of the Appellate Body. My main problem is that the WTO, in particular the Appellate Body, sometimes takes a rather detached approach when it considers consumer and public interest issues.<sup>86</sup> The previous decisions of the Appellate Body acknowledged the importance of due regard to public health issues and the fact that trade matters may not be considered in clinical isolation from other matters. Consumer interests have, however, not always been fully appreciated in cases like *US - COOL*. The wanton disregard of consumer interests by the Appellate Body remains a matter of concern. Interestingly, in *U.S. - Clove Cigarettes* the Panel acknowledged that '[c]igarettes are inherently harmful to human health, as recognized by the WHO, the scientific community and both parties to this dispute.'<sup>87</sup> The Panel went on to state that it was aware, as a result of the risks associated with smoking, of the 'important international efforts to curb smoking'.<sup>88</sup> The Appellate Body also 'recognize[s] the importance of Members' efforts in the World Health Organization on tobacco control.' But, is this enough to change the character of the WTO as an institution that is too steeped in protecting trade interests over and above consumer interest?

## 6 Conclusion

Lester correctly observes that the TBT Agreement is one of the WTO agreements that put a strain on the ability of members to regulate tobacco.<sup>89</sup> In light of the preceding discussion, it could be said that the TBT curtails the ability of members to reconcile their trade related measures with the protection of other interests such as those of consumers. The WTO has tried its best to address the difficulty as evident in the Appellate Body's ruling in the clove dispute. Some of the highlights of the Appellate Body's report is the adoption of the new test of *legitimate regulatory distinction*, according to which any detrimental impact arising exclusively from a legitimate regulatory distinction will be accepted as not in violation of the TBT Agreement. The exception-like deference created in the *United States - Clove Cigarettes* may provide a glimmer of hope to consumers.

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86 On the longstanding debate about the relationship between international trade law and consumer protection law, in particular the argument of the State and/or producer-centred WTO Law; and the possible gradual improvement of this state of affairs, see generally Rolland, footnote 1 above.

87 Panel Report, *US - Clove Cigarettes*, *supra* n11 ¶ 7.1.

88 Panel Report, *US - Clove Cigarettes*, *supra* n11 ¶ 7.5.

89 Lester 'Domestic tobacco regulation and international law: the interaction of trade agreements and the Framework Convention on Tobacco Control' 2015 *Journal of World Trade* 19 - 47, at 23.

However, in my view and in agreement with an observation by Rolland, trade has serious ‘negative spill-over effects on consumers’, which can only be remedied through expansive interpretations by the Panel and Appellate Body.<sup>90</sup> Alternatively, there must be a general overhaul of the WTO to include as one of the main elements of the entire edifice of the WTO consumer protection and related issues or a clear articulation of consumer interests. To this end Rolland makes a comparison with the European international trade framework, which originally did not include consumer protection issues in the European Economic Community (‘EEC’) until after 1992 when the Treaty on European Union (Maastricht Treaty) made consumer protection part of the founding treaties of both the EEC and the European Union (EU).<sup>91</sup> Rolland’s work titled *Are Consumer-Oriented Rules the New Frontier of Trade Liberalization?* is to date one of the most poignant discussions of consumer protection within the framework of international trade through a comparative analysis of EU Law and WTO Law.<sup>92</sup> The complementarity of consumer protection and trade liberalisation is not a far-fetched dream. If the 31 GATT panels and the 157 panel and Appellate Body reports that peripherally mentioned consumers are anything to go by, it should not be an insurmountable task to bring consumer protection issues into the manifold at the WTO as the foundation is already laid.<sup>93</sup>

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90 Rolland, footnote n1 above, at 362. Rolland, at 365, aptly labeled this ‘the producer-centric quality of the WTO system’.

91 Rolland, *supra* n1 at 367. See also Rolland at 374 – 376.

92 For other studies see, Coglianese., Finkel., and Zaring ‘Import safety: Consumer protection in the global marketplace’ 2010 *Admin. & Regulatory L. News* 5; Muchmore ‘Private regulation and foreign conduct’ 2010 *San Diego L. Rev.* 371; Trujillo and de Lisle ‘Consumer protection in transnational contexts’ 2010 *Am. J. Comp. L.* 135.

93 See Rolland, *supra* n1 at 377.