

THE LEGITIMATE REGULATORY DISTINCTION: CHALLENGING THE BOUNDARY BETWEEN INTERPRETATION AND LAW-MAKING IN THE APPELLATE BODY^a

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Abstract

This paper focuses on the nature of the Appellate Body's interpretative method in arriving at its decision to read-in that Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) will not prohibit a detrimental impact on competitive opportunities for imports in cases where such detrimental impact stems exclusively from a legitimate regulatory distinction. This reading-in of the new phrase has been described as having been a contextual and teleological approach to interpretation by the Appellate Body. In this paper I consider what is meant by a teleological approach to interpretation and whether such an interpretation could in fact be another name for judicial law-making in some instances. In doing so, I suggest that a test to determine whether or not law-making has taken place could be to ask whether the Appellate Body's expression of the rights and obligations contained in the provision at issue was predictable. This is then applied to the Appellate Body's reasoning in *US – Clove Cigarettes* (2012) after an analysis of this reasoning, and from this I conclude that law-making could indeed have taken place in this case under the guise of a teleological approach to interpretation.

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I. Introduction

In the case of *US – Clove Cigarettes (2012)*, the Appellate Body (AB) read-in an addition to the test for consistency with Article 2.1 of the TBT Agreement such that Article 2.1 would not prohibit a detrimental impact on imports where it stems exclusively from a legitimate regulatory distinction.³ This development in TBT jurisprudence has sparked much debate on various fronts.⁴ However the focus of this paper is on the nature of the AB's interpretative method in arriving at the new test.

In this regard, Misuo Matsushita *et al* have stated that ‘...the omission of a general exception such as Article XX [from the TBT Agreement] had to be compensated by a dogmatically tenable contextual and teleological interpretation.’⁵ This implies not only that the AB took a contextual and teleological approach⁶ in interpreting Article 2.1 of the TBT Agreement, but also that this approach was necessary. The use of a teleological approach in this case evidences a clear shift in AB interpretative methods from the early days of the AB where there was heavy reliance on the Vienna Convention on the Law of Treaties (VCLT) and a textual approach to interpretation in particular.⁷ As noted by Claus-Dieter Ehlermann in 2003:

The heavy reliance on the ‘ordinary meaning to be given to the terms of the treaty’ has protected the Appellate Body from criticism that its reports have added to or diminished the rights and obligations provided in the covered agreements. On a more

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³ WTO Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)*, WT/DS406/AB/R, adopted 4 April 2012 at 174

⁴ See G Marceau “The New TBT Jurisprudence in US - Clove Cigarettes, WTO US - Tuna II, and US – Cool” (2013) 8 1 *Asian Journal of WTO and International Health Law and Policy* 2, PC Mavroidis “Driftin’ too far from shore – Why the test for compliance with the TBT Agreement developed by the WTO Appellate Body is wrong, and what should the AB have done instead” (2013) 12 3 *World Trade Review* 509, J Meltzer, A Porges “Beyond discrimination? The WTO parses the TBT Agreement in US — Clove Cigarettes, US — Tuna II (Mexico) and US—COOL” (2013) 14 2 *Melbourne Journal of International Law* 699 for discussion on the nature of the new TBT jurisprudence as initiated by *US – Clove Cigarettes (2012)*.

⁵ M Matsushita *et al* *The World Trade Organization: Law, Practice and Policy* 3 ed (2015) OUP at 451

⁶ An approach rejected by the Appellate Body in *Japan – Alcoholic Beverages*, as noted in M Lennard “Navigating by the Stars: Interpreting the WTO Agreements” (2002) 5 1 *Journal of International Economic Law* 17 at 27

⁷ Michael Lennard notes the centrality of the Vienna Convention even where Members were not signatories in M Lennard (2002) at 18, and he further notes that the Vienna Convention favours a textual approach at 21.

general level, the interpretative method established and clearly announced by the Appellate Body has had a legitimizing effect.⁸

A consequence of this sort of shift in approach, therefore, could be to diminish the perceived legitimacy of the AB as an institution whose mandate is simply dispute settlement and clarification in terms of Article 3.2 of the Dispute Settlement Understanding (DSU).⁹ However, a shift in interpretative approach from the early days of strict textualism of the AB was foreseen, and may even be described as inevitable given the increased caseload of the AB and the greater complexity of the issues that come before it.¹⁰ A teleological approach to interpretation may in fact be permissible under the dispute settlement mandate in the DSU in that it leads to clarification of obligations, albeit that it may increase the tension between the political and quasi-judicial activities of the WTO.¹¹ What would be difficult to reconcile with the AB's mandate in terms of Article 3.2 of the DSU, however, is judicial law-making.

This paper therefore seeks to address the question of whether the reading-in of the legitimate regulatory distinction test indeed represents a necessary shift toward a teleological approach to interpretation by the AB, or whether the AB exceeded its mandate to clarify and interpret the Agreements by venturing into the realm of law-making.

In order to answer this question I first consider the approaches to interpretation adopted by the AB and what limits to its interpretative methods may be present in terms of the DSU. I then consider what is meant by a teleological approach to interpretation, and whether there are any means by which to test whether such legal interpretation infringes on the province of law-making. Thereafter, the AB report in *US – Clove Cigarettes (2012)* is considered as it relates to the reading-in of the legitimate regulatory distinction requirement to Article 2.1 of the TBT Agreement in the context of the elucidated teleological approach to interpretation and the meaning of judicial law-making.

⁸ CD Ehlermann "Experiences from the WTO Appellate Body" (2003) 38 *Texas International Law Journal* 469 at 481

⁹ Article 3.2 specifically entrusts the DSB (and by implication the work of the Appellate Body) to preserve the rights and obligations of its members and not to add to or diminish these rights through its rulings.

¹⁰ Ehlermann predicted that the tension between quasi-judicial and political activities will continue to grow, because of increased caseload and complexities of issues before the Appellate Body, and also based on the experience of the European Court of Justice. See Ehlermann (2003) *Texas International Law Journal* at 484. Isabelle van Damme's scepticism in labelling the Appellate Body's method of interpretation as teleological in general is noted, however the argument in this paper is confined to the decision in *US – Clove Cigarettes (2012)*, which was decided after her scepticism was expressed. See I Van Damme "Treaty Interpretation by the WTO Appellate Body" (2010) 21 *3 European Journal of International Law* 605 at 618

¹¹ See Ehlermann (2003) *Texas International Law Journal* at 484.

II. Interpretative approaches taken by the Appellate Body and its mandate in terms of the Dispute Settlement Understanding

In its early days, the AB showed quite a clear tendency toward literal interpretation of the WTO Agreements. As pointed out by G Shaffer *et al*, '[t]he AB often adopted a technical, formalistic, and text-based approach, frequently citing dictionaries to support its reasoning.'¹² Much has been written about how this approach to interpretation has changed over the years, and why this may be the case.¹³ There seems to be general consensus that such a literal approach to interpretation began with the reference to the DSU and the mandate within Art 3.2 to interpret the texts in line with customary rules of interpretation in international law. These customary rules of interpretation were seen to be embodied in the VCLT, which has as its starting point in Art 31 that words should be given their ordinary meaning.

As the years have passed, however, more complex cases have come before the WTO for adjudication and the field of WTO law has developed alongside. As put by Schaffer *et al*, '[t]he WTO dispute settlement system has become much more legally and technically complex. Lawyers now frequently make procedural challenges giving rise to new jurisprudence, recursively increasing the need for lawyers.'¹⁴ This shift in interpretative approach over the years has given rise to criticism of the AB, such that it has at times been alleged that they have exceeded their mandate in terms of the DSU.¹⁵ However, Articles 31 and 32 of the VCLT do allow for adjudicators to take more into account than the ordinary meaning of the text, namely that the ordinary meaning of the text should be interpreted in its context and in light of the treaty's object and purpose.¹⁶ This context includes the preamble and annexes to the treaty¹⁷ as well as:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

¹² G Shaffer *et al* "The Extensive (But Fragile) Authority of the WTO Appellate Body" (2016) 79 1 *Law and Contemporary Problems* 237 at 252. See also S Picciotto "The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance" (2005) Working Paper 14: School of Public Policy Working Paper Series: ISSN 1479-9472 at 13

¹³ Quite a cynical assessment was given by Ghias in 2006: "It is not likely that the Appellate Body is going to gain unbridled power over international trade law and policy; rather, it will slowly continue to consolidate and expand its influence as it engages in judicial lawmaking". SA Ghias "International Judicial Lawmaking: A Theoretical and Political analysis of the WTO Appellate Body" (2006) 24 *Berkeley Journal of International Law* 534 at 552. See also J Greenwald "WTO Dispute Settlement: An Exercise in Trade Law Legislation?" (2003) 6 *Journal of International Economic Law* 113 at 114

¹⁴ Shaffer *et al* (2016) *Law and Contemporary Problems* 252

¹⁵ Indeed, the AB's initial caution in interpretation is evidence of its "concern to avoid accusations that it has exceeded its mandate through judicial activism." S Picciotto "The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance" (2005) Working Paper 14: School of Public Policy Working Paper Series: ISSN 1479-9472 at 16. See also n 11 above

¹⁶ Art 31(1)

¹⁷ Art 31(2)

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.¹⁸

These two provisions are particularly relevant in the context of the WTO because they effectively allow the AB to interpret a provision in a covered Agreement in light of other Agreements which may be related to the Agreement in question. Thus, for those Agreements which evolved out of the GATT, these two provisions of the VCLT could justify an interpretation of that Agreement in the context of the GATT, which would include the exceptions contained in Article XX of the GATT where similar such exceptions may not be present in the Agreement under consideration. The intention of the parties may also be taken into account in the interpretation of a provision by the AB in terms of Art 31(4) of the VCLT, and Art 32 allows for supplementary means of interpretation such as looking to preparatory work and circumstances surrounding a treaty's conclusion where interpretation in terms of Art 31 leaves the meaning to be obscure, ambiguous, or manifestly absurd or unreasonable, or simply to confirm the meaning obtained through Art 31. This potentially gives the AB wide scope in terms of its manner of interpretation of the WTO Agreements, but because the VCLT has the ordinary meaning of the text as its starting point it could be argued this should be the primary focus of the AB in its interpretation – hence the AB's initial textual approach to interpretation, among other reasons. However, Art 31(1) of the VCLT appears as one unbroken sentence¹⁹ while Art 31(2) appears to simply expand on what is meant by 'context'. In this regard, it could be argued that the VCLT thus allows the AB to adopt a contextual or purposive approach to interpretation, and the context and purpose of the provision at issue can be ascertained in light of other WTO Agreements.

If a teleological approach to interpretation can be seen to be consistent with the VCLT in this way, then it is nonetheless consistent with the mandate in terms of the DSU to clarify the agreements in accordance with the customary rules of interpretation in public international law. But Art 3.2 of the DSU does go further to specify that '[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.' Thus, while the customary rules of international law may allow the AB some flexibility in their methods of interpretation, any criticism of the AB's interpretative methods would be well-founded if such interpretative method can be seen to add to or diminish the rights of members in any of the covered agreements. Indeed, if they were to do so, then it could be argued that they have gone beyond mere interpretation and crossed the boundary into law-making.

III. The Teleological Approach and Judicial Law-Making

¹⁸ Art 31(2) (a)&(b)

¹⁹ 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'

A. What is a teleological approach?

As shown above, the AB had initially begun its approach to interpretation by adopting a purely literal approach in terms of Art 31 of the VCLT, and as such, such approach served to preserve its legitimacy as a newly formed institution. Lately, however, it has shifted toward what has been described as a teleological approach, and such approach may not necessarily be inconsistent with the VCLT or the DSU, provided that such approach remains a form of interpretation (even if it is purposive or contextual) and it does not diminish any of the rights or obligations contained in the covered agreements. This section will explore in greater detail what is meant by a teleological approach to interpretation.

Historical and teleological interpretation has been described by J Maftai & V Coman as involving 'clarifying the meaning of the terms of a treaty taking into account the historical, social, political conditions, needs which led to the adoption of the document in question and the purpose pursued by the states, as parties to the Treaty'.²⁰ This is an interesting description in the context of the AB because it refers to the clarification of meaning of terms of a treaty, as the AB is mandated to do in terms of the DSU. It has however been said that the European Court of Justice (ECJ) adopts a teleological approach to interpretation.²¹ This is so because it is partly the mandate of the ECJ to develop a body of jurisprudence in line with the object and purpose of the EU. Primarily, the ECJ also follows a civil law tradition, and, as pointed out by K Zweigert & H Puttfarcken, civil law methods of interpretation generally seek to extend the application of a statute, rather than restrict it, as might be the case in the common law.²² Writing as they were in 1970, they describe modern jurisprudence to be tending toward actualizing interpretation, rather than historical interpretation.²³ The plain meaning rule at this stage had fallen out of favour in civil law jurisprudence in favour of an actualising approach.²⁴ As a starting point, therefore, a teleological approach to interpretation could be seen to be a form of actualising interpretation which evolved out of a civil law tradition.

According to Lord Slynn, to his mind teleological is synonymous with purposive.²⁵ It is further implied by M van Alstine that legislative purpose is

²⁰ J Maftai & V Coman "Interpretation of Treaties" (2012) 8 2 *Acta Universitatis Danubius* 16 at 23

²¹ Ehlermann (2003) *Texas International Law Journal* 480, S Picciotto (2005) Working Paper 14 at 16

²² K Zweigert & H Puttfarcken "Statutory Interpretation – Civilian Style" (1970) *Tulane Law Review* 44 704 at 706

²³ Zweigert & Puttfarcken (1970) *Tulane Law Review* at 709

²⁴ Zweigert & Puttfarcken (1970) *Tulane Law Review* at 712. There is in fact quite an interesting reason given for this, namely that 'language is "plain" only if its meaning is plain; if not, the language is ambiguous. So in reality, it is the meaning, and the meaning only which we examine; whether or not we regard a statute as having a plain meaning is a result of our interpretation of the statute.' Zweigert & Puttfarcken (1970) *Tulane Law Review* 713. Thus if a judicial officer is called to interpret a provision by looking to its plain language, by its very nature it is implied that the provision's language is not plain.

²⁵ Lord Slynn of Hadley "They Call it "Teleological"" (1992) 7 *Denning Law Journal* 225 at 226.

synonymous with teleological justification.²⁶ Lord Slynn goes on to say that with respect to the ECJ, '[t]hat Court may, in application of a teleological interpretation, go so far as to override the clear, ambiguous words of a legal text.'²⁷ I assume that in this context what he meant was 'unambiguous' rather than 'clear and ambiguous', and that this was simply a typo in the final version of the article in which his sentiments appear. His meaning becomes clearer where he gives the example of the case of *Fellinger*,²⁸ where the ECJ looked to the preamble and purpose behind the provision at issue at the expense of the ordinary meaning of the regulation.²⁹ In so doing, what the court effectively did was to alter the provision in question to refer to the member state of last employment rather than member state of residence (as appeared in the text of the provision) by viewing it in light of other provisions. Essentially what they did was to give more weight to the provision in light of which it was viewed than to the provision they were interpreting, and this was seen to be a teleological approach to interpretation. Zweigert & Puttfarcken also give the example of how the meanings of certain provisions of the French Civil Code are currently the exact opposite to the original intention of the legislature and this still remains under the umbrella of 'interpretation' as such interpretation takes into account how things have changed over the years.³⁰

This then begs the question: at what point would such a dramatic shift in the effect of a provision have exceeded the bounds of interpretation and rather be better described as judicial law-making? And at what point could such a teleological approach be inconsistent with the mandate of the AB in terms of the DSU?

B. Teleological interpretation vs judicial law making

1. Law-making under the guise of interpretation?

As a cynical starting point, it could be alleged that a teleological approach to interpretation is simply a misnomer, when in fact it could be the civil law equivalent of judicial law-making. This point is alluded to by Zweigert & Puttfarcken where they state as follows:

If civilian courts, over the course of centuries, adapted the meaning of a statutory rule to the social conditions of the time, its wording having remained unchanged, civil law jurisprudence would still by all means attempt to bring such adaptation under the heading of 'interpretation' and thus 'application' of the original statute. If this same

²⁶ M van Alstine "Dynamic Treaty Interpretation" (1998) 146 3 *University of Pennsylvania Law Review* 687 at 743

²⁷ Slynn (1992) *Denning Law Journal* 226

²⁸ Case 67/79 *Fellinger v. Bundesanstalt für Arbeit* [1980] E.C.R. 535. ECJ quoted in Slynn (1992) *Denning Law Journal* at 226

²⁹ Slynn (1992) *Denning Law Journal* 227

³⁰ Zweigert & Puttfarcken (1970) *Tulane Law Review* 716

adaptation were effected by legislative enactment of a new statute, nobody would doubt that this was legislation and consequently, 'making' law.³¹

Thus a teleological approach to interpretation may just be semantics: the difference between the effect of changed wording of a legal text emanating from a judicial body where the same change of wording, if coming from a legislature, would be termed law-making. Zweigert & Puttfarken's view on the boundary between interpretation and law-making in civil law systems in fact goes even further, such that in practice there is very little difference between civil and common law legal systems as far as the role of the judiciary is concerned – the main difference is the philosophy underpinning them.³² Theoretically, there is no methodology in civil law jurisprudence 'which would analyze, rationalize, and systematize the specific role of the judge in the process of finding and making law.'³³ Despite this, they allege, 'the mainstream of jurisprudence has constantly refused to recognize the true extent of judicial law-making.'³⁴

If, then, ECJ interpretation styles such as the teleological approach are now being employed by the AB at the WTO, it may well be the case that judicial law-making could take place under the guise of interpretation. But even if this were the case it would be insufficient to simply rename teleological interpretation as judicial law-making, especially given the gravity of such an allegation as it applies to the AB. It may be true that certain instances of application of a teleological approach to interpretation would not amount to judicial law-making but rather could simply be an expression of the application of the VCLT in complex situations.

2. Possible tests for judicial law-making

In jurisdictions which incorporate common law elements – in particular the doctrine of precedent - it could be said that where a court makes a decision by laying down an interpretation, a general rule is created which is binding on all cases which fall within that rule.³⁵ In this way, interpretation and law-making are synonymous where that *ratio decidendi* binds subsequent courts in the manner of its decision-making. To determine whether judicial law-making in such jurisdictions has taken place, distinction may be drawn between decision-making on the facts and decision-making based on rules – as was made by JL Montrose.³⁶ An example he gives to illustrate this difference is where there exists a rule which applies to blondes and a rule which applies to brunettes. Where a court is called to decide which rule applies to auburn-

³¹ Zweigert & Puttfarken (1970) *Tulane Law Review* 715

³² Zweigert & Puttfarken (1970) *Tulane Law Review* 716

³³ Zweigert & Puttfarken (1970) *Tulane Law Review* 715

³⁴ Zweigert & Puttfarken (1970) *Tulane Law Review* 718

³⁵ JL Montrose "Judicial Law Making and Law Applying" (1956) *Butterworths South African Law Review* 187 at 205

³⁶ See Montrose (1956) *Butterworths South African Law Review* 187

haired people, if the court were to interpret that auburn-haired people fall into one category or the other, a rule has been created. As he puts it: 'to include auburn haired people in the group of brunettes is, of course, disguised law-making.'³⁷ On the other hand, if a judge were simply on the facts of a case to decide that an individual who is auburn-haired should have the law applying to brunettes apply to her, then this would be law-applying.³⁸ Naturally, however, this kind of a test for law-making will not be useful in a civil law-type environment such as the WTO where the concept of judicial law-making is not as readily accepted: an interpretation of a rule such as an extension of the definition of brunette to include auburn haired people, which is used by subsequent adjudicators, may yet simply be considered interpretation and not law-making.

In his discussion of what is meant by a teleological approach adopted by the ECJ, Lord Slynn of Hadley alludes to a possible test to determine the point at which interpretation becomes law-making. Writing from a British and thus common law perspective, he describes how the approach of the English courts to interpretation is more literal and historical rather than purposive and teleological.³⁹ But law-making within the English courts is something that happens quite readily in the development of the common law, and so it is described without any pretence within that system of law.⁴⁰ It is from this perspective that he describes that the test to determine whether judicial law-making has taken place or whether it is merely interpretation depends on the predictability of the result.⁴¹ He goes further to say that while the approach of the English courts and that of the ECJ to interpretation may differ, the result of that interpretation – whether teleological or literal – would nonetheless be predictable. The result where law making has taken place would not be. As he puts it: 'The teleological method of the European Court may well yield different results from the more literal methods of English domestic law, but both methods can be expected to give relatively predictable results in so far as they stay within the limits of interpretation.'⁴²

Unfortunately, Lord Slynn does not go much further in describing how we might define the predictability of the result, but it is perhaps a useful starting point. One question which is left open, for example, is what is meant by 'result'? Is the 'result' simply the outcome of the case after interpretation and application of the relevant law? Or does 'result' include a binding new interpretation of the applicable law? For example, an adjudicating authority could hypothetically add an additional

³⁷ Montrose (1956) *Butterworths South African Law Review* 196

³⁸ Montrose (1956) *Butterworths South African Law Review* 196

³⁹ Slynn (1992) *Denning Law Journal* 226

⁴⁰ This is the case for most jurisdictions which adopt a form of common law. As was put by FR Aumann in 1932: "Today it may be safely asserted that the weight of juristic opinion holds that judges (Anglo-American at least), do make law by means of the precedents which they establish through their decisions." F R Aumann "Judicial Law Making and Stare Decisis" (1932) 21 *Kentucky Law Journal* 156 at 160. The setting of precedent in itself could be argued to be indicative of law-making having taken place, but a full discussion of the nature and limits precedent are beyond the scope of this paper.

⁴¹ Slynn (1992) *Denning Law Journal* 230

⁴² Slynn (1992) *Denning Law Journal* 231

requirement not present in the text of the applicable law which is wholly unsupported by the apparent object and purpose of the text as evidenced by its preamble or any evidence of the conversation which took place leading to its promulgation, but such additional requirement may not ultimately affect the outcome of the case at hand. This may occur, for example, where a form of exception has been read in to the text, but on the facts of the case before the adjudicating authority the requirements for the newly stated exception are not met, and thus the outcome of the case remains predictable. However, such additional requirement may subsequently be applied by the same adjudicating authority to a case of similar facts at a later stage simply by virtue of the fact that such additional requirement had been created by them in a previous case.⁴³ In this case an exception has been created, and so too then it could be argued that law has essentially been created, but the outcome of the case in which the law was created would nonetheless be predictable.

It follows then, that if Lord Slynn's test is to be useful, it must surely be that the outcome which is to be considered would be more than the outcome of the particular case at hand, but rather the outcome of the legal reasoning which is carried forward from that case as well. Perhaps a better question to ask in this context would be 'is the way in which the adjudicating authority arrived at its decision a predictable expression of the rights and obligations implied in the law on which it relied?' This makes for a rather clumsy test in its own right, but it would allow for teleological interpretation to take place without it being construed as law-making. Perhaps a more succinct test, and one which is more in line with the nature of adjudication at the WTO and the mandate of given to dispute settlement by the DSU in terms of Art 3.2 would be 'was the AB's expression of the rights and obligations contained in the provision at issue predictable?' This may, at the very least, provide a little more clarity to the question of whether any rights or obligations have been diminished by the decision of the AB on a particular issue while still allowing for a teleological approach to interpretation in line with the VCLT.

IV. US – CLOVE CIGARETTES AND THE LEGITIMATE REGULATORY DISTINCTION

A. What changed?

In the TBT jurisprudence preceding the AB report in *US – Clove Cigarettes*, the legal test to determine consistency with Article 2.1 involved a fairly straightforward analysis:

1. Is the measure at issue a technical regulation?
2. Are the products at issue like products?

⁴³ While the role of precedent in AB decision-making is outside the scope of this paper, it is perhaps useful to consider that the use of its own reasoning employed in previous decisions by the AB could be an indicator that these decisions could be considered to be a source of law.

3. Are those products accorded treatment less favourable than products originating in any other country or domestic products?⁴⁴

These requirements are quite clearly lifted from the provision itself in a manner which could inspire little criticism for the AB's interpretation.⁴⁵ After *US – Clove Cigarettes*, these requirements in the test for consistency have not changed in themselves, however, the question of less favourable treatment has been expanded. Prior to *US – Clove Cigarettes*, 'treatment less favourable' was interpreted to mean where the measure 'modifies the conditions of competition in the relevant market to the detriment of the imported products.'⁴⁶ Following *US – Clove Cigarettes*, this interpretation has been expanded such that Article 2.1 has been found to not prohibit 'any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions.'⁴⁷

This is a particularly significant development because the phrase 'legitimate regulatory distinction' does not appear in Article 2.1, nor does it appear anywhere else in the TBT Agreement. While it may be argued that it is a mere elucidation on what is meant by less favourable treatment,⁴⁸ the reading in of the new phrase is potentially problematic for two reasons. The first of these reasons is that it could be construed as creating a form of exception where no such exception is otherwise present in the text, and as such it could be seen to diminish certain rights and obligations contained in the TBT Agreement in violation of Article 3.2 of the DSU. The second reason is related to the first: rather than being simply words used to elucidate their reasoning once-off based on the facts of one particular case, the use of the phrase as a form of exception has been carried forward and utilised in subsequent decisions, namely *US – Tuna II (Mexico)*⁴⁹ and *US – COOL*.⁵⁰ What this means is that the use of the phrase has become a permanent feature of TBT jurisprudence. As such, it may be possible to view the AB report as a source of law which may not be present in the TBT Agreement itself, and as such the AB could be seen to have exceeded its mandate in terms of the DSU. However, if the development of the phrase could be seen to be a form of interpretation which is covered by customary international law, then such criticism would be unfounded. What follows is an analysis of how the AB arrived at its decision to include the new

⁴⁴ This test appears in Appellate Body Report, *US – Clove Cigarettes*, above n1, para 168

⁴⁵ Article 2.1 of the TBT Agreement reads as follows:

'Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country'

⁴⁶ This was accepted by the parties in Appellate Body Report, *US – Clove Cigarettes*, above n1, para 166

⁴⁷ Appellate Body Report, *US – Clove Cigarettes*, above n1, para 174

⁴⁸ The test for determining less favourable treatment prior to this case and afterward also involves words which do not appear in the text of Art 2.1 of the Agreement

⁴⁹ WTO Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II (Mexico))*, WT/DS381/AB/R, adopted 16 May 2012

⁵⁰ WTO Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements (US – COOL)*, WT/DS384/AB/R, adopted 29 June 2012

requirement for consistency with Article 2.1 of the TBT Agreement, whereafter this analysis will be used to determine whether the reading-in of the new phrase is indeed problematic for the reasons outline above.

B How did the AB arrive at the new test?

The AB's reasoning in arriving at the new test is contained in paragraphs 162-188 of the AB report. This reasoning could be summarised as follows:

- Treatment less favourable is determined by assessing whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the imported products.⁵¹
- In *Dominican Republic – Import and Sale of Cigarettes*,⁵² it was also accepted that there would not be less favourable treatment where ‘the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product’⁵³, and as such other factors may be taken into account in the treatment less favourable enquiry.
- The ‘treatment no less favourable’ requirement in the TBT Agreement applies to technical regulations. Technical regulations ‘establish distinctions between products according to their characteristics or their related processes and production methods.’⁵⁴ Thus certain distinctions, ‘in particular those that are based *exclusively* on particular product characteristics or their related processes and production methods,’ would not necessarily be seen to constitute less favourable treatment in terms of Art 2.1 TBT.⁵⁵
- The AB then moves to Art 2.2 for the sake of context, and as such they focus on the fact that ‘obstacles to international trade’ may be permitted insofar as they are not found to be ‘more trade-restrictive than necessary to fulfil a legitimate objective’. This context is then used to interpret Art 2.1 as not prohibiting just any obstacle to international trade.⁵⁶

⁵¹ Appellate Body Report, *US – Clove Cigarettes*, above n1, para 166

⁵² WTO Appellate Body Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes (Dominican Republic — Import and Sale of Cigarettes)*, WT/DS302/AB/R, adopted 25 April 2005

⁵³ Appellate Body Report, *US – Clove Cigarettes*, above n1, para 166, referring to WTO Appellate Body Report, *Dominican Republic — Import and Sale of Cigarettes*, above n49, para 96. Incidentally, *Dominican Republic — Import and Sale of Cigarettes* was decided in terms of Art III:4 of the GATT, but the AB in *US - Clove Cigarettes* nonetheless saw this as a worthy comparison.

⁵⁴ Appellate Body Report, *US – Clove Cigarettes*, above n1, para 169. Incidentally, the word ‘distinction’ does not appear in the Annex 1 definition of a technical regulation

⁵⁵ I have attempted to paraphrase this line of reasoning for the sake of clarity, but it should be noted that the word “exclusively” as quoted from paragraph 169 of the report is not my emphasis.

⁵⁶ Appellate Body Report, *US – Clove Cigarettes*, above n1, para 171. They go on to say: “Indeed, if any obstacle to international trade would be sufficient to establish a violation of Article 2.1, Article 2.2 would be deprived of its *effet utile*.”

- The AB then looks to the sixth recital of the preamble to the TBT Agreement for the sake of context in determining the meaning of legitimate objective.⁵⁷ The AB finds that this recital makes it clear that technical regulations may be pursued for the sake of those legitimate objectives listed, provided that such technical regulations ‘are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the TBT Agreement.’⁵⁸
- The AB then refers to the object and purpose of the TBT Agreement, saying that such object and purpose is to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members’ right to regulate.⁵⁹
- The AB concludes paragraph 174 by stating: ‘This object and purpose therefore suggests that Article 2.1 should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions.’⁶⁰

This is the first time that these words are used together in this context and at this point the phrase has been created. The AB then goes on to consider the meaning of ‘treatment no less favourable’ in the context of Art III:4 of the GATT decisions. The discussion of treatment less favourable takes on a more general character in paragraph 176 as it refers to the requirement of effective equality of opportunities for imported products as part of the treatment no less favourable requirement. But it is interesting to note that the AB chooses to use the phrase ‘regulatory distinctions’ in its descriptions of the types of measures where there was found to be treatment less favourable in terms of the GATT.⁶¹ The phrase “regulatory distinction” is used again in paragraph 178 where the AB refers to its decision in *EC – Asbestos*,⁶² and the AB report in *EC – Asbestos* is then quoted as saying that ‘a Member may draw distinctions between products which have been found to be ‘like’, without, for this reason alone, according to the group of ‘like’ imported products ‘less

⁵⁷ Appellate Body Report, *US – Clove Cigarettes*, above n1, para 172 and 173. Much of the wording of the sixth recital has clearly been lifted from Art XX of the GATT, which functions as an exceptions clause. The TBT Agreement contains no such exceptions clause, despite the wording of the sixth recital.

⁵⁸ Appellate Body Report, *US – Clove Cigarettes*, above n1, para 173. The way in which the AB considers this recital in this paragraph seems to form the basis for the reading-in of an exception into Art 2.1, despite the fact that the AB specifically refers to the recital as context for Art 2.1.

⁵⁹ Appellate Body Report, *US – Clove Cigarettes*, above n1, para 174. This object and purpose is not explicitly stated in the preamble to the agreement, and indeed there is no explicit “right to regulate” stated in the Agreement. However, recitals 3 and 5 of the preamble do allude the obtaining of this balance.

⁶⁰ Appellate Body Report, *US – Clove Cigarettes*, above n1, para 174

⁶¹ Appellate Body Report, *US – Clove Cigarettes*, above n1, para 176

⁶² WTO Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos (EC – Asbestos)*, WT/DS135/AB/R, adopted 12 March 2001, quoted in *US – Clove Cigarettes* at para 178

favourable treatment' than that accorded to the group of 'like' domestic products.⁶³ After reaching its conclusion on the interpretation of treatment less favourable in terms of the GATT, the AB then goes on to reiterate that in the context of the TBT Agreement, where there is not *de jure* discrimination, it then becomes necessary for a panel to assess whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction.⁶⁴

C An analysis of the AB's method in arriving at the new test

Following from the summary of the AB's reasoning above, the AB can be seen to have first looked to its own previous interpretation of treatment less favourable, and considered that in its own previous interpretation of treatment less favourable in terms of the GATT it had left open the possibility that such detrimental effect could be explained by factors other than a form of less favourable treatment prohibited by the GATT. It then looked to the nature of a technical regulation, and from there derived the concept of a 'distinction', although it is not clear where this word arose from because it is not in the definition of a technical regulation in terms of Annex 1 of the TBT Agreement. The AB then used the context of a technical regulation again to include the word "exclusively" in that such measure would be seen to relate to a technical regulation. Incidentally, the word 'exclusively' in Annex 1 of the TBT Agreement is preceded by the word 'may'⁶⁵ in its reference to types of technical regulations. The AB then moves to look at context within the TBT Agreement, namely Article 2.2 and recital 6 of the preamble. From these provisions it gathers the word 'legitimate', and sees room for an exception to be read into Article 2.1. In this sense it reads a purpose into the TBT Agreement. It then further refers to the purpose of the TBT Agreement in its final formulation of the test. It then went on to look at Article III:4 of the GATT as further context for its interpretation. Although its purpose in doing so is not explicit, it does appear that the AB uses this context to further justify its use of the words 'regulatory' and 'distinction' in its new test.

At the risk of putting it too crudely, the AB's reasoning in this case could be further summarised and be seen to amount to the following: detrimental effects on products do not amount to less favourable treatment when such impact is caused by something other than the origin of the product, and in the context of the preamble and Article 2.2 of the TBT Agreement, as well as Article III:4 of the GATT, there is scope for an acknowledgment of certain types of technical regulation which result in a

⁶³ Appellate Body Report, *EC – Asbestos*, above n 59, para 100 quoted in Appellate Body Report, *US – Clove Cigarettes*, above n1, para 178

⁶⁴ Appellate Body Report, *US – Clove Cigarettes*, above n1, para 182

⁶⁵ The provision defines a technical regulation as a 'Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It *may* also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.' (my emphasis). This indicates that technical regulations do not necessarily deal exclusively with the examples given.

detrimental effect on certain products which should not be prohibited by the TBT Agreement. These types of technical regulations are the ones that draw distinctions between products in a regulatory fashion (which is the essence of technical regulations) for the exclusive purpose of pursuing legitimate objectives.

The AB's reference to the definition of a technical regulation as implying that not all distinctions amount to less favourable treatment does not appear to advance their argument: to say that because technical regulations establish distinctions between products according to their characteristics or their related processes and production methods means that those types of distinctions would not necessarily be seen to constitute less favourable treatment in terms of Article 2.1 TBT amounts to circular reasoning. It amounts to saying that technical regulations do not necessarily accord less favourable treatment to imported products where those technical regulations are technical regulations by their very nature. Surely this is why the phrase "treatment no less favourable" was included in Article 2.1 in the first place?

Reference to their own reasoning in *Dominican Republic – Cigarettes* to say that detrimental effects that are caused by something other than origin do not necessarily amount to treatment less favourable also does not further their argument because there are many other possible causes of a detrimental effect that could be taken into account, not just those that stem exclusively from a legitimate regulatory distinction. The AB could just as easily have included another step in the test for consistency: for example, they could just as easily have stated that a panel should consider whether the detrimental impact was caused by market forces outside the control of the respondent in determining whether there has been treatment less favourable.

What is left of the AB's reasoning after these two steps are extracted, therefore, is merely the context of the provision provided in the preamble and Art 2.2 of the TBT Agreement, as well as Article III:4 of the GATT, and the read-in purpose of the TBT Agreement.

1. Is it teleological interpretation?

It seems fairly safe to say in this context that the AB in this case interpreted Article 2.1 in light of the object and purpose of the TBT Agreement to the extent that more weight was given to the context provided by other provisions within the TBT Agreement and in other Agreements than to the wording of the provision at issue. This method of interpretation is clearly contextual and purposive, and in light of the discussion and examples given above, could indeed be seen to be teleological. However, this interpretation does not necessarily constitute a departure from the VCLT, given that Art 31(2) allows for other provisions in the Agreement and other Agreements related thereto to be looked to for the purpose of context. But does the AB's reasoning in this case cross the boundary between interpretation and judicial law-making?

2. Is it judicial law-making?

As mentioned above, a possible test to determine whether or not judicial law-making has taken place could be 'was the AB's expression of the rights and obligations contained in the provision at issue predictable?'

The reading in of the new words in determining 'treatment no less favourable' in itself does not amount to an unpredictable expression of the rights and obligations contained in Article 2.1. As mentioned above, in its previous jurisprudence the AB had interpreted treatment no less favourable to amount to 'effective equality of opportunities for imported products' in the context of the GATT. These words do not appear in the text of the Agreement either, so how does the legitimate regulatory distinction differ?

In the case of effective equality of opportunities for imported products, this can be seen to amount to a definition, and as such the definition is a predictable expression of 'treatment no less favourable'. The legitimate regulatory distinction on the other hand appears as though it could be a retrofitted exception, manufactured deliberately in light of the context and purpose of the TBT Agreement. As shown in the analysis above, the only parts of the AB's reasoning that culminated in the creation of the new test were their consideration of the context and purpose of Article 2.1 of the TBT Agreement as evidenced by other provisions and other Agreements. From this context and purpose the AB has effectively decreed that there should be some form of relief in the Agreement for Members who wish to regulate for legitimate reasons, and in a sense the legitimate regulatory distinction amounts to that relief. What is also striking from the above analysis is the way in which the AB extracted their words from seemingly authoritative sources: from Annex 1 and Article 2.2 of the TBT Agreement, and from their own previous jurisprudence. In so doing they seem to have been looking to justify the use of language not in Article 2.1 where such language would otherwise not be a predictable definition of the concept of 'treatment no less favourable'. In this way it is further distinct from the previous interpretation of 'treatment no less favourable'.

Finally, in the way in which it operates, the legitimate regulatory distinction appears to operate as a form of exception in that it could potentially justify technical regulations giving less favourable treatment to imported products. By its nature, an exception would diminish the rights and obligations contained in the TBT Agreement unless it could be argued that such exception was already present and was simply 'found' through an acceptable means of interpretation. The final question, then, is whether the inclusion of such an exception was a predictable expression of the rights and obligations already contained in the TBT Agreement. Given the multitude of other possibilities that the AB could have read into Art 2.1, it seems unlikely that the formulation of such an exception couched in those exact terms would be predictable. As such, the AB appears to have created a source of law in this case.

V. CONCLUSION

In this paper I have argued that the manner in which the AB has interpreted 'treatment no less favourable' in Article 2.1 of the TBT Agreement in *US – Clove Cigarettes (2012)* to exclude detrimental effects that stem exclusively from legitimate regulatory distinctions could indeed be construed as a teleological approach to interpretation. A teleological approach to interpretation in itself is not in contravention of the AB's mandate to clarify the agreements in line with customary rules of interpretation in public international law. However, the way in which the AB has used a teleological interpretative method in this particular case has led to an expression of the rights and obligations contained in Article 2.1 of the TBT Agreement that was not necessarily predictable. This expression has subsequently been used in the AB's legal reasoning in its subsequent decisions, and subsequent panels have been bound by this interpretation, thus they appear to have created a source of law. Therefore, while a shift toward a more teleological approach to interpretation in the AB may have been inevitable and may be in line with the AB's mandate in terms of Article 3.2 of the DSU, the way in which the AB interpreted Article 2.1 of the TBT Agreement in *US – Clove Cigarettes (2012)* goes further than mere interpretation, and may amount to judicial law-making. But even if it is found that this interpretation does not quite amount to law-making, the AB report in *US – Clove Cigarettes (2012)* sets a dangerous precedent in that there is nothing to prevent future law-making by the AB under the guise of a teleological interpretation of the covered agreements.

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