
REGULATING TOBACCO FLAVORS: IMPLICATIONS OF WTO LAW

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I.	INTRODUCTION	384
II.	EXISTING FLAVORING MEASURES	387
	A. <i>Overview</i>	387
	B. <i>Challenge to United States Legislation in the WTO Dispute Settlement System</i>	388
	C. <i>Objections to Canadian Legislation in the TBT Committee</i>	390
III.	GATT 1994	392
	A. <i>Relationship with the TBT Agreement</i>	392
	B. <i>National Treatment (Art. III:4)</i>	393
	1. <i>Overview</i>	393
	2. <i>Like Products</i>	394
	3. <i>Less Favorable Treatment</i>	399
	4. <i>Conclusion</i>	401
	C. <i>Most Favored Nation (MFN) Treatment (Art. I:1)</i>	401
	1. <i>Overview</i>	401
	2. <i>Immediately and Unconditionally</i>	403
	3. <i>Conclusion</i>	405
	D. <i>Prohibition on Quantitative Restrictions (Art. XI:1)</i>	405
	E. <i>General Exceptions (Art. XX)</i>	406
	1. <i>Overview</i>	406
	2. <i>Necessary to Protect Human Health (Art. XX(b))</i>	407

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3. Arbitrary or Unjustifiable Discrimination or a Disguised Restriction on Trade (Chapeau)	410
4. FCTC as Evidence	412
IV. TBT AGREEMENT	413
A. <i>Inapplicability of the SPS Agreement</i>	413
B. <i>Existence of a Technical Regulation (Annex 1)</i>	415
C. <i>National Treatment and MFN Treatment (Art. 2.1)</i>	416
D. <i>Not More Trade Restrictive Than Necessary (Art. 2.2)</i> .	417
E. <i>Specification in Terms of Performance (Art. 2.8)</i>	419
F. <i>Relevance of International Standards (Arts 2.4-2.5)</i>	420
G. <i>Special and Differential Treatment (Article 12.3)</i>	421
V. CONCLUSION	422

ABSTRACT

Within the World Trade Organization (“WTO”), regulatory measures of Canada and the United States restricting “flavoring” of tobacco products including cigarettes with additives such as chocolate, clove and sweeteners are under challenge. At the same time, the tobacco lobby continues to target other tobacco control measures on the basis that they violate international trade or investment law, including Australia’s plain packaging proposal, Uruguay’s stricter labelling requirements, and Norway’s display ban. The WTO-consistency of regulatory restrictions on tobacco flavoring provides an informative case study of the relationship between tobacco control and international economic law. The WTO’s *General Agreement on Tariffs and Trade 1994* and *Agreement on Technical Barriers to Trade* grant WTO Members significant flexibility in implementing genuine health measures including these kinds of restrictions. Nevertheless, to ensure WTO-consistency, tobacco flavoring measures must be carefully designed to achieve their health objectives based on available scientific and empirical evidence, avoiding unnecessary discrimination against or between imported tobacco products and unjustified barriers to international trade. Exemptions for additives that cause direct or indirect harm by masking tobacco harshness, attracting certain groups of consumers such as young people, or increasing the toxicity or addictiveness of tobacco products, are likely to undermine a Member’s health goals and in turn its claim of WTO-consistency.

I. INTRODUCTION

In many countries around the world, tobacco control measures are becoming stricter. Tobacco companies are responding, as ever, with whatever policy and legal arguments they can muster. In numerous cases, such as Australia’s commitment to plain packaging of cigarettes, sensible

public health policy prevails.¹ However, developed and developing countries need support in withstanding the pressures imposed by the tobacco industry. Tobacco lobbyists routinely claim that tobacco control measures violate international trade and investment law. The uncertainty and complexity of these fields exacerbate the problem of regulatory chill. As an example, in March 2010, Philip Morris launched arbitral proceedings against Uruguay—often identified as a champion of tobacco control²—pursuant to a bilateral investment treaty between Uruguay and Switzerland. The proceedings challenge Uruguayan regulatory measures requiring large health warnings on cigarette packets and extending prohibitions regarding the use of misleading descriptors such as “light” and “mild” in conjunction with cigarettes.³ At the time of writing, Uruguay’s ultimate response is uncertain.⁴ Philip Morris is also challenging a Norwegian display ban on tobacco products under the European Economic Agreement.⁵

In this article, we consider the implications of the law of the World Trade Organization (“WTO”) for regulatory measures by WTO Members that restrict “flavoring” of tobacco products. This case study of the relationship between tobacco control and international economic law is particularly pertinent, given the ongoing WTO dispute launched by Indonesia against a United States flavoring measure,⁶ recent complaints about a Canadian flavoring measure expressed by other Members in the WTO’s Committee on Technical Barriers to Trade (“TBT Committee”),⁷

¹ NAT’L PREVENTATIVE HEALTH TASKFORCE, AUSTRALIA: THE HEALTHIEST COUNTRY BY 2020 – TECHNICAL REPORT 2: TOBACCO CONTROL IN AUSTRALIA 20-21 (2009); NAT’L PREVENTATIVE HEALTH TASKFORCE, AUSTRALIA: THE HEALTHIEST COUNTRY BY 2020 – NATIONAL PREVENTATIVE HEALTH STRATEGY: THE ROADMAP FOR ACTION 181-82 (2009); THE COMMONWEALTH OF AUSTRALIA, TAKING PREVENTATIVE ACTION: A RESPONSE TO ‘AUSTRALIA: THE HEALTHIEST COUNTRY BY 2020’ 65-67 (2010).

² See, e.g., *Award Winners named for World No Tobacco Day in the Americas*, PAN AMERICAN HEALTH ORG. (May 30, 2006), <http://www.paho.org/english/dd/pin/pr060530a.htm>.

³ FTR Holding S.A. et al. v. Oriental Republic of Uru., ICSID Case No. ARB/10/7 (request for institution of proceedings registered Mar. 26, 2010), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=casesRH&actionVal=ListCases> (follow pending cases hyperlink then go to case 106) (last updated Nov. 24, 2010); Luke Peterson, *Philip Morris Files First Known Investment Treaty Claim Against Tobacco Regulations*, 3 INVESTMENT ARBITRATION REPORTER (Mar. 18, 2010).

⁴ Cf. Rory Carroll, *Uruguay Bows to Pressure Over Anti-smoking Law Amendments*, THE GUARDIAN, July 27, 2010, <http://www.guardian.co.uk/world/2010/jul/27/uruguay-tobacco-smoking-philip-morris>.

⁵ Peterson, *supra* note 3; Michael Sandelson, *Philip Morris to Sue Norwegian State*, THE FOREIGNER, Mar. 9, 2010, <http://theforeigner.no/pages/news/philip-morris-to-sue-norwegian-state>.

⁶ See *infra* Part II(b).

⁷ See *infra* Part II(c).

and the recent session of the Conference of the Parties to the *World Health Organization* (“WHO”) *Framework Convention on Tobacco Control* (FCTC),⁸ which adopted partial guidelines for the implementation of Article 13 of the FCTC,⁹ including guidance on flavoring measures.

The domestic measures at issue for the purposes of this article are laws, regulations or other regulatory requirements that prohibit the manufacture, sale, distribution or importation of tobacco products containing any or excess amounts of additives that either lend a “characterising flavor” to the product or its smoke (for example, an additive that makes a cigarette taste like cherry), or otherwise affect the flavor of the product or its smoke (for example, by masking the harshness of the tobacco). The relevant additives may be natural or artificial, but we exclude from our analysis the regulation of tobacco as an ingredient and the regulation of ingredients that arise naturally in the course of manufacture (for example, ingredients that are naturally generated during the curing process). For convenience, in this article we describe the measures at issue as “flavoring measures,” even though some may be seen as affecting the flavor of tobacco products more directly than others. References below to “restricted additives” are intended to cover additives that are either completely prohibited or limited to specific amounts, while references to “flavored” tobacco products are intended to cover both products containing prohibited additives and products containing additives in excess of prescribed amounts. A “non-flavored” tobacco product contains no prohibited additives and no other additives in excess of prescribed amounts.

Below we first outline the kinds of flavoring measures that are currently in place in some countries. We then examine the most relevant WTO agreements on this issue, namely the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) and the *Agreement on Technical Barriers to Trade* (“TBT Agreement”), keeping in mind that currently 135 of the 172 parties to the FCTC are also WTO Members. We conclude that the WTO agreements contain ample flexibility to enable WTO Members to enact genuine measures for the protection of public health. However, flavoring measures that discriminate against or between imported products, or that are more trade-restrictive than necessary, risk violating certain WTO provisions. Apparent concessions to the tobacco lobby reflected in some flavoring measures, which may be accepted in order to enable the passage of the measures through the domestic regulatory system, are likely to undermine the health justification and hence the WTO-consistency of the measures. That is not to say that WTO Members

⁸ WHO Framework Convention on Tobacco Control, *adopted* May 21, 2003, 2302 U.N.T.S. 166 (entered into force Feb. 27, 2005).

⁹ Consideration of these guidelines was mandated by the Conference of the Parties to the WHO Framework Convention on Tobacco Control, Third Session, Durban, South Africa, Nov. 17-22, 2008, *Elaboration of Guidelines for Implementation of Article 13 of the Convention*, FCTC/COP3/9, Annex 1 (Sept. 2, 2008).

should abandon flavoring measures, whether or not they are party to the FCTC. Rather, flavoring measures should be carefully designed to comply with WTO law, not merely for the sake of compliance, but also to ensure that these measures properly target their health goals. Our analysis also highlights the value of developing further scientific and empirical evidence to support the direct and indirect health benefits of particular flavoring measures.

II. EXISTING FLAVORING MEASURES

A. Overview

The Annex to this article summarizes flavoring measures in the United States, Canada, France and Australia. 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. Menthol cigarettes make up a significant proportion of the market in the United States and a very small proportion in Canada.¹⁰ The federal measures in the United States and Canada are discussed further below in the context of complaints by WTO Members within the WTO. The United States federal measure is narrower, prohibiting the use—“as a constituent or additive”—of flavors, herbs and spices that are a “characterizing flavour of the tobacco or smoke” (excluding tobacco and menthol). Thus, a flavor that is not “tasted” by the smoker will not be caught by the restriction. In contrast, the Canadian federal measure applies to a broad range of specified “additives” (such as spices and sugars), whether or not those additives affect the final “flavour” of the product. The measure includes a detailed list of exempt additives (including menthol). The French law prohibits the sale or distribution of flavored cigarettes containing more than prescribed amounts of ingredients that give a sweet or acidulous flavor. Most of the (sub-national) measures within Australia focus on preventing young people from smoking and on fruity, sweet or confectionary-like flavors. They enable a Minister or Secretary to declare a product prohibited in particular circumstances. Pursuant to these measures, a range of products have been prohibited.¹¹

¹⁰ Two percent of cigarettes in Canada contain menthol. Rob Cunningham, *Canada: Ban on Flavours*, 19 *TOBACCO CONTROL* 4, 4 (2010). As for the United States, “[m]enthols accounted for a quarter of the roughly 370 billion cigarettes smoked domestically in 2006 and are more popular here than anywhere else in the world.” Paul Smalera, *Cool, Refreshing Legislation for Philip Morris*, *THE BIG MONEY* (June 8, 2009), available at <http://www.thebigmoney.com/articles/judgments/2009/06/08/cool-refreshing-legislation-philip-morris>. See also Jennifer Kreslake et al., *Tobacco Industry Control of Menthol in Cigarettes and Targeting of Adolescents and Young Adults*, 98 *AM. J. PUB. HEALTH* 1685, 1685 (2008).

¹¹ Tobacco Products Regulation (Prohibited Tobacco Products) Notice 2006 (S. Austl.), reprinted in *South Australia Government Gazette* at 2640 (Aug. 10, 2006), available at http://www.governmentgazette.sa.gov.au/2006/august/2006_046.pdf;

In addition to the measures noted in the Annex, a number of bills for flavoring measures have been introduced in state legislatures of the United States,¹² typically excluding menthol, and sometimes clove. A bill has also been introduced into the House of Commons of Canada that would outlaw the sale by manufacturers and retailers of tobacco products “that includ[e] a flavouring agent” other than sugar or tobacco.¹³

B. *Challenge to United States Legislation in the WTO Dispute Settlement System*

On April 7, 2010, Indonesia formally requested consultations with the United States in the WTO dispute settlement system in connection with the United States’ *Family Smoking Prevention and Tobacco Control Act 2009* (“US Act”).¹⁴ Neither of these countries is a party to the FCTC.¹⁵ On June 9, 2010, after consultations failed to resolve the dispute, Indonesia requested the establishment of a WTO Panel in order to do so.¹⁶ Indonesia alleges that the US Act is inconsistent with, *inter alia*, the national treatment obligation in GATT Article III:4 and TBT Article 2.1 because it treats imported clove cigarettes less favorably than like domestic menthol cigarettes,¹⁷ which have a significant market share.¹⁸

Tobacco (Prohibited Smoking Products) Declaration 2009 (No. 1) (Austl. Cap. Terr.), available at <http://www.legislation.act.gov.au/ni/2009-53/current/pdf/2009-53.pdf>. Notice under section 29 of the Public Health (Tobacco) Act 2008 (N.S.W.), reprinted in New South Wales Government Gazette at 136 (Jan. 15, 2010), available at http://www.nsw.gov.au/sites/default/files/GovernmentGazette15January2010_0.pdf; Order under Section 15N(1) of the Tobacco Act 1987 Banning the Sale of Tobacco Products (Vict.), reprinted in Victoria Government Gazette at 1335 (June 24, 2010), available at <http://www.gazette.vic.gov.au/gazette/Gazettes2010/GG2010G025.pdf>.

¹² Hawaii, Massachusetts, Montana, and West Virginia.

¹³ An Act to Amend the Tobacco Act (Cigarillos, Cigars and Pipe Tobacco), Bill C-348 (tabled on Mar. 26, 2009 and Mar. 3, 2010) (Can.).

¹⁴ Request for Consultations by Indonesia, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/1 (Apr. 14, 2010).

¹⁵ The United States signed the FCTC on May 10, 2004 but has not ratified the treaty. Indonesia is neither a signatory nor a party to the treaty. See http://www.who.int/fctc/signatories_parties/en/index.html (last accessed Nov. 5, 2010).

¹⁶ Request for the Establishment of a Panel by Indonesia, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/2 (June 11, 2010) [hereinafter Panel Request, *US – Clove Cigarettes*].

¹⁷ *Id.* at 1-2. Indonesia also maintains (at page 2) that if the ban on flavored cigarettes constitutes a sanitary or phytosanitary measure then it is inconsistent with various provisions of the WTO’s *Agreement on Sanitary and Phytosanitary Measures*. See *Agreement on the Application of Sanitary and Phytosanitary Measures*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 493 (1994) [hereinafter SPS Agreement]; *infra* Part IV(a).

¹⁸ See *supra* note 10.

The United States objected to the establishment of the Panel when this matter was first raised before the WTO's Dispute Settlement Body ("DSB") on June 22, 2010, indicating that the Tobacco Products Scientific Advisory Committee of the United States Food and Drug Administration ("FDA") was studying the effects of menthol cigarettes¹⁹ and was due to transmit its findings to the FDA in March 2011,²⁰ which could lead to further regulation.²¹ (The Committee has now issued its report, which concludes that "[m]enthol cigarettes have an adverse impact on public health in the United States," and that "[t]here are no public health benefits of menthol compared to non-menthol cigarettes," and therefore recommends to the FDA that "[r]emoval of menthol cigarettes from the marketplace would benefit public health in the United States."²²) At the June 2010 DSB meeting, Indonesia maintained that the Act has led to the complete cessation of imports into the United States of kretek (clove-flavored) cigarettes, which were valued at \$15.2 million in 2008 and of which 99 percent originated in Indonesia.²³ In contrast, according to Indonesia, menthol cigarettes are untouched by the US Act and yet account for 44 percent of cigarettes consumed by youth smokers in the United States and 28 percent of all cigarettes consumed in the United States.²⁴

At the second meeting of the DSB at which the matter was raised, the United States was unable to prevent the establishment of a Panel in accordance with Article 6.1 of the DSU. Accordingly, on July 20, 2010, the DSB established the Panel as requested by Indonesia, and the Panel was composed on September 9, 2010.²⁵ The Panel expects to conclude its work by the end of June 2011.²⁶

¹⁹ See, e.g., Tobacco Products Scientific Advisory Committee, 75 Fed. Reg. 28,027 (May 19, 2010).

²⁰ *U.S. Rejects Indonesia's First WTO Panel Request on Clove Cigarette Ban*, 28 INSIDE U.S. TRADE (2010) [hereinafter *Clove Cigarette Ban*].

²¹ *DSB Establishes Panel to Hear Indonesian Challenge of U.S. Clove Cigarette Ban*, 28 INSIDE U.S. TRADE (2010).

²² U.S. Food and Drug Administration, *Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations*, pp. 204, 208 (2011), <http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/default.htm> [hereinafter TPSAC Menthol Report].

²³ Jonathan Lynn, *US Rejects WTO Panel on Clove Cigarette Ban*, REUTERS (June 25, 2010).

²⁴ *Clove Cigarette Ban*, *supra* note 20.

²⁵ Constitution of the Panel Established at the Request of Indonesia, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/3 (Sept. 14, 2010).

²⁶ Communication from the Chairman of the Panel, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/4 (Mar. 9, 2011).

C. *Objections to Canadian Legislation in the TBT Committee*

The WTO's TBT Committee comprises representatives of all WTO Members, and its purposes include "affording Members the opportunity of consulting on any matters relating to the operation of [the TBT Agreement] or the furtherance of its objectives."²⁷ A number of WTO Members have recently expressed concerns regarding Canada's *Cracking Down on Tobacco Marketing Aimed at Youth Act 2009* ("Canadian Act") within the context of that committee.

At the meeting of the TBT Committee in November 2009, Argentina, Mexico, Switzerland, Colombia, the European Union,²⁸ Turkey, and the Former Yugoslav Republic of Macedonia expressed varying degrees of concern about the consistency of the Canadian Act with certain substantive and procedural TBT provisions.²⁹ The United States also asked a number of questions concerning the measure.³⁰ Argentina's concerns included that certain "additives" are "an essential component to mitigate the strong flavour of Burley tobacco," such that a prohibition of these additives as in the Canadian Act "could . . . represent a *de facto* prohibition of blended cigarettes."³¹ In response, Canada explained that the Canadian Act is "designed to address public health concerns by reducing the incentives for young people to smoke," stressing that the legislation does not "ban any type of tobacco or tobacco product."³² Canada also suggested that some non-blended Burley cigarettes are (lawfully) sold on the Canadian market, so that it is "not correct to state that the ban on additives constitute[s] an implicit ban on Burley tobacco."³³ Blended cigarettes in any case make up a very small proportion of the Canadian mar-

²⁷ Agreement on Technical Barriers to Trade, art. 13.1, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

²⁸ Until Nov. 30, 2009, the European Union was known as the "European Communities" in the WTO. See Member Information: The European Union and the WTO, http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (last accessed Aug. 13, 2010).

²⁹ WTO Committee on Technical Barriers to Trade, *Note by the Secretariat: Minutes of the Meeting of 5-6 November 2009*, G/TBT/M/49 (Dec. 22, 2009) ¶¶ 8-13, 15 [hereinafter *November 2009 Meeting Minutes*].

³⁰ *Id.* at ¶ 14.

³¹ *Id.* at ¶ 8.

³² *Id.* at ¶ 16.

³³ *Id.*

ket,³⁴ whereas the United States (for example) is a substantial manufacturer and exporter of these cigarettes.³⁵

In March 2010, Malawi, a WTO Member that is “the largest producer of Burley tobacco in the world,” circulated a formal written communication regarding the Canadian Act.³⁶ According to Malawi, cigarettes fall into two major categories, both of which taste like tobacco: (i) “traditional blended” cigarettes, which comprise a blend of Burley tobacco, Oriental tobacco, and Virginia tobacco, and (ii) “flue-cured” cigarettes, which are “the dominant type of cigarette sold in Canada” and are permitted under the Canadian Act.³⁷ Malawi contends that, although “additives are an essential component of traditional blended cigarettes . . . to confer on each brand its unique tobacco taste,” they “do not lend a characterizing fruit or confectionary flavour to the end product.”³⁸ On this basis, Malawi implies that the Canadian Act may be inconsistent with a number of provisions of the TBT Agreement.³⁹ Tobacco industry representatives in the Philippines advocated a similar response by that country.⁴⁰ According to a WTO news item,⁴¹ at the March 2010 meeting of the TBT Committee, Malawi and 13 other Members expressed similar concerns about the Canadian Act: Mexico, Argentina, Colombia, Brazil, Switzerland, the Dominican Republic, Philippines, Turkey, the EU, the Former Yugoslav Republic of Macedonia, the US, Japan and Zimbabwe.⁴² Canada responded by “stress[ing] that certain additives did increase the attractiveness of tobacco products,” repeating that the Cana-

³⁴ According to one (pro-tobacco) source, “American blend cigarettes account for less than 1 percent of the cigarette market in Canada” with “traditional Canadian cigarettes” accounting for “98 percent of the market.” Roger Quarles, *Administration Must Confront Canada on Burley Tobacco Ban*, THE HILL (Nov. 16, 2009), <http://thehill.com/opinion/op-ed/68001-administration-must-confront-canada-on-burley-tobaccoban>.

³⁵ According to one (pro-tobacco) source, “the U.S. grew \$336 million worth of burley tobacco in 2008, over 80 percent of which was exported to other countries.” *Id.*

³⁶ WTO Committee on Technical Barriers to Trade, *The Effects of Canada’s Tobacco Act on Malawi*, G/TBT/W/329 (Mar. 24, 2010) ¶ 5 [hereinafter *Act on Malawi*].

³⁷ *Id.* at ¶¶ 3-4, 11. Only 0.8% of cigarettes sold in Canada are blended with Burley tobacco. Cunningham, *supra* note 10, at 5.

³⁸ *Act on Malawi*, *supra* note 36, at ¶ 4.

³⁹ *Id.* at ¶¶ 9-15.

⁴⁰ Letter from Rodolfo Salanga, President of Philippine Tobacco Inst., Inc. to Peter Favila, Secretary of the Philippine Department of Trade and Indus. (Mar. 4, 2010).

⁴¹ The minutes of the March 2010 meeting of the TBT Committee are not publicly available at the time of writing.

⁴² WTO, *Tobacco and Alcohol Technical Barriers Among Members’ Trade Concerns* (Mar. 25, 2010), http://www.wto.org/english/news_e/news10_e/tbt_24mar10_e.htm.

dian Act “does not ban any type of tobacco product or types of tobacco” and highlighting that the ban of additives applies to “little cigars, cigarettes and blunt wraps sold in Canada, regardless of their origin.”⁴³

In June 2010, Malawi’s concerns were echoed and elaborated in formal written statements by Kenya⁴⁴ and Uganda.⁴⁵ More than 20 WTO Members also raised concerns about the impact of the Canadian Act on blended tobacco at the June 2010 meeting of the TBT Committee.⁴⁶ Canada “reiterated that the measure does not ban any type of tobacco product, it only prohibits the use of additives, including flavours that make tobacco products more appealing to children and youth.”⁴⁷

In response to these concerns about the Canadian Act, Indonesia highlighted in a written statement its concerns regarding the US Act (as discussed above).⁴⁸ Indonesia emphasized that even a “more targeted ban” than the Canadian Act—including a measure limited to “characterizing flavours”—must be “non-discriminatory, based on scientific and technical evidence, and at a minimum, cover those characterizing flavours shown to attract youth smokers.”⁴⁹ Indonesia had previously raised these concerns regarding the US Act in the TBT Committee.⁵⁰

III. GATT 1994

A. Relationship with the TBT Agreement

The GATT 1994 and the TBT Agreement may both apply simultaneously to a given measure, but to the extent of any conflict between the two agreements the latter will prevail.⁵¹ In the absence of a conflict, a measure that is consistent with the GATT 1994 could nevertheless be

⁴³ *Id.*

⁴⁴ WTO Committee on Technical Barriers to Trade, *The Effects of Canada’s ‘Tobacco Act’ on Kenya*, G/TBT/W/330 (June 16, 2010).

⁴⁵ WTO Committee on Technical Barriers to Trade, *The Effects of Canada’s ‘Tobacco Act’ on Uganda*, G/TBT/W/331 (June 23, 2010).

⁴⁶ WTO Committee on Technical Barriers to Trade, *Note by the Secretariat: Minutes of the Meeting of 23-24 June 2010*, G/TBT/M/51 (Oct. 1, 2010) ¶¶ 181-216.

⁴⁷ WTO, *Tobacco and Alcohol Again Among Members’ Trade Concerns* (June 23-24, 2010), http://www.wto.org/english/news_e/news10_e/tbt_23jun10_e.htm; see also *id.* at ¶¶ 217-26.

⁴⁸ See *supra* Part II(b).

⁴⁹ WTO Committee on Technical Barriers to Trade, *Response by Indonesia to Malawi’s Communication ‘The Effects of Canada’s ‘Tobacco Act’ on Malawi,’* ¶ 4, G/TBT/W/332 (June 28, 2010).

⁵⁰ *November 2009 Meeting Minutes*, *supra* note 29, at ¶ 6; WTO Committee on Technical Barriers to Trade, *Certain New Measures by United States Addressing the Ban on Clove Cigarettes: Communication from Indonesia*, G/TBT/W/323 (Aug. 20, 2009).

⁵¹ General Interpretative Note to Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization*, 1995, 1867 U.N.T.S. 187.

found inconsistent with the TBT Agreement, and vice versa. Since the TBT Agreement is the more specific agreement in this context, a WTO Panel in a dispute concerning a flavoring measure would usually examine the measure under the TBT Agreement before examining it under the GATT 1994.⁵² Nevertheless, for the purpose of this article, we first address the GATT 1994 because a number of the principles contained in that agreement (such as non-discrimination and general exceptions) are elaborated and refined in the TBT Agreement, so it is helpful to examine the basic principles first.

B. National Treatment (Art. III:4)

1. Overview

Article III:4 of the GATT 1994 provides:

The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use⁵³

This provision compares the treatment by a WTO Member of:

- (i) “products of national origin,” which are frequently described as “domestic products” (i.e., products manufactured within the Member’s territory by a manufacturer of any nationality); and
- (ii) imported products (i.e., products of the territory of another WTO Member that are imported into the regulating Member’s territory).

Accordingly, the potential for inconsistency with GATT Article III:4 arises where tobacco products are manufactured in the territory of a WTO Member that imports tobacco products from at least one other WTO Member. Inconsistency with this provision might alternatively be shown with respect to *potential or hypothetical* (as opposed to existing)

⁵² See, e.g., Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 204, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter Appellate Body Report, *EC – Bananas III*]; Panel Report, *European Communities – Trade Description of Sardines*, ¶ 7.19, WT/DS231/R (May 29, 2002) [hereinafter Panel Report, *EC – Sardines*]; Panel Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 8.15-17, WT/DS135/R (Sept. 18, 2000) [hereinafter Panel Report, *EC – Asbestos*].

⁵³ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, as amended and incorporated into Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A, Apr. 15, 1994, art. III:4, 33 I.L.M. 1125 (1994) [hereinafter GATT 1994].

imports from a WTO Member, for example where a flavoring measure effectively precludes imports from that Member altogether.⁵⁴

A flavoring measure regulating tobacco products that are manufactured, marketed, distributed or sold within that Member's territory would fall within the phrase "laws, regulations and requirements affecting . . . internal sale, offering for sale, purchase, distribution or use," which has been interpreted broadly.⁵⁵

2. Like Products

A flavoring measure would typically not distinguish explicitly between domestic and imported products. In other words, it would be origin neutral on its face, applying equally to domestic and imported tobacco products.⁵⁶ However, the national treatment obligation prohibits not only *de jure* discrimination against imports (e.g., a measure that allows domestic but not imported cigarettes to be sold to children) but also *de facto* discrimination against imports (e.g., a measure that bans the sale of cigarettes with beige wrapping but not "like" cigarettes with white wrapping, if domestic cigarettes are white and imported cigarettes are beige). Accordingly, the question arises whether flavored tobacco products are "like" non-flavored tobacco products. (A related question, which we do

⁵⁴ See, e.g., Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 627, WT/DS169/R (July 31, 2000); Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations,"* ¶ 8.133, WT/DS108/RW (Aug. 20, 2001) [hereinafter Panel Report, *US – FSC*]; see also, in the context of GATT 1994, art. III:2: Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, 20-21, WT/DS31/AB/R (June 30, 1997) [hereinafter Appellate Body Report, *Canada – Periodicals*]; Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, ¶ 7.356, WT/DS366/R (Apr. 27, 2009) [hereinafter Panel Report, *Colombia – Ports of Entry*].

⁵⁵ See, e.g., Appellate Body Report, *EC – Bananas III*, *supra* note 52, ¶ 220; Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products*, ¶ 7.1448, WT/DS363/R (Aug. 12, 2009) [hereinafter Panel Report, *China – Publications*].

⁵⁶ If the measure did distinguish explicitly between imported and domestic products, for example by restricting flavors of imported but not domestic cigarettes, then the relevant imported and domestic products might be characterized as "like products" on the basis that the only difference between them is their origin. In the context of GATT 1994, art. III:4 see, e.g., Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 10.74, WT/DS139/R (Feb. 11, 2000) [hereinafter Panel Report, *Canada – Autos*]; Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶ 6.164, n.246, WT/DS276/R (Apr. 6, 2004) [hereinafter Panel Report, *Canada – Wheat Exports and Grain Imports*]; Panel Report, *China – Publications*, *supra* note 55, ¶ 7.1446; Panel Report, *India – Measures Affecting the Automotive Sector*, ¶¶ 7.174, 7.302, WT/DS175/R (Dec. 21, 2001) [hereinafter Panel Report, *India – Autos*]; Panel Report, *Turkey – Measures Affecting the Importation of Rice*, ¶ 7.214, WT/DS334/R (Sept. 21, 2007) [hereinafter Panel Report, *Turkey – Rice*]; Panel Report, *US – FSC*, *supra* note 54, ¶ 8.133.

not focus on here, is whether a flavored tobacco product that is targeted by a Member's flavoring measure (e.g., a flavored cigarette, in the case of the U.S. Act) is "like" a flavored tobacco product that is not caught by the measure (e.g., a flavored cigar).⁵⁷

Traditionally, the determination of whether products are like in the context of GATT Article III:4 depends on an assessment of four criteria:

- (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products.⁵⁸

Applying these traditional criteria to flavored and non-flavored tobacco products is largely a factual exercise that would depend on the particular circumstances surrounding a given challenged measure and the products and additives it targeted:

- (i) The *properties, nature and quality* of the products would arguably be by definition altered by the inclusion of restricted additives. If the restricted additives are undetectable in the final flavored product, it would be much harder to argue that this product differs from a non-flavored tobacco product. The difference between the products would be enhanced if the restricted additives could be shown to increase the palatability, toxicity, addictiveness or carcinogenicity of the products (just as the Appellate Body has held that the carcinogenicity of asbestos fibers distinguishes them physically from substitute fibers).⁵⁹ In 1990, in evidence concerning the use of cigarette additives generally, WHO representatives advised a GATT Panel that "there was no scientific evidence that one type of cigarette was more harmful to health than another."⁶⁰ Although further research is necessary, the science has since progressed to some extent to suggest that at least some additives (including menthol, chocolate and licorice) may directly increase the health risk of cigarettes.⁶¹ The FCTC Conference of the Parties recently adopted guidelines that note:

⁵⁷ See TPSAC Menthol Report, *supra* note 19, at 208.

⁵⁸ Appellate Body Report, *European Community – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 101, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter Appellate Body Report, *EC – Asbestos*].

⁵⁹ *Id.* ¶ 114.

⁶⁰ Report of the Panel, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 53, DS10/R - 37S/200 (Oct. 5, 1990).

⁶¹ See, e.g., TPSAC Menthol Report, *supra* note 19, at 208; *Report of the Scientific Committee on Emerging and Newly Identified Health Risks on the Addictiveness and Attractiveness of Tobacco Additives*, at 46 (Nov. 12, 2010), available at http://ec.europa.eu/health/scientific_committees/emerging/docs/scenihr_o_031.pdf [hereinafter

- High sugar content improves the palatability of tobacco products to tobacco users. Examples of sugars and sweeteners used in these products include glucose, molasses, honey and sorbitol.
- Masking tobacco smoke harshness with flavours contributes to promoting and sustaining tobacco use. Examples of flavouring substances include benzaldehyde, maltol, menthol and vanillin.
- Spices and herbs can also be used to improve the palatability of tobacco products. Examples include cinnamon, ginger and mint.⁶²

It would be harder to establish a difference between flavored and non-flavored tobacco products if the only difference between them lies in the amount of restricted additives they include, where additives are prohibited only above certain amounts.

- (ii) The *end-uses* of the products would be unlikely to be altered by the inclusion of the restricted additives or their inclusion above prescribed levels.
- (iii) *Consumers' tastes and habits* might be altered by the inclusion or amount of restricted additives. Scientific and other empirical evidence would be helpful in establishing this fact, either in general or with respect to the particular measure challenged. Evidence of competition in the marketplace⁶³ between flavored and non-flavored tobacco products would increase the chance that these two groups of products would be considered like. The Member imposing the flavoring measure could argue that consumers are likely to prefer the flavored product: the

Tobacco Additives Scientific Committee]; WHO Study Group on Tobacco Product Regulation, *The Scientific Basis of Tobacco Product Regulation: Report of a WHO Study Group*, WHO TECHNICAL REPORT SERIES 945 (2007) 11, 26-27, 35, 37, available at http://www.who.int/tobacco/global_interaction/tobreg/tsr/en/index.html [hereinafter *Tobacco Product Regulation*]; WHO, *Monograph: Advancing Knowledge on Regulating Tobacco Products* (2001) 35, available at http://www.who.int/tobacco/sactob/regulating_tobacco/en [hereinafter *Advancing Knowledge on Regulating Tobacco Products*]; *Menthol Cigarettes Are More Addictive, New Research Finds*, SCIENCE DAILY (Jan. 12, 2009), available at <http://www.sciencedaily.com/releases/2009/01/090110085918.htm>, citing K.K. Gandhi et al., *Lower Quit Rates Among African American and Latino Menthol Cigarette Smokers at a Tobacco Treatment Clinic*, 63 INT'L J. CLINICAL PRAC. 360 (2009).

⁶² Conference of the Parties to the WHO Framework Convention on Tobacco Control, Fourth Session, Punta del Este, Uruguay, Nov. 15-20, 2010, *Report of Committee A (Draft)*, at 10, (Draft) FCTC/COP/4/28 (Nov. 20, 2010) [hereinafter *Report of Committee A (Draft)*].

⁶³ "Article III . . . is concerned with competitive relationships in the marketplace." Appellate Body Report, *EC – Asbestos*, *supra* note 58, ¶ 117.

restricted additives make the product more attractive to consumers or particular groups of consumers (such as young people or African Americans), precisely as they are designed to do (thus indirectly increasing the health risk associated with the product). Some evidence supports this position, which also follows from the fact that additives may make tobacco products physically more palatable, as already discussed.⁶⁴ However, it might be difficult to establish that consumers distinguish between flavored and non-flavored tobacco products if they taste the same, or if consumers are unaware of the inclusion of or the effect of the restricted additives on the taste or feel of the product. Conversely, if the restricted additives directly increase the health risk of the product, and if this fact is established and well-known, consumers might on that basis distinguish between the products.⁶⁵ Again, it would be harder to establish a difference in consumer perception if the only difference between flavored and non-flavored products lies in the amount of restricted additives they include.

- (iv) At the six-digit level of *tariff classification* under the Harmonized Commodity Description and Coding Systems (“Harmonized System”),⁶⁶ the classification is unlikely to be changed by the inclusion of the restricted additives or their inclusion above prescribed amounts (i.e., flavored and non-flavored cigarettes are both cigarettes).⁶⁷ Nevertheless, at a more specific level of tariff classification (e.g., eight or ten digits) within a given WTO Member’s domestic system, inclusion of the restricted additives might in some instances alter the tariff classification. For example, the current United States system distinguishes between cig-

⁶⁴ See, e.g., TPSAC Menthol Report, *supra* note 19, at 204, 208; *Tobacco Additives Scientific Committee*, *supra* note 61, at 50; *Tobacco Product Regulation*, *supra* note 61, at 10-11, 16, 18-19, 26; *Advancing Knowledge on Regulating Tobacco Products*, *supra* note 61, at 34; Jennifer Kreslake et al., *Tobacco Industry Control of Menthol in Cigarettes and Targeting of Adolescents and Young Adults*, 98 AM. J. PUB. HEALTH 1685, 1685-86, 1688-89 (2008).

⁶⁵ Cf. Appellate Body Report, *EC – Asbestos*, *supra* note 58, ¶ 122 (holding that the consumer of chrysotile asbestos fibers, being a manufacturer who incorporated these fibers into another product, would likely be shaped by the health risks associated with the fibers).

⁶⁶ The Harmonized System is a uniform nomenclature developed by the World Customs Organization that many WTO Members follow. It is periodically updated. The versions that are likely to be most relevant are the current version and the version that applied during the negotiations to create the WTO including the SPS Agreement (both of which came into force in 1995).

⁶⁷ Tobacco products are contained in HARMONIZED TARIFF SYSTEM OF THE UNITED STATES, ch. 24, available at <http://www.usitc.gov/publications/docs/tata/hts/bychapter/1001C24.pdf>.

arettes containing clove and other cigarettes.⁶⁸ A difference in tariff classification is less likely if both flavored and non-flavored products contain restricted additives, but merely in different amounts.

This list of criteria for determining likeness is not exhaustive, and a WTO Panel examining a challenged measure under GATT Article III:4 would need to examine all relevant evidence in assessing whether the relevant products were like.⁶⁹ An additional basis on which a Member might seek to defend a flavoring measure would be that flavored tobacco products are not like non-flavored tobacco products because the aim and effect of the measure is to minimize harm from tobacco consumption, preventing initial and continued use of tobacco products. To the extent that this argument can be framed in the context of the four criteria as already explained, it is unobjectionable. However, the Appellate Body has rejected the so-called “aim-and-effects” test.⁷⁰ According to the traditional jurisprudence, Panels and the Appellate Body are unlikely to accept that the relevant products are distinct based solely on an independent characterization of a measure’s aims and effects.⁷¹

In summary, although it is not possible to draw a definitive conclusion on the question of like products in the abstract, it is quite likely that some flavoring measures would differentiate between flavored tobacco products and “like” non-flavored tobacco products. Put differently, while some measures of this kind might entail no national treatment violation because they distinguish between products that are not “like,” others might be found to distinguish between like products. Those measures would then have to be examined further under GATT Article III:4 to

⁶⁸ *See id.*

⁶⁹ Appellate Body Report, *EC – Asbestos*, *supra* note 58, ¶ 102.

⁷⁰ Appellate Body Report, *EC – Bananas III*, *supra* note 52, ¶¶ 216, 241; *see also* Panel Report, *Japan – Taxes on Alcoholic Beverages*, ¶ 6.16, WT/DS8/R (July 11, 2006) [hereinafter Panel Report, *Japan – Alcoholic Beverages*]; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS11/R (July 11, 1996) p. 23 [hereinafter Appellate Body Report, *Japan – Alcoholic Beverages*]. *Cf.* Report of the Panel, *United States – Measures Affecting Alcoholic and Malt Beverages*, ¶ 5.25-26, DS23/R-39S/206 (Mar. 16, 1992), GATT B.I.S.D. (35th Supp.) (1989); Dispute Settlement Panel Report, *United States – Taxes on Automobiles*, ¶ 5.9-10 (Oct. 11, 1994), 33 I.L.M. 1397 (1994).

⁷¹ *See* Robert Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an “Aim and Effects” Test*, 32 INT’L LAWYER 619 (1998); Donald Regan, *Regulatory Purpose and “Like Products” in Article III:4 of the GATT (With Additional Remarks on Article III:2)*, 36 J. WORLD TRADE 443 (2002); Joseph Weiler, *Law, Culture, and Values in the WTO – Gazing into the Crystal Ball*, in *THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW* 749, 758-72 (Daniel Bethlehem et al. eds., 2009); TANIA VOON, *CULTURAL PRODUCTS AND THE WORLD TRADE ORGANIZATION* 82-85, 87 (2007).

determine whether they accord “less favourable” treatment to imported products than to like domestic products.

3. Less Favorable Treatment

If a Member’s flavoring measure differentiates between flavored and non-flavored tobacco products, it will be inconsistent with the national treatment obligation of GATT Article III:4 if it treats imported products less favorably than like domestic products. Whether this occurs will again depend on an empirical and factual analysis in the particular circumstances. The central question is whether the challenged measure “modifies the conditions of competition in the relevant market to the detriment of imported products,”⁷² but WTO case law does not clearly and consistently explain how to determine whether imported products are treated less favorably than like domestic products. At least three (potentially overlapping) approaches are possible:⁷³

- (i) *Disproportionate disadvantage*: A measure treats imported products less favorably than like domestic products within the meaning of GATT Article III:4 if it “accord[s] to the group of “like” imported products “less favourable treatment” than that accorded to the group of “like” domestic products.”⁷⁴ In other words, imported products are disproportionately disadvantaged by the measure. This reading is supported by the *context* of Article III:4, which is relevant to the interpretation of Article III:4.⁷⁵ That context includes Article III:1, which states that “internal . . . regulations . . . should not be applied . . . so as to afford protection to domestic production.”⁷⁶ Indeed, the Appellate Body has described the words “less favourable treatment” as expressing this “general principle” in Article III:1.⁷⁷ If

⁷² Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 137, WT/DS161/AB/R (Dec. 11, 2000).

⁷³ This framework of three approaches (albeit using different names) appears in Nicolas F. Diebold, *Non-Discrimination and the Pillars of International Economic Law: Comparative Analysis and Building Coherency* 9-13 (Society of International Economic Law, Working Paper No. 24, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1632927. This part of the article also draws on Lothar Ehring, *De Facto Discrimination in World Trade Law: National and Most-Favoured-Nation Treatment—or Equal Treatment?*, 36 J. WORLD TRADE 921 (2002).

⁷⁴ Appellate Body Report, *EC – Asbestos*, *supra* note 58, ¶ 100 (emphasis in original); see also Panel Report, *European Communities – Approval and Marketing of Biotech Products*, ¶ 7.2514, WT/DS291/R (Sept. 26, 2006) [hereinafter Panel Report, *EC – Biotech*].

⁷⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.2, 1869 U.N.T.S. 401; *Vienna Convention on the Law of Treaties*, art. 31(1)-(2), 1155 U.N.T.S. 133 [hereinafter VCLT].

⁷⁶ GATT 1994, *supra* note 53, art. III:1.

⁷⁷ Appellate Body Report, *EC – Asbestos*, *supra* note 58, ¶ 100.

the burden of the measure does not fall disproportionately on imported products, then it is difficult to see how it is applied so as to afford protection to domestic production or in what sense it discriminates against imports. (Nevertheless, although Article III:1 informs the interpretation of the whole of Article III,⁷⁸ a complainant making a claim under Article III:4 need not establish as a separate consideration that the challenged measure is applied so as to afford protection.⁷⁹) Using this approach, a measure that prohibits the sale of flavored tobacco products would treat imported products less favorably – contrary to Article III:4 – if most imported tobacco products are flavored (and are therefore caught by the measure) and most like domestic products are non-flavored (and are therefore not caught by the measure).

- (ii) *Failure to accord best treatment*: A minority of WTO cases may be read as suggesting that a measure treats imported products less favorably if even one imported product falls in the disfavored category created by the measure (i.e., one imported tobacco product is flavored) and even one domestic product falls in the favored category (i.e., one domestic tobacco product is non-flavored).⁸⁰ This reading suggests that national treatment in fact requires Members to accord the best treatment to every imported product and not merely treatment as favorable as that accorded to domestic products in general. Under this approach, if imported flavored tobacco products were held to be like domestic non-flavored tobacco products, a flavoring measure would most likely be found to accord less favorable treatment to imported products than to like domestic products, contrary to GATT Article III:4. In our view, and that of most commentators,⁸¹ this approach is inconsistent with the purpose of the national treatment obligation as reflected in GATT Article III:1, inappropriately catching legitimate instances of government regulation that have neither the purpose nor the effect of discriminating against imported products.
- (iii) *Differential treatment explained by factors related to foreign origin*: Some more recent WTO cases have suggested that a measure does not accord “less favourable treatment” to imported products within the meaning of GATT Article III:4 “if the detrimental effect” of the measure on imported products “is explained by factors or circumstances unrelated to the foreign

⁷⁸ Appellate Body Report, *Japan – Alcoholic Beverages*, *supra* note 70, at 18.

⁷⁹ Appellate Body Report, *EC – Bananas III*, *supra* note 52, ¶ 216.

⁸⁰ See, e.g., Panel Report, *Canada – Periodicals*, *supra* note 54, ¶ 5.29, as discussed in Ehring, *supra* note 73, at 941-42.

⁸¹ See Diebold, *supra* note 73, at 10 n.40.

origin of the product,” such as the market share of the importer⁸² or a difference in the perceived safety of the products.⁸³ Like the disproportionate disadvantage approach described above, a focus on whether the differentiation is explained by factors related to foreign origin is supported by the context provided in Article III:1. This approach may offer some scope for considering the purpose of a flavoring measure and the increased health risks associated with flavored tobacco products (whether because they inherently increase the risk of the product or because they make this fundamentally unsafe product more attractive to consumers).

In summary, a WTO Member that was unsuccessful in arguing that flavored tobacco products are not like non-flavored tobacco products would have strong arguments for adopting the first or third approaches above in determining whether the measure accords less favorable treatment to imported products. Nevertheless, the flavoring measure in question might still be regarded as according less favorable treatment to imported products if most imported tobacco products are flavored and most like domestic products are non-flavored, or even if a significantly greater proportion of imported products than domestic products are flavored.

4. Conclusion

A flavoring measure that prohibits the sale of tobacco products that are typically imported may well violate the national treatment obligation in GATT Article III:4, unless the flavored tobacco products that it targets can be distinguished from non-flavored tobacco products physically, in terms of risk, or in the minds of consumers. Flavoring measures that exempt certain additives (e.g., menthol, clove or sugar) are particularly likely to create national treatment problems if the exempt additive is commonly used in domestic rather than imported tobacco products, unless the exempt products can be distinguished from the targeted products based on their physical properties, health implications or consumer perceptions. However, a measure that is *prima facie* inconsistent with GATT Article III:4 might be justified under GATT Article XX (as discussed below)⁸⁴ and therefore ultimately WTO-consistent.

C. Most Favored Nation (MFN) Treatment (Art. I:1)

1. Overview

Article I:1 of the GATT 1994 provides:

⁸² Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 96, WT/DS302/AB/R (Apr. 25, 2005).

⁸³ Panel Report, *EC – Biotech*, *supra* note 74, ¶ 7.2514.

⁸⁴ See *infra* Part III(e).

With respect to . . . all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.⁸⁵

The Appellate Body has made clear that, like GATT Article III:4, the most favored nation (“MFN”) obligation in GATT Article I:1 applies not only to *de jure* discrimination but also to *de facto* discrimination.⁸⁶ Article I:1 compares the treatment by a WTO Member of, *inter alia*:

- (i) products imported from any country (whether or not a WTO Member) into the Member’s territory; and
- (ii) products imported from any WTO Member into the Member’s territory.

Accordingly, the potential for inconsistency with GATT Article I:1 arises where tobacco products are imported from two or more countries, at least one of which is a WTO Member, into a WTO Member’s territory. Conceivably, an inconsistency might also be possible with respect to potential or hypothetical imports from a WTO Member, for example where a flavoring measure precludes those imports altogether.

A measure prohibiting imports of flavored tobacco products would be a rule in connection with importation, within the meaning of GATT Article I:1. Similarly, as explained above, a measure affecting tobacco products sold or distributed in a Member’s territory is a matter referred to in Article III:4 and therefore also falls under Article I:1.

The Appellate Body has pointed out that GATT Article I:1 refers to “*any advantage*,”⁸⁷ and it has adopted a broad interpretation of the phrase “advantage, favour, privilege or immunity.”⁸⁸ A relevant advantage provides “more favourable competitive opportunities” or “commercial opportunities” or affects “the commercial relationship between products.”⁸⁹ A WTO Member that prohibits the importation, sale or distribution of flavored tobacco products clearly grants an advantage of this

⁸⁵ GATT 1994, *supra* note 53, art. I:1.

⁸⁶ Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 78, WT/DS139/AB/R (May 31, 2000) [hereinafter Appellate Body Report, *Canada – Autos*].

⁸⁷ *Id.* ¶ 79.

⁸⁸ Appellate Body Report, *EC – Bananas III*, *supra* note 52, ¶ 206; *see also* Panel Report, *Colombia – Ports of Entry*, *supra* note 54, ¶¶ 7.340, 7.344-345.

⁸⁹ Panel Report, *Colombia – Ports of Entry*, *supra* note 54, ¶¶ 7.341, 7.346 (*quoting* Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Complaint by Guatemala and Honduras, ¶ 7.239, WT/DS27/R/GTM, WT/DS27/R/HND (Sept. 25, 1997).

kind to non-flavored products (e.g., menthol cigarettes, or cigarettes without characterizing flavors added).

Although the meaning of “like products” varies across the various WTO agreements and provisions,⁹⁰ the interpretation of that term in GATT Article I:1 is broadly similar to that described above with respect to GATT Article III:4.⁹¹ Therefore, some flavoring measures may be found to differentiate between flavored tobacco products and like non-flavored tobacco products.

2. Immediately and Unconditionally

A key question in applying the MFN obligation is whether the advantage granted by the importing Member to non-flavored products is granted “immediately and unconditionally” to like flavored products from all WTO Members.⁹² Three alternative approaches can be discerned in describing the conditions that GATT Article I:1 precludes:

- (i) *Any conditions*: Under this approach, an advantage is accorded “immediately and unconditionally” under GATT Article I:1 only if it is subject to no conditions whatsoever.⁹³ Accordingly, a Member that allowed the importation or sale of only non-flavored tobacco products would not be granting the advantage of allowing importation or sale immediately and unconditionally to all like tobacco products of WTO Members. Rather, that advantage would be granted only on the condition that the products are non-flavored. We do not consider this approach to Article I:1 tenable, as it limits the autonomy of WTO Members to regulate products sold within their own territory, without linking the differentiation to the origin of the products or demonstrating discrimination between imports (that is, without demonstrating that most or even any of the disfavored products are imported from one or more WTO Members).⁹⁴
- (ii) *Conditions unrelated to the imported product*: Under this more flexible approach, a Member may not make an advantage conditional on “any criteria that [are] not related to the imported

⁹⁰ Appellate Body Report, *Japan – Alcoholic Beverages*, *supra* note 70, at 21.

⁹¹ See, e.g., Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, ¶ 7.714, WT/DS174/R (Mar. 15, 2005); see also Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, ¶ 14.141, WT/DS54/R (Dec. 7, 1998) [hereinafter Panel Report, *Indonesia – Autos*].

⁹² GATT 1994, *supra* note 53, art. I:1.

⁹³ Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 7.59, WT/DS246/R (Dec. 1, 2003).

⁹⁴ Compare the approaches to “less favourable treatment” in the context of GATT 1994, *supra* note 53, art. III:4. See also Panel Report, *Canada – Autos*, *supra* note 56, ¶ 10.24.

product itself,”⁹⁵ but criteria or conditions that are related to the imported product are allowed. For example, a Member could provide preferable tariff treatment to imported tires made of recycled material, but not to imported tires made using biofuels if they were identical to tires made using fossil fuels. Assuming that the restricted additives were detectable in the final flavored product, a flavoring measure that distinguished between flavored and non-flavored tobacco products would be consistent with GATT Article I:1. However, this approach to the meaning of “immediately and unconditionally” has been criticized on the basis that a condition unrelated to the imported product will not necessarily involve discrimination between imports.⁹⁶

- (iii) *Conditions related to the origin of the products:* A third approach precludes a Member from subjecting an advantage to conditions related to the origin of the products, including “conditions with respect to the situation or conduct” of the originating countries.⁹⁷ Under this approach, the question is whether the conditions “amount to discrimination between like products of different origins.”⁹⁸ A reasonable argument can be made that conditions regarding the inclusion of particular additives in tobacco products do not relate to the origin of those products or to the situation or conduct of their countries of origin, even though some WTO Members may in practice be more likely to use certain additives (for example, because their domestic consumers largely smoke blended cigarettes). The success of this argument would depend on the specific circumstances of the dispute, the definition of the additives covered by the measure (including any exemptions to the measure), and the evidence supporting the distinctions drawn in the measure. Of the three approaches to the meaning of “immediately and unconditionally” in GATT Article I:1, this approach is the most harmonious⁹⁹ and consistent with the interpretation of “less favourable treatment” in GATT Article III:4 (and particularly the third approach to the interpretation of that term discussed above). This factor supports the use of this third approach, particularly

⁹⁵ Panel Report, *Indonesia – Autos*, *supra* note 91, ¶ 14.143; *see also id.* ¶ 14.147.

⁹⁶ *See, e.g.*, Panel Report, *Canada – Autos*, *supra* note 56, ¶ 10.29.

⁹⁷ *Id.* ¶ 10.23; *see also* Panel Report, *Colombia – Ports of Entry*, *supra* note 54, ¶¶ 7.362, 7.366.

⁹⁸ Panel Report, *Canada – Autos*, *supra* note 56, ¶ 10.30; *see also* Appellate Body Report, *EC – Bananas III*, *supra* note 52, ¶ 206.

⁹⁹ *See, e.g.*, Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, ¶ 268, WT/DS350/AB/R (Feb. 4, 2009).

since Articles I:1 and III:4 both have the purpose of maintaining non-discriminatory competitive conditions between products.¹⁰⁰

In summary, a WTO Member that was unsuccessful in arguing that flavored tobacco products are not like non-flavored tobacco products would have strong arguments for adopting the second or third approaches above in determining whether the measure accords an advantage immediately and unconditionally to like products of all WTO Members. Nevertheless, the flavoring measure in question might still be regarded as failing to accord an advantage to like products imported from all WTO Members if most tobacco products imported from one or more WTO Members are flavored and most like products imported from one or more other countries are non-flavored, or even if a significantly greater proportion of products imported from one or more WTO Members than from another country are flavored.

3. Conclusion

A flavoring measure that prohibits the sale, distribution or importation of tobacco products typically manufactured in or imported from one or more specific WTO Members other than the regulating Member may well violate the MFN obligation in GATT Article I:4, unless the flavored tobacco products that it targets can be distinguished from non-flavored tobacco products physically, in terms of risk, or in the minds of consumers. Flavoring measures that exempt certain additives (e.g., menthol, clove or sugar) are particularly likely to create MFN problems if the exempt additive is commonly used in tobacco products manufactured in or imported from particular WTO Members, unless the exempt products can be distinguished from the targeted products based on their physical properties, health implications or consumer perceptions. In any case, a measure that is *prima facie* inconsistent with GATT Article I:4 might be justified under GATT Article XX (as discussed below)¹⁰¹ and therefore ultimately WTO-consistent.

D. *Prohibition on Quantitative Restrictions (Art. XI:1)*

Most existing flavoring measures prohibit manufacture, sale, or distribution of flavored tobacco products rather than importation of those products.¹⁰² Nevertheless, if a Member decided to prohibit the importation of tobacco products that could not be domestically manufactured, sold, distributed or marketed, that prohibition would be examined under GATT Article III:4¹⁰³ according to the same analysis as a prohibition on

¹⁰⁰ See, e.g., Appellate Body Report, *Canada – Autos*, *supra* note 86, ¶¶ 82, 84.

¹⁰¹ See *infra* Part III(e).

¹⁰² See *supra* Part II.

¹⁰³ GATT 1994, *supra* note 53, *Ad art. III* provides that “any law . . . of the kind referred to in [Article III:1] which applies to an imported product and to the like

sale, as contained above.¹⁰⁴ One WTO Panel has suggested that a measure might be simultaneously subject to GATT Article III and GATT Article XI:1.¹⁰⁵ We regard this as a minority view.¹⁰⁶ However, were it to prevail, it would render inconsistent with GATT Article XI:1 a prohibition on imports of any tobacco products. Again, this would be subject to the general exceptions in GATT Article XX, to which we now turn.

E. *General Exceptions (Art. XX)*

1. Overview

A flavoring measure that is otherwise inconsistent with a provision of GATT 1994 may nevertheless be justified and therefore not a WTO violation if it falls within one of the exceptions in Article XX, which reads:

Article XX

General Exceptions

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) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health; . . .
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement . . .¹⁰⁷

In order to establish an exception under Article XX,¹⁰⁸ the respondent must first demonstrate that the challenged measure is provisionally justified in that it falls within the description of one of the sub-paragraphs of Article XX. Second, the respondent must demonstrate that the measure is applied in a manner consistent with the opening paragraph, or “chapeau,” of Article XX.¹⁰⁹

domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is . . . subject to the provisions of Article III.” See also Panel Report, *EC – Asbestos*, *supra* note 52, ¶¶ 8.86-99.

¹⁰⁴ See *supra* Part III(b).

¹⁰⁵ Panel Report, *India – Autos*, *supra* note 56, ¶ 7.224.

¹⁰⁶ See, e.g., PETROS MAVROIDIS, *TRADE IN GOODS* 59 (2007).

¹⁰⁷ GATT 1994, *supra* note 53, art. XX.

¹⁰⁸ On the applicable burden of proof, see *infra* note 180 and accompanying text.

¹⁰⁹ See, e.g., Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 118, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Appellate Body Report, *US – Shrimp*] (quoting Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 22, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter Appellate Body Report, *US – Gasoline*]).

Below, we consider whether a flavoring measure would be justified under Article XX(b) on the basis that it is necessary to protect human health. Although other justifications might also be possible, such as under paragraphs (a) and (d), we focus on Article XX(b) because it provides the most obvious and directly relevant exception. The meaning of the word “necessary” under paragraphs (a) and (d) of Article XX would be interpreted in a manner corresponding to that discussed below in connection with Article XX(b).¹¹⁰ A defense under Article XX(a) would require evidence of a link between flavoring measures and the protection of “standards of right and wrong conduct maintained by or on behalf of a community or nation.”¹¹¹ A defense under Article XX(d) could apply where a flavoring measure was needed to secure compliance with, for example, other laws prohibiting the marketing of tobacco products to young people. A WTO Member that was also an FCTC party could not use Article XX(d) to justify a flavoring measure on the basis that it was necessary to secure compliance with the FCTC or related protocols or guidelines, except to the extent that those FCTC requirements had been incorporated in WTO-consistent domestic law or otherwise had direct effect in the Member’s legal system.¹¹²

In *Brazil – Retreaded Tyres*, the Appellate Body most recently explained its approach to whether a measure is “necessary” to protect human health under Article XX(b),¹¹³ and to whether the measure is applied consistently with the requirements of the chapeau. Our analysis below follows the framework set out in that decision.

2. Necessary to Protect Human Health (Art. XX(b))

In order to determine whether a flavoring measure is necessary to protect human health, a Panel must assess: (i) the extent to which the measure contributes to the achievement of its (health) objective; and (ii) the extent to which the measure restricts trade; (iii) “in the light of the impor-

¹¹⁰ See, e.g., Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 251-52, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter Appellate Body Report, *China – Publications*] (discussing the meaning of “necessary” in GATT 1994, art. XX(a)); Panel Report, *Colombia – Ports of Entry*, *supra* note 54, ¶¶ 7.547 -.548 (discussing the meaning of “necessary” in GATT 1994, art. XX(d)).

¹¹¹ Panel Report, *China – Publications*, *supra* note 55, ¶ 7.759 (quoting Panel Report, *United States – Measures Affecting the Cross-Border Supply of Betting and Gambling Services*, ¶ 6.465, WT/DS285/RW (Mar. 30, 2007), which relates to the equivalent provision in the WTO’s General Agreement on Trade in Services, Apr. 15, 1994, art. XIV(a), Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183).

¹¹² See, e.g., Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, ¶ 79, WT/DS308/AB/R (Mar. 6, 2006).

¹¹³ See *supra* note 110 and accompanying text.

tance of the interests or values at stake.”¹¹⁴ If on this basis the measure appears to be necessary, the Panel must confirm this result by considering whether a less trade restrictive measure that provides “an equivalent contribution to the achievement of the objective pursued” is reasonably available to the respondent.¹¹⁵ If the complainant is unable to identify such an alternative, then the measure is provisionally justified as necessary to protect human health under GATT Article XX(b). We consider these elements in turn.

- (i) *Contribution to the health objective*: In order to be “necessary” to protect human life or health within the meaning of Article XX(b), the contribution of the measure to its health objective must be “material, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban.”¹¹⁶ The contribution need not be “immediately observable,” particularly given that it may not be possible to isolate the effects of one aspect of a “comprehensive policy” to address a particular health problem, and that some measures are intended “to reduce the incidence of diseases that may manifest themselves only after a certain period of time.”¹¹⁷ The extent to which a flavoring measure contributes to the objective of minimizing harm to human health through tobacco consumption will depend on the design of the particular measure and the market in which the products compete. Both qualitative and quantitative evidence¹¹⁸ may be used to demonstrate the relevant contribution, for example by showing the harm to human health caused by tobacco products, the increased direct and indirect harm caused by flavored tobacco products, and the predicted or proven impact of flavoring measures on tobacco consumption as a whole or within particular consumer groups.
- (ii) *Trade-restrictiveness*: A flavoring measure that prohibits the importation of flavored tobacco products is one of the most restrictive measures available,¹¹⁹ especially if domestic production and distribution of like products is not also curtailed. A measure that prohibits the sale and distribution of flavored tobacco products without banning imports is less trade restric-

¹¹⁴ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 156, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter Appellate Body Report, *Brazil – Retreaded Tyres*]; see also *id.* ¶ 210 (discussing the tension between international trade objectives and public health concerns when analyzing a flavoring measure under Art. XX(b)).

¹¹⁵ *Id.* ¶¶ 156, 178.

¹¹⁶ *Id.* ¶ 210.

¹¹⁷ *Id.* ¶ 151.

¹¹⁸ See *id.*

¹¹⁹ See *id.* ¶ 150.

tive (because imports are permitted) but is still likely to restrict trade.

- (iii) *Importance of the interests pursued*: The Appellate Body has held, in connection with health risks associated with asbestos fibers, that the objective of “preserv[ing] . . . human life and health . . . is both vital and important in the highest degree.”¹²⁰ The risks to human life and health associated with tobacco products are likely to be regarded in a similar way, such that a WTO Panel or the Appellate Body would generally accept that the health interests pursued by a flavoring measure are of extremely high importance.
- (iv) *Alternative measures*: Less trade-restrictive measures than banning sale, distribution and importation do exist, such as labeling, increasing tariffs, increasing internal taxes (such as sales taxes), and education campaigns. However, using these measures alone to target flavoring would often arguably be insufficient to achieve the WTO Member’s “desired level of protection”¹²¹ from the health risks associated with tobacco products, such that they are not in fact “genuine alternative[s].”¹²² Moreover, WTO Members will often be able to show that these other measures are already in place, and that the flavoring measure supplements and works in conjunction with them, meaning that these other measures are not *alternatives* to the flavoring measure. The Appellate Body reached a similar conclusion in *Brazil – Retreaded Tyres*, accepting that it may not be possible to “substitut[e] one element of [a] comprehensive policy for another” without “weaken[ing] the policy by reducing the synergies between its components, as well as its total effect.”¹²³ Finally, in some cases a WTO Member might be able to show that these alternative measures are not “reasonably available,”¹²⁴ for example because they are too administratively or financially burdensome.¹²⁵

In summary, despite the likely high degree of trade-restrictiveness of a flavoring measure, the importance of protecting human health will gener-

¹²⁰ Appellate Body Report, *EC – Asbestos*, *supra* note 58, ¶ 172.

¹²¹ Appellate Body Report, *Brazil – Retreaded Tyres*, *supra* note 114 (quoting Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 308, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter Appellate Body Report, *US – Gambling*]).

¹²² *Id.*

¹²³ *Id.* ¶ 172; *see also id.* ¶ 151.

¹²⁴ *See id.* ¶ 156 (quoting Appellate Body Report, *US – Gambling*, *supra* note 121, ¶ 308).

¹²⁵ *But cf.* Appellate Body Report, *China – Publications*, *supra* note 110, ¶¶ 318, 328.

ally mean that the measure is provisionally justified as “necessary” to protect human life or health under GATT Article XX(b), as long as the relevant Member is able to adduce sufficient evidence regarding the contribution of the particular measure to its health objective.

3. Arbitrary or Unjustifiable Discrimination or a Disguised Restriction on Trade (Chapeau)

A WTO Member whose flavoring measure is provisionally justified under paragraph (b) of GATT Article XX would also need to establish, under the chapeau of Article XX, that the measure is not applied in a manner that would constitute “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or a “disguised restriction on international trade.”¹²⁶

The Appellate Body has emphasized that the focus of the chapeau is on the *application* of a measure rather than the measure itself,¹²⁷ in the sense that a measure that is neutral on its face might nevertheless be applied in a discriminatory fashion. Nevertheless, in our view, a measure that is inherently discriminatory would ordinarily also be applied in a discriminatory manner. This view is consistent with the Appellate Body’s statement—made in connection with determining whether a measure is “applied . . . so as to afford protection to domestic production” under GATT Article III:1—that “protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure.”¹²⁸ Accordingly, the content of a measure may be relevant in determining whether it is applied in a discriminatory manner contrary to the chapeau.

The requirements of the Article XX chapeau are necessarily different from the core WTO disciplines (such as national treatment in Article III:4) to which they provide an exception.¹²⁹ If a measure is applied in a discriminatory manner, the question under the chapeau is whether that discrimination has “a legitimate cause or rationale” in the light of the ostensible objective of the measure, being the health objective falling within Article XX(b).¹³⁰ If “the reasons given for this discrimination bear no rational connection to [that] objective . . . , or would go against that objective,” then it is likely to be found arbitrary or unjustifiable.¹³¹ The “effects of the discrimination may be a relevant factor . . . for deter-

¹²⁶ GATT 1994, *supra* note 53, art. XX.

¹²⁷ See, e.g., Appellate Body Report, *Brazil – Retreaded Tyres*, *supra* note 114, ¶ 215 (citing Appellate Body Report, *US – Gasoline*, *supra* note 109).

¹²⁸ Appellate Body Report, *Japan – Alcoholic Beverages*, *supra* note 70, at 27.

¹²⁹ See, e.g., Appellate Body Report, *US – Gasoline*, *supra* note 109, at 23.

¹³⁰ Appellate Body Report, *Brazil – Retreaded Tyres*, *supra* note 114, ¶ 225.

¹³¹ See *id.* ¶ 227.

mining whether the cause or rationale of the discrimination is acceptable.”¹³²

Thus, a flavoring measure that burdens imported products more than domestic products (whether due to its structure or its application in practice) might nevertheless satisfy the chapeau if the reason for this discrimination is that the imported products contain an additive that poses a higher risk to health than additives used by domestic products. Conversely, a flavoring measure that exempts certain products would be unlikely to satisfy this chapeau requirement if the exemption is unrelated to the health objectives or even undermines those objectives, as is arguably the case in relation to the exclusion of menthol.¹³³ Similarly, an exemption from a flavoring measure of imports of tobacco products from particular countries on the basis of a preferential trade agreement would likely undermine those objectives and therefore constitute arbitrary or unjustifiable discrimination.¹³⁴

The case law has less fully elaborated the phrase “disguised restriction on international trade” in the chapeau of Article XX, but similar considerations are likely to apply to those discussed above in relation to “arbitrary or unjustifiable discrimination.”¹³⁵ A measure might also be applied in a manner that amounted to a “‘disguised restriction’ on international trade” without being discriminatory,¹³⁶ keeping in mind that the purpose of the chapeau is to “prevent abuse of the exceptions” contained in the various paragraphs of Article XX.¹³⁷

In conclusion, a flavoring measure that is genuinely targeted to achieve health objectives by reducing tobacco consumption of the population as a whole or of particular sub-groups is likely to be justified on the basis of GATT Article XX(b), provided that it is supported by significant evidence and not subject to exemptions or exclusions that are unrelated to or that undermine its health goals.

¹³² *Id.* ¶ 230.

¹³³ See sources cited *supra* notes 61, 64.

¹³⁴ See Appellate Body Report, *Brazil – Retreaded Tyres*, *supra* note 114, ¶ 228 (referring to an exemption for the customs union MERCOSUR).

¹³⁵ See Appellate Body Report, *US – Gasoline*, *supra* note 109, at 25; see also Panel Report, *EC – Asbestos*, *supra* note 52, ¶ 8.236; Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 by Malaysia)*, ¶ 5.142, WT/DS58/RW (June 15, 2001) [hereinafter Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*]; Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 7.330, WT/332/R (June 12, 2007).

¹³⁶ See Appellate Body Report, *US – Gasoline*, *supra* note 109, at 25.

¹³⁷ Appellate Body Report, *Brazil – Retreaded Tyres*, *supra* note 114, ¶ 227.

4. FCTC as Evidence

The FCTC and related decisions and guidelines may themselves provide evidence relevant to GATT Article XX(b),¹³⁸ particularly for FCTC parties who are also WTO Members. The use of non-WTO international law in WTO disputes is highly contentious. However, in a complaint against a flavoring measure, the FCTC could arguably be used, not as law applicable in the dispute,¹³⁹ nor in interpreting particular words in Article XX(b),¹⁴⁰ but simply as a “factual reference”¹⁴¹ in assessing the importance of the interest at stake, the relationship between the measure and the health objective, the availability of alternatives, and any discriminatory aspects of the measure. In November 2010, the Conference of the Parties to the FCTC held its fourth session in Punta del Este, Uruguay. That session saw partial guidelines adopted on the implementation of Articles 9 and 10 of the FCTC, including a recommendation that FCTC parties “regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products.”¹⁴² In an apparent ref-

¹³⁸ These documents could also constitute evidence relevant to the interpretation of other GATT or TBT provisions covered in this article. The analysis presented in this paragraph regarding how they could be used would apply similarly in that context.

¹³⁹ As we see no conflict between the FCTC and the Draft Guidelines and WTO rules in connection with flavoring measures, we do not address how such a conflict would be resolved, or whether in that circumstance a FCTC party could use the FCTC as an independent defense to a WTO violation.

¹⁴⁰ Non-WTO international law could be used in determining the “ordinary meaning” of WTO terms pursuant to VCLT, *supra* note 75, art. 31(1). *See, e.g.*, Panel Report, *EC – Biotech*, *supra* note 74, ¶¶ 7.92-94, 7.96; Appellate Body Report, *US – Shrimp*, *supra* note 109, ¶¶ 130-31. More controversially, in interpreting a WTO term, non-WTO international law could be relied on as a “relevant rul[e] of international law applicable in relations between the parties” pursuant to VCLT, art. 31(3)(c). The question then arises whether the “parties” means the parties to the relevant dispute or the parties to the treaty as a whole (that is, in the context of the WTO, all WTO Members). Although the Appellate Body has not yet ruled on this question, a panel has suggested that the latter interpretation is correct. Panel Report, *EC – Biotech*, *supra* note 74, ¶ 7.68. *Contra id.* ¶ 7.72. On that basis, the FCTC could not be relied on pursuant to VCLT, art. 31(3)(c), unless all Members were party to the FCTC. The former interpretation would mean that the FCTC could not be relied on pursuant to VCLT, art. 31(3)(c), unless all parties to the dispute were party to the FCTC. VCLT, *supra* note 75, art. 31(3)(c).

¹⁴¹ Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, *supra* note 135, ¶ 130; JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW 269 (2003); *see also* Appellate Body Report, *US – Shrimp*, *supra* note 109, ¶ 171; Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 163, WT/DS246/AB/R (Apr. 7, 2004); Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT’L L. 753, 791 (2002).

¹⁴² *Report of Committee A (Draft)*, *supra* note 62.

erence to the controversy regarding blended cigarettes noted above, the recommendation also states: “Ingredients indispensable for the manufacturing of tobacco products and not linked to attractiveness should be subject to regulation according to national law.”¹⁴³ This qualification did not appear in the original draft guidelines;¹⁴⁴ it was introduced during negotiations in Uruguay.

It would be difficult for a non-party to the FCTC to rely on this kind of material to support its health claims (as its failure to become a party could undermine its arguments), but a non-party to the FCTC could attempt to rely on gaps in this material to demonstrate a lack of consensus on the structure and content of desirable flavoring measures.

IV. TBT AGREEMENT

A. *Inapplicability of the SPS Agreement*

Article 1.5 of the TBT Agreement states that its provisions “do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures” (“SPS Agreement”).¹⁴⁵ However, we do not regard the flavoring measures at issue in this article as sanitary and phytosanitary (“SPS”) measures, for reasons set out below. In Indonesia’s challenge to the US Act, Indonesia treats the US Act as a technical regulation subject to the TBT Agreement.¹⁴⁶ However, it also states that if the United States asserts that the US Act creates an SPS measure, “then it is Indonesia’s view that the measure is inconsistent with Articles 2, 3, 5, and 7 of the SPS Agreement.”¹⁴⁷

The definition of SPS measures in Annex A of the SPS Agreement encompasses measures applied in the following three situations:¹⁴⁸

[T]o protect animal or plant life or health . . . from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms.¹⁴⁹

¹⁴³ *Id.*

¹⁴⁴ Conference of the Parties to the WHO Framework Convention on Tobacco Control, Fourth Session, Punta del Este, Uruguay, Nov. 15-20, 2010, *Draft Guidelines for the Implementation of Articles 9 and 10 of the WHO Framework Convention on Tobacco Control, (Including Amendments Received from Parties during the First Meeting of Committee A)*, at 11-12, FCTC/COP/4/6 Rev.1 (Nov. 18, 2010).

¹⁴⁵ TBT Agreement, *supra* note 27, art. 1.5.

¹⁴⁶ Panel Request, *US – Clove Cigarettes*, *supra* note 16, at 2.

¹⁴⁷ *Id.*

¹⁴⁸ The definition also extends to measures applied “to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests,” but this aspect of the definition is not relevant to the measures at issue in this article. SPS Agreement § 1(d).

¹⁴⁹ *Id.* § 1(a).

Flavoring measures are designed to protect *human* health. The context provided by the other paragraphs of the definition identified below, which refer specifically to “human” life or health, suggests that the exclusion of the word “human” in this part of the definition was intended to exclude measures applied to protect human life or health.¹⁵⁰

[T]o protect human or animal life or health . . . from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs.¹⁵¹

Although some flavoring measures might target “additives, contaminants, [or] toxins” that in themselves pose risks to human health (for the purpose of reducing that risk),¹⁵² we consider that tobacco products are not properly described as “foods, beverages or feedstuffs.”¹⁵³ Our interpretation is supported by the ordinary meaning¹⁵⁴ of the word “food,” as well as the fact that tobacco is explicitly excluded from the definition of “food” in the Procedural Manual of the Codex Alimentarius Commission (“Codex”).¹⁵⁵ Codex is recognized in the SPS Agreement as the relevant body establishing international standards, guidelines and recommendations for food safety.¹⁵⁶ The particular use made of Codex documentation is controversial,¹⁵⁷ but Panels and the Appellate Body have on a number of occasions recognized its role under the SPS Agreement and

¹⁵⁰ Cf. Panel Report, *EC – Biotech*, *supra* note 74, ¶ 7.219.

¹⁵¹ SPS Agreement § 1(b).

¹⁵² On the importance of the purpose of the measure in determining whether it is covered by the SPS Agreement, see Joost Pauwelyn, *The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures As Applied in the First Three SPS Disputes: EC – Hormones, Australia – Salmon and Japan – Varietals*, 2 J. INT’L ECON. L. 641, 643 (1999); Jacqueline Peel, *A GMO by Any Other Name . . . Might Be an SPS R! Implications of Expanding the Scope of the WTO Sanitary and Phytosanitary Measures Agreement*, 17 EUR. J. INT’L L. 1009, 1015 (2006).

¹⁵³ “[M]easures controlling human exposure to carcinogens (other than food-borne carcinogens) would not be SPS measures.” Jeffery Atik, *Trade and Health*, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 597, 599 (Daniel Bethlehem et al. eds., 2009).

¹⁵⁴ VCLT, *supra* note 75.

¹⁵⁵ “Food means any substance, whether processed, semi-processed or raw, which is intended for human consumption, and includes drink, chewing gum and any substance which has been used in the manufacture, preparation or treatment of “food” but does not include cosmetics or tobacco or substances used only as drugs.” SECRETARIAT OF THE JOINT FAO/WHO FOOD STANDARDS PROGRAMME, CODEX ALIMENTARIUS COMMISSION: PROCEDURAL MANUAL 18 (19th ed. 2010) (emphasis added).

¹⁵⁶ SPS Agreement § 3(a).

¹⁵⁷ See, e.g., Doaa Abdel Motaal, *The “Multilateral Scientific Consensus” and the World Trade Organization*, 38 J. WORLD TRADE 855, 864-68, 870-72 (2004).

have referred to its experts, Procedural Manual, standards and other materials in deciding disputes under the SPS Agreement.¹⁵⁸

[T]o protect human life or health . . . from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests.¹⁵⁹

Again, the reference to diseases being “carried” by animals and plants suggests an intention to target communicable rather than non-communicable diseases, as well as a focus on measures designed to combat existing diseases rather than to prevent the development of diseases through tobacco use.

B. *Existence of a Technical Regulation (Annex 1)*

Article 2 of the TBT Agreement imposes a number of obligations on WTO Members with respect to “technical regulations.”¹⁶⁰ Paragraph 1 of Annex 1 to the TBT Agreement defines a technical regulation as follows:

Document which lays down *product characteristics or their related processes and production methods*, including the applicable administrative provisions, with which compliance is *mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.¹⁶¹

The Appellate Body has determined that a “technical regulation” for the purposes of the TBT Agreement must apply to “an *identifiable* product, or group of products.”¹⁶² Existing flavoring measures typically apply to identifiable products such as “cigarettes” or “tobacco products,” often supplemented with definitions of these terms. Existing flavoring measures are also mandatory as opposed to voluntary: all covered tobacco products must comply with them.

Existing flavoring measures typically lay down “product characteristics” within the meaning of the definition of “technical regulation” under Annex 1 to the TBT Agreement in that they require that tobacco products not be manufactured or sold with certain characteristics such as specified additives or additives that increase palatability. The Appellate Body has recognized that product characteristics may be imposed in this negative form.¹⁶³ Flavoring measures might be imposed with respect to the

¹⁵⁸ See, e.g., Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, ¶¶ 535, 693, WT/DS321/AB/R (Oct. 16, 2008) [hereinafter Appellate Body Report, *Canada – Hormones*]; Panel Report, *EC – Biotech*, *supra* note 74, ¶¶ 7.21, 7.297.

¹⁵⁹ SPS Agreement § 1(c).

¹⁶⁰ TBT Agreement, *supra* note 27, art. 2.

¹⁶¹ TBT Agreement Annex 1, ¶ 1 (emphasis added).

¹⁶² Appellate Body Report, *EC – Asbestos*, *supra* note 58, ¶ 70.

¹⁶³ Appellate Body Report, *EC – Asbestos*, *supra* note 58, ¶ 69.

method used to manufacture tobacco products (e.g., banning the use of particular additives in the manufacturing process), even if not imposing requirements directly on the characteristics of the product itself. Such measures are still likely to fall within the definition of technical regulation because they are “related” to the product characteristics—that is, they are likely to affect the characteristics of the final product.¹⁶⁴

In conclusion, flavoring measures would generally constitute technical regulations and be subject to the TBT Agreement on that basis. A range of consequences flow from this conclusion, including a requirement that WTO Members comply with the procedural obligations in the TBT Agreement, which we do not address further in this article.¹⁶⁵ Instead, we now turn to the relevant substantive obligations imposed on Members by the TBT Agreement with respect to technical regulations.

C. National Treatment and MFN Treatment (Art. 2.1)

Article 2.1 of the TBT Agreement states that, “[w]ith respect to their central government bodies”:

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.¹⁶⁶

This provision has been subject to very limited jurisprudence to date.¹⁶⁷ However, as it clearly encompasses the principles of national treatment and MFN treatment found in GATT Articles III:4 and I:1 respectively, as discussed above, a WTO Panel would be likely to regard as useful guidance the case law on those GATT provisions in applying Article 2.1.¹⁶⁸ (Similarly, for example, the Appellate Body recently used its jurisprudence under GATT Article III:1 to inform its analysis of the definition of

¹⁶⁴ See Committee on Trade and Environment, *Note by the Secretariat: Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics*, WT/CTE/W/10, G/TBT/W/11 (Aug. 29, 1995); VCLT, *supra* note 75, art. 31.

¹⁶⁵ See, e.g., TBT Agreement, *supra* note 27, arts. 2.9-2.12. Indonesia is challenging the U.S. Act with respect to a number of procedural obligations under the TBT Agreement. Panel Request, *US – Clove Cigarettes*, *supra* note 16, at 1-2.

¹⁶⁶ TBT Agreement, *supra* note 27, art. 2.1 (emphasis added).

¹⁶⁷ See Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complaint by Australia)*, ¶¶ 7.463-476, WT/DS290/R (Mar. 15, 2005) [hereinafter Panel Report, *EC – Trademarks and Geographical Indications (Australia)*].

¹⁶⁸ See PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 818 (2d ed. 2008).

an SPS measure under the SPS Agreement.)¹⁶⁹ Accordingly, the relevant considerations would be as discussed above.¹⁷⁰

Nevertheless, the TBT obligations are different from those under the GATT 1994¹⁷¹ and the analysis might therefore be modified. A key difference is that a measure caught by TBT Article 2.1 cannot be “saved” by an exception in the way that a measure caught by GATT Article III:4 can be saved by GATT Article XX(b), because the TBT Agreement contains no “general exceptions” provision corresponding to GATT Article XX.¹⁷² On that basis, “like products” should arguably be interpreted more narrowly under the TBT Agreement in order to avoid unwarranted interference with legitimate regulatory policies. The narrower interpretation could include consideration of the aims and effects of a measure in assessing likeness, unlike in the GATT context. On a narrower interpretation of “like products,” a WTO Member would be more likely to succeed in arguing that a flavored tobacco product is not like a non-flavored tobacco product and therefore that its flavoring measure does not breach TBT Article 2.1.

D. *Not More Trade Restrictive Than Necessary* (Art. 2.2)

Article 2.2 of the TBT Agreement provides:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating *unnecessary obstacles to international trade*. For this purpose, technical regulations shall *not be more trade-restrictive than necessary* to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: . . . protection of *human health* or safety . . . In assessing such risks, relevant elements of consideration are, *inter alia*: *available scientific and technical information*, related processing technology or intended end-uses of products.¹⁷³

Article 2.2 of the TBT Agreement has not yet been applied in a WTO dispute.¹⁷⁴ However, Indonesia alleges that the US Act is inconsistent with this provision “because there is no scientific or technical information indicating that clove cigarettes pose a greater health risk than menthol cigarettes or that youth smoke clove cigarettes in greater numbers than menthol.”¹⁷⁵

¹⁶⁹ Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, ¶ 173, WT/DS367/AB/R (Nov. 29, 2010).

¹⁷⁰ See *supra* Parts III(b)-(c).

¹⁷¹ Appellate Body Report, *EC – Asbestos*, *supra* note 58, ¶ 80.

¹⁷² Cf. VAN DEN BOSSCHE, *supra* note 168.

¹⁷³ TBT Agreement, *supra* note 27, art. 2.2 (emphasis added).

¹⁷⁴ See Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, *supra* note 167, ¶ 7.515.

¹⁷⁵ See Panel Request, *US – Clove Cigarettes*, *supra* note 16, at 1.

The wording of TBT Article 2.2 is quite similar to that in GATT Article XX(b). Accordingly, similar considerations to those discussed above in relation to GATT Article XX(b)¹⁷⁶ are likely to apply pursuant to TBT Article 2.2.¹⁷⁷ For example, a flavoring measure that is “necessary to protect human . . . health” under GATT Article XX(b) would be unlikely to constitute an “unnecessary obstacle to international trade” under TBT Article 2.2, particularly if the measure also satisfied the chapeau requirements of GATT Article XX. Similarly, the factors considered in the necessity test articulated by the Appellate Body in *Brazil – Retreaded Tyres* for the purpose of GATT Article XX(b) of trade-restrictiveness, the importance of the interest pursued, the measure’s contribution to that interest, and the existence of less trade-restrictive alternatives can all be seen as directly or indirectly reflected in the terms of TBT Article 2.2.¹⁷⁸ “[A]vailable scientific or technical information”¹⁷⁹ or evidence is expressly included in TBT Article 2.2 and, as noted in the context of GATT Article XX(b), will be highly relevant in determining whether a flavoring measure is more trade-restrictive than necessary to achieve its health objective.

One key difference in the analysis under TBT Article 2.2 is that this provision imposes a positive obligation on WTO Members, whereas GATT Article XX(b) operates as an exception to other obligations in the GATT 1994. A flavoring measure that is consistent with the national treatment and MFN provisions of the GATT 1994 would not need to be justified under GATT Article XX(b); a measure that is found inconsistent with national treatment or MFN under the GATT 1994 would need to be justified under GATT Article XX(b), and the respondent would bear the burden of establishing that its measure falls within that exception.¹⁸⁰ In contrast, a flavoring measure that is consistent with the national treatment and MFN requirements in TBT Article 2.1 would also need to be consistent with TBT Article 2.2. The complainant would bear the burden of establishing that the measure is not consistent with TBT Article 2.2.¹⁸¹

¹⁷⁶ See *supra* Part III(e).

¹⁷⁷ See VAN DEN BOSSCHE, *supra* note 168.

¹⁷⁸ Appellate Body Report, *Brazil – Retreaded Tyres*, *supra* note 114, ¶¶ 156, 178, 210.

¹⁷⁹ The word “available” might be read as meaning that the responding WTO Member need not “adopt or even explore a less restrictive alternative that has not been shown as effective in achieving its legitimate objective on the basis of *existing* scientific and other relevant information.” MICHAEL TREBILCOCK AND ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 218 (3d ed. 2005).

¹⁸⁰ Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (Apr. 25, 1997) pp. 14-16.

¹⁸¹ See Appellate Body Report, *European Communities – Trade Description of Sardines*, ¶ 275-76, WT/DS231/AB/R (Sept. 26, 2002) [hereinafter Appellate Body Report, *EC – Sardines*] (referencing the TBT Agreement, art. 2.4); Appellate Body

E. *Specification in Terms of Performance (Art. 2.8)*

Article 2.8 of the TBT Agreement states that, “[w]herever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.”¹⁸² In other words, technical regulations should focus on the “operation or functioning” of a product, “usually with regard to effectiveness,”¹⁸³ rather than the means of achieving that operation. For example, a performance-based fire regulation might “specif[y] fire-ratings for building components,” whereas a design-based regulation might prescribe the use of steel over wood in particular parts of a building (or vice versa).¹⁸⁴ Article 2.8 is consistent with other parts of Article 2,¹⁸⁵ because performance-based regulations may be less trade-restrictive than regulations prescribing characteristics of a product that do not affect the product’s performance.

Indonesia maintains that the US Act is inconsistent with Article 2.8 “because the ban on characterizing flavors is based on descriptive characteristics.”¹⁸⁶ Although the exemption of menthol is based on design, the focus of the US Act on *characterizing* flavors is arguably performance-based, since it relates to the way the product functions and its likely impact on consumers. In contrast, the Canadian Act could be seen as being based on design or description because it encompasses additives that do not necessarily have a characterizing flavour. On the other hand, Canada could contend that these additives nevertheless affect the functioning and effect of the products (for example by masking the harshness of tobacco).

In any case, the strength of Article 2.8 in disciplining Members’ measures is limited in that it is prefaced by the words “[w]herever appropriate.”¹⁸⁷ Even a measure based on descriptive characteristics rather than performance will be consistent with TBT Article 2.8 if the Member can show that this is “appropriate.”¹⁸⁸ Demonstrating the appropriateness of a measure may require evidence similar to that put forward in demon-

Report, *EC – Hormones*, *supra* note 158, ¶¶ 74, 104, 109, 171 (referencing the SPS Agreement, art. 3.3); *see also* TREBILCOCK & HOWSE, *supra* note 179, at 217.

¹⁸² TBT Agreement, *supra* note 27, art. 2.8.

¹⁸³ Panel Report, *EC – Sardines*, *supra* note 52, ¶ 7.81.

¹⁸⁴ Negotiating Group on Market Access, *Scope of the Negotiation on Non-Tariff Barriers: Modalities – Submission by New Zealand (Addendum)*, ¶ 13, TN/MA/W/4/Add.1 (Mar. 4, 2003).

¹⁸⁵ *See* Panel Report, *EC – Sardines*, *supra* note 52, ¶ 7.81 (interpreting TBT Agreement, art. 2.3).

¹⁸⁶ Panel Request, *US – Clove Cigarettes*, *supra* note 16, at 2.

¹⁸⁷ TBT Agreement, *supra* note 27, art. 2.8.

¹⁸⁸ *Cf.* Panel Report, *EC – Sardines*, *supra* note 52, ¶ 7.116 (interpreting “inappropriate” in Article 2.4 of the TBT Agreement); Appellate Body Report, *EC – Sardines*, *supra* note 181, ¶ 285.

strating that the measure is not more trade-restrictive than necessary under TBT Article 2.2. More broadly, a reasonable argument can be made that performance-based regulation is generally unsuited to the current context of tobacco control. The concepts and purpose behind Article 2.8 do not apply easily to tobacco products, given that the end-use of these products is necessarily harmful to health. For example, performance-based health regulations for tobacco products could theoretically identify the allowable direct or indirect health impact of a given product (for example, by prohibiting tobacco products that have more than a specified level of attraction to children, or that generate more than a specified level of disease in their consumers). However, this kind of regulation is simply unfeasible in view of the long and complex causal chain between smoking and disease, and the variety of factors that affect the initiation and maintenance of smoking habits.

F. *Relevance of International Standards (Arts 2.4-2.5)*

Article 2.4 of the TBT Agreement imposes a general obligation on WTO Members to use international standards, where they “exist or their completion is imminent . . . as a basis for their technical regulations.”¹⁸⁹ According to Article 2.5 of the TBT Agreement, a technical regulation adopted for a health or other objective identified in TBT Article 2.2 that “is in accordance with relevant international standards” is “rebuttably presumed not to create an unnecessary obstacle to trade” under Article 2.2.¹⁹⁰ International standards on tobacco additives (which need not be established by consensus)¹⁹¹ therefore have the potential to buttress a Member’s claims concerning its health objectives and to protect it from a finding of violation of TBT Article 2.2 with respect to a flavoring measure. However, no such standards presently exist.¹⁹²

Paragraph 2 of Annex 1 of the TBT Agreement defines a standard as a:

Document approved by a recognized body, that provides, for common and repeated use, rules, *guidelines or characteristics for products* or related processes and production methods, with which compliance is *not mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.¹⁹³

¹⁸⁹ TBT Agreement, *supra* note 27, art. 2.4.

¹⁹⁰ *Id.* art. 2.5.

¹⁹¹ Appellate Body Report, *EC – Sardines*, *supra* note 181, ¶¶ 222-25, 227 (referring to the TBT Agreement, ¶ 2).

¹⁹² See SCIENTIFIC ADVISORY COMMITTEE ON TOBACCO PRODUCT REGULATION (SACTOB), WHO, RECOMMENDATION ON TOBACCO PRODUCT INGREDIENTS AND EMISSIONS 1 (2003).

¹⁹³ TBT Agreement Annex 1, ¶ 2 (emphasis added).

Unlike in the SPS Agreement,¹⁹⁴ “international standards” are not separately defined in the TBT Agreement. However, the Panel in *EC – Sardines* defined “international” standards as “standards that are developed by international bodies,”¹⁹⁵ which it defined in turn as bodies “whose membership is open to the relevant bodies of at least all [WTO] Members,” in accordance with the definition in paragraph 4 of Annex 1 to the TBT Agreement.¹⁹⁶ Accordingly, a WHO or FCTC decision or guideline might constitute an international standard.

G. *Special and Differential Treatment (Article 12.3)*

Article 12.3 of the TBT Agreement states that, in preparing and applying technical regulations, Members shall “take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations . . . do not create unnecessary obstacles to exports from developing country Members.”¹⁹⁷ This provision is yet to be interpreted in a WTO dispute. However, Indonesia’s challenge to the US Act includes an allegation of inconsistency with Article 12.3, on the basis that the US Act “create[s] an unnecessary barrier to exports from developing countries,” namely clove cigarettes from Indonesia.¹⁹⁸

The obligation under Article 12.3 is for Members to “take account” of the special needs of developing country Members, “with a view to ensuring” that their technical regulations do not create unnecessary obstacles.¹⁹⁹ Like many other provisions relating to “special and differential treatment” of developing and least-developed country Members, we regard Article 12.3 as imposing a procedural requirement that does not necessarily specify a particular outcome.²⁰⁰ Moreover, Article 12.3 does not imply that all measures affecting exports from developing country Members create unnecessary obstacles to those exports. Whether a flavoring measure creates an “unnecessary” obstacle will depend on its health objective and the considerations examined above in relation to TBT Article 2.2²⁰¹ and GATT Article XX(b).²⁰²

¹⁹⁴ SPS Agreement Annex A, ¶ 3.

¹⁹⁵ Panel Report, *EC – Sardines*, *supra* note 52, ¶ 7.63.

¹⁹⁶ *Id.* ¶ 7.66.

¹⁹⁷ TBT Agreement, *supra* note 27, art. 12.3.

¹⁹⁸ Panel Request, *US – Clove Cigarettes*, *supra* note 16, at 2.

¹⁹⁹ TBT Agreement, *supra* note 27, art. 12.3.

²⁰⁰ Cf. Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶ 6.223, WT/DS141/R (Oct. 30, 2000); Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, ¶¶ 7.110, 7.114 (referring to Article 15 of the WTO’s *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the Anti-Dumping Agreement)).

²⁰¹ See *supra* Part IV(d).

V. CONCLUSION

The primary obligations and exceptions examined in this article are: national treatment and MFN treatment under the GATT 1994 and the TBT Agreement; the health exception under GATT Article XX(b); and the requirement that technical regulations not be more trade-restrictive than necessary under TBT Article 2.2. A key consideration with respect to each of these obligations and exceptions is *discrimination*. Relevant discrimination may exist in law or in fact, and it may be against or between imported products, against foreign investors, or between “like” products or circumstances. Whether a flavoring measure results in discrimination will depend on the particular country and its market for tobacco products, including factors such as: whether tobacco products are domestically manufactured or imported; the sources of any imports; the market share between tobacco products of different manufacturers; the nature of the tobacco products that are purchased by the population at large or specific groups of consumers; and consumer perception of the various tobacco products available.

A flavoring measure that discriminates in its content or application is much more likely to breach an international trade obligation than a flavoring measure that is origin neutral both *de jure* and *de facto*. WTO Members should therefore resist the temptation to appease tobacco companies by introducing discriminatory exemptions into their flavoring measures. However, this is not the end of the enquiry. A non-discriminatory flavoring measure must still be not more trade-restrictive than necessary under TBT Article 2.2. Conversely, a discriminatory flavoring measure may be nevertheless consistent with WTO law if it is necessary to achieve a genuine health objective pursuant to GATT Article XX(b).

Accordingly, the consistency of a flavoring measure with WTO law will depend heavily on the link that can be demonstrated between the measure and its health objective. This demonstration will require sufficient qualitative and quantitative evidence concerning: the difference between flavored and non-flavored products; the additional direct or indirect harm caused by flavored products when compared to non-flavored products; the predicted or verified impact of the flavoring measure or similar regulatory measures on consumption patterns; the availability of alternative regulatory measures that have the same health effects without infringing on international trade to the same degree; and the consistency of the State’s laws and practices (including its participation in the FCTC) with its declared health objectives.

²⁰² See *supra* Part III(e).

**ANNEX:
Overview of Existing Flavoring Measures**

Domestic Measure	Products Covered	Prohibited Conduct/Products	Prohibited Additives/Flavors	Permitted Additives/Flavors (Other Than Tobacco)
Australia: Australian Capital Territory <i>Tobacco Act 1927</i> , § 21	<ul style="list-style-type: none"> • Smoking products 	The Minister may declare a smoking product prohibited if:	<ul style="list-style-type: none"> • The smoking product or the smoke of the product, has a distinctive fruity, sweet or confectionary-like character; and • The nature of the product or the product's package may be attractive to children 	
Australia: New South Wales <i>Public Health (Tobacco) Act 2008</i> , § 29	<ul style="list-style-type: none"> • Tobacco products 	The Minister may declare a tobacco product prohibited if:	<ul style="list-style-type: none"> • The product or its smoke has a distinctive fruity, sweet or confectionary-like character that might encourage a minor to smoke 	
Australia: South Australia <i>Tobacco Products Regulation Act 1997</i> , § 34A	<ul style="list-style-type: none"> • Tobacco products • Non-tobacco products designed to resemble a tobacco product 	The Minister may declare a tobacco product prohibited if:	<ul style="list-style-type: none"> • The product or its smoke possesses a distinctive fruity, sweet or confectionary-like character; and • The nature of the product, or the way it is advertised, might encourage young people to smoke 	
Australia: Tasmania <i>Public Health Act 1997</i> , § 68A(c)-(e)	<ul style="list-style-type: none"> • Tobacco • Tobacco products • Cigarette papers 	Display, sale or supply of flavored products	<ul style="list-style-type: none"> • Confectionary-flavored or confectionary-scented; • Fruit-flavored or fruit-scented 	
Australia: Victoria <i>Tobacco Act 1987</i> , § 150	<ul style="list-style-type: none"> • Tobacco products • Non-tobacco products that resemble a tobacco product or could encourage smoking 	The Secretary may recommend a ban order in respect of a product if:	<i>Tobacco Products:</i> <ul style="list-style-type: none"> • The product or its smoke possesses a distinctive fruity, sweet or confectionary-like character; or • The product has packaging that appeals to children or young people; OR <i>Non-Tobacco Products:</i> <ul style="list-style-type: none"> • Resembles a tobacco product; or 	

Domestic Measure	Products Covered	Prohibited Conduct/Products	Prohibited Additives/Flavors	Permitted Additives/Flavors (Other Than Tobacco)
			<ul style="list-style-type: none"> • Is of a nature or is advertised in a way that may encourage children or young people to smoke, AND • The supply of the product should be prohibited, with regard to the objects of the Act 	
Canada: Federal Tobacco Act (as amended by the <i>Cracking Down on Tobacco Marketing Aimed at Youth Act 2009</i>), §§ 5.1-5.2	<ul style="list-style-type: none"> • Cigarettes • Little cigars • Blunt wraps 	<ul style="list-style-type: none"> • Use of prohibited additives in covered products • Sale of covered products containing prohibited additives 	Include: <ul style="list-style-type: none"> • Additives that have flavoring properties or that enhance flavor • Caffeine • Certain coloring agents • Spices and herbs • Fruit flavors • Sugars and sweeteners • Vitamins • Taurine (Full list in column 1 of Schedule to Act)	Include: <ul style="list-style-type: none"> • Menthol • Citric acid • Ethanol • Guar gum • Paraffin wax (Full list in column 1 of Schedule to Act)
Canada: Ontario Smoke-Free Ontario Act (as amended by 2010, ch. 1, sch. 27), § 6.1; <i>Ontario Regulation 48/06</i> (as amended by Reg. 237/10), § 11.1	<ul style="list-style-type: none"> • Cigarillos • Tobacco products 	Sale at retail or for subsequent retail sale or distribution for that purpose of: <ul style="list-style-type: none"> • Cigarillos – <i>unless prescribed</i> • Tobacco products – <i>where prescribed</i> as prohibited, that contain a flavoring agent or are represented as being flavored 		<ul style="list-style-type: none"> • Menthol-flavored cigarillos
Canada: New Brunswick Tobacco Sales Act (as amended 2009), § 4.1	<ul style="list-style-type: none"> • Cigarillos • Tobacco products 	Sale of cigarillos or tobacco products that contain a flavoring agent or are represented as being flavored <i>unless prescribed</i> by regulation		
Canada: Saskatchewan Tobacco Control Act (as amended 2010), §§ 5.1-5.2	<ul style="list-style-type: none"> • Little cigars • Tobacco products 	Sale of: <ul style="list-style-type: none"> • Little cigars – <i>unless prescribed</i> • Tobacco products – <i>where prescribed</i>, that contain a flavoring agent or are represented as being flavored 		

Domestic Measure	Products Covered	Prohibited Conduct/Products	Prohibited Additives/Flavors	Permitted Additives/Flavors (Other Than Tobacco)
France <i>Code de la Santé Publique</i> , art. L. 3511-2 (as amended by Decree 2009-1764)	• Cigarettes	Sale or distribution of flavored cigarettes containing more than <i>prescribed amounts</i> of ingredients that give a sweet or acidulous flavor	• Vanillin or ethylvanillin > 0.05% of tobacco mass • Sweetener on the cigarette “cuff”	
United States: Federal <i>Federal Food, Drug and Cosmetic Act</i> (as amended by the <i>Family Smoking Prevention and Tobacco Control Act 2009</i>), § 907(a)(1)(A)	• Cigarettes and component parts	Covered products containing—as a constituent or additive—a flavor, herb or spice that gives a <i>characterizing</i> flavor	Include: strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, liquorice, cocoa, chocolate, cherry or coffee	• Menthol
United States: Maine <i>An Act Concerning Certain Flavored Cigarettes and Flavored Cigars and Hard Snuff 2007</i> , Pub. L. ch. 467, § 1560-D	• Cigars, cigarettes and component parts	Sale or distribution of covered products with a <i>characterizing</i> flavor <i>unless</i> : • They were on the market before Jan. 1, 1985; and • The Attorney-General determines that the characterizing flavor, packaging, promotion and brand do not directly or indirectly target youth or encourage the initiation of smoking		• Menthol • Clove • Coffee • Nuts • Peppers
United States: New Jersey N.J. STAT. ANN. §§ 2A:170-51.6	• Cigarettes and component parts	Sale or distribution of covered products with a <i>characterizing</i> flavor or marketed as such	Include tastes or aromas relating to: fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice	• Clove • Menthol
United States: New York <i>Administrative Code of the City of New York</i> (as amended by the <i>Local Laws of the City of New York for the Year 2009, No. 69</i>), § 17-715	• Tobacco products excluding cigarettes	Sale of covered products with a <i>characterizing</i> flavor except in a tobacco bar	Include tastes or aromas relating to: fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice	• Menthol • Mint • Wintergreen

