A critical analysis of the legitimate regulatory distinction test as conceived in *US–Clove Cigarettes*, *US–Tuna II* and *US–COOL*.

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Introduction

Since the signing of the General Agreement on Tariffs and Trade (hereafter referred to as the 'GATT') in 1947, the prevalence of tariffs as barriers to trade in the international sphere has declined significantly.[1] As early as 1970, however, certain contracting parties to the GATT were becoming concerned with the rising number of non-tariff barriers to trade. Technical regulation measures may be used as an effective and efficient means of achieving legitimate trade and policy objectives. However, these measures may be outdated, overly burdensome, discriminatory, or otherwise inappropriate, leading to a situation where such measures can reduce competition, stifle innovation, and create unnecessary technical barriers to trade.[2] As a result, Working Group 3 of the Committee on Trade in Industrial Products was set up in the 1970s, prior to the Tokyo Round, tasked with evaluating the impact of non-tariff barriers on international trade. Their conclusion was that technical barriers were the largest non-tariff constraint faced by exporters.[3] The final results of this evaluation were seen during the Uruguay Round, where the Agreement on Technical Barriers to Trade (hereafter the 'TBT Agreement')[4] was negotiated, subsequently comprising an integral part of the Agreement Establishing the World Trade Organization.[5]

The TBT Agreement's objective and purpose are clear, and are formulated in a way which plainly illustrates the history and context from which the Agreement was created. The preamble to the Agreement reflects the trade-liberalisation objective of the TBT Agreement by expressing the "desire" that technical regulations, technical standards, and conformity assessment procedures do not create unnecessary obstacles to international trade.[6] This objective is qualified, however, by the proceeding recital, which recognises Members' right to regulate in order to pursue certain legitimate objectives. It is important to view and

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[1] Motaal (2011).

[2] United States Trade Representative (2014) foreword.

[3] Motaal (2011).

[4] *Agreement on Technical Barriers to Trade*, 1186 UNTS 276 (entered into force 1 January 1980).

[5] *Marrakesh Agreement Establishing the World Trade Organization*,1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*') ('*TBT Agreement*')

[6] "Members … desiring … to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade"

interpret the relevant Articles of the Agreement in light of these recitals, and the preamble as a whole, to place their specific aims in context.

The TBT Provisions at Issue

The most important provisions for the purposes of this discussion, and arguably the three major TBT disputes, are Articles 2.1 and 2.2 of the Agreement on Technical Barriers to Trade. These provisions deal with non-discrimination in respect of technical regulations. By declaring that products from Members will be accorded no less favourable treatment than like products of both national and foreign origin, Article 2.1 incorporates both the principles of Most-Favoured-Nation[7] as well as National Treatment.[8] Article 2.2 holds, essentially, that technical regulations be no more trade-restrictive than necessary to achieve a legitimate objective. It worth noting that the TBT Agreement does not contain an exceptions clause which could result in the justification of violations of these non-discrimination provisions (as the GATT does in Article XX).

The Early Application and Effect of the TBT Agreement on WTO Law.

In the past, Panels and the Appellate Body, where appropriate, seemed averse to utilizing the Agreement on Technical Barriers to Trade as a decider in dispute settlement. Often disputes fell to be decided under a number on overlapping claims based on various WTO Agreements. This, at least at first, resulted in disputes which could or should have been decided under the TBT Agreement being decided under other Agreements, for a variety of reasons.

The case of *EC - Asbestos*[9] is one such case and has raised questions with academics regarding the supposed aversion to the Agreement.[10] The Appellate Body in this case refused to examine Canada's claims under the TBT Agreement, and I submit that this was unjustifiable. Their reasoning for doing so was illustrative, however, of the nature of TBT disputes and how they were viewed at the time, demonstrating quite clearly that problems

[7] Van den Bossche and Zdouc (2013) at 316.

[8] National treatment ('NT') was defined in Appellate Body Report *Japan – Taxes on Alcoholic Beverages* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R adopted 1 November 1996, DSR 1996:I 97 at 114 as "… a general prohibition on the use of internal taxes and other internal regulatory measures, so as to afford protection to domestic production."

[9] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII 3243 paras 78 – 83

[10] Pauwelyn (2002) at 63.

existed within the WTO dispute settlement framework regarding TBT. The reasoning was crisply and clearly summarized by Pauwelyn as follows:

> "we [the Appellate Body] did not go into Canada's TBT claims for we are unclear as to what TBT provisions may mean: TBT is quite different from GATT (reason i) and no-one, not the panel (reason ii), nor any other dispute settlement report (reason iii), nor the parties in dispute (reason iv), has given us (sufficient) guidance on what TBT may mean."[11]

Clearly, this reasoning is indicative of an Appellate Body which favoured the GATT as a dispute resolving mechanism, as it was more familiar territory. The approach, it is submitted, violated general legal principles, such as *jura novit curia*, without truly sufficient cause, even in the name of judicial economy.

EC - Sardines[12] was the first major TBT case and it was widely thought that the decision would pave the way for a fresh interpretation of the state of international trade law at the time, particularly technical regulations, as well as reinvigorating the Appellate Body's interpretative methods to more fully place its interpretations within a framework which clearly explores both the normative and policy considerations and the consequences of its decisions.[13] This, it did not do.

The result of disputes such as *EC – Asbestos* and *EC – Sardines* was that they created a TBT regime which was fractured and incomplete, with precedent that was too strict in its interpretation of certain provisions, and completely lacking in interpretation of others.[14] *EC – Sardines*, up until 2011, was the only dispute that could qualify as a true TBT dispute, and due to certain failings of the Appellate Body in its examination and application of the Agreement, as well as the legitimate factual limitations of the dispute, important questions remained unanswered, such as the understanding of non-discrimination under the TBT and the rule of necessity for promotion of legitimate objectives. What was needed was a case which was able to clearly and singularly define key terms and ideas with particular regard to technical regulations, and which could develop a coherent test for measures regarding their

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[11] Pauwelyn (2002) at 67.

[12] Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359.

[13] Horn and Weiler (2002) at 7-8.

[14] See Pauwelyn (2002); Mavroidis (2013).

consistency with the Agreement on Technical Barriers to Trade. In 2012, the Appellate Body adjudicated three such cases, *US–Clove Cigarettes*,[15] *US–Tuna II*[16] and *US–COOL*.[17]

A Brief Overview of the 2012 TBT Cases[18]

US – Clove Cigarettes

Importantly, before *US – Clove Cigarettes*, no case had dealt specifically with Article 2.1 of the TBT Agreement.[19] This case was seminal: a marker to be followed in all future interpretations of the TBT Agreement in relation to non-discrimination.

The dispute arose following the promulgation of measures by the United States in an effort to address the severe public health consequences of tobacco use and addiction, particularly the signing of the Family Smoking Prevention and Tobacco Control Act.[20] Based on evidence collected which suggested that flavoured cigarettes were particularly attractive to the youth, the legislation specifically banned such cigarettes. However, an exception was granted for menthol cigarettes, purportedly because they are smoked more widely by citizens, other than the youth, and the effects of prohibiting them had not been adequately evaluated.[21] However, menthol cigarettes were mainly US – produced, while other flavoured cigarettes were almost

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[15] Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012: XI, p. 5865 & Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012: XI, 5751.

[16] Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013 & Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, 1837.

[17] Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745 & Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, 2449.

[18] The facts which formed the bases of these disputes will only be referred to in terms of the provisions relevant to the legitimate regulatory distinction test, and its creation. For a comprehensive understanding of other TBT aspects, the dispute documents should be read in their entirety.

[19] Panel Report para 7.80.

[20] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified in sections of 21 U.S.C.).

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

completely produced overseas, with Indonesia, the complainant in this case, having the bulk of the US market share in clove cigarettes specifically.

Ultimately, the Panel found the United States' ban on flavoured cigarettes inconsistent with Article 2.1, firstly by finding that the products were like, based on an examination of the regulatory purpose of the regulation at issue, and secondly by finding that the regulation treated imported clove cigarettes less favourably than like domestic menthol cigarettes.[22]

Subsequently, the Panel found that the measure amounted to less favourable treatment in that "it altered the competitive relationship between domestic menthol cigarettes and imported clove cigarettes to the detriment of the latter".[23]

While the Appellate Body, in its final determination, upheld the Panel decision in all major respects, its reasoning varied considerably. The Appellate Body report was employed as a decisive initial statement (in the larger TBT jurisprudential sense) on the interpretation of Article 2.1.

Noting that the TBT Agreement does not contain exception provisions, such as the Article XX of the GATT, the Appellate Body stated that Article 2.1 does not prohibit less favourable treatment which "stems exclusively from a legitimate regulatory distinction."[24] To quote the Appellate Body in creating this test:

> "[the] "treatment no less favourable" requirement of Article 2.1 [prohibits] both *de jure* and *de facto* discrimination against imported products, while at the same time permitting detrimental impact on competitive opportunities for imports that *stem exclusively from legitimate regulatory distinction*"[25]

The United States' appeal questioned the Panel's finding that the harm to clove cigarettes was not explained by legitimate regulatory distinctions.[26] In response, the Appellate Body agreed with the Panel that the reasons cited for exempting menthol cigarettes are not "legitimate regulatory distinctions."[27] Moreover, the Appellate Body explained that a detrimental impact on imports, by itself, is not sufficient to establish a violation of Article 2.1 of the TBT

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[22] Panel Report *US – Clove Cigarettes* para 7.28 - 7.293.

[23] Panel Report para 7.289.

[24] Appellate Body Report para 88.

[25] *Ibid* paras 175, 182. My emphasis.

[26] Submission of the United States, *United States–Measures Affecting the Production and Sale of Clove Cigarettes*, 70, WT/DS406 103–107. Voon, (2012) at 219.

[27] Appellate Body Report para 225.

Agreement, effectively reading in a second stage of enquiry in determining less favourable treatment.[28]

To determine whether or not the test is applicable, the Appellate Body stated that Panels will need to look to the "design, architecture, revealing structure, operation and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed".[29] In essence, the jurisprudence regarding Article III:4 of the GATT, read with Article XX, was adopted and applied to non-discrimination obligations regarding technical regulations. There are differing viewpoints on the correctness and legitimacy of this approach, which will be discussed in detail further on.

US - Tuna II

This case involved a US measure, the Dolphin Protection Consumer Information Act,[30] which monitored and enforced a private, voluntary 'dolphin safe' label on tuna sold in the US. The US regulation, confirmed in *Earth Island Institute v Hogarth*[31] prohibited of the use of the label on tuna marketed and sold in the United States unless "an observer has certified that no dolphins were killed or seriously injured and no purse seine nets were intentionally deployed or used to encircle dolphins during that fishing trip."[32] Conversely, for tuna caught outside the Eastern Tropical Pacific region (the 'ETP'), "where there is no significant dolphin-tuna association, it will be sufficient for the captain of the vessel to certify the latter."[33]

Mexico, as a tuna fisher in the ETP, challenged the measure, stating firstly that it violated Article 2.1 of the TBT since this was a method typically used by Mexican fishers, and that not allowing it to qualify for 'dolphin-safe' labelling *de facto* limited the competitive opportunities for Mexican-caught tuna in the United States, even if no dolphins had in fact been harmed.

Subsequently, the Panel that found there was no violation of Article 2.1.[34] In determining this, the Panel examined the fishing practices of Mexican fisheries and the impact of the

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[28] *Ibid* para 208.
[29] *Ibid* 215.
[30] 16 USC § 1385 (2006).
[31] 494 F 3d 757 (9th Cir, 2007).
[32] Panel Report *US – Tuna II* para 2.20.
[33] *Ibid* 7–8 (Table: *US Dolphin Safe Labelling Conditions*) paras 2.24 – 2.25.
[34] *Ibid* para 7.374.

regulations on fishers in the ETP as well as the relative effect on those outside it, including the associated costs. In the opinion of the Panel, the impact of the measure on operators in the tuna market was not related to the nationality of the product, but rather to the fishing practices, geographical location, relative integration of different segment of production and economic and marketing choices.

The Appellate Body significantly modified the Panel's analysis of 2.1 and ultimately found that there *had* been a violation of Article 2.1. It was in the Appellate Body report that the issue of non-discrimination as a result of a legitimate regulatory distinction again arose. The Appellate Body held that the United States

> "had not demonstrated that the difference in labelling conditions for tuna products … is 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean. It follows from this that the United States has not demonstrated that the detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction. We note, in particular, that the US measure fully addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP."[35]

Essentially the Appellate Body stated that the measure was not applied even-handedly, and thus could not be considered a *legitimate* regulatory distinction. As the Appellate Body explained: "[t]he [subsequent] question before us is thus whether the United States has demonstrated that *this* difference in labelling conditions is a legitimate regulatory distinction".[36] This led to the finding above: that the detrimental impact on Mexican tuna products did not arise exclusively from a legitimate regulatory distinction.

US – Country of Origin Lablelling (*US – COOL*).

Finally, the US – COOL case concerned a mandatory labelling scheme[37] which imposed on retailers an obligation to provide origin information on certain listed commodities sold, including a range of meat products - specifically at issue were beef and pork.[38]

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[35] Appellate Body Report para 297.

[36] *Ibid* para 284.

[37] 60 Stat. 1087, *United States Code*, Title 7, section 1621 *et seq.*, as amended. Also the Farm Security and Rural Investment Act of 2002, Public Law No. 107-171, section 10816, 116 Stat. 134, 533-535, subsequently amended by the Food, Conservation, and Energy Act of 2008, Public Law No. 110-234, section 11002, 122 Stat. 923, 1351-1354. Both Farm Bills subsequently became part of the Agricultural Marketing Act of 1946, codified

The complainants, Mexico and Canada, claimed that the labelling measures were inconsistent with Articles 2.1 and 2.2 of the TBT Agreement. More specifically, they argued that the United States' measures accorded imported livestock less favourable treatment than that accorded to like domestic livestock in a manner inconsistent with Article 2.1 of the TBT Agreement as well as Article III:4 of the GATT 1994.

The Panel ultimately concluded that due to the additional costs associated with the COOL measures which arose in respect of foreign products created an incentive for producers to use US meat, to the detriment of Canadian and Mexican imports.[39] Thus the measure was found to violate Article 2.1.

As it was wont to do in all three TBT cases, the Appellate Body upheld the Panel's ruling with regard to its finding that the measure was inconsistent with Article 2.1, but disagreed with its analysis. After agreeing with the Panel as to the measure's detrimental impact, the Appellate Body criticised the Panel for conducting an incomplete Article 2.1 analysis.[40] It was specifically noted by the Appellate Body that for a measure to fall under the scope of a *legitimate* regulatory distinction, the measure would have to be applied even-handedly. To this end, the Appellate Body reiterated the words used in *US – Clove Cigarettes*,[41] that a panel must "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue".[42] It was underscored in *US – COOL*, following a lengthy discussion, that while a detrimental impact on imported goods may *prima facie* demonstrate less favourable treatment, this may be rebutted: a detrimental impact on imported goods will amount to less favourable treatment *only* if it cannot be justified as the outcome of pursuing a legitimate objective. As was demonstrated in all three Appellate Body reports, this requirement is examined in the form of a two-stage test: First, has there been a detrimental impact? Second, does such impact stem exclusively from a legitimate regulatory distinction?

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as *United States Code*, Title 7, section 1621 *et seq.* (*Ibid.*, para. 7.13) The COOL requirements are contained in section 1638 of Title 7.

[38] Panel Report paras 7.64-7.67.

[39] *Ibid* paras 7.420, 7.506.

[40] Appellate Body Report *US – COOL* para 293.

[41] *Ibid* 271.

[42] Appellate Body Report *US – Clove Cigarettes* para 182.

Ultimately, the Appellate Body held that the detrimental impact could not be explained by a legitimate regulatory distinction because the measure resulted in arbitrary and unjustifiable discrimination, "such that they [could not] be said to be applied in an even-handed manner".[43]

The Rise and Interpretation of the Legitimate Regulatory Distinction

What is the legitimate regulatory distinction test?

As explained in *US – Clove Cigarettes*:[44] in the preamble to the TBT Agreement, a balance is sought to be struck between, on one hand, the pursuit of trade liberalization, and on the other, Members' right to regulate. These principles are not far removed from the balance that exits between the National Treatment obligation of Article III or that of MFN in Article I, and the general exceptions provided for under Article XX of the GATT. The two Agreements are linked by the desire to further the objectives of the GATT in the second recital of the preamble of the TBT Agreement.[45] Article 2.1, and the concept of "less favourable treatment" in the TBT Agreement were not previously subject to exceptions. Both the Panel and Appellate Body in the *US – Clove Cigarettes* dispute were faced with this issue: the lack of exceptions in the TBT Agreement (such as those present in Article XX of the GATT) which could justify measures which were inconsistent with the obligations of Article 2.1. The Appellate Body in that dispute took up the task of introducing elements based on the balance and purpose of the GATT into the TBT Agreement. In order to achieve this, there were suggestions that the GATT Article XX should be applied *mutatis mutandis* in cases of provisional Article 2.1 violation. It was also suggested that the terms "like products" or "less favourable treatment" should be reinterpreted in order to include Article XX flexibilities within their interpretation.[46]

What happened instead, was that the Appellate Body placed the GATT-like flexibilities under the "less favourable treatment" element of Article 2.1 of the TBT Agreement, holding that the balance in the GATT is expressed by the National Treatment rule in Article III:4 qualified by

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[43] Appellate Body Report *US – COOL* paras 347–350.

[44] Appellate Body Report para 109.

[45] "Members, Having regard to the Uruguay Round of Multilateral Trade Negotiations; Desiring to further the objectives of GATT 1994; ..."

[46] These options were noted in the World Trade Organization, *World Trade Report 2012 - Trade and public policies: a closer look at non-tariff measures in the 21st century,* at 189**,** referring to Lester, *Anti-Coercion in Tuna,* International Law and Policy Blog (May 29**,** 2012) online: (http://worldtradelaw.typepad.com/ielpblog/2012/05/anti-coercion-jurisprudence.html).

the exceptions in Article XX while in the TBT Agreement, this balance is to be found in Article 2.1 itself, read in the light of its context and of its object and purpose.[47]

In assessing Article 2.1, the Appellate Body considered that the GATT and TBT "overlap in scope and have similar objectives."[48] Going against the analysis of the Panel it was found that the GATT *could* be used as direct comparative setting, based on the parallels between Article 2.1 and GATT III:4.[49] Additionally, the Appellate Body took the view that the TBT preamble could be read to mean that the TBT Agreement intends to expand pre-existing GATT disciplines and provides a balance that is not, in principle, different from the balance set out in the GATT, between Articles III and XX.[50] Finally, the Appellate Body specifically gave weight to the fact that the TBT Agreement does not contain a general exceptions clause as found in the GATT, Article XX.[51]

The result of this analysis was the reading in of the "legitimate regulatory distinction". To again quote *US - Clove Cigarettes*:

> "... the context and object and purpose of the TBT Agreement weigh in favour of interpreting the "treatment no less favourable" requirement of Article 2.1 as not prohibiting a detrimental impact on imports that stems exclusively from a legitimate regulatory distinction"[52]

Essentially a two stage test had been created: First, has the measure caused a detrimental impact on competitive opportunities for the group of imported products, as compared to domestic like products, in terms of Article 2.1 of the TBT Agreement? If so, could it nevertheless be said that such detrimental impact stems exclusively from a legitimate regulatory distinction, whereby the measure will be held not to be inconsistent with Article 2.1?

Word by word analysis

In order to fully understand the phrase "legitimate regulatory distinction", each word and its meaning should be examined and placed in context through its previous usage within WTO Agreements and decisions.

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[47] Appellate Body Report *US – Clove Cigarettes* para 109.
[48] *Ibid* Para 91.
[49] *Ibid* Para 100.
[50] *Ibid* Para 96.
[51] *Ibid* Para 101.
[52] *Ibid* Para 181.

"Legitimate" within the TBT framework, appears only in Article 2.2 and is read into Article 2.1 by way of context. In this sense we can take it to be tied to the list of legitimate objectives available under Article 2.2, such as the protection of human health or safety or animal or plant life or health for example, and interpret its meaning in accordance with the scope of that Article, despite the fact that the Appellate Body drew no specific links between the two. It should be remembered however, that it is not clear whether the "legitimate regulatory distinction" is meant to have the same scope as that of "legitimate objectives" in Article 2.2. The word "regulatory" is clearly derived from the scope of Article 2.1 – for a measure to be considered under that section, it must be a technical regulation. The distinction which is to be considered should similarly be viewed as part of a regulatory framework, and, it is assumed, may not be the result of a standard, or otherwise. Finally, "distinction": This term does not appear in the TBT Agreement, but it can be taken that in this context it is derived from the definition of technical regulations which "are measures that, by their very nature, establish distinctions between products".[53] As a whole, the term "legitimate regulatory distinction" can be taken to mean: a measure which has the effect of differentiating between products in pursuance of a reasonable and justifiable objective, in a fair and justifiable manner.

Another facet of the test, as laid down in *US – Clove Cigarettes*, is that the detrimental impact on imports stems *exclusively* from a legitimate regulatory distinction. It is submitted that the word "exclusively" is important, though not much attention has been paid to its use by the Appellate Body thus far. Its meaning is clear: for the detrimental impact to be justified, the legitimate regulatory distinction must form the whole of the reason for the detrimental impact. However, questions are raised by this usage.

Does the use of the word mean that the distinction formed must succeed in its purpose? Or should its purpose and objective be the standards by which to judge whether a detriment stems exclusively from it? For example, if the objective is to prevent youth smoking, should the case be judged on whether the detriment is caused purely from issues that arise from *trying* to prevent youth smoking, or from those that arise if youth smoking is in fact curbed to some degree? While the Appellate Body has provided little guidance in this regard, I submit that Panels should focus on the actual degree of contribution that a measure makes toward its objective, not the contribution it should have made or whether the measure completely achieves or satisfies some minimum level of fulfilment of that objective.

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[53] Appellate Body Report *US – Clove Cigarettes* para 169.

Moreover, what of a case whereby a technical regulation discriminates between like products and leads to detrimental conditions for said product, but is not the sole cause of such detrimental impact? Or where there has been an established legitimate regulatory distinction, but the detrimental impact has been wider than could have been reasonably anticipated, or perhaps stems from other partially-related sources. Perhaps imagine a scenario involving multi-stage production of a product where completely separate measures in separate countries combine to cause a detrimental impact on competitive opportunities in the final country of sale. Only through a combination of measures impacting on different stages of production does a detriment arise, and it can be shown that the detriment in the final country does arise from a legitimate regulatory distinction. However, it is clear that the detriment does not arise *exclusively* from that particular legitimate regulatory distinction. Will the detrimental impact be justified as far as the legitimate regulatory distinction's scope extends? Or will there be an effort made to address the full cause of the detriment by the Appellate Body? Is this even possible, given the limitations of the DSB in relation to its mandate?

Legitimacy within the TBT Agreement

As mentioned above, the term "legitimate" is used in a number of TBT provisions[54] and is again used in the new phrase "legitimate regulatory distinction". What will be examined briefly here is whether this use of the word legitimate is consistent with the read-in provision in Articles which use the same phrase.

Article 2.2 provides an open list of what constitutes a 'legitimate objective' and it is in this sense that the word is repeated in Articles 2.4 and 2.5 of the Agreement. What is required to be legitimate for the purposes of these Articles is the objective itself. In these types of cases, the objective's legitimacy is determined first and then weighed against the necessity of the measure's trade restrictiveness.[55] Contrast this with the interpretation of Article 2.1, where the word 'legitimate' is only present through reading in. As discussed above, what is being examined is whether the detrimental impact which stems from the measure may be justified according to the objectives, as well as the "design, architecture, revealing structure, operation and application"[56] of the measure. Thus, it is the treatment which differentiates between the products itself which must be considered legitimate, and not the objective of the measure.

[54] Articles 2.2, 2.4, 2.5, and 5.2.4.

[55] Appellate Body Report *US - COOL* para 372.

[56] Appellate Body Report *US – Clove Cigarettes* para 182.

This has benefits in its own way, as pointed out by Marceau: no longer can parties tailor their measures so they appear to fall under a "legitimate objective" in terms of Article 2.2.[57]

On examination of the above, especially with reference to the Appellate Bodies' drawing parallels with the GATT, one might assume that the legitimate regulatory distinction is in fact a simple transference of GATT jurisprudence into the TBT Agreement, albeit under a different heading. The accuracy of this assumption will be examined below. While the Appellate Body in any of the three cases did nothing to dispel this possibility, can it really be said that the chapeau of Article XX of the GATT may be relied upon as the marker for which factors should be taken into account in a Panel's examination of even-handedness? It is submitted that this notion would be problematic, for a number of reasons. The most prominent reason would be the blurring of the line between the GATT and the TBT's application, mentioned above - this will be dealt with in a later chapter. For now however, it is sufficient to note that the Appellate Body used the words "design and application" of the measure, whereas the GATT, in its relevant provision, deals with the application of the measure only.[58] Thus, it can be assumed that the Appellate Body wished for future panels to engage in a more holistic interpretation of a measure when determining from where the detrimental impact springs, than would be expected under the corresponding provisions of the GATT.

Analysis of the Phrase in Context

A valuable question regarding the above is: does an assessment of whether a detrimental impact (caused by a regulatory distinction) is "legitimate", necessarily require an examination of whether such a distinction is designed and applied in an even-handed manner?[59]

The phrase "even-handed" is used in each of the TBT decisions,[60] and is explained through reference in each of the disputes, particularly *US – COOL*, where the phrase was markedly focused on. Where a regulatory distinction is not designed and applied in an even handed manner, such as where it is designed or applied in a way which comprises of arbitrary or unjustifiable discrimination under the definition employed by the Appellate Body, that

[57] Marceau (2013) at 28.

[58] See Appellate Body Report *US - COOL* para 271.

[59] *EC – Seal Products* (DS400, DS401) - European Union Responses to First Set of Questions from the Panel, Question 35.

[60] Appellate Body Report *US – Clove Cigarettes* para 182; Appellate Body Report *US – Tuna II* paras 216, 225, 232, 281, 297 and 298; Appellate Body Report *US – COOL* paras 30, 271, 293, 328 and 349.

distinction cannot be considered "legitimate", and thus the detrimental impact will result in discrimination prohibited under Article 2.1. As per *US - Clove Cigarettes*, a panel must methodically analyse

> "all the specific circumstances of the case, including the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, particularly, whether that technical regulation is even-handed, in order to determine whether the detrimental impact is caused by a legitimate regulatory distinction or by unjustifiable discrimination against the group of imported products."[61]

Thus, the question of even-handedness plays into the question of legitimacy of the distinction and implies a measure of fairness.

This discussion, however, begs the question: "what exactly is even-handedness"? Employing the language of the three disputes, it can be seen that a valuation of a measure's "even-handedness" involves examining whether the measure is "fair", "non-discriminatory" and "calibrated"[62] to its purpose. In response to a question from the Panel,[63] the European Union explained that the dictionary meaning of "even-handed" refers to "fair, evenly-balanced; free of bias or preference".[64] Accordingly, even-handedness as a concept refers to similar situations and their treatments: are the situations treated differently, and is the measure calibrated (thereby not going beyond what is necessary) to achieve its purpose? The origin of the phrase is not clear, but is thought to have been drawn from the sixth recital of the preamble to the TBT Agreement, along with concept of "unjustifiable or arbitrary discrimination and disguised restrictions on trade" in the chapeau of Article XX of the GATT.[65]

The lack of clear definition of the phrase "legitimate regulatory distinction" and its reliance on even-handedness is problematic. There are a few instances where the wording has proved confusing.[66] It is submitted that the Appellate Body in *US – COOL*, in fact, over-simplified

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[61] Appellate Body Report *US – Clove Cigarettes* para 182; and Appellate Body Report, *US – COOL* para 271.

[62] Particularly used in *US – Tuna II*, see paras 285-286.

[63] *EC – Seal Products* - European Union Responses to First Set of Questions from the Panel, question 35.

[64] OED On-Line, Entry 1
(http://www.oed.com/view/Entry/242829?rskey=yg9GDD&result=2&isAdvanced=false#eid)

[65] Marceau (2013) at 28.

[66] Carlone (2014) at 123, as evidenced by the sentence: "Ultimately, it decided that the detrimental impact was due to arbitrary and unjustifiable discrimination because it could not be explained by a legitimate regulatory distinction." The issue here is whether the measure was arbitrary because it could not be explained by a

the analysis by boiling it down to merely whether the measure is even-handed or not. It is stated that the question of whether the detrimental impact stems exclusively from a legitimate regulatory distinction may be alternately phrased as "whether the [COOL] measure is designed and applied in an even-handed manner, or whether it lacks even-handedness".[67] It goes on to state that a measure will not be even-handed if it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination. Does this reduce the second stage of the test ("whether the detriment stems exclusively from a legitimate regulatory distinction") to "is the measure designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination"? Here, I submit that what is effectively being said by the Appellate Body is that if the measure constitutes arbitrary discrimination it cannot be even-handed, and if it is found not to be even-handed, then it will not be considered legitimate. I further submit that this would be a less than satisfactory position for the Appellate Body to place itself in. Surely whether or not a detrimental impact stems exclusively from a legitimate regulatory distinction is a question which requires a further analysis over and above whether the discrimination is unjustifiable and arbitrary. As a reference, a panel would have to draw on GATT Article XX jurisprudence in examining the meaning of the phrase "arbitrary or unjustifiable discrimination". If it could be argued that the phrase "arbitrary or unjustifiable discrimination" can in fact be transplanted directly into the realm of TBTs for the purposes of interpretation, there is still the problem of its meaning: what is being searched for is Article 2.1 discrimination - discrimination with regard to National Treatment or MFN but focused on TBTs - to find that the measure is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination would not be fulfilling of the purpose of the Article. Conversely, to find that the measure is not arbitrary or unjustifiable, it is submitted, would not on its own show that the measure is even-handed and that the measure stems exclusively from a legitimate regulatory distinction. It is *not* submitted that this is what the Appellate Body entailed in its adoption of the phrase,[68] however, it is worrying that there is little discussion of other factors which may be used to determine when a regulatory distinction is not legitimate. In assuming these Article XX-like characteristics into Article 2.1 the Appellate Body somehow failed to utilise or benefit from the later judicial interpretations of the chapeau, and instead employed vague terms such as

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legitimate regulatory distinction, or rather was the measure not a legitimate regulatory distinction because it was unjustifiable.

[67] Appellate Body Report *US – COOL* para 340.

[68] *Ibid* para 340.

'even-handedness' to describe their fresh interpretation of the Article. In fact, it was pointed out by the Appellate Body in *EC – Seal Products*[69] that in the context of Article 2.1 it is only the regulatory distinction that leads to the detrimental impact on imported products that should be examined for its legitimacy. Under the chapeau of Article XX a measure can be found to be applied in a manner that discriminates arbitrarily or unfairly on a number of grounds, including grounds which differ in their "nature and quality" from the discrimination that was found to be inconsistent with the nondiscrimination obligations of the GATT.[70] Clearly the chapeau provides a more rounded scheme for assessing claims and thus has more value to a party to a dispute. Those looking to justify a claim under Article XX also will benefit from the abundance of judicial interpretation surrounding it, giving it substance and certainty. Is this indicative of the fact that the legitimate regulatory distinction is lacking substance?

The Consequences of the Legitimate Regulatory Distinction

The final question which needs answering, and perhaps the one which is not currently capable of being answered, is whether the reading-in of the legitimate regulatory distinction and its subsequent interpretation has been positive or not.

The Homogenisation of the GATT and the TBT Agreement

Without doubt, and with more than a little significance, throughout the Appellate Body reports discussed above, it can be seen that Articles 2.1 (and 2.2 to a lesser extent) have been considered in terms similar to those of Article XX of the GATT. The advent of the legitimate regulatory distinction introduced an Article XX-type analysis into the TBT Agreement. Similar to the case of the chapeau to Article XX, the focus of the Appellate Body is on how the measure is applied (leading to a detrimental impact) and then whether the distinction which arises from the measure is connected to achieving a legitimate policy objective.[71]

It must be borne in mind that although the TBT Agreement is intended to "further the objectives of the GATT", it does so through a specialised legal regime that only applies to a limited class of measures (TBTs). For these measures, the TBT Agreement imposes

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[69] Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014.

[70] *Ibid* para 5.312.

[71] Meltzer and Porges (2013) at 27.

obligations on Members that are "*different* from, and *additional* to" those in GATT.[72] This is but one example of a distinction being drawn between the GATT and the TBT Agreement, and it is clear that the differing functions and context in which they were each conceived are important to WTO jurisprudence as a whole. Is it acceptable then that the Appellate Body attempted to import GATT concepts into the TBT Agreement, but failed to take cognisance of the surrounding interpretations which informed and augmented such concepts, resulting in a compromise which is insufficient? It has been suggested that this may have been attempted for simplicity's sake, and it seems apparent that this was a consideration by the Appellate Body – but is it not preferable to have an instrument which is able to clearly and decisively deal with the specialised issues for which it was drafted, in a way which is suited to meet their particular challenges? Homogeneity between the agreements is a natural response in the Appellate Body's attempt to utilise the TBT Agreement more where it was applicable; a reaction to the critics of *EC – Asbestos* and an attempt to mould the TBT Agreement into something more familiar. The question is: is this result worth it, when the cost is an unsatisfactory and indistinct test?

As an extension of this line of thought, it seems that while finding that a measure is inconsistent with the TBT Agreement may be the end of the examination, a TBT measure consistent with Article 2.1 of the TBT Agreement may still require further examination in terms of the GATT. This follows the conclusion of the Appellate Body in *US - Tuna II* that the Panel violated DSU Article 11 by refusing to assess the GATT consistency of the challenged measure, after concluding that the said measure was not inconsistent with Article 2.1 of the TBT Agreement.[73] Thus, by importing measures from the GATT directly, in terms of the legitimate regulatory distinction test, has the Appellate Body effectively said that if a measure is consistent with 2.1, it will be consistent with the GATT, considering the GATT origins of the legitimate regulatory distinction?[74] Put another way, the test for whether a detrimental impact stems exclusively from a legitimate regulatory distinction is effectively attempting to be same as that under Article XX of the GATT, surely a finding of consistency with Article 2.1 will then necessitate a finding of justification under Article XX? Perhaps not

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[72] Appellate Body Report *EC - Asbestos* paras 79 - 80.

[73] Appellate Body Report *US – Tuna II* para 116.

[74] Of course there are textual differences between Article 1:1 of the GATT and Article 2.1 of the TBT Agreement. Article 1:1 refers to any "advantage" while Article 2.1 refers to "treatment no less favourable". This difference should be borne in mind when reading the above.

yet, but it is my submission that this conclusion is the direction that the Appellate Body's interpretation is heading towards.

Conclusion

In conclusion, it is apparent, following the decisions of the three above cases, that the Appellate Body's seeming aversion to utilizing the TBT Agreement as a dispute settlement mechanism has largely been addressed by the Appellate Body, in the three 2012 disputes. We have had three disputes adjudicated upon, varying in their facts though largely following a similar legal thread. Similarly, these three disputes were decided in much the same way by the Appellate Body, which ruled that the regulatory measures at issue violated Article 2.1 of the TBT Agreement in each dispute, thus demonstrating discrimination against like products. The Appellate Body, in deciding these matters, read in the test of the legitimate regulatory distinction, holding that that any detrimental impact would be permitted if it stemmed exclusively from a legitimate regulatory distinction. As a result of this addition, issues relating to the importation of GATT principles into the TBT Agreement, have arisen, leading to confusion and unanswered questions.

It is undeniably a positive step that the Appellate Body has moved on from its reluctance to rely on the TBT Agreement in matters which are clearly TBT-related, considering the DSB practice of relying on more specific Agreements when they are applicable. However, by reading-in the legitimate regulatory distinction in the way that they have, with little explanation and much appropriation from the GATT, and through seemingly shoe-horning different issues under an Article 2.1 analysis when this may not have been appropriate, the Appellate Body appears to have fallen short of expectations. While not a failure by any means, the way in which the Appellate Body considered the cases of *US – Clove Cigarettes*, *US – Tuna II* and *US – COOL* left much to be desired in a number of areas – most notably in their attempt to deal with discrimination in respect of technical regulations, as well as in response to the need to create a valid, coherent test for compliance with the TBT Agreement. As discussed above, is the homogenization of the GATT and the TBT Agreement as a result of the legitimate regulatory distinction test desirable? In a sense, yes – it provides guidelines for the straightforward interpretation of the TBT Agreement, through use of well-trodden GATT principles. It also addresses the aforementioned aversion to the use of the TBT Agreement as a dispute settlement tool, by allowing the Appellate Body to work with interpretations it is more comfortable with and which it assumes will yield positive results.

However, this comes at the expense of the very purpose for the creation of a separate agreement. With the prevalence of technical regulations as barriers to trade, an agreement was formed to deal with them "specifically and in detail".[75] Is the loss of the specificity of the agreement to TBTs and TBT issues really worth simplicity of interpretation? Especially when faced with the reality that the reading-in of the legitimate regulatory distinction is not actually sufficient as an interpretative mechanism and has been left incomplete and unexplained. If this is the extent to which the Appellate Body had intended to add to the TBT Agreement, it should come as no surprise that the watered-down version of the chapeau that was imported is insufficient to deal with issues relating to discrimination in Article 2.1. While the correct outcome may have been achieved in some of the discussed cases, it seems certain that the application of the legitimate regulatory distinction test will at some point prove inadequate when faced with a measure which does not fit into its mould.

[75] Panel Report *EC – Sardines* at G.2.VII.2.

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