

***United States – Measures Affecting the Production and Sale of
Clove Cigarettes
(AB-2012-1 / DS406)***

**Request for Permission to Submit Information to the Appellate
Body by Non-Parties**

&

Information for Submission to the Appellate Body

ON BEHALF OF

**The O’Neill Institute for National and Global Health Law
Georgetown University Law Center**

Washington DC
January 26, 2012

REQUEST FOR PERMISSION TO SUBMIT INFORMATION TO THE APPELLATE BODY BY NON- PARTIES

Authority of the Appellate Body to seek and receive information

1. It is well established that the Appellate Body has the power to accept unsolicited *amicus curiae* briefs from individuals or organizations that are not Members of the WTO.¹

The identity of the applicant

2. The O’Neill Institute for National and Global Health Law at Georgetown University was established to respond to the need for innovative solutions to the most pressing national and international health concerns. Housed at the Georgetown University Law Center in Washington D.C., the O’Neill Institute reflects the importance of public and private law in health policy analysis. The essential vision for the O’Neill Institute rests upon the proposition that the law has been, and will remain, a fundamental tool for solving critical health problems in our global, national, and local communities. By contributing to a more powerful and deeper understanding of the multiple ways in which law can be used to improve health, the O’Neill Institute hopes to encourage key decision-makers in the public, private, and civil society sectors to employ the law as a positive tool to enable individuals and populations in the United States and throughout the world to lead healthier lives. For additional information, please visit www.oneillinstitute.org.

The applicant's interests in the dispute

3. The applicant has an interest in ensuring that resolution of the dispute does not have negative impacts on the ability of WTO Members to regulate in the interests of public health. The applicant also has a specific interest in global tobacco control because it is an area in which the applicant conducts research and provides assistance to governmental, inter-governmental and non-government bodies.

4. This is the first dispute in which Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) has been applied to a technical regulation implemented for a public health purpose. Hence, the interpretation of this provision provided by the Appellate Body will have significance for other health measures that constitute technical regulations.

5. If upheld, the Panel’s interpretation of Article 2.1 could have wide-ranging effect. For example, the conclusion that a technical regulation may be consistent with Article 2.2

¹ See discussion in Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359, paras 157 - 159

and protected by Article XX(b) of the GATT 1994, but may nonetheless violate Article 2.1 arguably alters the degree of deference to domestic health measures traditionally shown in WTO jurisprudence.

Issues the applicant intends to address

6. The specific issues addressed in the attached submission reflect the applicant's interests in the systemic impacts of this dispute. These issues include the:
 - (i) whether the Panel erred in assuming that Article 2.1 of the TBT Agreement applies to de facto discrimination;
 - (ii) whether the Panel erred in its interpretation of the phrase 'like products' under Article 2.1; and
 - (iii) whether the Panel gave sufficient weight to the unique character of tobacco products and the risks of illicit trade in tobacco products in its analysis of less favorable treatment under Article 2.1.

7. The United States of America (United States) has made its written submission to the Appellate Body available to the public and the applicant has reviewed this submission. The applicant seeks to advance submissions not made by the United States and thereby provide unique contributions to resolution of the dispute. More specifically, the applicant seeks to argue that Article 2.1 of the TBT Agreement is narrower in its application than has been argued by the United States.

8. In this respect, because WTO law is a species of public law it is important that the law develops not solely in response to the specific arguments made by either party to a dispute, but by reference to the full range of arguments that can be brought to bear to an issue.

The applicant is independent from the parties

9. The applicant's submission is not a partisan submission and the applicant does not make its submission in order to support either party to the dispute.

10. The applicant does not express a position on whether the dispute should be resolved in favor of one party or another. Although the applicant's submissions are capable of affecting resolution of the dispute, this is an inevitable consequence of providing useful information and this alone does not suggest partisanship.

11. As described above, the applicant's interests in this dispute relate to its systemic implications for public health. This is consistent with the identity of the applicant and its mission. This interest is also reflected in the nature of the submissions.

12. The applicant has not had private access to the submissions of either party to the dispute. Nor has the applicant discussed the contents of its submission with either of the parties in advance of submission.

13. As an institute based at a university engaged in research-intensive activity, the institute has received funding from United States government sources. However, this funding is in no way dependent on or otherwise related to the applicant's submission.

14. As a courtesy to the parties to the dispute the applicant has forwarded a copy of this document via email to:

Permanent Mission of the Republic of Indonesia
To the United Nations, WTO and Other International Organizations in Geneva
16 rue de Saint-Jean
Geneva 1203, Switzerland
mission.indonesia@ties.itu.int

and via facsimile to:

Office of the United States Trade Representative
Geneva, Switzerland
011-41-22-749-5308

The applicant's submission may contribute to decision-making

15. The attached submission is likely to contribute to decision-making in three primary ways.

16. First, the attached submission addresses questions of law arising in interpretation of Article 2.1 of the TBT Agreement, which as noted, is being applied to a public health measure for the first time.

17. Second, the attached submission makes novel arguments about the application of Article 2.1 that were not advanced by the United States in its appellant submission.

18. Third, the attached submission sets out historical information concerning the regulation of emerging tobacco products, their prohibition in the territory of various WTO Members, and the risks associated with illicit trade in tobacco products.

The applicant stands ready to provide further information

19. Should the Appellate Body wish to consult with the applicant, it stands ready to provide further information.

INFORMATION FOR SUBMISSION TO THE APPELLATE BODY

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A. Article 2.1 of the TBT Agreement should be interpreted in a manner that does not upset the existing balance between domestic regulatory autonomy and respect for commitments (the balance between rights and obligations)

1. There is a delicate balance between the rights and obligations of WTO Members. This balance is reflected particularly in the text of the GATT 1994 and in jurisprudence interpreting that agreement. This balance provides the right to regulate in the public interest, including for protection of human life and health. Equally, WTO Members are obliged to ensure that such internal regulation is non-discriminatory, or alternatively, that it is permissible under one of the general exceptions in Article XX.

2. The balance found in the jurisprudence gives effect to the intent of WTO Members as reflected in the WTO covered agreements. This balance also gives effect to the intent of WTO Members as reflected in multilateral instruments adopted outside the WTO, including instruments relating to the protection of human life and health. The preamble to the TBT Agreement seeks to capture this balance in stating:

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;

3. The conclusion of the Panel that a technical regulation consistent with Article 2.2 may nonetheless violate Article 2.1 upsets this balance between rights and obligations. Assuming that Article XX of the GATT 1994 does not apply to the TBT Agreement, there is no apparent exception applicable to a violation of Article 2.1 of the TBT Agreement. Hence, an overly expansive interpretation of Article 2.1, such as that offered by the Panel, upsets the balance reflected in WTO jurisprudence to date.

1. The Panel erred in assuming that Article 2.1 applies to de facto discrimination.

4. In its analysis under Article 2.1, the Panel drew upon the existing jurisprudence under Article III:4 of the GATT 1994. In doing so, the Panel assumed that Article 2.1 applies to both de jure and de facto discrimination.¹ Put another way, the Panel assumed that Article 2.1 prohibits not only technical regulations that discriminate through their form, but also technical regulations that discriminate in their effect. Similarly, the panel in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* assumed that Article 2.1 applies to de facto discrimination without

¹ Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, (“Panel Report”), WT/DS406/R, paras 7.76 – 7.77

examining the issue.² The panel in *United States – Certain Country of Origin Labelling (COOL) Requirements* examined this issue briefly and concluded that Article 2.1 does apply to de facto discrimination. However, the argument that Article 2.1 does not apply to de facto discrimination was not advanced by the United States in any of these disputes.

5. Article 2.1 is silent as to whether it applies to de facto discrimination. This silence must be interpreted in the context of the TBT Agreement and its place in the WTO Agreement more broadly.

(a) Concluding that Article 2.1 does not apply to de facto discrimination is consistent with the interpretive approach taken in other WTO covered agreements.

6. Some national treatment provisions, such as Article XVII of the GATS and Article 3 of TRIPS, are express in their application to de facto as well as de jure discrimination.³ The absence of express wording in Article 2.1 suggests that the provision does not apply to de facto discrimination. This interpretation is consistent with the interpretive principle *expressio unius est exclusio alterius* (the expression of one thing is to the exclusion of all others).

7. The fact that Article III:4 of the GATT 1994 is silent on whether that provision prohibits de facto as well as de jure discrimination does not affect this analysis of Article 2.1. When the GATT 1994 was incorporated into the WTO Agreement, GATT 1947 jurisprudence had established that the provision applied to both forms of discrimination.⁴ Hence, there was no need to clarify this point through express wording as was necessary in the context of other WTO covered agreements.

8. Similarly, the fact that Article II (Most-Favoured-Nation Treatment) of the GATS is not express in its application to de facto discrimination, but has been held to apply to de facto discrimination, does not affect the above analysis. In *EC – Bananas III*, the Appellate Body reasoned that this provision applies to de facto discrimination because circumvention of the rule would otherwise not be difficult.⁵ For reasons explained below, this rationale does not apply in the context of Article 2.1 of the TBT Agreement. In addition, in the context of the GATS there is a question of taking a consistent approach

² Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, WTDS386/R, paras 7. 298 – 7.302; Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R

³ See for example Article XVII of the GATS and Article 3 of TRIPS.

⁴ GATT 1947 Panel Report, *Japan—Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*, Nov. 10, 1987, GATT B.I.S.D. (34th Supp.) (1988)

⁵ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (“EC – Bananas III”)*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 233

between MFN treatment and national treatment. That is, there is no rationale to apply one approach to national treatment and another to MFN treatment within the one covered agreement. This issue of internal consistency does not arise in the context of the TBT Agreement.

(b) The risk of circumvention is the primary reason provisions governing non-discrimination have been applied to de facto discrimination.

9. In considering whether Article II of the GATS applies to de facto discrimination, the Appellate Body stated ‘if Article II was not applicable to de facto discrimination, it would not be difficult -- and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods -- to devise discriminatory measures aimed at circumventing the basic purpose of that Article.’⁶ This concern with circumvention is the central justification for applying Article III:4 of the GATT 1994 to de facto discrimination. Otherwise, Members could use measures that are origin neutral on their face to alter the conditions of competition to the detriment of imported goods or services.

(c) There is no risk of circumvention if Article 2.1 of the TBT Agreement is applied only to de jure discrimination.

10. The TBT Agreement applies concurrently with the GATT 1994 to technical regulations, meaning that a single measure may be analyzed under both the GATT 1994 and the TBT Agreement simultaneously. Accordingly, Article III:4 of the GATT 1994 governs a technical regulation that is discriminatory in its effect (and for this reason not subject to Article 2.1).

11. Article 2.2 of the TBT Agreement also applies to technical regulations that are discriminatory in their effect. The most relevant part of Article 2.2 states that ‘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.’

12. Both the GATT 1994 and Article 2.2 of the TBT Agreement provide protection against circumvention. Technical regulations violate the GATT 1994 if discriminatory in effect and not saved by an exception in Article XX. In this respect, the chapeau of Article XX means that that provision is unlikely to provide protection to measures seeking to circumvent the prohibition on de jure discrimination in Article 2.1 of the TBT Agreement. Similarly, a technical regulation seeking to circumvent a prohibition on de jure discrimination in Article 2.1 is unlikely to survive analysis under Article 2.2 of the TBT Agreement because the trade restrictiveness of such a measure (the imposition on market access) would have to be justified as necessary to achieve a legitimate objective.

13. Technical regulations that are discriminatory in their effect, but survive analysis under the GATT 1994 and Article 2.2 of the TBT Agreement, ought to be considered lawful regulation within the rights of a WTO Member. To find otherwise would upset the balance between rights and obligations.

⁶ Appellate Body Report, *EC – Bananas III*, para. 233

(d) Article 2.1 retains utility as a rule removing facially discriminatory technical regulations from the scope of general exceptions.

14. The fact that Article III:4 of the GATT 1994 applies to technical regulations subject to Article 2.1 raises the question of what utility Article 2.1 possesses. The utility of Article 2.1 is to remove some technical regulations from the scope of general exceptions.

15. Under other WTO covered agreements it is permissible to engage in de jure discrimination in certain circumstances. For example, SPS measures might formally discriminate on the basis of origin and yet be permissible under Articles 2 and 5 of the SPS Agreement. This might occur, for example, if a disease is specific to the territory of one WTO Member. If such a disease could be spread through trade in goods from the territory of that Member, measures that formally discriminate against imports from that Member's territory might be lawful under the SPS Agreement. Along the same lines, these same measures might also be lawful under the GATT 1994 by virtue of Article XX(b).

16. These types of measures may be lawful because de jure discrimination may be justifiable in the context of certain sanitary and phytosanitary measures. In contrast, there is no apparent justification for technical regulations (that do not fall within the scope of the SPS Agreement) to be de jure discriminatory.

17. As the Appellate Body stated in *EC – Asbestos*, "[t]he heart of the definition of a "technical regulation" is that a document must 'lay down' -- that is, set forth, stipulate or provide -- "product characteristics".⁷ These characteristics are objectively definable, meaning that there is no justification (and hence no exception) for technical regulations that discriminate on their face. The distinct utility of Article 2.1 is that it clarifies this position.

18. For the avoidance of doubt, this argument does not imply that Article 2.1 prevents WTO Members from implementing any technical regulation that on its face draws distinctions between imported and domestic products. Rather, as the submission below suggests, it is permissible for WTO Members to draw distinctions on the face of a technical regulation between products that are not like.⁸ For example, a technical regulation requiring marks of origin may not be facially discriminatory if the products compared are not like. In the submission below, this might be the case either because the products do not compete or because the products are distinct in regulatory terms.

⁷ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("EC – Asbestos"), WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243, para. 67

⁸ Under the submission elaborated below, this would include marks of origin. For example, marks of origin may not govern like products if likeness analysis is animated by regulatory factors. Such measures would, therefore, be subject to the strictures of the GATT 1994.

2. The Panel erred in concluding that likeness should be determined solely by reference to the regulatory objective of the United States.

19. Irrespective of whether Article 2.1 applies to de facto as well as de jure discrimination, the Panel erred in its interpretation of likeness under Article 2.1.

20. The Panel held that the declared legitimate objective of the United States must permeate and inform the likeness analysis.⁹ This conclusion is sound and this regulatory focused analysis is central to likeness under Article 2.1. However, this approach should not exclude consideration of the extent to which products are in a competitive relationship as a separate criterion. This is because it is not possible to discriminate in favor of one product or another if those products are not in competition with one another.

21. Under Article 2.1 of the TBT Agreement, for product categories to be considered like, the following two elements must be established:

- (i) that the product categories are in a sufficiently competitive relationship within the territory of the Respondent; and
- (ii) that prima facie, there is no legitimate basis for the Respondent to distinguish between the product categories through a technical regulation.

22. In short, likeness under Article 2.1 involves an examination of the extent to which product categories compete and the extent to which those product categories are like in terms of the regulatory objective pursued.

(a) The absence of exceptions to Article 2.1 presents a distinct context from that of Article III of the GATT 1994.

23. Article III is subject to the general exceptions in Article XX of the GATT 1994, whereas Article 2.1 is not subject to any apparent exception. This context is significant for interpretation of Article 2.1 because interpretation of the prohibition in Article 2.1 has a greater impact on the rights of Members (their domestic regulatory autonomy) than interpretation of Article III:4 of the GATT 1994.

24. The distinct context of Article 2.1, which is also reflected in the preamble of the TBT Agreement, necessitates an interpretation that is more deferential to Members' domestic regulatory choices than would be the case under Article III of the GATT 1994.

(b) Likeness under Article 2.1 should be determined by reference to (i) the extent of competition between product categories and (ii) whether there is a legitimate basis to distinguish between those product categories.

25. Under Article III:4 of the GATT 1994, the prevailing approach to likeness is to examine the extent to which product categories are in competitive relationship. To the extent that the health risks posed by those product categories are relevant to likeness, those risks are examined in determining the extent to which products compete in the

⁹ Panel Report, para. 7.119

marketplace. Hence, the health risks posed by products are not examined under a separate criterion in the context of Article III:4.¹⁰

26. In the context of the TBT Agreement, whether products are comparable in a regulatory sense should be examined as a separate criterion of likeness. If there is no exception to Article 2.1, a competition-focused analysis is not sufficient because products may be in a highly competitive relationship with one another despite posing divergent risks and yet there is no exception to Article 2.1.

27. In *EC – Asbestos*, the Appellate Body held that the health risks associated with products may be relevant to the extent to which those products compete. More specifically, health risks may be relevant to the physical properties of the products and to consumers' tastes and habits. However, it is also possible that consumers' tastes and habits may not be affected by the known risks associated with consuming a product. The Appellate Body recognized as much in stating:

We recognize that consumers' reactions to products posing a risk to human health vary considerably depending on the product, and on the consumer. Some dangerous products, such as tobacco, are widely used, despite the known health risks. The influence known dangers have on consumers' tastes and habits is, therefore, unlikely to be uniform or entirely predictable.¹¹

28. The reactions of consumers to risk may vary for a number of reasons, such as differences in risk tolerance and differences in knowledge of the risks in question. Hence, in some instances the impact of divergent risks on competition between products may be insignificant.

29. Under the GATT 1994, the fact that products pose divergent risks to health may ultimately be examined under Article XX. The general exceptions form a crucial aspect of the balance between rights and obligations. Because of these exceptions, the limited role played by health risks in a competition-focused likeness analysis under Article III is not problematic. However, this is not the case in the context of Article 2.1 of the TBT Agreement. Assuming that there are no exceptions to Article 2.1 of the TBT Agreement, products should not be considered like under Article 2.1 if there is a legitimate basis to distinguish between them i.e. divergent risks should be considered as a separate criterion under Article 2.1 likeness analysis.

30. The less favorable treatment element of Article 2.1 does not provide sufficient scope to take account of divergent risks posed by different product categories. The approach to interpretation of Article III of the GATT 1994 is fundamentally distinct from, and not equal to, the approach to Article XX. Whether one product category is treated less favorably than another concerns whether differences in treatment can be explained by factors other than the foreign origin of the products concerned. This is distinct from the question under Article XX, which is whether a Member has sufficient grounds for

¹⁰ Appellate Body Report, *EC – Asbestos*, para. 113

¹¹ Appellate Body Report, *EC – Asbestos*, para. 122, fn. 103

adopting or enforcing a WTO inconsistent measure. Accordingly, the less favorable treatment element, as interpreted under Article III of the GATT 1994, does not provide the same degree of protection for the rights of Members as Article XX.

31. It is preferable to consider regulatory distinctions between products under the element of likeness. This is in line with the ordinary wording of Article 2.1, interpreted in its context. Additionally, examining whether products are like in terms of the risks a Member is seeking to address (the regulatory purpose) provides a well-structured and relatively objective test. This is in contrast from guessing whether divergences in treatment are explained by reference to either the foreign origin of products or their divergent risks. The latter test invites examination of the protectionist intent of the Member implementing the measure, which is a less reliable means of decision-making (even if examined by reference to objective evidence).

32. In summary, for products to be like under Article 2.1 the following two elements must be established:

- (i) that the product categories are in a sufficiently competitive relationship within the territory of the Respondent; and
- (ii) that there is no legitimate basis for the Respondent to distinguish between the product categories through a technical regulation.

B. In finding that less favorable treatment occurred, the panel erred in not giving sufficient weight to the unique character of tobacco products and the risks associated with illicit trade in tobacco products.

33. In finding that the technical regulation treated imported tobacco products less favorably than like domestic tobacco products, the Panel drew a conclusion of systemic importance to tobacco control. Accordingly, it is worthwhile to provide some of the regulatory context underlying tobacco product regulation of the type implemented by the US.

34. In recent years, a number of new types of tobacco products have emerged for recreational use. These products include:

- electronic cigarettes;
- fruit and confectionary flavored cigarettes;
- tobacco and nicotine gels, liquids and creams;
- nicotine drinks and foods; and
- dissolvable products.

35. For many of these products the potential impact on public health is twofold. First, consumption of the products may be harmful to individual consumers (although the extent of that harm is unknown). Second, the presence of these products on the market may attract new consumers, or consumers who would otherwise quit. This may increase

the prevalence of tobacco consumption and with it the morbidity and mortality associated with this activity.¹²

36. WTO Members take different approaches to the regulation of these products. This is partly because different WTO Members take different approaches to risk, and partly because the second risk differs from the territory of one Member to another. In many instances, however, WTO Members maintain partial restrictions on tobacco products that prohibit sale of some categories of products but not others.

37. The partial character of restrictions on tobacco products is attributable to the historical context of tobacco regulation. In many Members, the practice of tobacco consumption was widespread, and entrenched by virtue of nicotine addiction, before the health consequences of consumption were understood. This widespread use of addictive products now impedes the ability of Members to prohibit tobacco products entirely because it creates a risk of illicit trade and other negative social effects associated with criminalization of entrenched products. Hence, Members have sought less trade restrictive approaches, which include selective prohibitions, such as in the case of new or emerging products.

38. The risk that a prohibition will lead to significant illicit trade is difficult to predict in advance. As such, Members must make a judgment about their risk tolerance for illicit trade in tobacco products and tailor their tobacco control measures to that risk tolerance. In this respect, it is reasonable to expect that the risk of illicit trade is greater for prohibitions on products where the demand for those products is established and widespread, as compared to products that are not well established in the market.

39. The risks associated with illicit trade are also not strictly domestic. Rather, illicit trade in the territory of one Member has spillover effects for other Members. This conclusion is implicit in the fact that Parties to the WHO Framework Convention on Tobacco Control are negotiating an optional protocol on illicit trade in tobacco products.¹³ This process suggests the existence of collective action problems demanding international coordination and cooperation.

40. In its analysis under Article 2.2, the Panel recognized that there is no contradiction in the idea that a Member might seek to reduce rather than eliminate certain risks by banning certain but not all products within a given product category.¹⁴ Put another way, the partial character of a product ban does not make that ban more trade restrictive than necessary to protect health.

¹² For further information see the work of the World Health Organization Study Group on Tobacco Product Regulation,

http://www.who.int/tobacco/global_interaction/tobreg/en/

¹³ See http://www.who.int/fctc/protocol/illicit_trade/en/

¹⁴ Panel Report, para. 7.377

41. However, in the context of less favorable treatment analysis under Article 2.1, the Panel characterized the US concern with illicit trade as relating to ‘the costs that might be incurred by the United States were it to ban menthol cigarettes.’¹⁵ The panel stressed that by excluding menthol from the scope of the product ban, the US sought to minimize or eliminate costs it may incur while triggering costs to producers of like products in the territory of other Members.

42. The Panel erred in this characterization of the risks posed by illicit trade. Even if the risks of illicit trade associated with banning menthol would fall on the United States alone, those risks may still constitute evidence that regulatory distinctions were drawn for reasons other than the foreign origin of clove cigarettes. However, the Panel failed to give due consideration to this argument.

¹⁵ Panel Report, para. 7.289