



# The Tobacco Control Act's Ban of Clove Cigarettes and the WTO: A Detailed Analysis

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## Summary

In 2009, Congress passed the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act), which banned the sale of all flavored cigarettes, except menthol cigarettes, in Section 907(a)(1)(A). Indonesia, a major producer of clove cigarettes, challenged the Tobacco Control Act's ban on non-menthol flavored cigarettes before a World Trade Organization (WTO) panel, claiming, among other things, that it violated Articles 2.1 and 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement). Article 2.1 requires WTO members to ensure that domestic regulations setting forth product characteristics treat like imported products no less favorably than like domestic products. Article 2.2 requires that such regulations be no more trade restrictive than necessary to fulfill a legitimate objective. The panel hearing the dispute agreed with Indonesia on Article 2.1 but found for the United States on Article 2.2. The United States appealed the panel's finding on Article 2.1.

On April 4, 2012, the Appellate Body issued a decision. Although the Appellate Body disagreed with certain legal standards applied by the panel, it ultimately upheld the panel's conclusion that menthol cigarettes and clove cigarettes are like products and that the Tobacco Control Act's ban of non-menthol flavored cigarettes treats imported clove cigarettes less favorably than domestic menthol cigarettes. The Appellate Body stated that this case involved *de facto* discrimination and drew on jurisprudence developed under Article III:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), which is similar to Article 2.1 of the TBT Agreement, to hold that "likeness in Article 2.1 [] is based on the competitive relationship between and among products." The Appellate Body accepted that domestic regulations may legitimately distinguish between products to serve a public health interest. However, it found that the differential treatment of menthol and clove cigarettes in the Tobacco Control Act did not stem from a legitimate regulatory distinction. The Appellate Body, therefore, found that Section 907(a)(1)(A) violated Article 2.1 of the TBT Agreement.

The panel found that Section 907(a)(10)(A), in providing a period of three months before the ban took effect, violated Article 2.12 of the TBT Agreement, which requires a "reasonable interval" between publication of the law and its effective date. The United States appealed. The Appellate Body rejected Indonesia's argument that paragraph 5.2 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns, which interpreted "reasonable interval" within Article 2.12 to mean "a period of not less than six months," was a legally binding interpretation of Article 2.12 under Article IX:2 of the Agreement Establishing the World Trade Organization (WTO Agreement). However, the Appellate Body found that paragraph 5.2 was a "subsequent agreement" under Article 31(3) of the Vienna Convention on the Law of Treaties. The Appellate Body stated that under Article 2.12 the complaining Member must establish a prima facie case by demonstrating that the technical regulation provides an interval between publication and effective date of less than six months; then the burden shifts to the responding Member to demonstrate that the interval provided is reasonable.

In response to the Appellate Body's decision, the United States has suggested that it will likely maintain the ban on clove cigarettes while fulfilling its obligations under the WTO Agreement. It appears the United States has not yet settled on how it will accomplish this. The United States and Indonesia agreed that the United States would comply with the Appellate Body decision by July 24, 2013.

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## Introduction

In an effort to curb youth smoking, Section 907(a)(1)(A) of the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) banned all flavorings in cigarettes except menthol.<sup>1</sup> The ban took effect three months after the Tobacco Control Act became law. This ban was in response to the burgeoning market for cigarettes with flavors, like spice, fruit, and candy, that appealed to youth.<sup>2</sup> Although menthol cigarettes also appeal to youth, they represent over a quarter of all the cigarettes smoked, meaning they have broad appeal among adults also.<sup>3</sup> Rather than ban menthol cigarettes, therefore, Congress authorized the Food and Drug Administration (FDA) to “ban or modify the use of menthol in cigarettes based on scientific evidence.”<sup>4</sup> The FDA is studying the matter and has taken no action to date with respect to banning menthol in cigarettes. Clove cigarettes, which are banned by the Tobacco Control Act as non-menthol flavored cigarettes, are primarily imported from Indonesia, while menthol cigarettes are primarily produced domestically.

The United States and Indonesia are Members of the World Trade Organization (WTO), a multilateral international economic organization created by the Marrakesh Protocol, which was signed in 1994.<sup>5</sup> The Agreement Establishing the World Trade Organization (WTO Agreement) includes a number of agreements to which all WTO Members must agree.<sup>6</sup> Among these agreements are the Agreement on Technical Barriers to Trade (TBT Agreement) and the General Agreement on Tariffs and Trade (GATT 1994).<sup>7</sup> Article 2.1 of the TBT Agreement requires WTO Members to treat “like” imported products no less favorably than “like” domestic products with respect to domestic regulations that set forth product characteristics. Article 2.2 of the TBT Agreement provides that such regulations cannot be “more trade restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create.”

Indonesia brought a claim before the WTO, arguing, among other things, that imported clove cigarettes are like domestically produced menthol cigarettes; that the Tobacco Control Act treats clove cigarettes less favorably than menthol cigarettes in violation of Article 2.1; and that the Tobacco Control Act is more trade restrictive than necessary under Article 2.2. Indonesia also claimed that the ban, in taking effect after three months, violates Article 2.12 of the TBT Agreement, which requires a “reasonable interval” between a law’s publication and its taking effect. The panel hearing Indonesia’s claim agreed with Indonesia as to Articles 2.1 and 2.12, but rejected its argument with respect to Article 2.2.<sup>8</sup> The United States appealed the panel’s finding with respect to Articles 2.1 and 2.12 to the Appellate Body. Indonesia did not appeal the panel’s finding with respect to Article 2.2.

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<sup>1</sup> P.L. 111-31 (2009). For more information on the Tobacco Control Act, see CRS Report R41304, *FDA Final Rule Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco*, by C. Stephen Redhead and Jane M. Smith.

<sup>2</sup> H.Rept. 110-762, at 77 (2008).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 77-78.

<sup>5</sup> Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (2d ed.) (Cambridge University Press 2008) at 36-37.

<sup>6</sup> *Id.* at 44.

<sup>7</sup> *Id.* at 44-48.

<sup>8</sup> Panel Report, *United States: Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS 406/R (February 9, 2011) (hereinafter “Clove Cigarettes Panel Report”).

Although the Appellate Body disagreed with the panel's interpretation of certain terms, it upheld the panel's conclusion that the Tobacco Control Act violated Article 2.1 of the TBT Agreement, concluding that clove cigarettes are like menthol cigarettes and that clove cigarettes receive less favorable treatment under Section 907(a)(1)(A) than menthol cigarettes.<sup>9</sup> In reaching this conclusion, the Appellate Body treated this as a case of *de facto*, not *de jure*, discrimination.<sup>10</sup> It concluded that Article 2.1 should be interpreted in conjunction with Article III:4 of the GATT 1994<sup>11</sup> and that likeness under Article 2.1, therefore, is based on the competitive relationship of the products.<sup>12</sup> The Appellate Panel stated also that detrimental impacts on like imported products are permissible provided they are due exclusively to legitimate regulatory distinctions.<sup>13</sup> The Appellate Body rejected that the United States had a legitimate reason for banning clove cigarettes, while not banning menthol cigarettes. The United States had argued that because millions of adults smoke menthol cigarettes, a ban would result in the development of a black market for menthol cigarettes and the health care system being overwhelmed by the many people who satisfied their nicotine addiction by smoking menthol cigarettes.<sup>14</sup> The Appellate Body focused on the purpose of the ban, which was to ban cigarettes with characterizing flavors that mask the harshness of cigarette smoke because such cigarettes appeal to youth smokers. However, the Appellate Body stated that menthol cigarettes share with clove cigarettes the very characteristic that justified the ban—they have a characterizing flavor that masks the harshness of tobacco smoke.<sup>15</sup> Moreover, the Appellate Body questioned the likelihood of the development of a black market and the health care system being overwhelmed by menthol smokers in the event the United States were to ban menthol cigarettes, noting that regular cigarettes contain nicotine

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<sup>9</sup> Appellate Body Report, *United States: Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS 406/AB/R (April 4, 2012) (hereinafter “Clove Cigarettes AB Report”).

<sup>10</sup> *De jure* discrimination occurs when the law by its terms is discriminatory. *De facto* discrimination occurs when a law that is not discriminatory by its terms has a discriminatory impact.

<sup>11</sup> Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 are similar in that they both require national treatment of imported goods. Article 2.1 of the TBT Agreement provides: “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....” Article III:4 of the GATT 1994 provides: “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”

Despite the similarities between Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement, there are differences. Article III:4 of the GATT 1994 applies to “all laws, regulations and requirements affecting ... [the] internal sale, offering for sale, purchase, transportation, distribution or use” of products, while Article 2.1 of the TBT Agreement only applies to “technical regulations,” which are “[d]ocument[s] which lay[] down product characteristics or their related processes and production methods.” Therefore, the GATT 1994 has broader application than the TBT Agreement. A second difference is that GATT 1994 contains “General Exceptions” in Article XX, which provides that nothing in GATT 1994 shall be construed to limit a Member’s ability to adopt and enforce measures which, among other things, are “necessary to protect human, animal, or plant life or health,” subject to the requirement that such measures “are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” The TBT does not have a comparable article. Finally, because there have been far fewer cases decided under the TBT Agreement than the GATT 1994, the jurisprudence of the TBT Agreement is not as fulsome and well developed as the jurisprudence of the GATT 1994. This was only the second case to consider Article 2.1 of the TBT Agreement.

<sup>12</sup> Clove Cigarettes AB Report, ¶¶ 100, 109.

<sup>13</sup> *Id.*, ¶ 174.

<sup>14</sup> *Id.*, ¶ 216.

<sup>15</sup> *Id.*, ¶ 225.

and would remain available.<sup>16</sup> Therefore, the Appellate Body found that the decision to exempt menthol cigarettes from the ban on flavored cigarettes was not justified by a legitimate policy distinction. However, it reiterated that public health concerns, such as curbing youth smoking, are legitimate regulatory ends.<sup>17</sup>

As mentioned above, Indonesia claimed that the Tobacco Control Act was more trade restrictive than necessary in violation of Article 2.2, but the panel found that Indonesia failed to make its case. Indonesia did not appeal that conclusion. In particular, the panel found that the ban's purpose, to reduce youth smoking, was a legitimate regulatory end;<sup>18</sup> that Indonesia failed to demonstrate that the ban would make no "material contribution" to the goal of reducing youth smoking;<sup>19</sup> and that Indonesia had failed to establish that there were less trade restrictive measures that the United States could take that would achieve a comparable reduction in youth smoking.<sup>20</sup> Accordingly, the panel concluded that Indonesia had failed to establish that the ban on clove cigarettes was more trade restrictive than necessary.<sup>21</sup> Because Indonesia did not appeal that part of the decision, the panel's conclusion stands.

Article 2.12 of the TBT Agreement requires a "reasonable interval" between publication of a technical regulation and its effective date. Indonesia complained that the Tobacco Control Act provided an interval between publication and effective date of three months while the term "reasonable interval" meant not less than six months. Indonesia based this claim on the fact that paragraph 5.2 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns (Doha Ministerial Decision) interpreted "reasonable interval" within Article 2.12 to mean not less than six months. Paragraph 5.2, Indonesia argued, was a legally binding interpretation under Article IX:2 of the WTO Agreement. Without finding that paragraph 5.2 was a legally binding interpretation under Article IX:2, the panel determined that it must "guide" the panel's interpretation of "reasonable interval."<sup>22</sup> In the alternative, the panel found that paragraph 5.2 could be considered a subsequent agreement of the parties within Article 31(3) of the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>23</sup> Ultimately, it found that the Tobacco Control Act violated Article 2.12.

The Appellate Body determined that paragraph 5.2 was not a legally binding interpretation under Article IX:2 of the WTO Agreement,<sup>24</sup> but it was a subsequent agreement under Article 31(3) of the Vienna Convention.<sup>25</sup> Therefore, the burden to present a prima facie case that the interval provided by the Tobacco Control Act is less than six month fell on Indonesia, as the complaining Member,<sup>26</sup> and the burden to rebut this prima facie showing by demonstrating that the interval is reasonable fell on the United States, as the responding Member.<sup>27</sup> Because the Appellate Body

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*, ¶ 236.

<sup>18</sup> Clove Cigarette Panel Report, ¶¶ 7.344-7.350.

<sup>19</sup> *Id.*, ¶¶ 7.379-7.417.

<sup>20</sup> *Id.*, ¶¶ 7.418-7.428.

<sup>21</sup> *Id.*, ¶ 7.432.

<sup>22</sup> *Id.*, ¶ 7.576.

<sup>23</sup> *Id.*

<sup>24</sup> Clove Cigarettes AB Report, ¶ 255.

<sup>25</sup> *Id.*, ¶ 269.

<sup>26</sup> *Id.*, ¶ 281.

<sup>27</sup> *Id.*

concluded that Indonesia presented a prima facie case which the United States failed to rebut, it held that the Tobacco Control Act violated Article 2.12 of the TBT Agreement.<sup>28</sup>

In response to the Appellate Body's decision, the United States suggested that it will likely maintain the ban on clove cigarettes and stated that it will act in a way that respects its obligations under the WTO Agreement. However, it appears that the United States has not yet settled on a course of action.

## Analysis

### **“Like Products” and “Treatment no Less Favorable” Under Article 2.1 of the TBT Agreement**

Article 2.1 of the TBT Agreement requires Members to treat imported products that are like domestic products no less favorably than the domestic products with regard to technical regulations. The Appellate Body upheld the panel's conclusion that imported clove cigarettes are like domestically produced menthol cigarettes and that the Tobacco Control Act treats imported clove cigarettes less favorably than it treats domestic menthol cigarettes. This case presented one of the first opportunities for the Appellate Body to interpret what “likeness” and “treatment no less favourable” mean in Article 2.1.

#### **Analytical Framework**

The Appellate Body began its analysis by “consider[ing] Article 2.1 as a whole in its context and in light of the object and purpose of the TBT Agreement.”<sup>29</sup> The Appellate Body focused on the Preamble of the TBT, in particular, the second, fifth, and sixth recitals.

The second recital states: “*Desiring* to further the objectives of GATT 1994.”<sup>30</sup> The Appellate Body interpreted this recital to mean that “the TBT Agreement expands on existing GATT disciplines and emphasizes that the two Agreements should be interpreted in a coherent and consistent manner.”<sup>31</sup>

The fifth recital provides: “*Desiring* however to ensure that technical regulations and standards, ... and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade.”<sup>32</sup> The Appellate Body observed that the fifth recital is “reflected in those TBT provisions that aim at reducing obstacles to international trade and that limit Members’ right to regulate, for instance, by prohibiting discrimination against imported products (Article 2.1) or requiring that technical regulations be no more trade restrictive than necessary to fulfill a legitimate objective (Article 2.2).”<sup>33</sup>

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<sup>28</sup> *Id.*, ¶ 297.

<sup>29</sup> *Id.*, ¶ 85.

<sup>30</sup> *Id.*, ¶ 90.

<sup>31</sup> *Id.*, ¶ 91.

<sup>32</sup> *Id.*, ¶ 92.

<sup>33</sup> *Id.*, ¶ 93.

However, the fifth recital is qualified by the sixth recital, which states:

*Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.<sup>34</sup>

The Appellate Body read the sixth recital “to suggest that Members have a right to use technical regulations in pursuit of their legitimate objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the TBT Agreement.”<sup>35</sup> Characterizing the preamble as balancing “on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members’ right to regulate,” the Appellate Body stated that the balance “is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.”<sup>36</sup>

Next, the Appellate Body noted that Article 2.1 applied to “technical regulations,” which are defined as “[d]ocument[s] which lay[] down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory.”<sup>37</sup> The Appellate Body concluded that “in the case of technical regulations, the measure itself may provide elements that are relevant to the determination of whether products are like and whether less favourable treatment has been accorded to imported products.”<sup>38</sup>

Finally, the Appellate Body noted the similarity of the language of the national treatment obligation of Article 2.1 and the language of Article III:4 of the GATT 1994. Noting that the two Articles share the same core terms—“like products” and “treatment no less favourable”—and the same scope of application, the Appellate Body determined that “in interpreting Article 2.1 of the TBT Agreement, a panel should focus on the text of Article 2.1, read in the context of the TBT Agreement, including its preamble, and also consider other contextual elements, such as Article III:4 of the GATT 1994.”<sup>39</sup> Therefore, the Appellate Body recognized the similarity of Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 for their core terms (“like products” and “less favourable treatment”), as well as their similarity in providing room for Members to regulate for domestic purposes.

## **Relevance of Regulatory Purpose of the Technical Regulation to the Likeness Determination**

One of the issues before the Appellate Body was the extent to which the regulatory purpose of the technical regulation at issue should influence the likeness analysis. The panel wrote that the

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<sup>34</sup> *Id.*, ¶ 94.

<sup>35</sup> *Id.*, ¶ 95.

<sup>36</sup> *Id.*, ¶ 96.

<sup>37</sup> *Id.*, ¶ 97.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*, ¶100.



purpose of Section 907(a)(1)(A) of the Tobacco Control Act must inform the likeness analysis under Article 2.1 of the TBT Agreement: “the declared legitimate public health objective of Section 907(a)(1)(A), i.e. the reduction of youth smoking, must permeate and inform our likeness analysis.”<sup>40</sup>

The Appellate Body rejected the panel’s approach, concluding that the regulatory purpose of the measure at issue does not directly factor in the likeness analysis. It explained that “the concept of ‘like products’ serves to define the scope of products that should be compared to establish whether less favourable treatment is being accorded to imported products.”<sup>41</sup> The Appellate Body “consider[ed] that the determination of likeness under Article 2.1 of the TBT Agreement, as well as under Article III:4 of the GATT 1994, is a determination about the nature and extent of a competitive relationship between and among the products at issue.”<sup>42</sup> Regulatory concerns behind a technical regulation may nonetheless play a role in the likeness determination “[t]o the extent that they are relevant to the examination of certain ‘likeness’ criteria and are reflected in the products’ competitive relationship.”<sup>43</sup> As explained below, however, regulatory concerns primarily relate to analyzing less favorable treatment.

## **Like Products**

There are four traditional likeness criteria in GATT 1994 jurisprudence: physical characteristics; end-uses; consumer tastes and habits; and tariff classification.<sup>44</sup> The United States only appealed the panel’s findings that clove and menthol cigarettes are like products with respect to end-uses and consumer tastes and habits.

### ***End-Uses***

The panel determined that menthol cigarettes and clove cigarettes shared the same end-use: “to be smoked.”<sup>45</sup> The United States argued that there are two distinct end-uses: “satisfying an addiction to nicotine” and “creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke.”<sup>46</sup> The United States claimed menthol cigarettes are used primarily for satisfying an addiction, while clove cigarettes are used primarily for providing a pleasurable experience.<sup>47</sup>

The Appellate Body first distinguished end-uses from consumer tastes and habits. “[E]nd-uses describe the possible functions of a product, while consumer tastes and habits reflect the consumers’ appreciation of these functions.”<sup>48</sup> In another case decided under Article III:4 of GATT 1994, “the Appellate Body described end-uses as the extent to which products are capable of performing the same, or similar, functions and consumer tastes and habits as the extent to

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<sup>40</sup> Clove Cigarettes Panel Report at ¶ 7.119.

<sup>41</sup> Clove Cigarettes AB Report, ¶ 116.

<sup>42</sup> *Id.*, ¶ 120.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, ¶ 104.

<sup>45</sup> *Id.*, ¶ 122.

<sup>46</sup> *Id.*, ¶ 122.

<sup>47</sup> *Id.*, ¶ 123.

<sup>48</sup> *Id.*, ¶ 125.

which consumers are willing to use the products to perform these functions.”<sup>49</sup> The Appellate Body concluded: “that consumers smoke to satisfy an addiction or that they smoke for pleasure are relevant to the examination of both end-uses and consumer tastes and habits.”<sup>50</sup> The Appellate Body, therefore, agreed with the United States that the end uses being compared should be “to satisfy an addiction to nicotine” and “creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke.”<sup>51</sup>

However, the Appellate Body found, based on the findings of the panel, that both menthol and clove cigarettes serve both end-uses. First, it concluded that because menthol and clove cigarettes contain characterizing flavors that mask the harshness of tobacco smoke, they are both “capable of performing a social/experimentation function and, thus, share the end-use of ‘creating a pleasurable smoking experience associated with the taste of the cigarette and the aroma of the smoke.’”<sup>52</sup> Because both kinds of cigarettes contain nicotine, they are both capable of performing the function of “satisfying an addiction to nicotine.” “The fact that more ‘addicts’ smoke menthol than clove cigarettes does not mean that clove cigarettes cannot be smoked to ‘satisfy an addiction to nicotine.... [W]hat matters in determining a product’s end-use is that a product is capable of performing it, not that such end-use represents the principal or most common end-use of that product.”<sup>53</sup>

Although the Appellate Body agreed with the United States that the panel should have considered the two specific end-uses proffered by the United States, it upheld the panel’s finding of likeness with respect to end-uses because it concluded that both menthol and clove cigarettes could serve both end-uses of satisfying an addiction and creating a pleasurable experience.

### *Consumer Tastes and Habits*

The panel below determined that the purpose of Section 907(a)(1)(A) should determine the consumers whose tastes and habits should be considered.<sup>54</sup> Because the purpose of Section 907(a)(1)(A) was to curb smoking by youth, therefore, the panel considered potential and actual youth smokers and concluded that because both kinds of cigarettes have characterizing flavors, they both appeal to youth and are “similar for the purpose of starting to smoke.”<sup>55</sup> On appeal, the United States noted that Section 907(a)(1)(A) made a regulatory distinction between cigarettes, not only based on their appeal to youth, but also based on their appeal to adults.<sup>56</sup> The panel, the United States argued, should have considered the tastes and habits of adult smokers also.<sup>57</sup>

The Appellate Body agreed with the United States that the panel should have considered adult smokers as well as youth smokers: “In an analysis of likeness based on products’ competitive

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<sup>49</sup> *Id.* (internal quotation marks and citation omitted).

<sup>50</sup> *Id.*, ¶ 126.

<sup>51</sup> *Id.*, ¶ 130.

<sup>52</sup> *Id.*, ¶ 131.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*, ¶ 133.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*, ¶ 134.

<sup>57</sup> *Id.*

relationship, it is the market that defines the scope of consumers whose preferences are relevant.”<sup>58</sup>

The proportion of youth and adults smoking different types of cigarettes may vary, but clove, menthol, and regular cigarettes are smoked by both young and adult smokers. To evaluate the degree of substitutability among these products, the Panel should have assessed the tastes and habits of all relevant consumers of the products at issue, not only of the main consumers of clove and menthol cigarettes, particularly where it is clear that an important proportion of menthol cigarette smokers are adult consumers.<sup>59</sup>

Although the Appellate Body agreed with the United States that the consumers whose tastes and habits should be considered included adult and youth smokers, it sustained the panel’s conclusion that menthol and clove cigarettes were like for the criterion of consumer tastes and habits. The Appellate Body explained:

In order to determine whether products are like under Article 2.1 of the TBT Agreement, it is not necessary to demonstrate that the products are substitutable for all consumers or that they actually compete in the entire market. Rather, if the products are highly substitutable for some consumers but not for others, this may also support a finding that the products are like.<sup>60</sup>

The Appellate Body noted, therefore, that substitutability did not have to exist throughout the market in order for products to be like.<sup>61</sup> Rather it is enough that the products are substitutable within a segment of the market.<sup>62</sup>

[T]he mere fact that clove cigarettes are smoked disproportionately by youth, while menthol cigarettes are smoked more evenly by young and adult smokers does not necessarily affect the degree of substitutability between clove and menthol cigarettes. The Panel found that, from the perspective of young and potential young smokers, clove-flavoured cigarettes and menthol-flavoured cigarettes are similar for purposes of starting to smoke. We understand this as a finding that young and potential young smokers perceive clove and menthol cigarettes as sufficiently substitutable. This, in turn, is sufficient to support the Panel’s finding that those products are like within the meaning of Article 2.1 of the TBT Agreement, even if the degree of substitutability is not the same for all adult smokers.<sup>63</sup>

Thus, even though the Appellate Body held that the panel should have considered adult and youth smokers, ultimately it only considered the substitutability of menthol and clove cigarettes among youth smokers. Therefore, the Appellate Body found that they were like products for the consumer tastes and habits criterion.

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<sup>58</sup> *Id.*, ¶ 137.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*, ¶ 142.

<sup>61</sup> *Id.*, ¶ 143.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*, ¶ 144.

## Less Favorable Treatment

The panel found that Section 907(a)(1)(A) treated imported clove cigarettes less favorably than it treated domestically produced menthol cigarettes because it banned clove cigarettes while exempting menthol cigarettes. The United States argued on appeal that the panel erred in focusing solely on clove and menthol cigarettes. Instead, the United States argued, the panel should have compared the treatment accorded to the group of imported from all Members to the treatment accorded the group of domestic like products.<sup>64</sup> In addition, the United States complained that the panel considered only the products on the market when the ban went into effect and did not consider products that had been on the market previously.<sup>65</sup> Finally, the United States claimed the panel erred in finding that the less favorable treatment accorded clove cigarettes was related to their origin.<sup>66</sup>

## *Analytical Framework*

Although the United States and Indonesia agreed that the test for less favorable treatment is whether the “technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of imported products,” they could not agree on the circumstances under which a detrimental impact on imported products constituted less favorable treatment. Indonesia argued that any detrimental impact constituted less favorable treatment, while the United States argued the detrimental impact will not constitute less favorable treatment if it is “explained by factors or circumstances unrelated to the foreign origin of the product.”<sup>67</sup>

To settle this dispute, the Appellate Body began by considering the meaning of the term “technical regulation.”

A technical regulation is defined in Annex 1.1 [ ] as a “[d]ocument which lays down product characteristics or their related processes and production methods with which compliance is mandatory.” As such, technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics or their related processes and production methods. This suggests, in our view, that Article 2.1 should not be read to mean that any distinction, in particular those that are based exclusively on particular product characteristics or their related processes and production methods, would per se accord less favorable treatment within the meaning of Article 2.1.<sup>68</sup>

Next, the Appellate Body considered Article 2.2 of the TBT Agreement: “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 fulfill a legitimate objective, taking account of the risks non-fulfillment would create.”<sup>69</sup>

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<sup>64</sup> *Id.*, ¶ 163.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*, ¶ 166.

<sup>68</sup> *Id.*, ¶ 169.

<sup>69</sup> *Id.*, ¶ 170.

The Appellate Body stated, “The context provided by Article 2.2 suggests that ‘obstacles to international trade’ may be permitted insofar as they are not found to be ‘unnecessary,’ that is ‘more trade-restrictive than necessary to fulfill a legitimate object.’”<sup>70</sup> To the Appellate Body, this meant that “Article 2.1 does not operate to prohibit a priori any obstacle to international trade.”<sup>71</sup>

Next, the Appellate Body considered the sixth recital of the TBT Agreement’s preamble. The sixth recital explicitly provides that Members may take “measures necessary for, inter alia, the protection of human life or health, provided such measures ‘are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination’ or a ‘disguised restriction on international trade’ and are ‘otherwise in accordance with the provisions of this Agreement.’”<sup>72</sup>

Looking again at the object and purpose of the TBT Agreement, the Appellate Body wrote that, given that the purpose of the TBT Agreement is to “strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members’ right to regulate,” “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.”<sup>73</sup> Article 2.1 of the TBT Agreement, therefore, prohibits *de jure* and *de facto* discrimination but allows detrimental impacts on imported products if those impacts arise exclusively from legitimate regulatory distinctions.<sup>74</sup>

The Appellate Body next outlined the jurisprudence concerning less favorable treatment developed under Article III:4 of GATT 1994, which it considered instructive in assessing the meaning of this concept. After reviewing a number of cases, the Appellate Body stated, “the ‘treatment no less favourable’ standard of Article III:4 of the GATT 1994 prohibits WTO members from modifying the conditions of competition in the marketplace to the detriment of the *group* of imported products vis-à-vis the *group* of domestic like products.”<sup>75</sup>

The Appellate Body elaborated on how its standard should be applied when *de facto* discrimination is alleged:

Accordingly, where the technical regulation at issue does not *de jure* discriminate against imports, the existence of a detrimental impact on competitive opportunities for the group of imported vis-à-vis the group of domestic like products is not dispositive of less favourable treatment under Article 2.1. Instead, a panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. In making this determination, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even handed in order to determine whether it discriminates against the group of imported products.<sup>76</sup>

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<sup>70</sup> *Id.*, ¶ 171.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*, ¶ 173.

<sup>73</sup> *Id.*, ¶ 174.

<sup>74</sup> *Id.*, ¶ 175.

<sup>75</sup> *Id.*, ¶ 179 (emphasis added).

<sup>76</sup> *Id.*, ¶ 182.

Therefore, the Appellate Body agreed with the United States that detrimental impact on a group of like imported goods is not sufficient to establish a violation of Article 2.1 of the TBT Agreement. If the detrimental impact stems *exclusively* from a legitimate regulatory distinction, it will be permitted.

### ***Product Scope of the "Treatment No Less Favorable" Comparison***

On appeal, the United States argued that the panel improperly limited the less favorable treatment analysis to one imported product (Indonesian clove cigarettes) and one domestic product (domestically produced menthol cigarettes).<sup>77</sup> Instead, the United States argued, the panel should have included menthol cigarettes imported from all Members,<sup>78</sup> and all domestic non-menthol flavored cigarettes.<sup>79</sup> Had the panel done so, the United States implied, the panel would not have found that the Tobacco Control Act treated clove cigarettes less favorably than menthol cigarettes.

The United States argued that the panel should not have limited its analysis to Indonesian clove cigarettes. Instead, it should have also considered menthol cigarettes imported from all Members.<sup>80</sup> The Appellate Body disagreed because “the national treatment obligation of Article 2.1 calls for a comparison of treatment accorded to the group of like products imported from the Member alleging a violation of Article 2.1, and treatment accorded to the group of like domestic products.”<sup>81</sup> Because the vast majority of the cigarettes imported from Indonesia consist of clove cigarettes, the Appellate Body found that the panel did not err in finding that the group of like products imported from Indonesia consisted of clove cigarettes.<sup>82</sup> The product scope of the less favorable treatment analysis, therefore, begins with the group of like products from the complaining Member.

The United States argued also that the panel should have considered the treatment accorded non-menthol domestically produced flavored cigarettes. The Appellate Body noted that the United States did not challenge on appeal the panel’s exclusion of non-menthol domestically produced flavored cigarettes from the determination of like products. Therefore, without a finding by the panel that non-menthol domestically produced flavored cigarettes are like clove cigarettes, the Appellate Body could not determine whether the panel erred in failing to include non-menthol domestically produced flavored cigarettes in its less favorable treatment comparison.<sup>83</sup> However, the Appellate Body noted that the United States had confirmed that non-menthol domestically produced flavored cigarettes did not have “any sizeable market share in the United States.”<sup>84</sup> Therefore, the Appellate Body “considered it safe to assume” that inclusion of non-menthol domestically produced flavored cigarettes in the comparison would not have altered the panel’s conclusion that the group of like domestic products consisted of menthol cigarettes.<sup>85</sup>

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<sup>77</sup> *Id.*, ¶ 186.

<sup>78</sup> *Id.*, ¶ 196.

<sup>79</sup> *Id.*, ¶ 198.

<sup>80</sup> *Id.*, ¶ 196.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*, ¶ 197.

<sup>83</sup> *Id.*, ¶ 199.

<sup>84</sup> *Id.*, ¶ 200.

<sup>85</sup> *Id.*

### ***Temporal Scope of the “Treatment No Less Favorable” Comparison***

The United States argued that the panel erred to the extent it did not consider the effect of the Tobacco Control Act on non-menthol flavored domestic cigarettes based on its finding that at the time the ban on non-menthol flavored cigarettes went into effect, there were no non-menthol domestic flavored cigarettes on the market.<sup>86</sup> The United States asserted the panel should have considered the effect of the Tobacco Control Act on domestically produced non-menthol flavored cigarettes before the ban went into effect.<sup>87</sup> Specifically, the United States argued that “Article 2.1 ... does not establish a rigid temporal limitation in relation to the evidence that a panel may consider in performing a less favourable treatment analysis.”<sup>88</sup> The Appellate Body agreed with the United States that nothing in Article 2.1 prohibits a panel from

taking into account evidence pre-dating the establishment of a panel to the extent that such evidence informs the panel’s assessment of the consistency of the measure at [the time the panel was established]. This is particularly so in the case of a *de facto* discrimination claim, where a panel must base its determination on the totality of facts and circumstances before it, including the design, architecture, revealing structure, operation, and application of the technical regulation at issue.<sup>89</sup>

However, the Appellate Body stated that the panel’s statement that at the time of the ban, there were no non-menthol domestic flavored cigarettes was related to its consideration of the costs imposed by Section 907(a)(1)(A), not to its consideration of less favorable treatment.

### ***Legitimate Regulatory Distinction***

Although the United States acknowledged that Section 907(a)(1)(A) treats imported clove cigarettes differently from domestically produced menthol cigarettes to the detriment of clove cigarettes, it argued that the detrimental impact stems exclusively from a legitimate regulatory distinction.<sup>90</sup> The United States argued the exemption for menthol cigarettes addressed two distinct objectives: first, avoiding the health care system becoming overwhelmed by the millions of smokers addicted to menthol cigarettes seeking treatment; and second, avoiding the development of a black market to supply the needs of menthol smokers.<sup>91</sup> The panel rejected these as legitimate objectives because they amounted to the United States avoiding costs associated with banning all flavored cigarettes while imposing costs on the producers of clove cigarettes.<sup>92</sup> Because the panel did not address the U.S. claim that its decision not to ban menthol cigarettes was based on legitimate public health considerations, the panel did not make any factual findings about those considerations.

Although the Appellate Body did not agree with the panel’s analysis based on costs, ultimately it upheld the panel’s conclusion that Section 907(a)(1)(A) violated Article 2.1 of the TBT Agreement. First, the Appellate Body noted that the panel found that virtually all clove cigarettes

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<sup>86</sup> *Id.*, ¶ 201.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*, ¶ 202.

<sup>89</sup> *Id.*, ¶ 206.

<sup>90</sup> *Id.*, ¶ 215.

<sup>91</sup> *Id.*, ¶ 216.

<sup>92</sup> *Id.*, ¶ 217.

imported into the United States in the three years prior to the ban came from Indonesia and that the vast majority of clove cigarettes consumed in the United States came from Indonesia.<sup>93</sup> Moreover, the United States had confirmed that non-clove flavored cigarettes subject to Section 907(a)(1)(A)'s ban were on the market for a very short time and represented a relatively small market share.<sup>94</sup> Finally, the Appellate Body pointed out that the record revealed that between 2000 to 2009, between 94.3% and 97.4% of all cigarettes sold in the United States were produced domestically and that menthol cigarettes accounted for 26%.<sup>95</sup> In light of those facts, the Appellate Body concluded “the design, architecture, revealing structure, operation and application of Section 907(a)(1)(A) strongly suggest that the detrimental impact on competitive opportunities for clove cigarettes reflects discrimination against the group of like products imported from Indonesia.”<sup>96</sup>

Second, the Appellate Body rejected the U.S. claim that the detrimental impact on clove cigarettes was based on legitimate public health considerations. The Appellate Body noted that the purpose of Section 907(a)(1)(A) was to curb youth smoking. However, the Appellate Body stated, menthol cigarettes share with clove cigarettes the characteristic that makes them appealing to youth smokers—a characterizing flavor that masks the harshness of tobacco smoke.<sup>97</sup> Furthermore, the Appellate Body rejected the U.S. justification for not banning menthol cigarettes. The Appellate Body doubted that the health care system would be overwhelmed by menthol cigarette smokers or that a black market would develop because regular cigarettes, which contain nicotine and could therefore satisfy the addiction of menthol smokers, would still be on the market.<sup>98</sup> The Appellate Body, therefore, upheld the panel's conclusion that by exempting menthol cigarettes from the ban on flavored cigarettes, Section 907(a)(1)(A) accords less favorable treatment to imported clove cigarettes than to domestically produced menthol cigarettes.

## **“Reasonable Interval” Under Article 2.12 of the TBT Agreement**

Article 2.12 of the TBT Agreement requires Members to “allow a reasonable interval between the publication of technical regulations and their entry into force.” The Tobacco Control Act gave three months notice before its ban went into effect.

Indonesia argued before the panel that paragraph 5.2 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns (Doha Ministerial Decision) defined “reasonable interval” within Article 2.12 to mean not less than six months and that paragraph 5.2 constitutes “a legally binding interpretation pursuant to Article IX:2 of the WTO Agreement.”<sup>99</sup> Paragraph 5.2 provides that “reasonable interval” “shall be understood to mean” not less than six months. Article IX:2 of the WTO Agreement provides:

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<sup>93</sup> *Id.*, ¶ 222.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*, ¶ 223.

<sup>96</sup> *Id.*, ¶ 224.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*, ¶ 238.



The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of the Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members.<sup>100</sup>

Without deciding whether paragraph 5.2 of the Doha Ministerial Decision was a legally binding interpretation under Article IX:2, the panel stated that it “must be guided by [the Doha Ministerial Decision] in its interpretation of the phrase reasonable interval as [the Doha Ministerial Decision] was agreed to by all WTO Members meeting in the form of the Ministerial Conference, the highest ranking body of the WTO.”<sup>101</sup> Furthermore, the panel stated that paragraph 5.2 could be a “subsequent agreement of the parties” on the meaning of “reasonable interval” in Article 2.12 of the TBT Agreement within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>102</sup> Article 31(3)(a) of the Vienna Convention provides: “There shall be taken into account, together with context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.”<sup>103</sup> The panel ultimately concluded that Indonesia had established a prima facie case that Section 907(a)(1)(A) violated Article 2.12 and that the United States failed to rebut it.

On appeal, the United States argued that the panel erred (1) in attributing “interpretive value” to paragraph 5.2 of the Doha Ministerial Decision and (2) in finding that Indonesia had established a prima facie case of inconsistency with Article 2.12 of the TBT that the United States failed to rebut.<sup>104</sup>

### **Paragraph 5.2 of the Doha Ministerial Decision as a Legally Binding Interpretation Adopted Under Article IX:2 of the WTO Agreement**

The Appellate Body began its analysis of the status of paragraph 5.2 of the Doha Ministerial Decision by noting that Article IX:2 of the WTO Agreement on legally binding interpretations has “clearly articulated and strict decision-making procedures.”<sup>105</sup> Specifically, it provides “(i) a decision by the Ministerial Conference or the General Council to adopt such interpretations shall be taken by a three-fourths majority of Members; and (ii) such interpretations shall be taken on the basis of a recommendation by the Council overseeing the functioning of the relevant Agreement.”<sup>106</sup> Because the United States only appealed the panel’s decision based on the lack of a recommendation from the relevant Council, the Appellate Body limited its decision to that issue. It found “in the absence of evidence of the existence of a specific recommendation from the Council for Trade in Goods concerning the interpretation of Article 2.12 of the TBT Agreement, paragraph 5.2 of the Doha Ministerial Decision does not constitute a multilateral interpretation adopted pursuant to Article IX:2 of the WTO Agreement.”<sup>107</sup> Because the Council on Trade in

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<sup>100</sup> *Id.*, ¶ 248.

<sup>101</sup> *Id.*, ¶ 239 (internal quotation marks omitted; brackets in original).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*, ¶ 261.

<sup>104</sup> *Id.*, ¶ 240.

<sup>105</sup> *Id.*, ¶ 250.

<sup>106</sup> *Id.* at 251.

<sup>107</sup> *Id.*, ¶ 255.

Goods had not made a recommendation to the Ministerial Council, the Appellate Body concluded that paragraph 5.2 did not satisfy the requirements of Article IX:2 of the WTO Agreement.

### **Paragraph 5.2 of the Doha Ministerial Decision as a Subsequent Agreement Within Article 31(3)(a) of the Vienna Convention**

Next, the Appellate Body considered whether, as the panel found, paragraph 5.2 could be considered a subsequent agreement of the parties within the meaning of Article 31(3)(a) of the Vienna Convention<sup>108</sup> on the interpretation of “reasonable interval” in Article 2.12 of the TBT Agreement.<sup>109</sup> The United States argued that “a decision by the Ministerial Conference that does not conform with the specific decision-making procedures established by Article IX:2 of the WTO Agreement cannot constitute a ‘subsequent agreement between the parties’ within the meaning of Article 31(3)(a) of the Vienna Convention.”<sup>110</sup>

Distinguishing legally binding subsequent interpretations adopted under Article IX:2 of the WTO Agreement from subsequent agreements under Article 31(3)(a) of the Vienna Convention, the Appellate Body rejected the U.S. argument. The Appellate Body explained, “Multilateral interpretations under Article IX:2 of the WTO Agreement provide a means by which Members ... may adopt binding interpretations that clarify WTO law for all Members.”<sup>111</sup> In contrast,

Article 31(3)(a) of the Vienna Convention is a rule of treaty interpretation, pursuant to which a treaty interpreter uses a subsequent agreement between the parties on the interpretation of a treaty provision as an interpretive tool to determine the meaning of that treaty provision. Pursuant to Article 3.2 of the [Dispute Settlement Understanding (DSU)], panels and the Appellate Body are required to apply the customary rules of interpretation of public international law—including the rule embodied in Article 31(3)(a) of the Vienna Convention—to clarify the existing provisions of the covered agreements. Interpretations developed by panels and the Appellate Body in the course of a dispute settlement proceeding are binding only on the parties to a particular dispute. Article IX:2 of the WTO Agreement does not preclude panels and the Appellate Body from having recourse to a customary rule of interpretation of public international law that, pursuant to Article 3.2 of the DSU, they are required to apply.<sup>112</sup>

The Appellate Body proceeded to consider whether paragraph 5.2 of the Doha Ministerial Decision was such a subsequent agreement. It stated: “a decision adopted by Members may qualify as a ‘subsequent agreement between the parties’ regarding the interpretation of a covered agreement or the application of its provisions if (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an agreement between Members on the interpretation of application of WTO law.”<sup>113</sup> As there was no doubt that paragraph 5.2 was adopted after Article 2.12 of the TBT Agreement, the

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<sup>108</sup> Article 31(3) of the Vienna Convention provides: “There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or application of its provisions[.]”

<sup>109</sup> *Id.*, ¶ 256.

<sup>110</sup> *Id.*, ¶ 257.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*, ¶ 258.

<sup>113</sup> *Id.*, ¶ 262.

only issue for the Appellate Body was whether paragraph 5.2 expressed an agreement among the Members on the meaning of “reasonable interval” within Article 2.12 of the TBT Agreement.<sup>114</sup>

The Appellate Body began its analysis by noting that in a previous WTO case,

the Appellate Body observed that the International Law Commission (the “ILC”) describes a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention as “a further *authentic element of interpretation* to be taken into account together with context.” According to the Appellate Body, by referring to “authentic interpretation,” the ILC reads Article 31(3)(a) as referring to *agreements bearing specifically upon the interpretation of the treaty*.<sup>115</sup>

The Appellate Body concluded that paragraph 5.2, in expressly addressing Article 2.12, “bears specifically” on the meaning of “reasonable interval” within Article 2.12 of the TBT Agreement.<sup>116</sup>

Next, it considered whether paragraph 5.2 was an agreement among the Members. Noting that Article 31(3)(a) of the Vienna Convention does not specify a form that a subsequent agreement must take, the Appellate Body stated that Article 5.2 “can be characterized as a ‘subsequent agreement’ . . . provided that it clearly expresses a common understanding, and an acceptance of that understanding among Members with regard to the meaning of the term ‘reasonable interval.’”<sup>117</sup> Because paragraph 5.2 of the Doha Ministerial Decision provides that “reasonable interval” in Article 2.12 of the TBT Agreement “shall be understood to mean” not less than six months, the Appellate Body concluded that paragraph 5.2 was a subsequent agreement on the meaning of “reasonable interval” within Article 31(3)(a) of the Vienna Convention.<sup>118</sup> Therefore, “the terms of paragraph 5.2 of the Doha Ministerial Decision constitute an interpretive clarification to be taken into account in the interpretation of Article 2.12 of the TBT Agreement.”<sup>119</sup>

### **Interpretation of Article 2.12 of the TBT Agreement In Light of Paragraph 5.2 of the Doha Ministerial Decision**

The Appellate Body began its interpretation of Article 2.12 of the TBT by noting that the reason for allowing a reasonable interval from publication of a technical regulation and its going into force is to allow producers in exporting Members to adapt to the rule.<sup>120</sup> Therefore, Article 2.12, in conjunction with paragraph 5.2 of the Doha Ministerial Decision, establishes a rule that, normally, producers in exporting Members require a period of at least six months to adapt to the new technical regulation.

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<sup>114</sup> *Id.*, ¶ 263.

<sup>115</sup> *Id.*, ¶ 265 (emphasis in original).

<sup>116</sup> *Id.*, ¶ 266.

<sup>117</sup> *Id.*, ¶ 267.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*, ¶ 269.

<sup>120</sup> *Id.*, ¶ 272.

## **Prima Facie Case That the United States Violated Article 2.12 of the TBT Agreement**

The panel put the burden on Indonesia to establish a prima facie case that the six-month period provided in Article 2.12 was reasonable and found that Indonesia had set forth a prima facie case which the United States failed to rebut. The United States made two arguments on appeal. First, the United States argued that in order to make a prima facie case, Indonesia needed to establish that the three month period allowed by the Tobacco Control Act was unreasonable, which it failed to do.<sup>121</sup> Second, the United States argued that even if the panel was correct that “the elements of a prima facie case may be drawn exclusively from paragraph 5.2 of the Doha Ministerial Decision, the Panel erred in finding that Indonesia had succeeded in making such a case.”<sup>122</sup>

The Appellate Body declared that a complaining Member establishes a prima facie case of inconsistency with Article 2.12 of the TBT Agreement when it shows that the importing Member allowed a period of less than six months from the time the technical regulation is published until its effective date.<sup>123</sup> Then, the burden shifts to the importing member to rebut the prima facie case.<sup>124</sup> In order to identify the elements of a rebuttal, the Appellate Body spelled out the exceptions to Article 2.12:

First, Article 2.12 of the TBT Agreement excludes from the obligation to provide a “reasonable interval” between the publication and the entry into force of technical regulations “those urgent circumstances” referred to in Article 2.10 of the TBT Agreement. Thus, where “urgent problems of safety, health, environmental protection or national security” arise for a Member that is implementing a technical regulation, a period of six months or more cannot be considered to be a “reasonable interval” within the meaning of Article 2.12. Second, Article 2.12 expressly states that the rationale for providing a “reasonable interval” ... is “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’s technical regulation. If these producers can adapt their products or production methods to the requirements of an importing Member’s technical regulation in less than six months, a period of six months or more cannot be considered to be a “reasonable interval”.... Third, paragraph 5.2 allows an importing Member to depart from the obligation to provide a “reasonable interval” of, “normally,” not less than six months ... if this interval would be “ineffective to fulfill the legitimate objectives pursued” by its technical regulation. Therefore, a period of “not less than six months” cannot be considered to be a “reasonable interval,” within the meaning of Article 2.12, if this period would be ineffective to fulfill the legitimate objectives pursued by the technical regulation at issue.<sup>125</sup>

In order to rebut a prima facie case, therefore, the responding member must establish

(i) that the “urgent circumstances” referred to in Article 2.10 of the TBT Agreement surrounded the adoption of the technical regulation at issue; (ii) that producers of the complaining Member could have adapted to the requirements of the technical regulation at

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<sup>121</sup> *Id.*, ¶ 277.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*, ¶¶ 280–281.

<sup>124</sup> *Id.*, ¶ 281.

<sup>125</sup> *Id.*, ¶ 282.

issue within the shorter interval that it allowed; or (iii) that a period of “not less than” six months would be ineffective to fulfill the legitimate objectives of its technical regulation.<sup>126</sup>

Thus, the Appellate Body disagreed with the panel’s allocation of the burden of proof, but ultimately agreed that Indonesia had set forth a prima facie case, which the United States failed to rebut.<sup>127</sup>

## The U.S. Response

At the April 24, 2012, meeting of the Dispute Settlement Body (DSB), the United States made a statement about the Appellate Body’s decision. The United States explained that the Tobacco Control Act was aimed at “cigarettes that were smoked by a small fraction of the population and predominantly by young people.”<sup>128</sup> Although tobacco and menthol cigarettes, which are smoked by “tens of millions of addicted adults,” pose a serious public health issue, those issues are different from the issue which the Tobacco Control Act was intended to address—youth smoking.<sup>129</sup>

The United States noted that the panel, in finding the Tobacco Control Act consistent with Article 2.2 of the TBT, concluded that the Tobacco Control Act serves the legitimate objective of reducing youth smoking by removing “trainer cigarettes” from the market and that it was not more trade restrictive than necessary.<sup>130</sup> However, in light of those conclusions, the United States found it “very hard” to understand the Appellate Body’s conclusion that the Tobacco Control Act breaches Article 2.1 of the TBT Agreement. In particular, the United States appreciated that the Appellate Body recognized that Members may make “legitimate regulatory distinctions between like products, even where there is a detriment to the competitive conditions for the group of like imported products compared to the group of like domestic products.”<sup>131</sup> However, the United States stated that the Appellate Body’s findings and analysis on Article 2.1 are “problematic” because it fails to appreciate that, “from the perspective of public health regulation, there is a clear difference between a product, such as clove cigarettes, that is smoked in the United States experimentally by a small number of young people but relatively few adults, and a product such as menthol cigarettes, that is not only used by youth during initiation but also by tens of millions of addicted adults.”<sup>132</sup>

Because the Appellate Body recognized that the panel failed to explain why it rejected the U.S. regulatory approach and, therefore, made no factual findings, the United States asserted, the Appellate Body should have overturned the panel’s conclusion.<sup>133</sup> Instead, the United States complained, the Appellate Body engaged in its own analysis and rejected the U.S. explanation without citing to any facts to support its view that the basis for the distinction was not legitimate.

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<sup>126</sup> *Id.*, ¶ 283.

<sup>127</sup> *Id.*, ¶ 296.

<sup>128</sup> Statement by the United States at the April 24, 2012, DSB Meeting, available at <http://geneva.usmission.gov/2012/04/25/statements-by-the-united-states-at-the-april-24-2012-dsb-meeting/>.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

“The Appellate Body thus reached conclusions that were not, as they should be in any dispute, based on Panel findings or undisputed facts.”<sup>134</sup> By doing so, the United States stated, the Appellate Body in effect put itself in the position of regulator, weighing the risks and benefits from including menthol cigarettes in the ban.<sup>135</sup> The United States asserted that the Appellate Body rejected the judgment of the U.S. regulators that menthol cigarettes should not be included in the ban and substituted its own judgment on the basis that “it is not clear” that the concerns of the U.S. regulators would materialize if menthol cigarettes were banned.<sup>136</sup> “The result in this dispute should be of grave concern to any Member regulating for the benefit of public health as, without the benefit of analysis based in any factual findings, it was decided that a public health regulation must be applied to additional types of products, despite the potential harms of an extended ban.”<sup>137</sup>

Finally, the United States expressed disappointment with the Appellate Body’s determination that the Tobacco Control Act’s interval of three months between publication and effective date was not “reasonable” and thus inconsistent with Article 2.12 of the TBT Agreement. First, the United States asserted, the Appellate Body’s treatment of paragraph 5.2 of the Doha Ministerial Decision undermines its own finding that paragraph 5.2 was not a legally binding interpretation of “reasonable interval” under Article IX:2 of the WTO Agreement.<sup>138</sup> “[B]y treating paragraph 5.2 of the Doha Decision as a ‘subsequent agreement’ that establishes the meaning of the covered agreements, the Appellate Body report effectively eliminates the safeguards that Members have included in Article IX:2 of the WTO Agreement.”<sup>139</sup> Second, the United States stated, by finding that a prima facie case under Article 2.12 of the TBT Agreement is establishing that the technical regulation allows less than six months between publication and effective date, the Appellate Body reversed the burden of proof for Article 2.12 claims.<sup>140</sup> “[A]s members generally recognize, it must be the complaining party’s burden to prove all the elements of its legal claim. This should include that the complaining Member’s producers could not have adapted to the requirements within the interval actually allotted and that a period of not less than six months would be effective to fulfill the legitimate objective of the challenged measure.”<sup>141</sup>

On May 24, 2012, the United States issued the following statement at the meeting of the DSB about how it intends to respond to the conclusions of the Appellate Body:

[T]he United States wishes to state that it intends to implement the recommendations and rulings of the [Appellate Body] in a manner that protects public health and respects the obligations of the United States under the WTO Agreement.

- In this regard, the United States would emphasize the [panel’s] finding that the U.S. measure reflects the overwhelming view of the scientific community that banning clove and other flavored cigarettes benefits the public health by reducing the likelihood that youth will enter into a lifetime of cigarette addiction.

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

- Accordingly, the [panel] found that a ban on clove cigarettes meets the requirements of Article 2.2 of the TBT Agreement and is thus no more trade restrictive than necessary to fulfill a legitimate public health objective.

The United States will need a reasonable period of time in which to implement in this dispute.<sup>142</sup>

The United States and Indonesia agreed that 15 months—until July 24, 2013—was a reasonable period of time for the United States to comply with the Appellate Body decision.<sup>143</sup>

The statement that the United States will act in a manner that protects the public health, coupled with the highlighting of the panel's finding that Section 907(a)(1)(A) reflects the overwhelming view of the scientific community that banning clove and other flavored cigarettes benefits the public health, appears to suggest that the United States intends to maintain the ban on clove cigarettes. The United States also states that it will act in a way that respects its obligations under the WTO Agreement. It is unclear from this statement what the United States intends to do.

## Conclusion

The Appellate Body determined that Section 907(a)(1)(A) of the Tobacco Control Act violates Article 2.1 of the TBT Agreement in that it bans clove cigarettes, which are predominantly imported from Indonesia, while allowing menthol cigarettes, which are predominantly produced domestically. The Appellate Body concluded that clove cigarettes and menthol cigarettes are like products: with respect to end-uses, they are both capable of satisfying a nicotine addiction and creating a pleasurable smoking experience; and, with respect to consumer tastes and habits, they compete with each other and are substitutable within the youth segment of the overall market. The Appellate Body also determined that Section 907(a)(1)(A) treats clove cigarettes less favorably than menthol cigarettes and that this less favorable treatment is not justified by a legitimate regulatory distinction. The United States had argued that because millions of adult smokers are addicted to menthol cigarettes, banning them would run the risk of menthol smokers overwhelming the health care system as they sought treatment for nicotine withdrawal and turning to a black market to obtain menthol cigarettes. However, the Appellate Body noted the addictive ingredient in cigarettes is nicotine and that regular cigarettes, which contain nicotine, would continue to be available.

The Appellate Body also found that Section 901(a)(1)(A) violated Article 2.12 of the TBT Agreement because it did not provide a “reasonable interval” between its publication and its effective date. In arriving at this finding, it determined that paragraph 5.2 of the Doha Ministerial Decision is not a legally binding interpretation of “reasonable interval” under Article IX:2 of the WTO Agreement because it did not satisfy the procedural requirements of Article IX:2. The Appellate Body determined, however, that paragraph 5.2 of the Doha Ministerial Decision constituted a subsequent agreement on the meaning of “reasonable interval” within Article 31(3) of the Vienna Convention. It also determined that a complaining Member establishes a prima

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<sup>142</sup> Statement by the United States at the May 24, 2012, DSB Meeting, available at <http://geneva.usmission.gov/2012/05/24/statement-by-the-united-states-at-the-may-24-2012-dsb-meeting/>.

<sup>143</sup> *United States: Measures Affecting the Production and Sale of Clove Cigarettes*, Agreement Under Article 21 3(b) of the DSU, June 19, 2012.

facie case by establishing that the technical regulation allows less than six months between publication and effective date. A responding Member rebuts a prima facie case by establishing that the time provided by the technical regulation is reasonable.

The U.S. statement in response to the Appellate Body's decision seems to suggest that the United States intends to maintain the ban on clove cigarettes, while at the same time respecting its obligations under the WTO Agreement. It appears the United States has not yet decided how it intends to accomplish this goal. The United States and Indonesia agreed to a compliance date of July 24, 2013.<sup>144</sup>

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<sup>144</sup> WT/DS/406/10 (June 19, 2012).