



GREAT ZIMBABWE UNIVERSITY
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19/07/2024

HERBERT CHITEPO LAW SCHOOL
BACHELOR OF LAWS DEGREE
EXAMINATION QUESTION PAPER

MODULE CODE	LLB615
MODULE NARRATION	INTERNATIONAL TRADE LAW
DATE	2024
DURATION	3 HOURS
TOTAL	70 MARKS

INSTRUCTIONS TO CANDIDATES:

- 1. Write legibly.**
- 2. Section A is compulsory.**
- 3. Answer any two questions in section B.**
- 4. This question paper consists 5 pages.**

SECTION A

THIS SECTION IS COMPULSORY

QUESTION ONE

- a) Read the facts set out in the briefing paper below on *Tobacco Product Regulation and the WTO: US — Clove Cigarettes* and then answer the questions that follow:

Tobacco Product Regulation and the WTO: US — Clove Cigarettes

On 2 September 2011, the World Trade Organization (WTO) released the report of a panel tasked with considering a complaint brought by Indonesia concerning prohibitions on certain flavoured tobacco products implemented by the United States (US). The panel concluded that the US violated WTO law and recommended that the US be asked to bring its laws into conformity with WTO law. This briefing paper gives some background to those aspects of the dispute most relevant to public health, explains the panel's decision, examines the implications for tobacco control and public health more generally and outlines the options open to the US.

Background

In 2009, the Family Smoking Prevention and Tobacco Control Act amended the Federal Food, Drug, and Cosmetic Act.¹ Among other things, the change to the law created a prohibition on cigarettes containing a constituent that is a characterizing flavour of the tobacco or tobacco smoke, other than menthol or tobacco. Section 907(a)(1)(A) of the former Act states: a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavour (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavour of the tobacco product or tobacco smoke. Nothing in this subparagraph shall be construed to limit the Secretary's authority to take action under this section or other sections of this Act applicable to menthol or any artificially or natural flavour, herb, or spice not specified in this subparagraph.

Indonesia, which is an exporter of clove cigarettes, objected to the law and requested the establishment of a WTO panel. Indonesia argued that the law treats Indonesian

clove cigarettes less favourably than like menthol cigarettes of US origin, in violation of Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) and Article III:4 of the General Agreement on Tariffs and Trade (GATT 1994). Indonesia also argued that the US measure is not necessary to achieve a legitimate objective, such as protection of human life or health, and that accordingly, the measure results in violation of Article 2.2 of the TBT Agreement, and is not defensible under Article XX(b) of the GATT 1994.

The US argued that the measure is non-discriminatory and that the law draws a distinction between clove cigarettes and menthol cigarettes on health grounds (rather than based on the origin of the products). More specifically, the US argued that clove cigarettes are a starter product especially attractive to youth, whereas menthol cigarettes are not starter products because they are attractive to youth and adult smokers in similar proportions. After the US had made its first and second written submissions to the panel, this argument was undermined by a report of the Tobacco Products Scientific Advisory Committee (TPSAC). This body was mandated by the Family Smoking Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 387g(a)(1)(A) Family Smoking Prevention and Tobacco Control Act, HR 1256, section 907(a)(1)(A) Prevention and Tobacco Control Act to report to the US Food and Drug Administration (FDA). Notably, the report concluded that the availability of menthol cigarettes increases initiation among youth.

TPSAC does conclude that the availability of menthol cigarettes has led to an increase in the number of smokers and that this increase does have adverse public health impact in the United States. TPSAC found evidence that the availability of menthol cigarettes increases initiation; of particular concern was the high rate of menthol cigarette smoking among youth and the trend over the last decade of increasing menthol cigarette smoking among 12- to 17-year-olds, even as smoking of non-menthol cigarettes declines. TPSAC also concluded that cessation is less likely to be successful among smokers of menthol cigarettes. Thus, the availability of menthol cigarettes increases initiation and reduces cessation, thereby increasing the number of people who are smoking. This increase in the number of smokers represents an adverse impact of the availability of menthol cigarettes on public health.

Although this development moved the ground beneath the US arguments, the US had also argued that a regulatory distinction was drawn between clove and menthol cigarettes because the extent of menthol consumption in the US means that prohibiting menthol could create significant risks of illicit trade as well as problems for the US health system (given the addictive character of nicotine).

These and other arguments were Mitigated against the backdrop of the World Health Organization Framework Convention on Tobacco Control (WHO FCTC), which has 174 states parties. Although neither the US nor Indonesia is a Paid to the WHO FCTC (the US has signed but not ratified), the Convention gives expression to the public health goals pursued through tobacco control and the strength of support for tobacco control among states. The Fourth Session of the Conference of Parties to the WHO FCTC adopted Partial Guidelines on Regulation of the Contents of Tobacco Products and Regulation of Tobacco Product Disclosures. The Partial Guidelines address the use of flavourings and other substances as means of mating tobacco products more attractive or palatable. The Partial Guidelines state:

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.

The Partial Guidelines then make the following recommendation:

Parties should regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products.

Ingredients indispensable for the manufacturing of tobacco products and not linked to attractiveness should be subject to regulation according to national law.

If you were appearing for Indonesia, how would you frame your arguments against the ban on clove cigarettes?

If you were appearing for the US, how would you defend section 907(a)(1)(a) of the Family Smoking Prevention and Tobacco Control Act.?

Your answer should make maximum use of the facts set out in the briefing paper. It is not necessary to examine the WTO TBT agreement for purposes of this question.

(30 marks)

SECTION B

ANSWER ANY TWO QUESTIONS IN THIS SECTION

QUESTION TWO

Note: All countries are WTO Members.

Boland, a developing WTO member, has recently had a spike in HIV/AIDS infections and related deaths. Initially, the government responded with increased access and availability to generic anti-retroviral drug therapy (ART), however, the number of AIDS related deaths continues to increase with little or no noticeable difference despite the wide availability and distribution of generic ART drugs.

The government of Boland commissions a study, through the Boland AIDS Commission (BAC), to provide an explanation on the current situation and provide possible solutions to the health crises. The BAC presents the following findings to the Boland government:

- Clinical studies had confirmed the emergence of a new hybrid HIV variant which was similar to HIV-1 and HIV-2, but the mutation had resulted in resistance to generic ART drugs used in treating HIV-1 and HIV-2 infections. The sample of the new HIV variant had been sent to the World Health Organisation (WHO) which had confirmed the emergence of a new HIV-3 variant;
- All existing generic ART drugs had proved to be ineffective in treating the new HIV-3 virus;
- To date, only one ART drug, *Philovera*, had proved to be effective in treating the HIV-3 variant. The patent for *Philovera* is held by a pharmaceutical company, Diabax, based in Goodland, a developed WTO member, and costs USD5000,00 per patient per annum.

- Diabax has declined to enter into negotiations for the granting of licenses for pharmaceutical companies in other countries to manufacture *Philovera*, which if accepted, would have decreased the cost of the drug;
- There is no technology and knowledge capacity to manufacture *Philovera* in Boland, and Boland cannot afford to procure the drug from Diabax;
- Capacity to manufacture *Philovera* exists in Hopely, a developing WTO member, however, Boland has not acceded to the Protocol Amending the TRIPS Agreement of 2005.

You are the chief trade legal advisor to the government of Boland and are required to provide a legal brief on options available in the WTO system for Boland to procure *Philovera* at an affordable and reasonable price to assist in dealing with the HIV-3 pandemic.

(20 marks)

QUESTION THREE

You are an independent legal practitioner and are asked for an opinion on whether Zimbabwe should continue to be part of the World Trade Organisation. Write a report objectively setting out your legal opinion.

(20 marks)

QUESTION FOUR

Two of the key premises on which international trade is based are those of 'most favoured nation-treatment' and 'national treatment'. With reference to the WTO Agreement and Dispute Settlement Body Reports, what do you understand by these concepts?

(20 marks)

**TOTAL MARKS: 70
END OF QUESTION PAPER
BEST WISHES!!**