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**MANAGING THE TRADE-PUBLIC HEALTH LINKAGE IN DEFENCE OF  
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APPRAISAL OF *UNITED STATES-MEASURES AFFECTING THE  
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**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\****

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## **1. Introduction**

With trade measures adopted by the World Trade Organisation (WTO) Member States having moved beyond tariffs and quotas and now covering issues of domestic regulation and policy, arguments that trade agreements undermine national sovereignty have been advanced.<sup>1</sup> Such arguments have been countered by critics who regard some of the trade measures adopted in pursuit of free trade as being discriminatory and question how such measures can be justified, especially where they are employed by developed countries against products originating from developing countries.<sup>2</sup> Nowhere are these arguments more important than in the context of the adjudication of disputes involving WTO Member States' regulation of public health-related matters affecting international trade. Such disputes have polarized public health advocates and international trade enthusiasts.

In an effort to disentangle the effect of WTO Member States' adoption of public health measures which impact negatively on international trade, the *United States* -

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\* See the Appellate Body Report *United States-Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/AB/R (April 4, 2012) (hereinafter referred to as Appellate Body Report *US-Clove Cigarettes*). See also the WTO Panel Report *United States - Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R (September 2, 2011) (hereinafter referred to as WTO Panel Report *US-Clove Cigarettes*).

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<sup>1</sup> Lester 2012 *Free Trade Bulletin*.

<sup>2</sup> Voon 2012 *ASIL Insights* 16.

*Measures Affecting the Production and Sale of Clove Cigarettes*<sup>3</sup> case has become of prime interest not only due to its implications regarding balancing the potentially conflictual relationship/tensions between trade and health but also due to the clarifications it offers concerning the implementation of the *Agreement on Technical Barriers to Trade*.<sup>4</sup>

The *US-Clove Cigarettes* case gave the Panel and Appellate Body the opportunity to deal with the sometimes irresistible national urge to discriminate against foreign products in the guise of public health protection. Failure to address and discipline that urge could jeopardise WTO Member States' prospects of benefiting from the market opening potential of WTO legal instruments generally, especially the provisions of the *TBT Agreement* and *The Agreement on the Application of Sanitary and Phytosanitary Measures*.<sup>5</sup> Through a critical examination of the Panel and Appellate Body decisions in the *US-Clove Cigarettes* case, this article seeks to demonstrate that in the *US-Clove Cigarettes* case, the WTO Panel and Appellate Body successfully defended both the integrity of WTO Member States' treaty commitments and the overarching importance of trade liberalisation within the Organisation's policy foundations, where these came under threat by a government allegedly acting in defence of public health. It will also highlight the fact that both the Panel and Appellate Body failed to duly acknowledge the development-related challenges facing those developing countries that are part of the WTO family.

## 2. Background to the *US-Clove Cigarettes* dispute

In June 2009, the United States (US) government passed the *Family Smoking Prevention and Tobacco Control Act (FSPTCA)*, which banned the sale of all

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<sup>3</sup> See the Appellate Body Report *United States - Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (April 4, 2012) (hereinafter referred to as Appellate Body Report *US-Clove Cigarettes*); and also the WTO Panel Report *United States - Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R (September 2, 2011) (hereinafter referred to as WTO Panel Report *US-Clove Cigarettes*).

<sup>4</sup> See the *Agreement on Technical Barriers to Trade* (1995) (hereinafter *TBT Agreement*) and the *Marrakech Agreement Establishing the WTO* (1994).

<sup>5</sup> The *Agreement on the Application of Sanitary and Phytosanitary Measures* (1995) (hereinafter *SPS Agreement*) is an international treaty of the WTO which was negotiated during the *Uruguay Round of the General Agreement on Tariffs and Trade*. It entered into force in 1995.

flavoured cigarettes except menthol cigarettes.<sup>6</sup> The *FSPTCA* gave the *Food and Drug Administration (FDA)* broad new statutory authority to regulate tobacco products under the *Federal Food, Drug, and Cosmetic Act*.<sup>7</sup> It is important to observe that in 1996 the *FDA* had claimed authority to regulate cigarettes. However, in the year 2000, in the case of *FDA v Brown and Williamson Tobacco Corporation*,<sup>8</sup> the US Supreme Court restricted the *FDA* from authority to regulate cigarettes. The Court held that the US Congress did not intend to allow the *FDA* to independently regulate tobacco products. In particular, section 101(b)(3) of the *FSPTCA* gives the *FDA* regulatory authority over cigarettes under the *FFDCA*. Further, section 101 of the *FSPTCA* added a new provision to the *FFDCA*, section 907(a)(1)(A). This section's purpose was described in the US House Report to the Panel as being that of protecting public health, including the reduction of smoking among youths.<sup>9</sup> Whilst the *FFDCA* does not exempt menthol cigarettes from any new regulations, section 907(e) requires the US Scientific Advisory Committee to issue a report on the impact of menthol cigarettes on public health.

Section 907(a)(1)(A) exempts menthol cigarettes from the ban imposed on the sale of cigarettes that contain a herb or spice that is a "characterizing flavour of the tobacco product". The exemption provided for in section 907(a)(1)(A) was provided for in the *FFDCA* regardless of the objectives of the *FSPTCA* being that of providing "...the Secretary with proper 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". Questions could thus be raised as to why menthol cigarettes were excluded from the ban if the intention of the legislation was to reduce the number of young smokers. Due consideration in this regard should have been given to the fact that cigarettes, flavoured or not, have the same type of harmful effects.

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<sup>6</sup> See the US *Family Smoking Prevention and Tobacco Control Act, Public Law No. 111-131, 2009 (FSPTCA)*.

<sup>7</sup> See the *Federal Food, Drug, and Cosmetic Act, United States Code, Title 21 (FFDCA)*.

<sup>8</sup> *FDA v Brown and Williamson Tobacco Corporation* 529 US 120 161 (2000).

<sup>9</sup> See the US House Report to the WTO Panel Exhibit 67, 37, 2011.

The US imposed a ban on the importation and sale of flavoured cigarettes in the aftermath of the promulgation of the *FSPTCA*. This prompted Indonesia to request the establishment of a Panel to determine whether or not the ban imposed by the US was inconsistent with its obligations as a Member State of the WTO.<sup>10</sup> Indonesia's complaint was driven by the fact that before the US ban, the former was the largest exporter of clove cigarettes to the later.<sup>11</sup> Indonesia thus challenged the US regulation against cigarettes containing a flavour, herb or spice that gives a characterizing flavour to the product except for menthol cigarettes as provided for in section 907(a)(1)(A) of the *FFDCA*.

### 3. Arguments of the parties

Indonesia argued that by imposing a ban on clove cigarettes, while continuing to allow the sale of menthol cigarettes, the US discriminated against Indonesian products and therefore violated its obligation to eschew non-discriminatory trading practices as a Member of the WTO.<sup>12</sup> Further, Indonesia argued that the passing into law of the *FSPTCA* discriminated against Indonesia because clove cigarettes sold in the US before the ban were imported primarily from Indonesia, whilst almost all menthol cigarettes sold in the US were produced domestically.<sup>13</sup> Indonesia contended that section 907(a)(1)(A) of the *FFDCA* was inconsistent with Article 2.1 of the *TBT*. It also argued that in the context of Article 2.1 of the *TBT Agreement*, a determination of "likeness" of products is fundamentally a determination about the nature and extent of the competitive relationship among products. The Panel acknowledged in this instance that the vast majority of clove cigarettes consumed in the US came from Indonesia with one US company, Nat Sherman, being a manufacturer of clove-flavoured cigarettes prior to the ban imposed in terms of the *FSPTCA*. This in itself suffices to raise doubts as regards the legitimacy of the US ban

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<sup>10</sup> Request for Consultations by Indonesia, *US-Clove Cigarettes*, 5, WT/DS406/1 (April 4, 2010).

<sup>11</sup> See the US's first written submission to the WTO Panel, para 35.

<sup>12</sup> See Indonesia's Panel Request, WT/DS406/2 2.

<sup>13</sup> See US's first written submission to the WTO Panel, para 35.

on clove cigarettes as the ban would have adverse economic effects on Indonesia rather than on the US.

Article III: 4 of *General Agreement on Tariffs and Trade (GATT)* provides for the non-discrimination clause. Indonesia correctly argued that regardless of the differences in the characterization of the products, clove and menthol cigarettes were "like products". As such, section 907 of the *FFDCA* violated *GATT* Article III: 4 since the US ban applied only to clove cigarettes but not to menthol cigarettes. Indonesia's argument is significant if regard is given to the fact that the ban imposed on clove cigarettes was carried out on health grounds. Are menthol cigarettes as a "like product" not likely to produce the same effect as the banned Indonesian-produced clove cigarettes? This issue again raised doubts about the legitimacy of the US ban on Indonesian produced clove cigarettes.

Of special significance to developing countries, Indonesia also argued that section 907(a)(1)(A) of the *FFDCA* violates Article 12.3 of the *TBT Agreement*. Article 12.3 of the *TBT Agreement*, which provides that: "Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members." Indonesia based its argument on the fact that having demonstrated how Article 2.2 of the *TBT Agreement* prohibits the creation of unnecessary barriers to trade, and that clove cigarette sales in the US consisted primarily of Indonesian clove cigarettes, the US was supposed to take account of the special development and trade needs of Indonesia as a developing country Member of the WTO.<sup>14</sup> Indonesia advanced its case by showing that six million Indonesians were directly or indirectly employed in the manufacture of cigarettes and the growing of tobacco.<sup>15</sup> The implication of Indonesia's argument regarding the alleged Article 12.3 violation is that not only was

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<sup>14</sup> See Indonesia's first written submission to the WTO Panel, para 147.

<sup>15</sup> Indonesia's first written submission to the WTO Panel, para 5.

the US ban on the sale of Indonesian-produced clove cigarettes a threat to Indonesia's economic prosperity but also to the general welfare of its workers and its sustainable development.

In response, the US as signatory to the *Framework Convention on Tobacco Control*<sup>16</sup> rejected Indonesia's claims that section 907(a)(1)(A) was inconsistent with Article 2.1 of the *TBT Agreement*.<sup>17</sup> The US accused Indonesia of failing to prove that clove cigarettes and regular or menthol cigarettes were viewed as "interchangeable" in the marketplace.<sup>18</sup> Further, the US argued that Indonesia's reliance on the jurisprudence developed under *GATT* Article XX(b) in the context of Article 2.2 of the *TBT Agreement* was a "radical approach" that should be rejected.<sup>19</sup> Some of the WTO case law relied upon by Indonesia included *EC-Asbestos*<sup>20</sup> and *Brazil-Retreaded Tyres*.<sup>21</sup> Concerning Article 12.3 of the *TBT Agreement*, the US was of the view that Indonesia had failed to demonstrate that it had acted inconsistently with the provision.<sup>22</sup> The US further argued that Article 12.3 of the *TBT Agreement* did not require the developed country Member to accept every recommendation presented by the developing country, and the fact that Congress decided to value the public health interest over the interests of cigarette manufacturers, both domestic and foreign, could not support a credible claim that the US had acted inconsistently with Article 12.3.<sup>23</sup>

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<sup>16</sup> The *Framework Convention on Tobacco Control* (2005) (FCTC) entered into force in 2005 and was negotiated in response to concerns about a globalised tobacco epidemic, exacerbated by increasing international trade in tobacco and foreign direct investment. Its main objective is to reduce the demand for and supply of tobacco.

<sup>17</sup> WTO Panel Report *US-Clove Cigarettes* para 6.28.

<sup>18</sup> WTO Panel Report *US-Clove Cigarettes* para 6.28.

<sup>19</sup> WTO Panel Report *US-Clove Cigarettes* para 7.357.

<sup>20</sup> WTO Appellate Body Report *European Communities - Measures Affecting Asbestos and Asbestos Containing Products* 99, WT/DS135/AB/R (April 5, 2001) para 172 (hereinafter referred to as WTO Appellate Body Report *EC-Asbestos*).

<sup>21</sup> WTO Appellate Body Report *Brazil - Measures Affecting Imports of Retreaded Tyres* WT/DS332/AB/R (December 17, 2007) para 144.

<sup>22</sup> WTO Panel Report *US-Clove Cigarettes* 162 para 7.602.

<sup>23</sup> WTO Panel Report *US-Clove Cigarettes* 162 para 7.604.

#### 4. WTO Panel decision

In order to establish whether or not products in dispute are like products, the standard prescribed is that of comparability. GATT Article III:2 states that the degree of similarity required is that the products must be "like". "Likeness" was discussed by the WTO Panel Report in the *Japan-Alcohol* case. The issue in the case was whether or not various alcohol beverages were "like" shochu, a traditional Japanese drink that was receiving favourable tax treatment in comparison to imported products such as vodka. The Panel noted that:

... vodka and shochu shared most physical characteristics ... except for filtration, there was virtual identity in the definition of the two products ... difference in the physical characteristics of alcoholic strength of two products did not preclude a finding of likeness ....

Using the same reasoning adopted in the *Japan-Alcohol* case, the Panel found that clove and menthol cigarettes were physically similar and both contained an additive that provides them with a characterizing flavour.<sup>24</sup> It noted the significance of the presence of additives in both clove and menthol cigarettes, which it deemed relevant on the basis that section 907(a)(1)(A) of the *FFDCA* is a technical regulation aimed at regulating cigarettes which include such additives. The implication of the Panel's conclusions is that both clove and menthol cigarettes should have been subjected to the same test before a ban could be instituted against either one of the products.

The presence of the additive in menthol cigarettes also raised the significance of the technical regulation against clove cigarettes.<sup>25</sup> The purpose of a technical regulation is subverted if, as the Panel concluded, "...both clove and menthol cigarettes share the same end-use of smoking."<sup>26</sup> As such, if the perception of the smokers (young smokers under the age of 18), as the WTO Panel found, is that flavoured cigarettes

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<sup>24</sup> WTO Panel Report *US-Clove Cigarettes* 78 para 7.240.

<sup>25</sup> Lester, Mercurio and Davies *World Trade Law* 262.

<sup>26</sup> WTO Panel Report *US-Clove Cigarettes* 78 para 7.241.



are similar for the purpose of starting to smoke,<sup>27</sup> then it is illegal to impose a ban on clove cigarettes without extending the ban to the production, importation and sale of menthol cigarettes.<sup>28</sup> Here, the WTO Panel found that clove and menthol cigarettes are classified under the same 6-digit HS code, namely 2402.20, which makes them "like products". Accordingly, the Panel found that clove and menthol cigarettes were like products for the purpose of Article 2.1 of the *TBT Agreement*.

The Panel also had to establish whether imported Indonesian clove cigarettes were accorded less favourable treatment than that accorded to like products for the purpose of Article 2.1 of the *TBT Agreement*.<sup>29</sup> In reaching its decision, the Panel concluded that: "The fact that section 907(a)(1)(A) differentiates between like products is not in itself sufficient to violate the national treatment obligation embodied in Article 2.1 of the *TBT Agreement*".<sup>30</sup> The Panel found that, by forbidding the sale of imported clove cigarettes, section 907(a)(1)(A) accords to those cigarettes "less favourable treatment" than it accords to the like domestic product, in this case menthol cigarettes.<sup>31</sup>

In interpreting the "less favourable treatment" test under Article 2.1 of the *TBT Agreement*, the Panel, as with "likeness," applied the lessons from *GATT* Article III:4.<sup>32</sup> The Panel adopted a jurisprudence which reflects a competition-based analysis in terms of *GATT* Article III:1. In the Panel's view, the wording of Article 2.1 of the *TBT Agreement* appeared to be modelled on that of *GATT* Article III:4.<sup>33</sup> In the Panel's view, "Article 2.1 of the *TBT Agreement* and 1994 *GATT* Article III:4 impose a similarly worded obligation upon Members to provide imported products 'treatment no less favourable than that accorded to like products of national origin'". However, whilst placing weight on the similarity of the wording of the two provisions, as was done by the Appellate Body in the *EC-Asbestos* case, the Panel noted with caution that "...even to the extent that the terms used are identical, they

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<sup>27</sup> WTO Panel Report *US-Clove Cigarettes* 78 para 7.242.

<sup>28</sup> WTO Panel Report *US-Clove Cigarettes* 78 para 7.243.

<sup>29</sup> WTO Panel Report *US-Clove Cigarettes* 79 para 7.248.

<sup>30</sup> WTO Panel Report *US-Clove Cigarettes* 79 para 7.249.

<sup>31</sup> WTO Panel Report *US-Clove Cigarettes* 79, para 7.249. See also the WTO Appellate Body Report *EC-Asbestos* para 100.

<sup>32</sup> WTO Panel Report *US-Clove Cigarettes* 80 para 7.251.

<sup>33</sup> WTO Panel Report *US-Clove Cigarettes* 80 para 7.253.

'must be interpreted in light of the context and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears'.<sup>34</sup> The Panel then reasoned that if the legitimate objective of reducing youth smoking informed its analysis on "likeness", then for the same reasons, the interrogation of whether clove cigarettes imported from Indonesia were accorded "less favourable treatment" than that accorded to the domestic like product should be founded on the same objective.

The Panel referred to the case of *Korea-Various Measures on Beef* in which the Appellate Body observed that "whether or not imported products are treated 'less favourably' than 'like products' should be assessed ... by examining whether a measure modifies the conditions of the competition in the relevant market to the detriment of imported products."<sup>35</sup> Accordingly, the Panel concluded that under *GATT* Article III:4, whether "treatment less favourable" has been accorded to imported products compared to like domestic products rests essentially on an assessment of the conditions of competition in the relevant market.<sup>36</sup> The Panel thus concluded that banning clove cigarettes while exempting menthol cigarettes from the ban in terms of section 907(a)(1)(A) of the *FFDCA* accorded imported Indonesian clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes for the purposes of Article 2.1 of the *TBT Agreement*.<sup>37</sup>

Further, the Panel had to establish whether or not the US acted inconsistently with Article 12.3 of the *TBT Agreement* by failing to take account of the special development, financial and trade needs of Indonesia as a developing country Member of the WTO.<sup>38</sup> In *EC-Approval and Marketing of Biotech Products*, the Panel had observed that "Article 12.3 requires that in preparing and applying technical

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<sup>34</sup> WTO Appellate Body Report *EC-Asbestos* paras 88-89.

<sup>35</sup> WTO Appellate Body Report *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef* WT/DS161, 169/AB/R (January 10, 2001) para 137. See also WTO Panel Report *US-Clove Cigarettes* 82 para 7.264.

<sup>36</sup> WTO Panel Report, *US-Clove Cigarettes* 82 para 7.267.

<sup>37</sup> WTO Panel Report *US-Clove Cigarettes* 89 para 7.291(v).

<sup>38</sup> WTO Panel Report *US-Clove Cigarettes* 163 para 7.610.

regulations, standards and conformity assessment procedures, Members should take account of the special needs of developing country Members."<sup>39</sup>

The Panel also noted that "Article 12.3 is a specific application of the obligation in Article 12.2 to take account of developing country needs in the implementation of the *TBT Agreement* at the national level." However, the Panel concluded that the formulation "take account of" the special financial, development and trade needs of a developing country does not necessarily mean that the Member preparing or applying a technical regulation must agree with or accept the developing country's position.<sup>40</sup> The Panel opted for a rather conservative approach when it found that Indonesia's concerns in terms of Article 12.3 of the *TBT Agreement* had been subsequently addressed through correspondence with key officials in the US Government.<sup>41</sup> However, it should be questioned how and why the Panel reached such a conclusion when the US subsequent to that exchange of correspondence imposed a ban on Indonesian-produced clove cigarettes. Further, the Panel found rather strangely that the banning of clove cigarettes served a material legitimate objective of reducing youth smoking in the US while at the same time the same Panel accepted that the harmful effects of clove and menthol cigarettes are the same and that youths do not see any difference in smoking clove or menthol cigarettes at the entry point. In the end, the Panel concluded that Indonesia had failed to demonstrate that the US acted inconsistently with Article 12.3 of the *TBT Agreement*.

## 5. Appellate Body decision

The Appellate Body drew significantly from its previous jurisprudence regarding the national treatment obligation under *GATT* Article III:4 in assessing the US ban under Article 2.1 of the *TBT Agreement*.<sup>42</sup> The Appellate Body pointed out that the *TBT Agreement* has no general exceptions provision of the type found in *GATT* Article

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<sup>39</sup> WTO Panel Report *European Communities - Approval and Marketing of Biotech Products* WT/DS291/R, WT/DS292/R, WT/DS293/R (November 21, 2006) para 7.47 sub-paras 75 and 77.

<sup>40</sup> WTO Panel Report *US-Clove Cigarettes* 170 para 7.646.

<sup>41</sup> WTO Panel Report *US-Clove Cigarettes* 170 para 7.645.

<sup>42</sup> Voon 2012 *ASIL Insights* 2.

XX,<sup>43</sup> but it indicated 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 *GATT* Article III and the general exceptions provided under the *GATT* Article XX".<sup>44</sup> As a result, the Appellate Body rejected the Panel's reliance on the regulatory purpose in assessing the "likeness of products" under Article 2.1 of the TBT Agreement.<sup>45</sup>

The Appellate Body expressed the opinion that "the regulatory concerns underlying a measure, such as the health risks associated with a given product" were relevant in determining whether or not products are "like" only to the extent that those concerns affect the traditional criteria such as "physical characteristics" or "consumer preferences,"<sup>46</sup> or otherwise "have an impact on the competitive relationship between the products".<sup>47</sup> The Appellate Body further examined regulatory concerns under Article 2.1 of the *TBT Agreement* to determine whether or not the challenged measure affords "less favourable treatment" to imported Indonesian clove cigarettes.<sup>48</sup> Regardless of the Appellate Body's placing emphasis on the competitive relationship between the clove and menthol cigarettes, its finding that menthol and clove cigarettes are "like products" did not rely heavily on an analysis of the actual market for flavoured cigarettes as a whole.

The Appellate Body went on to rule that the "treatment no less favourable" requirement under the *TBT Agreement* Article 2.1 prohibits "both *de jure* (in law) and *de facto* (in fact)"<sup>49</sup> discrimination against imported products, while at the same

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<sup>43</sup> WTO Appellate Body Report *US-Clove Cigarettes* 40 para 101 and 180.

<sup>44</sup> WTO Appellate Body Report *US-Clove Cigarettes* 43 para 109.

<sup>45</sup> WTO Appellate Body Report *US-Clove Cigarettes* 45 para 112.

<sup>46</sup> WTO Appellate Body Report *US Clove-Cigarettes* 42 para 104. See also the WTO Appellate Body Report *European Communities - Regime for the Importation, Sale and Distribution of Bananas* WT/DS27/Ab/R (September 9, 1997) para 216 and 241. Here, the WTO Appellate Body rejected the "intent and effect" test for establishing "likeness".

<sup>47</sup> WTO Appellate Body Report *US-Clove Cigarettes* paras 117 and 119.

<sup>48</sup> WTO Appellate Body Report *US-Clove Cigarettes* 59 para 160.

<sup>49</sup> Lester, Mercurio and Davis *World Trade Law* 265. Lester, Mercurio and Davis have noted that "*De jure* discrimination involves discrimination that is apparent on the face of the measure. For

time permitting detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions".<sup>50</sup> Significantly, the Appellate Body made it clear that discrimination contrary to Article 2.1 of the *TBT Agreement* does not arise simply because one imported product is accorded less favourable treatment than one domestic like product; rather, the national treatment obligation in Article 2.1 of the *TBT Agreement* requires members "to accord to the group of imported products treatment no less favourable than that accorded to the group of like domestic products".<sup>51</sup>

Whilst being mindful that the meaning of the term "treatment no less favourable" in Article 2.1 of the *TBT Agreement* is to be determined in the light of the specific context of this Agreement, the Appellate Body considered previous rulings on the term's meaning in the context of Article III:4 of the *GATT* 1994 instructive. This approach guided its ruling on the legality of section 907(a)(1)(A) of the FFDCA, which banned the sale of clove cigarettes. Referring to the *EC-Asbestos* case, the Appellate Body reasoned that the "treatment no less favourable clause" of *GATT* Article III:4:

...expresses the general principle, in Article III:1, that internal regulations "should not be applied" ... so as to afford protection to domestic production ... If there is "less favourable treatment" of the group of "like" imported products, there is conversely, "protection" of the group of "like" domestic products.<sup>52</sup>

The "treatment no less favourable" standard of Article III:4 of the *GATT* 1994 therefore prohibits WTO Members from modifying the conditions of competition in the marketplace to the detriment of the group of imported products vis-a-vis the group of domestic like products.<sup>53</sup> The Appellate Body concluded that the "treatment no less favourable" requirement of Article 2.1 prohibits both *de jure* and *de facto*

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example a measure may state that imported goods are subject to sales tax of 20% whereas domestically produced goods are subject to a sales tax of 10%."

<sup>50</sup> WTO Appellate Body Report *US-Clove Cigarettes* para 175.

<sup>51</sup> WTO Appellate Body Report *US-Clove Cigarettes* para 180 and 193.

<sup>52</sup> WTO Appellate Body Report *EC-Asbestos* para 100.

<sup>53</sup> WTO Appellate Body Report *US-Clove Cigarettes* para 179.

discrimination against a group of imported products.<sup>54</sup> However, the Appellate Body also reasoned that the context, object and purpose of the *TBT Agreement* weigh in favour of interpreting the "treatment no less favourable" requirement of Article 2.1 as permitting a detrimental impact on imports that stems exclusively from legitimate regulatory distinction.<sup>55</sup> Accordingly, the Appellate Body concluded that section 907(a)(1)(A) modifies the conditions of competition in the US market to the detriment of imported clove cigarettes.<sup>56</sup>

Regarding the application of Article 12.3 of the *TBT Agreement*, Indonesia's argument that the risk of unemployment was an adequate basis upon which the US could be held liable for acting inconsistently with the provision was rejected.<sup>57</sup> That risk of unemployment was held not to be a "special need" given that every government is concerned about the unemployment rate among citizens.<sup>58</sup> In any event, there was no evidence before the Appellate Body that section 907(a)(1)(A) of the *FFDCA* had had any negative impact on employment in Indonesia.

## 6. Evaluation of WTO Panel and Appellate Body decisions

Under the WTO legal framework, countries have great flexibility to design public health-related and environmental regulations to have effect only within their territories.<sup>59</sup> However, the same discretion does not apply to measures that affect exports or imports.<sup>60</sup> An absence of clear guidelines on how to address issues of legality in the regulation of trade-related health matters, especially where developing countries trade, points to a legislative oversight on the part of the WTO and its Members.<sup>61</sup> Be that as it may, health-related trade disputes have resulted in the development of valuable jurisprudence by the WTO's Appellate Body. According to Sinha, the WTO's Appellate Body reports in the cases of *US-Clove Cigarettes* and *US-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna*

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<sup>54</sup> WTO Appellate Body Report *US-Clove Cigarettes* para 181.

<sup>55</sup> WTO Appellate Body Report *US-Clove Cigarettes* para 181.

<sup>56</sup> WTO Appellate Body Report *US-Clove Cigarettes* para 214.

<sup>57</sup> See the Executive Summary of the first written submission of Indonesia, WT/DS406/R D-25.

<sup>58</sup> See the Executive Summary of the first written submission of Indonesia, WT/DS406/R D-25.

<sup>59</sup> Houser *et al Levelling the Carbon Playing Field* 5.

<sup>60</sup> Cosby *Trade and Climate Change* 7.

<sup>61</sup> Hufbauer *et al Global Warming* 20.

*Products*<sup>62</sup> have re-ignited the debate on the WTO's role in balancing the rights of the sovereign to regulate in defence of public health or the environment within its domestic domain, with the need to maintain the sanctity of the multilateral trade order.<sup>63</sup>

The *US-Clove Cigarettes* case is one of the most controversial health-related disputes ever to arise in the history of the WTO; its importance lies in its provision of findings and rulings that should assist national trade law and policy makers to manage the public health and international trade interface. The case afforded the Panel and Appellate Body the opportunity to pronounce on the issues of protectionism in the context of what was clearly a genuine need for legitimate health regulation. The *US-Clove Cigarettes* case presents a classic example of how a country can promulgate a public health regulatory legislation which may actually constitute a disguised form of protectionism.<sup>64</sup> While some protectionism is obvious, other forms are disguised and can be seen only by examining the product market at issue closely.

In general terms, the Panel and Appellate Body's findings of violation in the *Clove Cigarettes* case were based on the notion that the exclusion of (mostly American) menthol cigarettes from the law, while the competing (mostly Indonesian) clove cigarettes were prohibited, constitutes protectionism. Even though the US statute is origin neutral on its face, and does not have explicitly different rules for imports and domestic products, there was clear evidence of the discriminatory nature and effect of the statute. This type of discrimination may be disguised or hidden in apparently legitimate health measures, but it can be uncovered by looking under the surface, as the Appellate Body did in this case.

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<sup>62</sup> WTO Appellate Body Report *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* WT/DS381/AB/R (May 16, 2012) (hereinafter referred to as WTO Appellate Body Report *US-Tuna Dolphin II*).

<sup>63</sup> Sinha 2012 *Trade, Law and Development* 269.

<sup>64</sup> Prior to the *US-Clove Cigarettes* case, a US law that required domestic cigarette makers to use a certain amount of domestically grown tobacco was challenged successfully in the GATT in 1994. See the GATT Panel Report, *US Measures Affecting the Importation, Internal Sale and Use of Tobacco* DS44/R 131.

Critics of this decision have expressed concern that this ruling undermines the ability of WTO Member States to regulate tobacco for public health purposes.<sup>65</sup> In reality, though, the only problem with the impugned measure was its discriminatory nature. If the law had banned menthol cigarettes as well, a move that health advocates supported, it would very likely have been found to be consistent with the WTO rules. However, it is significant that both the Appellate Body and the Panel's rulings were effectively anti-protectionism in the sense that they prevented the US from adopting a trade-related measure contrary to the larger WTO policy of liberalising international trade generally and permitting trade-restrictive measures only exceptionally. In this regard the rulings deserve to be applauded.

Drawing a line between protectionist and non-protectionist trade-related measures can be difficult. As the *Clove Cigarettes* case shows, some measures that are ostensibly intended for non-protectionist ends are in fact excellent examples of disguised protectionism. The Appellate Body and Panel correctly found that the US ban on clove cigarettes was inconsistent with obligations arising under 1994 *GATT* Article III:4, because clove and menthol cigarettes were "like products" and the ban discriminated against clove cigarettes. Article III:4 prohibits WTO Members from passing laws, regulations, or other requirements that treat an imported product less favourably than a "like" domestically produced product after it has cleared customs and entered the territory of the WTO Member. But the characterization of measures as protectionist or not is crucial for establishing applicable trade and investment rules, and thus must be examined carefully. In the *US-Clove Cigarettes* case trade and environment-related principles were used as a means of determining the legality of specific trade practices. The fact that this may broaden or enhance the legitimacy credentials of the WTO, especially within the community of human rights and environmental activists, was noted by Sinha when he remarked that:

It is important to mention ... that the legitimacy of the WTO may not necessarily stand on the shoulders of sovereign actors alone. Indeed, there could be a case to argue that the WTO has the unenviable role of finding legitimacy across its economically and culturally diverse constituencies, prominent among which are

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<sup>65</sup> Lester 2012 *Free Trade Bulletin* 2.



environmental and human rights activists, regardless of their national or cultural affiliation or origin.<sup>66</sup>

Similarly, Kulolesi has argued that a "state-centred understanding of legitimacy" can "no longer be taken for granted" and also noted that the growing interest in the legitimacy and accountability of international organizations "is coupled with re-invigorated interest in democracy at the inter-state level".<sup>67</sup> As such the Appellate Body and Panel rulings also curb the sometimes irresistible national pre-disposition towards discrimination in favour of domestic products or citizens. This urge makes it imperative for the Appellate Body and WTO panels to carefully scrutinise trade-impacting regulations where, as in this case, the regulation appears to be both necessary and scientifically justifiable.

In the *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*,<sup>68</sup> the Panel made the following observations on the applicable standard for evaluating if a measure is necessary under *GATT* Article XX(b): "The import restrictions imposed by Thailand could be considered to be necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives".<sup>69</sup> However in the *US-Clove Cigarettes* case the ban on clove cigarettes was unnecessary, as both the Appellate Body and Panel found, because the US could have employed other non-discriminatory policy measures capable of accomplishing its intended public health objectives. In the *EC-Hormones* case, the WTO Appellate Body held that the legal status of the precautionary principle was irrelevant when considering the scientific risk assessment and uncertainty under the SPS Agreement.<sup>70</sup>

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<sup>66</sup> Sinha 2012 *Trade, Law and Development* 269.

<sup>67</sup> Kulolesi *WTO Dispute Settlement System* 14, 32.

<sup>68</sup> GATT Panel Report *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes* DS10/R (November 7, 1990) paras 74-75.

<sup>69</sup> Lester, Mercurio and Davies *World Trade Law* 370.

<sup>70</sup> WTO Appellate Body Report *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef* WT/DS161, 169/AB/R (January 10, 2001) and WTO Appellate Body Report *EC-Asbestos*.

However, criticism can be directed at the Appellate Body and Panel's decision regarding Indonesia's claim of the US violation of Article 12.3 of the *TBT Agreement*. If after analysing the competitive relationship between clove and menthol cigarettes, the Appellate Body and Panel concluded that imported clove cigarettes and domestically produced menthol cigarettes were "like products" under Article III:4, then the implication was that the treatment of these "like products" was discriminatory under the *GATT* as the US provided clove cigarettes with drastically unequal competitive opportunities in comparison with the opportunities afforded to menthol cigarettes. It is important to observe that *GATT* Article XX's exceptions address issues related to balancing trade with other important socio-economic policies. Its provisions attempt to draw lines between domestic measures that are legitimately used to pursue certain policies and policies that are discriminatory or trade restrictive. Therefore if a Member adopts policies that infringe upon another with the effect of imposing trade barriers, the result in this regard would be economic loss. This could be taken to imply that the US' ban, to the extent that it resulted in economic loss and the imposition of a trade ban on Indonesia, was a threat to Indonesia's development.

Competitiveness largely determines trade gains. In the *US-Clove Cigarettes* case both the Appellate Body and Panel appeared to pay little attention to this fact and chose to dismiss Indonesia's claims in terms of Article 12.3 of the *TBT Agreement* on the basis that the resulting risk of unemployment was not a "special need". However, the Appellate Body and Panel could have done more in adopting a comprehensive approach which considers the developmental interests of Indonesia as a developing country. The linkage between trade and social policies should have been considered in this respect. Lester, Mercurio and Davies have observed that:

Whilst the trade debate in the nineteenth century was almost an economic issue ... today, by contrast, the trade debate is intimately linked to a wide range of social policy issues. This change is a result of a number of factors, including: the expanded scope of trade agreements, which are no longer limited to reducing tariff duties; [and] the integration of poor countries into the trading system, which has resulted in trade between countries with different income levels..."<sup>71</sup>

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<sup>71</sup> Lester, Mercurio and Davies *World Trade Law* 851.

But the clearly minimalist and non-robust approach of the Panel and Appellate Body could be explained and justified based on their inclination and preference for engaging in judicial economy.<sup>72</sup> Having found in favour of Indonesia on the ground pertaining to Article 2.1 of the *TBT Agreement*, it was not really necessary to make elaborate findings and conclusions on the claims of violations founded on Article 12.3. Sunstein has observed that: "Minimalism favours rulings that are narrow, in the sense that they govern only the circumstances of the particular case ... In law, narrow ... decisions have real advantages insofar as they reduce decision costs and error; [and] make space for democratic engagement on fundamental questions ...". Perhaps the Panel and Appellate Body's decisions allow room for academic engagement on the best possible approach to be adopted in the future regarding public health-based trade protectionism. However, Sunstein has also warned that judicial minimalism "is hard to justify... Sometimes small steps increase the aggregate costs of decisions; sometimes they produce large errors, especially when they export decision-making burdens to fallible people".<sup>73</sup> This assertion is plausible when one considers the cost implication of the Panel and Appellate Body's reluctance to robustly pronounce on a matter which has a significant future implication for developing countries that stand to benefit from pro-developmental WTO policies and decisions.

## 7. Conclusion

The US ban on clove cigarettes clearly violated Article III:4 in that, on the findings of the Panel and Appellate Body, the predominantly imported clove cigarettes and the largely domestically produced menthol cigarettes were "like products" because they share the same end-use, are physically similar and have identical tariff classifications. Furthermore, while the US ban on clove cigarettes was aimed at protecting human health, the verdicts of both the Panel and Appellate Body were

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<sup>72</sup> Sunstein 2007 *Tulsa Law Review* 825.

<sup>73</sup> Sunstein 2007 *Tulsa Law Review* 825.

identical, namely that the regulatory measure discriminated against the imported "like products" and afforded them a "less favourable treatment."

However, regardless of the foregoing, the Panel and Appellate Body lost an opportunity to address the special development needs of developing Member States in the *US-Clove Cigarettes* case. If the WTO is to develop a credible reputation as a forum for effective dispute resolution in matters where trade inter-connects with non-trade matters, then the WTO must adopt a direct approach to addressing disguised protectionism aimed at products originating from developing countries. Whilst it must be acknowledged that drawing a line between protectionist and non-protectionist laws may not always be easy, as was the case in the *US-Clove Cigarettes* case, the WTO adjudicating bodies could have taken a more robust position in favour of developing countries, even though some of the issues implicated might have been too politically sensitive for judicial resolution at the WTO.

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**List of abbreviations**

ASIL Insights	American Society of International Law Insights
FCTC	Framework Convention on Tobacco Control
FDA	Food and Drug Administration
FFDCA	Federal Food, Drug, and Cosmetic Act
FSPTCA	Family Smoking Prevention and Tobacco Control Act
GATT	General Agreement on Tariffs and Trade
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
US	United States of America
WTO	World Trade Organisation