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Memo

From: Todd Tucker, Public Citizen

To: Consumer and Health Groups

Date: January 13, 2012

Re: Considerations for U.S. in Appellate Body Review of Lower Panel *Clove Cigarettes* Ruling

Summary

On September 2, 2011, a panel report ruling against the U.S. ban on flavored cigarettes (which are often used to hook teenagers) was circulated to World Trade Organization (WTO) members after Indonesia successfully challenged the measure.¹ The panel found that the ban constituted a mandatory technical regulation that “is inconsistent with Article 2.1 of the [Technical Barriers to Trade] *TBT Agreement* because it accords to imported clove cigarettes treatment less favourable than that it accords to like menthol cigarettes of national origin...”²

In nearly 200 rulings over 16 years, this was the first time that the WTO ever found a violation under this article, which has long been of concern to consumer advocates.³ It was one of the first rulings under the TBT, which is one of 17 agreements administered by the WTO. It was quickly followed by two other rulings against two other popular U.S. consumer policies (dolphin-safe tuna labels and country-of-origin labels on meat) under novel interpretations of the TBT.

On January 5, 2012, the U.S. notified the Dispute Settlement Body (DSB) of its intent to appeal the ruling.⁴ **Given the profoundly negative implications for this particular policy and for the precedent it sets against consumer and health protection policies in general, this is a positive sign.**⁵ This memo reviews the lower panel ruling and discusses some substantive considerations for this appeal. The appeal will buy time (around two years, when compliance proceedings are taken into account) and offer a necessary opportunity to carve back the new overreaching TBT jurisprudence before it opens the door to further attacks on legitimate consumer and health regulations. Given the popularity and importance of the policy, however, the U.S. should also be poised to maintain the policy and challenge the legitimacy of any sanctions authorized by the DSB.

The panel ruling also created a new WTO requirement that has never been approved by Congress, U.S. negotiators or other WTO member countries, which is that there must be a six-month lag between publication and entry into force of regulations. The panel found that because there was only a lag of three months before the ban on flavored cigarettes went into effect, the U.S. had violated TBT Article 2.12.⁶ This provision states in part that “Members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.” WTO panels effectively writing new rules via dispute resolution has been a concern

in the past, and this instance (which has broad application to many non-trade policies) will also be of concern to regulators and legislators, and should be appealed.

Brief summary of details of the ruling and its implications

Section 907(a)(1)(A) of the Family Smoking Prevention and Tobacco Control Act (henceforth FSPTCA) states that:

“Beginning 3 months after the date of enactment of the Family Smoking Prevention and Tobacco Control Act, 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 flavor (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 flavor 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 artificial or natural flavor, herb, or spice not specified in this subparagraph.”⁷

The FSPTCA became law on June 22, 2009, and the above provisions entered into effect three months later, on September 22, 2009.⁸

On April 7, 2010, Indonesia began dispute settlement proceedings against the U.S., a process that culminated on September 2, 2011, when a DSB ruling was circulated to WTO members. The WTO panel issuing the ruling was comprised of Ronald Saborío Soto (Costa Rica), Ichiro Araki (Japan) and Hugo Cayrús (Uruguay).

While making the unconvincing rhetorical overture that “the WTO Agreements fully recognize and respect the sovereign right of Members to regulate in response to legitimate public health concerns...”⁹ the panel nonetheless found that the FSPTCA violated the TBT. Each WTO member has the general obligation to “ensure the conformity of their law, regulations and administrative procedures” with the WTO agreements’ rules.¹⁰ **Therefore, if the ruling is upheld, the U.S. would be subject to trade sanctions if it does not water down or eliminate the FSPTCA.**¹¹

The implications of this ruling are dire, especially in the context of a long battle to enhance regulation of tobacco stretching back decades.¹² This struggle has been beset by countless obstacles, ranging from industry opposition to adverse Supreme Court rulings on federal efforts to regulate tobacco in 2000.¹³ More recently, just two months after the adverse WTO ruling, the U.S. District Court for the District of Columbia ruled that another major plank of the FSPTCA (enhanced warning labels) violate corporations’ First Amendment rights to free speech.¹⁴ **The legitimacy of the WTO is likely to be further undermined if the Appellate Body upholds the lower panel ruling. It would pose an unacceptable barrier to public health if any time a good is imported it has to be excluded from regulation. Consumer and public health groups will see that their policy priorities are being undermined by industry in domestic courts**

when there is a U.S. law basis for a claim, and in the WTO when there is not. The combined effect is fatal to the viability of public interest regulation.

Article 2.1 finding – Discrimination

Article 2.1 of the TBT reads:

“2.1 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.”

It is clear that, on its face, the FSPTCA doesn't discriminate against foreign producers, or protect domestic ones. However, Indonesia stated “that a ban on clove cigarettes, which are mainly imported from Indonesia, but not on regular or menthol cigarettes, which are mainly locally produced, creates unequal conditions of competition in the U.S. market. Indonesia clarifies that, although facially neutral, Section 907(a)(1)(A) results in *de facto* discrimination against imported products.”¹⁵

The panel noted that the Appellate Body in *Korea – Various Measures on Beef* established a three-tier test for a finding of national treatment violations or discrimination under the WTO's (much more oft-interpreted) General Agreement on Tariffs and Trade (GATT), which it deemed relevant for TBT analysis:

“that the imported and domestic products at issue are ‘like products’, that the measure at issue is a ‘law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use’; and that the imported products are accorded ‘less favourable’ treatment than accorded to like domestic products.”¹⁶

Likeness analysis

In evaluating the first tier (“likeness”) under the GATT, panels and the Appellate Body have often conducted a four-plank approach, considering (a) the properties, nature and quality of the products; (b) the end-uses of the products; (c) consumers’ tastes and habits (i.e. consumers’ perceptions and behavior in respect of the products); and (d) the tariff classification of the products.¹⁷ If the evidence on these four planks suggests that the products are “like,” then they will likely be deemed “like” for the purposes of the discrimination analysis. The panel essentially adopted the GATT approach, with minor modifications.

In Indonesia's April 2010 Request for Consultations, it noted:

“In Section 907 of the [FSPTCA], the United States applied a ban on all flavoured cigarettes except menthol beginning 90 days after the Act is signed. The Act prohibits, among other things, the production or sale in the United States of cigarettes containing certain additives, including clove, but would continue to permit the production and sale of other cigarettes, including cigarettes containing menthol... Indonesia sees that these

measures discriminate against imported clove cigarettes where clove cigarettes sold in the United States are imported (primarily from Indonesia), while virtually all of the menthol cigarettes sold in the United States are produced domestically (imports are negligible).”¹⁸

The panel accepted Indonesia’s highly unusual comparison of the treatment that FSPTCA afforded imported *clove* cigarettes versus domestic *menthol* cigarettes. By choosing to do so, the panel effectively created a scenario that would support a finding that the U.S. policy violated TBT Article 2.1. The panel could have instead compared domestic clove cigarettes to imported clove cigarettes, or imported *clove* cigarettes to domestic sweet-flavored cigarettes. Any of these alternative comparisons would have showed that there is no discrimination, because the FSPTCA treats domestic clove and imported clove cigarettes in an identical manner, as it does domestic sweet-flavored and imported clove cigarettes.

The panel established that neither party strongly objected to the panel broadening the likeness analysis to include other flavored cigarettes.¹⁹ Nonetheless, the panel argued that it would be a violation of the due process rights of the parties and of third parties to expand their terms of reference to include additional products:

“We could easily contemplate the possibility that a WTO Member may have decided not to join as a third party to this dispute in the belief that the dispute only concerned clove and menthol cigarettes. It is thus not unthinkable that there might have been a different reaction among tobacco-producing WTO Members if Indonesia had either included regular cigarettes in its Panel Request or simply referred to domestic cigarettes instead of just to menthol. In light of the above, we feel compelled to conclude that we are bound by Indonesia’s summary of the legal basis of its national treatment complaint, which identifies the products at issue as imported clove cigarettes versus domestic menthol cigarettes. In our view, we would be exceeding our terms of reference if we were to expand the scope of Indonesia’s national treatment claim by including domestic regular cigarettes in our examination.”²⁰

The panel then proceeded to conduct the GATT four-plank likeness analysis. On the question of product characteristics, menthol and clove were both seen as a flavor that “reduces the harshness of tobacco.”²¹ The panel determined that both clove and menthol have the end use of being smoked,²² and have similar tariff classifications.²³

The panel also appeared to be following the lead of the Appellate Body in the *EC-Asbestos* case (on a GATT discrimination claim) of infusing health-related analysis throughout the likeness test, but in an *ad hoc* manner. On the question of product characteristics, the panel disregarded arguments about the health/regulatory reasons provided by the Office of the U.S. Trade Representative (USTR) for exempting menthol or targeting other flavors, and instead noted that cloves and menthol must be alike because they are both harmful to health.²⁴ On the question of consumer preferences, it utilized health justifications to limit the consumers under surveillance to minors,²⁵ but then stated that contradictory survey evidence meant that it could not evaluate whether teen consumers would substitute menthol for clove.²⁶ It then apparently disregarded the survey evidence presented by USTR,²⁷ and simply substituted non-survey based conjecture from

various intergovernmental studies as a stand-in to peer into “the mind of youth” to conclude that they must think menthol and cloves are similar.²⁸

In sum, the panel concluded that domestic menthol cigarettes and imported clove cigarettes were the relevant like products to which the next prong of the text should be applied.

Less favorable treatment

The panel also generally adopted the GATT approach for establishing less favorable treatment, while noting that “the legitimate objective of reducing youth smoking must permeate and inform” the analysis.²⁹ The panel quoted the Appellate Body in *Korea – Various Measures on Beef*: “whether or not imported products are treated ‘less favourably’ than like domestic products should be assessed... by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.”³⁰ Panelists noted that actual discriminatory “effects of the measure in the market” do not need to be established.³¹ The panel also noted that “national treatment” is not the same as “identical treatment.”³² The panel wrote:

“Overall, the Appellate Body’s jurisprudence on the less favourable treatment element under Article III:4 of the GATT 1994 imparts the following guidance: (i) the less favourable treatment test relates to the impact of the measure on the competitive relationship of groups of imports versus groups of domestic like products; (ii) less favourable treatment will exist if the measures modify these conditions of competition to the detriment of the group of imported like products; (iii) a panel is required to consider whether the detrimental effect(s) can be explained by factors or circumstances unrelated to the foreign origin of the product, and (iv) no separate demonstration that the measures are applied ‘so as to afford protection’ is required.”³³

The panel then advanced to find discrimination in the FSPTCA on the basis of its flawed likeness comparators:

“it is not the case, as the United States implies, that ‘one Indonesian import is included among the prohibited characterizing flavours and one U.S. produced cigarette is not’. Rather, the vast majority of Indonesia exports of cigarettes to the United States are included among the characterizing flavours banned by Section 907(a)(1)(A). We note that this would be in line with the Appellate Body’s findings in *EC-Asbestos*. In our view, the comparison between the group of like imported products with the group of like domestic products encompasses situations when ‘the vast majority of imports’ are accorded less favourable treatment.”³⁴

The panel did not document its assertion that “the vast majority of Indonesia [sic] exports of cigarettes to the United States are included among the characterizing flavours banned by Section 907(a)(1)(A).” (Even if this were true, it is not clear that this is significant. After all, Section 907 of the FSPTCA was enacted specifically because of a relatively new tactic utilized by tobacco companies to entice children with flavorings that were specifically appealing to them.³⁵ And there was evidence that U.S. firms were also impacted by the ban, as USTR argued.³⁶)

Instead, the panel proceeded to write that the fact that “Clove cigarettes are banned while menthol cigarettes are excluded from the ban” establishes that the FSPTCA treats the two products differently and to the detriment of imported clove cigarettes.³⁷

The panel then raised the question of whether the differential treatment was related to the national origin of clove cigarettes, but then failed to answer it. Instead, it simply substituted this step of the analysis with a return to the question of whether the products are treated differentially. In so doing, it returned to the U.S. contention that menthol was excluded from the ban because of the potential of creating health emergencies and a black market in a product that is consumed by vast numbers of (predominantly African American) adults (an argument raised repeatedly in the proceedings):

“the United States is not banning menthol cigarettes because it is not a type of cigarette with a characterizing flavour that appeals to youth, but rather because of the costs that might be incurred as a result of such a ban. We recall that at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol cigarettes which accounted for approximately 25 per cent of the market and for a very significant proportion of the cigarettes smoked by youth in the United States. It seems to us that the effect of banning cigarettes with characterizing flavours other than menthol is to impose costs on producers in other Members, notably producers in Indonesia, while at the same time imposing no costs on any U.S. entity.”³⁸

The logic of this conclusion is flawed on many levels. First, it is simply incorrect that banning the flavors of cigarettes involved imposed “no costs on any U.S. entity,” given U.S. producers of all strawberry, chocolate and other sweet-flavored cigarettes had their products banned. Therefore, they lost sales and the research and marketing costs they had put into these products. Second, it was misplaced to focus on the significant market share of menthol cigarettes given the information provided by the United States that African-American adults comprised the most significant users of this products, not youth. Finally, the notion that a basis for the policy to violate WTO rules was the mere consideration in the U.S. policymaking process of the problems that could result (health costs, black market etc.) if menthol cigarettes were banned is a significant indictment of the WTO’s inappropriate invasion of domestic policymaking processes.

On these bases, the panel found that the FSPTCA violated Article 2.1.³⁹

Article 2.2 finding – trade restrictiveness

Article 2.2 of the TBT reads:

“2.2 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. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter

alia: available scientific and technical information, related processing technology or intended end-uses of products.”

There would seem to be seven prongs to analysis under Article 2.2, including identifying:

1. The objective of the measure;
2. The legitimacy of the objective (taking into consideration the third sentence);
3. Whether the measure fulfills the legitimate objective;
4. The risks of non-fulfillment of the legitimate objective (taking into consideration the fourth sentence);
5. Whether the measure is trade restrictive;
6. Whether the measure is more trade restrictive than necessary to fulfill the legitimate objective; and
7. For completeness, whether the measure had the intent or effect (or both) of “creating unnecessary obstacles to international trade,” and whether this was through the preparation, adoption, or application (or some combination thereby) of the measure.

On the first two prongs, the panel found that the FSPTCA had as its objective the reduction of youth smoking, and that this objective was legitimate.⁴⁰ Different from the approach in the two other recent WTO attacks on U.S. consumer policies, the cloves panel took the following approach to determining the final five prongs:

“Our examination focuses on four main issues. The first is whether jurisprudence relating to Article XX(b) of the GATT 1994 is relevant to the interpretation of the ‘more trade-restrictive than necessary’ standard in Article 2.2 of the TBT Agreement. The second is whether the ban on clove cigarettes exceeds the level of protection sought by the United States. The third is whether the ban on clove cigarettes makes a material contribution to the objective of reducing youth smoking. The fourth is whether there are less-trade restrictive alternative measures that would make an equivalent contribution to the achievement of the objective pursued at the level of protection sought by the United States.”

On the first two “main issues”, the panel ruled that “there are some aspects of Article XX(b) jurisprudence that may be taken into account in the context of interpreting Article 2.2 of the TBT Agreement”⁴¹ and that “a Member may seek to reduce (rather than eliminate) certain risks by banning certain (but not all) products”⁴².

On the third “main issue”, the panel followed the GATT precedent from *Brazil – Retreaded Tyres*, and asked whether there was a “genuine relationship of ends and means between the objective pursued and the measure at issue,” which would establish a “material contribution.”⁴³ In evaluating whether a “material contribution” could be established, the panel examined four “lines of argument” by Indonesia, namely whether: “(i) clove cigarettes pose no greater health risk than other cigarettes; (ii) youth do not smoke clove cigarettes in significant numbers; (iii) other flavoured tobacco products popular with youth are not banned; and (iv) the available scientific evidence shows that banning clove cigarettes will do little to deter youth from smoking.”⁴⁴

- On the first “line of argument”, the panel found that this question would only be relevant if the objective of the FSPTCA was to eliminate all health risk from smoking.⁴⁵
- On the second “line of argument”, the panel found that Indonesia’s own estimate was that “6,800 minors regularly smoked clove cigarettes [...] hardly an insignificant number.”⁴⁶
- On the third “line of argument”, the panel found that the very fact that the FSPTCA didn’t ban all cigarettes saved it from being overly trade restrictive.⁴⁷ (This is a point worth noting, given the counterfactual is that a ban on all cigarettes would violate the WTO’s trade restrictiveness test.)
- On the fourth “line of argument”, the panel found that the scientific evidence contradicted Indonesia’s contentions.⁴⁸

Returning then to the fourth “main issue” – “whether there are less-trade restrictive alternative measures that would make an equivalent contribution to the achievement of the objective pursued at the level of protection sought by the United States” – the panel found against Indonesia. Indonesia suggested 25 alternative policies – ranging from warning labels on tobacco to “banning candy-flavored cigarettes, but not clove cigarettes”.⁴⁹ The panel concluded that, “each of the alternative measures suggested by Indonesia appears to involve a greater risk of non-fulfilment of the objective of reducing youth smoking, as compared with the outright ban currently in place”⁵⁰ and that “many of the alternative measures proposed by Indonesia are already in place in the United States.”⁵¹

For these reasons, the panel ruled that the FSPTCA did not violate Article 2.2.

Other Claims

Perhaps the most significant additional finding by the panel on various other claims brought by Indonesia was that WTO members will be obligated under normal circumstances to allow a minimum of six months between the publication and entry into force of regulations. Because the FSPTCA had a lag of only three months, the panel found the U.S. in violation of TBT Article 2.12,⁵² which states in part that “Members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.” Therefore, although the panel noted that Indonesia had weighed in extensively over the years of rolling out the regulation,⁵³ the panel nonetheless turned to a 2001 Doha Ministerial Decision⁵⁴ (which USTR argued was not a binding interpretation of WTO rules) to establish that “reasonable interval” meant “six months.”⁵⁵

The panel refused to examine the complaint’s other claims under the GATT, on the basis of judicial economy. USTR also invoked the public health defense under GATT Article XX(b), but only for Indonesia’s claims under the GATT, so it provided no defense against the TBT Article 2.1 claim.⁵⁶ The panel ruled against Indonesia on some other smaller claims,⁵⁷ while ruling in their favor on others.⁵⁸

Arguments for appellate review

The next stage in the proceedings is to have the case heard by a three-member panel (i.e. “division”) selected from the WTO’s Appellate Body (AB), which is composed of seven Members⁵⁹ who are appointed by the DSB to serve for four-year terms.⁶⁰ Article 6(2) of the WTO’s Working Procedures for Appellate Review states that: “The Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin.”⁶¹

Under WTO dispute resolution rules, the parties are not normally supposed to make new factual arguments or invoke new defenses at the appellate stage. As Article 17.6 of the WTO’s Understanding on Rules and Procedures Governing the Settlement of Disputes states, “An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.”⁶² Nonetheless, this section of the memo will outline a range of objections to the ruling – some articulated in legal interpretation *per se*, while others on the basis of policy and political objections to which the Appellate Body should be attentive. (USTR raised many of these points in its written Appellant Submission, and could use the arguments below to color in its points in its oral arguments. The Appellate Body may also have some discretion to consider issues of legal interpretation raised by the panel report.⁶³)

Appeal arguments that the U.S. might make

The panel erred by choosing to compare of the treatment that FSPTCA afforded imported clove cigarettes versus domestic menthol cigarettes.

The panel should have compared imported clove cigarettes and domestic clove cigarettes or imported clove cigarettes and domestic cigarettes with other sweet flavors. In making the incorrect choice of comparison in the first instance, the panel effectively created a finding that the U.S. policy would violate TBT Article 2.1. The panel’s inconsistent logic within the ruling emphasizes the error. In its Article 2.2 analysis, the panel accepts that banning candy-flavored cigarettes but not clove cigarettes would not meet the legitimate U.S. goal of reducing youth smoking – putting the two categories together as appropriate targets to counter youth smoking. Yet, at the same time, the panel chose to compare clove and menthol cigarettes for applying the Article 2.1 test, a choice which led to its finding of discrimination. Similarly when considering the trade restrictiveness of the FSPTCA under Article 2.2, the panel stated that “given that the other flavoured cigarettes banned by Section 907(a)(1)(A) also had a very small market share – indeed, apparently smaller than that enjoyed by clove cigarettes – accepting Indonesia’s line of reasoning would lead to the conclusion that banning these other cigarettes would also fail to make a material contribution to the objective of reducing youth smoking.”⁶⁴ It is difficult to reconcile the panel’s acceptance of the fact that the ban on other sweet cigarettes could lead to a material contribution towards the goal of reducing teen smoking for the sake of the Article 2.2 analysis, while according this fact no weight under the Article 2.1 analysis.

The panel’s likeness test effectively requires best treatment for clove cigarettes rather than not treating them less favorably, in contradiction to past rulings.

The panel went against the Appellate Body recommendation that imported products as a group must be treated less favorably than domestic products as a group (a test established in the *EC-Asbestos* case). By excluding other sweet imported and domestic cigarettes also banned under the FSPTCA from the likeness analysis, the panel set a precedent of effectively requiring that imports be accorded the “best treatment” rather than “no less favorable” treatment. Complainants with non-viable WTO complaints could make their complaints viable simply by tailoring their panel request in a sloppy or sneaky manner.

The panel’s likeness test requires absurd alternative justifications for policies that would not change the commercial outcome.

The panel report stated:

“We think that clove cigarettes and menthol cigarettes may be considered ‘like’ in certain contexts but not in others. For example, *these two kinds of cigarettes might not be considered ‘like’ in the context of a hypothetical measure regulating products on the basis of characteristics that clove cigarettes and menthol cigarettes do not have in common, for example whether they contain eugenol (clove cigarettes do, and most menthol cigarettes do not)*. Along the same lines, they might not be considered ‘like’ in the context of a hypothetical tax or fiscal measure based on the type of tobacco they contain (clove cigarettes tend to contain Java sun-cured tobacco, menthol cigarettes do not). However, these same two types of cigarettes might be considered ‘like’ in the context of other measures that regulate products on the basis of characteristics that clove and menthol cigarettes do have in common, for example a hypothetical measure distinguishing between various tobacco products on the basis of whether or not those products are carcinogenic (which clove cigarettes and menthol cigarettes both are).”⁶⁵ (emphasis added)

As the emphasized portion notes, the FSPTCA might have survived Article 2.1 scrutiny if, instead of banning flavors that appeal to teenagers in cigarettes, the measure instead banned eugenol (an ingredient in cloves). The effect, as far as Indonesia is concerned, would be the same: clove cigarettes could not be sold in the U.S. But, absurdly, a eugenol-based standard might have been seen as less “discriminatory” than the FSPTCA.

Besides the complicated issues of WTO law that this passage raises, it poses a fundamental question of democratic governance. If Rep. Henry Waxman (D-Calif.) thought that a flavored cigarette ban was easier to explain and sell to the public and fellow legislators than an obscure reference to the banning of eugenol, why should a WTO panel second guess that choice and effectively impose a requirement that policy be justified in obscure ways (even when either possible justification leads to the same commercial outcome)?

The panel’s incorrect likeness analysis led to an erroneous conclusion as to differential costs.

The claim that the FSPTCA imposed “no costs on any U.S. entity” cannot be supported by the facts of the matter. The firms that had spent decades developed strawberry and other flavored

cigarettes could not market these cigarettes. U.S. firms that might have produced clove cigarettes faced a cost. Indeed, many of the large cigarette companies make (or have made) tobacco, menthol, and other flavored cigarettes, so even “menthol cigarette producers” face a cost in their potential non-menthol flavored product lines.

The panel mistook incremental regulation for discrimination.

By accepting Indonesia’s terms of reference from the Panel Request, the lower panel effectively foreclosed incremental regulation. This has broad implications. Policymaking has shifted away from the regulatory approach historically favored by many liberal groups (across-the-board prohibitions, industrial policy, etc.) Such broad bans have not been treated kindly by the GATT/WTO, and as noted above, the panel explicitly cited the fact that the policy did not ban all cigarettes as a basis for finding the measure was not trade restrictive.

In designing FSPTCA, U.S. policymakers conducted a balancing exercise. They gave weight to the desire to reduce teenage smoking, and they gave weight to potential adverse consequences (i.e. cessation costs and the potential increase in black market activity) from withdrawing menthol cigarettes consumed by large numbers of adults from the legal market. There’s no evidence that protecting U.S. menthol cigarette producers was a motivation of the FSPTCA, and U.S. producers actually saw their product offerings limited as a result. Indeed, the FSPTCA envisions extending the flavored cigarette ban to menthol cigarettes when more studies can be completed.

If WTO rules simply helped countries (partially) internalize the costs that their regulatory decisions impose on people outside their borders, there might be little controversy. Policymakers would learn to assign a non-zero weight to other countries’ interests, just as they assign some non-zero weight to considerations like cessation costs. But the WTO panel went further. It assigned a 100 percent weighting to Indonesia's interests in its Article 2.1 analysis, and a zero weighting to other domestic policy considerations.

If the U.S. complies with the ruling by removing menthol, it will have to simply ignore the weighting it gave to cessation costs and other considerations. If the U.S. alternatively chooses to comply by maintaining the restrictions on candy-flavored cigarettes but exempting clove (as suggested by Indonesia)⁶⁶, the entire logic of the carefully targeted measure (focusing on flavored cigarettes that are predominantly starter cigarettes without meaningful adult consumption) begins to unravel.⁶⁷

The ruling suggests that any time a regulatory measure has any negative impact on foreign producers, the U.S. will have to carve out that country’s products or producers, or pursue wider measures (such as across-the-board bans) that might not make sense for a range of reasons. (And of course, those wider measures would themselves be likely to violate other WTO obligations.)

This ruling shows an over-willingness to conjure up the likeness analysis and conditions of competition analysis that is most likely to yield a violation finding. Liberal groups have long been used to having their favored regulatory approaches deemed WTO-illegal. This ruling shows

that even more conservative or incremental regulatory approaches are also at risk. Policymakers will be left wondering: what type of approach is left?

The panel should not have created a new binding WTO obligation on countries to institute six-month time lags before regulatory implementation.

When Congress authorized U.S. membership in the WTO, it certainly it did not agree to establishment by dispute panels of new WTO rules to which the U.S. would be bound. This aspect of the ruling – empowering an unelected WTO body to create a norm of a six-month time lag between publication and entry into force of technical regulations to which U.S. negotiators have also not agreed – is extremely troubling. Nothing in the TBT text requires that. The WTO should defer to national governments on such questions.

“Significant” impacts on trade should be truly significant.

While evaluating one of the smaller TBT claims, the U.S. apparently did not contest that the FSPTCA has a “significant impact on Indonesia’s trade.” However, in 2008, Indonesia’s exports to the U.S. were only \$15 million.⁶⁸ This was a year when Indonesia’s merchandise exports were \$139.6 billion.⁶⁹ The sum for Indonesia’s clove cigarette exports to the U.S. then, even if true, constituted around 0.01 percent of Indonesia’s external trade. It seems worth contesting, if only for precedential value, the significance of such a reduction in trade.

The panel’s interpretations of the two major TBT claims produce a “manifestly absurd or unreasonable” result.

The U.S. was saved in part from an Article 2.2 violation of “trade restrictiveness” because its flavored cigarettes ban affected what was construed as only a “tiny sliver” of the cigarette market.⁷⁰ However, one way of complying with Article 2.1 would be to apply the same ban on menthol as to clove cigarettes. This, however, would be much more “trade restrictive.” This creates a Catch 22 situation whereby the U.S. can only reduce “discrimination” by increasing “trade restriction.” (A similar Catch 22 was at work in the *U.S.-COOL* case, where a panel found both Article 2.1 and 2.2 violations.)

USTR could take this interpretative mess head on. It could argue that the panel should have consulted supplementary means of interpretation so that the TBT did not lead to a “manifestly absurd” situation. The U.S. could argue that consultation of supplementary materials is recommended under the Vienna Convention on the Law of Treaties:

“Article 31

General rule of interpretation

1. 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

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

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

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”⁷¹

Given the novelty of interpretations of these TBT provisions (and the fact that the VCLT does not delimit the universe of supplementary means of interpretation), the AB should consult as many supplementary means as possible, including the writings of experts on consumer and administrative law.

The panel should not have imported jurisprudence from the GATT anti-discrimination rule, and instead should have elaborated a special TBT “likeness” test.

Interpretation of the TBT agreement requires establishment of a free-standing discrimination analysis based on the specific TBT terms without (much) use of jurisprudence or standards from GATT Article III cases. USTR has not appeared to fundamentally challenge the application of the GATT likeness analysis to the TBT in any of the recent trio of anti-consumer cases.⁷² However, this is precisely the sort of question that the appellate body should consider.

The TBT covers technical regulations as they pertain to goods trade. Technical regulations are motivated for diverse reasons, including furthering consumer information, protecting public health, and advancing the functioning of the free market by correcting market failures, all while allowing regulators and legislators to weigh and balance the “costs of regulating” and minimizing the regulatory burdens on business. The panel’s reliance on the standard four-prong GATT likeness analysis (physical characteristics, end uses, consumer preferences, and tariff classification) disregarded the specific regulatory distinctions involved in labeling regimes.

Indeed, without special weight given to the costs and benefits of pursuing diverse regulatory regimes, the TBT would have little value as a *lex specialis* relative to the GATT.

For instance, it would entail significant regulatory and social costs to ban menthol cigarettes, which are smoked by large numbers of adults. It may be the case that the benefits of doing so outweigh the costs, but a substantial scientific body of evidence and U.S. court decisions suggests otherwise. In the face of this debate, the WTO should defer to sovereign prerogatives to weigh and balance the costs of regulating, and find that products that are costly to regulate are unlike those that are less costly to regulate.

Conclusion

The crux of the lower panel ruling against the FSPTCA was that it banned clove cigarettes, while allowing menthol cigarettes, in violation of TBT Article 2.1. The partial nature of the ban likely counted in the U.S.' favor in the analysis under Article 2.2, which considers trade restrictiveness rather than specific instances of discrimination. This Catch 22 situation is just one of the reasons for reversing this overreaching TBT jurisprudence through appeal and other means.

Was the menthol exclusion justified, as a matter of policy? As USTR noted, the U.S. often addresses difficult issues incrementally, and there was a public health basis for doing so in this case.⁷³ Moreover, the FSPTCA clearly contemplates the extension of the ban onto menthol cigarettes as well.

Perhaps more importantly, the crafters of the FSPTCA were keenly aware of the U.S. court ruling against earlier efforts to regulate tobacco. As the conservative majority on the U.S. Supreme Court noted in the 2000 landmark case striking down FDA jurisdiction over tobacco,

“the FDA found that, because of the high level of addiction among tobacco users, a ban would likely be ‘dangerous.’ In particular, current tobacco users could suffer from extreme withdrawal, the health care system and available pharmaceuticals might not be able to meet the treatment demands of those suffering from withdrawal, and a black market offering cigarettes even more dangerous than those currently sold legally would likely develop. The FDA therefore concluded that, ‘while taking cigarettes and smokeless tobacco off the market could prevent some people from becoming addicted and reduce death and disease for others, the record does not establish that such a ban is the appropriate public health response under the act.’”⁷⁴

One can agree or disagree with the Supreme Court (or the FDA) on this count, but it is undeniable that the crafters of the FSPTCA had such precedents in mind when they created the Section 907 ban on flavored cigarettes that excluded menthol cigarettes, which are used by large numbers of adults.

This caution seems well advised. The long battle to get federal regulation of tobacco paved a course for how this matter was to be regulated in the U.S., while respecting federalism and separation of powers. This course was determined in large part by the conclusions of U.S. courts, and echoed by the political branches. In such instances, the WTO should strongly defer to

sovereign prerogatives. The WTO Appellate Body should overturn all three lower panel rulings against consumer safeguards in the U.S. (and consumers') favor.

ENDNOTES

¹ Panel Report, *U.S. – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, circulated 2 September 2011. Case documents and status available at:

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm

² Panel Report, *U.S.-Clove Cigarettes*, paras. 8.1-8.5.

³ When the U.S. Congress debated the Uruguay Round Agreements Implementation Act in a lame-duck session in 1994, Rep. Peter DeFazio (D-Ore.) said: “This agreement will put at risk the environmental, food, consumer, health and safety laws of this Nation to something called a World Trade Organization, an organization that will settle disputes over trade barriers, and trade barriers is interpreted as anything that restricts the free movement of goods, whether it is restrictions against child labor, whether it is restrictions against dangerous substances in food and pesticides.... We are lowering ourselves to the worst standards, to the lowest common denominator, in order to get something that a few multinational corporations desperately want.” Senator Robert Byrd (D-W.V.), a noted expert on the legislative process who recently passed, warned: “U.S. laws and State laws in many areas must comport first with the WTO’s trade rules, or such laws can be challenged as an ‘illegal trade barrier’ by other countries. Federal and State laws dealing with toxics and hazardous waste, consumer protection, recycling and waste reduction, pesticides and food safety, energy conservation, wildlife protection, and natural resource and wilderness protection, would all be vulnerable to WTO challenge. The new GATT would prevent countries from rejecting products based on how they are made; for example, with child labor or with ozone depleting chemical processes.... If environmental laws get in the way of trade, they must fall. If consumer protection gets in the way, if standards of innumerable kinds, get in the way of trade, they go. Humane methods of trapping tuna, in order to protect dolphins go out the window. Flipper loses. Rigid pesticide controls which make products more expensive are GATT illegal. Out they go. Child labor laws restricting trade are illegal. Who cares? Only trade matters. What happens when our laws are declared a violation of GATT? The Administration would like us to accept the proposition that no U.S. laws are wiped out here, and technically they are not. What will happen is that other member nations, perhaps prodded, or even dominated by one or a group of multinational corporations, will bring a complaint against the U.S. before the WTO, and a Dispute Panel could rule in secret against a U.S. law, as being GATT illegal. The room for pernicious manufactured claims should be obvious to all of us. This puts great pressure on us to change our laws.”

⁴ See: http://www.wto.org/english/news_e/news12_e/dsapl_05jan12_e.htm

⁵ While there is no doctrine of binding precedent at the WTO, panels often cite each other and the Appellate Body in increasingly consistent fashion.

⁶ Panel Report, *U.S.-Clove Cigarettes*, para. 7.595.

⁷ See <http://www.govtrack.us/congress/billtext.xpd?bill=h111-1256>

⁸ Panel Report, *U.S.-Clove Cigarettes*, para. 2.5.

⁹ Panel Report, *U.S.-Clove Cigarettes*, para. 7.2.

¹⁰ Agreement Establishing the World Trade Organization Art. XVI(4).

¹¹ As we note in the summary, however, the U.S. should not face this prospect passively.

¹² Panel Report, *U.S.-Clove Cigarettes*, paras. 2.12-18.

¹³ Panel Report, *U.S.-Clove Cigarettes*, paras. 2.16-17. See also, *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, Supreme Court of the United States, March 21, 2000, 529 U.S. 120120 S.Ct. 1291.

¹⁴ United States District Court, District of Columbia, *R.J. Reynolds Tobacco Co., et al., v. United States Food and Drug Administration, et al.*, Civil No. 11-1482(RJL), Nov. 7, 2011.

¹⁵ Panel Report, *U.S.-Clove Cigarettes*, para. 7.50.

¹⁶ Panel Report, *U.S.-Clove Cigarettes*, para. 7.75.

¹⁷ Panel Report, *U.S.-Clove Cigarettes*, para. 7.121.

¹⁸ Request for Consultations by Indonesia, *U.S. – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R/1, 18 April, 2010.

¹⁹ Panel Report, *U.S.-Clove Cigarettes*, paras. 7.132-133.

²⁰ Panel Report, *U.S.-Clove Cigarettes*, paras. 7.144-147.

²¹ Panel Report, *U.S.-Clove Cigarettes*, para. 7.182.

²² Panel Report, *U.S.-Clove Cigarettes*, para. 7.198.

²³ Panel Report, *U.S.-Clove Cigarettes*, para. 7.239.

²⁴ Panel Report, *U.S.-Clove Cigarettes*, para. 7.183.

²⁵ Panel Report, *U.S.-Clove Cigarettes*, para. 7.206.

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- ²⁶ Panel Report, *U.S.-Clove Cigarettes*, para. 7.210.
- ²⁷ USTR, *U.S.-Clove Cigarettes*, First Written Submission, at paras 54-78.
- ²⁸ Panel Report, *U.S.-Clove Cigarettes*, para. 7.232.
- ²⁹ Panel Report, *U.S.-Clove Cigarettes*, para. 7.255.
- ³⁰ Panel Report, *U.S.-Clove Cigarettes*, para. 7.264.
- ³¹ Panel Report, *U.S.-Clove Cigarettes*, para. 7.267.
- ³² Panel Report, *U.S.-Clove Cigarettes*, para. 7.266.
- ³³ Panel Report, *U.S.-Clove Cigarettes*, para. 7.269.
- ³⁴ Panel Report, *U.S.-Clove Cigarettes*, para. 7.276.
- ³⁵ USTR, *U.S.-Clove Cigarettes*, First Written Submission, at paras. 48-51; USTR, *U.S. – Measures Affecting the Production and Sale of Clove Cigarettes*, U.S. Second Written Submission, Jan. 17, 2011, at para. 79-86. Available at: http://www.ustr.gov/webfm_send/2492
- ³⁶ USTR argued: “U.S.-produced flavored cigarettes other than tobacco or menthol were on the market as recently as one year before section 907(a)(1)(A) went into effect, and even if it were the case that they disappeared by 2009, there is no guarantee apart from section 907(a)(1)(A) that they would have been off the market for long. As the United States has demonstrated, U.S. companies had 26 flavored products on the market in 2008 compared to 19 products being sold by foreign companies (17 of which were be Indonesian [sic]). It may be in fact that some of these products remained on the market in 2009, even if discontinued earlier, as retailers sold their purchased stock to customers up until the time it was illegal to do so (i.e., September 22, 2009). Certainly, Indonesia has not put evidence indicating that that is not the case.” USTR went on: “85. Moreover, the effect of section 907(a)(1)(A) on U.S. or foreign cigarettes can not be accurately assessed solely by looking at what products were on the market in 2009, immediately before the ban went into effect. Such effect – not surprisingly advocated by Indonesia – fails to take into account the effect of the legislation in the lead up to its taking force. As stated previously, the measure forced U.S. companies to give up an entire product line that they had spent decades developing. Both in the First Submission and further in this submission, the United States presents significant evidence based on the internal corporate documents of the U.S. cigarette companies themselves that they had developed this product line for decades. Indonesia has not contested this fact, leaving the issue, thus far, completely rebutted. 86. The United States would also note that it is not unusual for a company to withdraw its product from the market where the government is strongly considering whether to ban that product. Two recent examples of this occurring in the United States are in regard to bisphenol A (“BPA”), a chemical that is present in many plastics, and infant cribs that with sides that move up and down. Moreover, the fact that the marketplace reacted preemptively to an impending ban cannot affect the analysis of whether a Member has acted consistently with its WTO obligations. If that were the case, then the same measure, enforced by two different Members, could be found both to be consistent and inconsistent based solely on the actions (or non-actions) of that Member’s domestic industry in the lead up to a measure taking force.” See USTR, *U.S.-Clove Cigarettes*, Second Written Submission, at paras 84-86.
- ³⁷ Panel Report, *U.S.-Clove Cigarettes*, paras. 7.279-281.
- ³⁸ Panel Report, *U.S.-Clove Cigarettes*, para. 7.289.
- ³⁹ Panel Report, *U.S.-Clove Cigarettes*, para. 7.293.
- ⁴⁰ Panel Report, *U.S.-Clove Cigarettes*, para. 7.430.
- ⁴¹ Panel Report, *U.S.-Clove Cigarettes*, para. 7.369.
- ⁴² Panel Report, *U.S.-Clove Cigarettes*, para. 7.377.
- ⁴³ Panel Report, *U.S.-Clove Cigarettes*, para. 7.379.
- ⁴⁴ Panel Report, *U.S.-Clove Cigarettes*, para. 7.381.
- ⁴⁵ Panel Report, *U.S.-Clove Cigarettes*, para. 7.384.
- ⁴⁶ Panel Report, *U.S.-Clove Cigarettes*, para. 7.390.
- ⁴⁷ Panel Report, *U.S.-Clove Cigarettes*, para. 7.395.
- ⁴⁸ Panel Report, *U.S.-Clove Cigarettes*, para. 7.415.
- ⁴⁹ Panel Report, *U.S.-Clove Cigarettes*, para. 7.422.
- ⁵⁰ Panel Report, *U.S.-Clove Cigarettes*, para. 7.424.
- ⁵¹ Panel Report, *U.S.-Clove Cigarettes*, para. 7.425.
- ⁵² Panel Report, *U.S.-Clove Cigarettes*, para. 7.595.
- ⁵³ Panel Report, *U.S.-Clove Cigarettes*, paras. 7.584, 7.589, 7.636-648.
- ⁵⁴ This reads: “Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase “reasonable interval” shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.” See Doha Ministerial Decision on Implementation-Related Issues and Concerns of 14 November 2001, WT/MIN(01)/17, para. 5.2. Available at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_implementation_e.htm
- ⁵⁵ Panel Report, *U.S.-Clove Cigarettes*, paras. 7.568-594.
- ⁵⁶ Panel Report, *U.S.-Clove Cigarettes*, paras. 7.296, 7.308.

⁵⁷ The panel found that the U.S. offered an explanation for the FSPTCA (paras. 7.461-463), that the FSPTCA was specific enough (para. 7.484), that it would not be appropriate to formulate the FSPTCA in terms of “performance” (para. 7.497), that Article 2.10 was not applicable to the dispute (para 7.507), that Indonesia had not established that the U.S. failed to “upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards” (para. 7.551), and that “by failing to demonstrate that the United States did not take account of the special development, financial and trade needs of Indonesia, in the preparation and application of Section 907(a)(1)(A), Indonesia has failed to demonstrate that the United States acted inconsistently with Article 12.3 of the *TBT Agreement*” (para. 7.649).

⁵⁸ The panel wrote: “By failing to notify to WTO Members through the Secretariat the products to be covered by the proposed Section 907(a)(1)(A), together with a brief indication of its objective and rationale, at an appropriate early stage, i.e., when amendments and comments were still possible, the Panel finds that the United States has failed to comply with its obligations under Article 2.9.2 of the TBT Agreement.” Panel Report, *U.S.-Clove Cigarettes*, para. 7.550.

⁵⁹ More information on the Appellate Body can be found here:

http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm By January 2012, the members will be: Peter Van den Bossche (Belgium), Ricardo Ramírez-Hernández (Mexico), Shotaro Oshima (Japan), David Unterhalter (South Africa), Yuejiao Zhang (China), Thomas Graham (US), and Ujal Bhatia (India).

⁶⁰ An accessible introduction to the WTO dispute settlement process can be found here:

http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ1_e.htm

⁶¹ Text available at: http://www.wto.org/english/tratop_e/dispu_e/ab_e.htm

⁶² See text at: http://wto.org/english/docs_e/legal_e/28-dsu_e.htm

⁶³ The WTO’s working procedures for appellate review state: “21. (1) The appellant shall, on the same day as the date of the filing of the Notice of Appeal, file with the Secretariat a written submission prepared in accordance with paragraph 2 and serve a copy of the submission on the other parties to the dispute and third parties. (2) A written submission referred to in paragraph 1 shall: (a) be dated and signed by the appellant; and (b) set out (i) a precise statement of the grounds for the appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof; (ii) a precise statement of the provisions of the covered agreements and other legal sources relied on; and (iii) the nature of the decision or ruling sought.” But they also state: “16(1): In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the division shall immediately notify the parties to the dispute, participants, third parties and third participants as well as the other Members of the Appellate Body.” See: http://www.wto.org/english/tratop_e/dispu_e/ab_e.htm Thus, while entirely new grounds could likely not be introduced late in the appeal process, new amplifying argumentation could likely be made at the oral arguments, and the Appellate Body could consider issues of law or legal interpretation related to the issues raised by the disputing parties. If its considerations strayed enough from the issues raised in the appellant and appellee submissions, it could notify the parties as to a special appropriate procedure. Given the novelty of the TBT interpretations in these three cases, such a procedure may have merit.

⁶⁴ Panel Report, *U.S.-Clove Cigarettes*, para. 7.396.

⁶⁵ Panel Report, *U.S.-Clove Cigarettes*, para. 7.246.

⁶⁶ Panel Report, *U.S.-Clove Cigarettes*, para. 7.422.

⁶⁷ This unfortunately appears to the argument that many global financial firms are making with respect to their desire to be carved out from Dodd-Frank regulations.

⁶⁸ Panel Report, *U.S.-Clove Cigarettes*, paras. 7.527-528.

⁶⁹ Data available at: <http://data.worldbank.org/country/indonesia>

⁷⁰ Panel Report, *U.S.-Clove Cigarettes*, paras 7.395.

⁷¹ See full text at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

⁷² There was some valuable prefiguring of this line of argument, however. In the *U.S.-Clove Cigarettes* case, USTR argued that “the fiscal treatment of two different products should have very little weight in the ‘like product’ analysis when the domestic measure under consideration is adopted not for fiscal purposes, but in order to protect human health.” See USTR, *U.S.-Clove Cigarettes*, First Written Submission, at para. 191.

⁷³ USTR, *U.S. – Measures Affecting the Production and Sale of Clove Cigarettes*, U.S. Second Written Submission, Jan. 17, 2011, at paras. 17-40. Available at: http://www.ustr.gov/webfm_send/2492

⁷⁴ *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, Supreme Court of the United States, March 21, 2000, 529 U.S. 120120 S.Ct. 1291, at 13.