Banning e-vapour products: implications under international trade law

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All views represented in this presentation are of the author alone

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Outline

1. The scope
2. Discrimination in the WTO
3. How to measure "likeness"?
4. Conclusions
5. Value and implications of the findings
6. Further work
The scope

• The measure
  A ban on importation of e-vapour products (EVPs)
• Objective
  Establish “likeness” of EVPs and cigarettes (necessary for finding discrimination)
• Products
  EVPs: E-cigarettes and heated tobacco products
• Applicability
  Limited to WTO; does not apply to other areas, e.g. risk to health
Discrimination in the WTO

• Article III:4 of the GATT 1994

  *The products… imported… shall be accorded treatment no less favourable than that accorded to like products… in respect of all laws, regulations…*

• Article 2.1 TBT

  *Members… ensure that in respect of technical regulations, products imported…shall be accorded treatment no less favourable than that accorded to like products of national origin…*
How to measure "likeness" in WTO?

Four elements identified in case law (EC – Asbestos):

1. The physical properties of the products
2. Their end-uses
3. Consumer preferences and
4. The international classification of the products for customs purposes
1. Physical Properties

- **Emission:** nicotine-containing aerosols
- **Combustion:** no combustion (heat with battery)
- **Chemicals:** less chemical components, some new components
- **Look and feel:** similar in particular ciga-likes (Cancer Research UK 2013)
- **Risk:** less risky products (ASH 2016)
2. End-Uses

- Similar taste, sensory experience, ritual, and nicotine delivery profile
- Significant switching (BMJ, 2014)
- Alternative use (Cancer Research UK, 2013)
- Sufficient to establish a competitive relationship even if no many physical characteristics
3. Consumer Preferences

The extent to which consumers perceive the product as *alternative means of performing particular functions in order to satisfy a particular want*

- **ASH (2016)** – a way of gradually quitting smoking
- **WHO (2014)** – mostly used by those who want to quit but also used simultaneously with cigarettes
- **BMJ (2015)** – e-cig offer a safer substitute for those who do not want to quit
- **Substitutability and use as alternative**
4. Tariff Classification

Tobacco
HS Chapter 24
2402.99: Others, manufactured tobacco, not for smoking (for heated tobacco products)

Pharma Products
HS Chapter 30
30.04: Others, including salts and concentrates

Electrical Machinery
HS Chapter 85
85.43: Electrical machinery and apparatus, having individual functions

Cartridges
HS Chapter 38
382490: chemical products and preparations of the chemical or allied industries
Conclusions

1. EVPs – may be considered “like” under the WTO

2. Low probability for health justification to pass given good evidence on reduced risk to health
The “likeness” of EVPs and cigarettes in WTO

VALUE AND IMPLICATIONS OF THE FINDINGS

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The Implications

A strong **first step** in fighting EVPs bans

If leveraged can have **chilling effect** on EVPs bans around the world
Several Uses

Legal analysis/Legal strategy

Positions/Advocacy/Policy shaping

Raising awareness/Dissemination

Domestic, regional, WTO
Further work...

“The devil is in the details...”

If the ban can be justified under the WTO health exception?

• Low probability given evidence on reduced risk to health (while cigarettes are allowed)
• Factualy intense (work with evidence on risk)

If findings are applicable to taxation measures, other measures?

Breach of investment law regime?

• Examining applicable bilateral investment treaties
• Definition of investor in particular cases
THANK YOU