

The Agreement on Technical Barriers to Trade



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Application

- Agreement applies inter alia to ‘technical regulations’
- Technical regulations:
 - Are mandatory
 - Apply to an identifiable product or group of products
 - Lay down product characteristics (either in negative or positive form)
- Examples include:
 - Product regulations (other than SPS measures)
 - Labeling requirements



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Non-Discrimination

- Article 2.1 establishes a prohibition on discrimination, which is not subject to an exception.
- In *US – Clove Cigarettes* a regulation prohibiting clove flavored cigarettes, but not menthol flavored cigarettes, was considered discriminatory.



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Non-Discrimination

- Likeness is fundamentally a question of the nature and extent of a competitive relationship between product categories.
- Less favorable treatment will arise if a regulation causes a detrimental impact on conditions of competition for imported products that does not stem exclusively from a legitimate regulatory distinction.
- In *US – Clove Cigarettes* it was found that the discrimination was not based on a legitimate regulatory distinction between clove and menthol flavored cigarettes.



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Necessity

- Article 2.2 requires that technical regulations be not more trade restrictive than necessary to achieve a legitimate objective.
- The list of legitimate objectives is open, but protection of human health is included.
- In *US –Clove Cigarettes* the panel rejected Indonesia's argument that the ban on clove flavored cigarettes is not necessary to protect human health.

International Standards

- Article 2.4 obliges Members to use relevant international standards as a basis for technical regulations.
- This is not required where those standards would be an inappropriate or ineffective means for fulfillment of the legitimate objective pursued.
- Art. 2.5 creates a rebuttable presumption of compliance with paragraphs 2 – 4 where a technical regulation is adopted, applied or prepared:
 - for one of the legitimate objectives explicitly mentioned in Art. 2.2, and
 - is 'in accordance' with relevant international standards.



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International Standards

- Whether WHO FCTC Guidelines are international standards was not considered in *US – Clove Cigarettes*.
- In *US – Tuna II* the Appellate Body clarified the definition, leaving open the possibility that WHO FCTC Guidelines may be international standards.
- To qualify, an instrument must be a standard adopted by an international standardizing body.
- Such a body must:
 - have recognized activities in standardization; and
 - be open to the relevant bodies of all WTO



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Transparency

- The TBT Agreement creates a TBT Committee, which is a forum for discussion of technical regulations, prior to the initiation of a dispute.
- The TBT Agreement also creates notification and publication obligations designed to give WTO Members the opportunity to comment before a technical regulation is adopted.
- In *US – Clove Cigarettes* it was held that the US failed to give formal notice of the product coverage of the regulation and to publish the regulation within a reasonable interval of implementation (6 months).



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Key points

- The outcome of *US – Clove Cigarettes* was specific to its facts and does not prevent WTO Members from prohibiting flavored tobacco products.
- WTO Members should ensure that regulatory distinctions between products are legitimate.
- Members must ensure that technical regulations are not more trade restrictive than necessary.
- Basing measures on the WHO FCTC and its guidelines may help ensure that regulations are not more trade restrictive than necessary.



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Thank you

- Questions?



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