United States – Measures Affecting the Production and Sale of Clove Cigarettes

(AB-2012-1 / DS406)

APPELLANT SUBMISSION
OF THE UNITED STATES OF AMERICA

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United States – Measures Affecting the Production and Sale of Clove Cigarettes

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SERVICE LIST

PARTY TO THE DISPUTE

H.E. Mr. Erwidodo, Permanent Mission of Indonesia

THIRD PARTIES

H.E. Mr. Roberto Azevedo, Permanent Mission of Brazil
H.E. Mr. Eduardo Muñoz, Permanent Mission of Colombia
H.E. Mr. Luis Manuel Piantini, Permanent Mission of the Dominican Republic
H.E. Mr. Angelos Pangratis, Permanent Mission of the European Union
H.E. Mr. Eduardo Sperisen-Yurt, Permanent Mission of Guatemala
H.E. Mr. Fernando de Mateo y Venturini, Permanent Mission of Mexico
H.E. Mrs. Elin Østebø Johansen, Permanent Mission of Norway
H.E. Mr. Bozkurt Aran, Permanent Mission of Turkey

Table of Contents

I. INTRODUCTION AND EXECUTIVE SUMMARY 1

II. FACTUAL BACKGROUND 5

A. The Public Health Crisis in the United States Caused by Cigarettes 5

B. The Measure At Issue And Its Immediate Context 8

C. Section 907(a)(1)(A) Is Consistent With Global Trends in Tobacco Regulation 11

D. The U.S. Cigarette Market 12

III. ARGUMENT 16

A. The Panel Erred in Finding That Clove Cigarettes and Menthol Cigarettes Are "Like Products" Under Article 2.1 of The TBT Agreement 16

1. The Panel Performed an Incomplete Analysis of the Different End-Uses of the Products at Issue 19

2. The Panel Erred by Failing to Examine All of the Evidence Related to the Consumer Tastes and Habits Criterion 21

a. The Panel Erred in Determining That It Need Not Examine the Tastes and Habits of Current Consumers as Part of Its Analysis 22

i. The Tastes and Habits of Current Consumers Are Essential to an Analysis of the "Consumer Tastes and Habits" Criterion and Are Especially Relevant in This Dispute . . 22

ii. The Panel's Finding on the "Declared Legitimate Objective" of Section 907(a)(1)(A) Does Not Justify the Exclusion of Current Consumers' Tastes and Habits . . . 25

b. The Panel Acted Inconsistently With Article 11 of the DSU by Finding that Clove Cigarettes and Menthol Cigarettes Are Similar for the Relevant Consumers at Issue in this Case 28

B. The Panel Erred in Concluding That Section 907(a)(1)(A) Accords to Imported Clove Cigarettes Treatment Less Favorable Than That Accorded to Like Products of National Origin 31

1. The Panel Erred by Limiting the Scope of Products It Would Consider to One Banned Imported Product and One Non-banned Like Domestic Product 33

a. The Panel's Legal Basis for Excluding Like Imported Products Is Incorrect 37

b. The Terms of Reference Did Not Justify the Panel's Legal Mistake of Comparing Only Imported Clove Cigarettes and Domestic Menthol Cigarettes 38

c. The Panel Applied an Overly Narrow Test to Determine the Effect on U.S. Products 40

2. The Panel Acted Inconsistently with Article 11 When It Concluded That There Were "No" Domestic Cigarettes with Characterizing Flavors Other Than Menthol at the Time of the Ban 42

3. The Panel Erred in Concluding That Any Detriment to the Competitive Conditions for Clove Cigarettes Could Not Be Explained by Factors Unrelated to the Foreign Origin of the Products 43

a. The Panel Failed to Apply an Appropriate Legal Framework to Its Analysis of Whether the Identified Detriment to the Competitive Conditions for Clove Cigarettes Could Be Explained by Factors or Circumstances Other Than the Origin of the Products 43

b. The Panel Failed to Make an Objective Assessment of the Facts in Finding That There Were No Costs Imposed on Any U.S. Entity 47

C. The Panel Erred in Finding That Section 907(a)(1)(A) Is Inconsistent with Article 2.12 of the TBT Agreement 48

1. The Panel's Analysis 48

2. The Panel's Analysis Contains Three Errors That Led It to Find, Incorrectly, That Section 907(a)(1)(A) Is Inconsistent with Article 2.12 50

a. The Panel Attributes the Incorrect "Interpretative Value" to Paragraph 5.2 of the Doha Ministerial Decision in Interpreting the Meaning of Article 2.12 51

b. The Panel Erred in Finding that Indonesia Had Established a *Prima Facie* Case of Inconsistency with Article 2.12 54
i. Indonesia Did Not Establish a *Prima Facie* Case Under the Terms of Article 2.12 Because It Did Not Establish That the Interval Period Was Unreasonable in Light of the Impact on Foreign Producers 55
ii. Indonesia Did Not Establish a *Prima Facie* Case Under the Terms of Paragraph 5.2 of the Doha Ministerial Decision 56

c. Even if Indonesia Did Establish a *Prima Facie* Case, the Panel Improperly Found That the United States Did Not Rebut That *Prima Facie* Case 62

3. Conclusion 62

D. The United States Conditionally Appeals That the Panel Erred in Concluding That the Jurisprudence Developed Under Article XX(b) of the GATT 1994 Is "Relevant" to the Interpretation of Article 2.2 of the TBT Agreement 63

1. Introduction 63

2. The Panel Erred by Concluding That the Jurisprudence of Article XX(b) of the GATT 1994 Is "Relevant" to the Interpretation of the "No More Trade-Restrictive Than Necessary" Requirement in Article 2.2 of the TBT Agreement 64

a. The Texts of Article 2.2 of the TBT Agreement and Article XX(b) of the GATT 1994 Are Not "Very Similar" 65

b. The Context of Article 2.2 of the TBT Agreement Does Not Establish a "Direct Link" With Article XX(b) of the GATT 1994 67

c. There Are Significant Differences Between the Analyses of Article XX(b) of the GATT 1994 and Article 2.2 of the TBT Agreement 69

d. Nothing in the U.S. Argument Indicates That It Is Appropriate to Adopt the Analysis of Article XX(b) of the GATT 1994 in Order to Interpret Article 2.2 of the TBT Agreement 71

e. Conclusion 72

IV. CONCLUSION 72

Table of Reports Cited

Short Form	Full Citation
Australia – Apples (AB)	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010.
Australia – Salmon (AB)	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998
Border Tax Adjustments	GATT Panel Report, *Border Tax Adjustments*, L/3464, Report of the Working Party adopted on 2 December 1970
Canada – Milk/Dairy (AB)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R and WT/DS113/AB/R, adopted 27 October 1999
Canada Periodicals (AB)	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997
Canada – Wheat (AB)	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004
Chile – Alcohol (AB)	Appellate Body Report, *Chile – Taxes on Alcoholic Beverages,* WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000
Chile – Price Band (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
Brazil – Retreaded Tyres (AB)	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007
Dominican Republic – Cigarettes (AB)	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
EC – Asbestos (Panel)	Panel Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/R, adopted 5 April 2001 as modified by the Appellate Body Report, WT/DS135/AB/R

EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, adopted 5 April 2001
EC – Biotech (Panel)	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006
EC – Hormones (AB)	Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Sardines (Panel)	Panel Report, *European Communities – Trade Description of Sardines,* WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R
EC – Sardines (AB)	Appellate Body Report, *European Communities – Trade Description of Sardines,* WT/DS231/AB/R, adopted 23 October 2002
Korea – Alcohol (AB)	Appellate Body Report. Korea – *Taxes on Alcoholic Beverages*, WT/DS75,84/AB/R, adopted February 17, 1999
Korea – Beef (AB)	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
Korea – Dairy (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000
Mexico – Soft Drinks (Panel)	Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 24 March 2006, as modified by the Appellate Body Report, WT/DS308/AB/R
Thailand – Cigarettes	GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, BISD 37S/132, adopted 7 November 1990
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
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US – Malt Beverages	GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages,* DS23/R, BISD 39S/206, adopted 19 June 1992
US – Section 211 (AB)	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002
US – Tuna (Panel)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, circulated 15 September 2011
US – Wool Shirts (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. At issue in this dispute is a product, cigarettes with characterizing flavors, which the Panel correctly found to be "inherently harmful to human health, as recognized by the World Health Organization ("WHO"), the scientific community and both parties to this dispute."[1] Also at issue is a U.S. federal law, Section 907(a)(1)(A) of the Family Smoking Prevention and Tobacco Control Act (the "Tobacco Control Act"),[2] enacted with what the Panel found to be a legitimate objective – to reduce youth smoking – and, thereby, to reduce market demand for cigarettes in the United States, as nearly every smoker begins by the age of 26.[3] The legitimate U.S. policy goal is to shrink the market for the product at issue in the interest of the public health.

2. It is the first time a WTO dispute has been brought involving cigarettes in the context not of a fiscal tariff or tax, but of a public health regulation. This dispute also raises several other novel issues. It is the first time a Panel has addressed a claim that a public health measure is inconsistent with Article 2.1 and Article 2.2 of the *Agreement on Technical Barriers to Trade* (the "TBT Agreement"). In light of the difficult issues facing the Panel, the United States notes that in several crucial respects, the Panel correctly approached the complexity of this dispute, and appropriately took account of the public health crisis posed by use of tobacco products and the uniqueness of the particular product and regulatory context. For example, the Panel Report correctly concluded that Section 907(a)(1)(A)[4] is consistent with Article 2.2 of the TBT Agreement because it is not more trade restrictive than necessary to fulfill a legitimate objective. The Panel Report specifically finds that there is no "contradiction in the idea that a Member would seek to *reduce* (rather than eliminate) certain risks by *banning* certain (but not all) products."[5] The Panel Report further finds that, by removing cigarettes that are especially appealing to young, novice smokers, Section 907(a)(1)(A) makes a material contribution to the

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[1] Panel Report, para. 7.1.

[2] The Tobacco Control Act was adopted June 2009 and it went into effect September 2009 as an amendment to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §387g(a)(1)(A).

[3] Panel Report, para. 7.116 (noting that the "declared" legitimate public health objective of Section 907(a)(1)(A) is the reduction of youth smoking); *see also* Panel Report, paras. 2.6-2.7 (noting that the objective of Section 907(a)(1)(A) is not set forth in the FSPTCA itself but that a report by the House Energy and Commerce Committee explains the objective as follows: "Consistent with the overall intent of the bill to protect the public health, including by reducing the number of children and adolescents who smoke cigarettes, section 907(a)(1) is intended to prohibit the manufacture and sale of cigarettes with certain 'characterizing flavors' that appeal to youth."). *See also* Panel Report, para. 2.6 (quoting Guidance on the measure issued by the U.S. Food and Drug Administration, including, *inter alia*, that "In addition to being more attractive to young people, flavored products make it easier for new smokers to start smoking by masking the unpleasant flavor of tobacco. . . . Removing these flavored products from the market is important because it removes an avenue that young people can use to begin regular tobacco use.")

[4] Section 907(a)(1)(A) of the Federal Food, Drug and Cosmetic Act ("FFDCA") (as amended by the Family Smoking Prevention and Tobacco Control Act).

[5] Panel Report, para. 7.377 (emphasis in original).

objective of reducing youth smoking,[6] and found, in particular, that "there is extensive scientific evidence supporting the conclusion that banning clove and other flavoured cigarettes could contribute to reducing youth smoking."[7] The Panel correctly found that, in this case, a ban on a small range of cigarettes is a legitimate measure to reduce youth smoking.[8]

3. It is difficult to reconcile these findings with the Panel's conclusion that Section 907(a)(1)(A) is inconsistent with Article 2.1 of the TBT Agreement because a domestically-made flavored cigarette, to which millions of adults in the United States are addicted, is regulated differently than an imported flavored cigarette used almost exclusively by novice smokers. There are serious policy implications of the resolution of Indonesia's national treatment claim in this dispute. The WHO advocates a number of product restrictions for tobacco products, which it recommends that countries undertake to the extent that they are achievable.[9] No WTO Member's public health authorities have advocated the ban of the cigarettes most heavily used within a Member's borders. The United States should not be forced to adopt a policy that no WTO Member has seriously considered. Consistent with the WHO's endorsement of an incremental approach to tobacco control, the Tobacco Control Act represents a policy decision to pursue an incremental public health approach to curtail tobacco use, with measures on multiple fronts, including limits on access, advertisement and labeling, and review and approval of new tobacco products.[10] The measure at issue here is one piece of this legislative effort, addressing a category of cigarettes that comprise a small share of the U.S. market and are primarily used by young people as "trainer" cigarettes. One might disagree with the approach taken by the United States, but such disagreement does not mean the U.S. approach was illegitimate, or a pretext for discrimination.

4. The United States should not be required to adopt as its regulatory approach the total removal of access to cigarettes with characterizing flavors, especially when a cigarette with a characterizing flavor is used regularly by millions of addicted adult smokers. The United States legitimately determined that such an approach could have an overall negative effect on the public health and welfare, for example by straining the health care system or exacerbating the illegal

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[6] Panel Report, para. 7.379-7.417.

[7] Panel Report, para. 7.415. Although the United States takes issue with the Panel's legal approach under Article 2.2 of the TBT Agreement, in particular by beginning its analysis with an incorrect inquiry, the United States also notes that in this instance the Panel was able to correctly render the facts and ultimately reach the correct result on this issue despite its flawed initial inquiry.

[8] Panel Report, para. 7.394 ("We note that it is not in dispute that youth smoke menthol (and regular) cigarettes in far greater numbers than clove cigarettes. However, we do not consider that the failure to ban these cigarettes demonstrates that banning clove cigarettes makes no material contribution to reducing youth smoking.").

[9] *See, e.g.*, U.S. Answer to Panel Q97, paras. 54-61; U.S. Second Written Submission, paras. 7, 143.

[10] *See, e.g.*, U.S. First Written Submission, paras. 103-135.

market unregulated products. However, should the Panel's national treatment approach stand, the result would appear to be that the United States would be permitted to ban other flavored cigarettes to reduce youth smoking, but would have to allow clove cigarettes, even though they promote initiation and all of the adverse health consequences that follow, simply because clove cigarettes are primarily imported from Indonesia. This result would be inconsistent with Article 2.1 of the TBT Agreement, which permits Members to draw production distinctions based on regulatory considerations, even where costs may result to imported products.

5. Although in a number of respects the Panel Report takes the correct approach to resolving the claims in this dispute, the Panel Report includes a number of serious, fundamental interpretive errors and, in some instances, fails to make an objective assessment of the facts, with respect to certain aspects of Indonesia's claims. In particular, the United States seeks review of the Panel's findings that Section 907(a)(1)(A) is inconsistent with Article 2.1 and 2.12 of the TBT Agreement, and conditionally appeals the Panel's findings and legal interpretations under Article 2.2 of the TBT Agreement.

A. The Panel Erred in Finding That Clove Cigarettes and Menthol Cigarettes Are "Like Products" Under Article 2.1 Of The TBT Agreement

6. The Panel erred in its legal interpretation of Article 2.1 by concluding that imported clove cigarettes and domestic menthol cigarettes are like products. The Panel conducted an incomplete and flawed "like product" analysis with respect to two criteria: end-uses and consumer tastes and habits. As the Appellate Body found in *EC – Asbestos*, where a Panel adopts the four *Border Tax Adjustment* criteria as the framework for its analysis, the Panel is obligated to examine thoroughly the evidence related to each individual element, and not to dismiss *a priori* any evidence relating to a particular criterion.[11] The Panel over-simplified its end-use analysis in finding that the only end-use of both products is only "to be smoked." In fact clove cigarettes and menthol cigarettes are used differently in the United States – clove cigarettes primarily as an experimental, special occasion activity and menthol cigarettes primarily by individuals on a regular basis to satisfy an addiction to nicotine. In addition to the errors in the analysis of end-uses, the Panel erred by performing an incomplete analysis of consumer tastes and habits related to clove and menthol cigarettes. The Panel made a legal error by excluding the tastes and habits of current consumers – a highly relevant demographic in this dispute. The Panel also acted inconsistently with Article 11 of the DSU by refusing to examine evidence submitted by the parties relevant to how consumers in the relevant market use clove and menthol cigarettes.

B. The Panel Erred in Concluding That Section 907(a)(1)(A) Accords to Imported Clove Cigarettes Treatment Less Favorable Than That Accorded to Like Products of National Origin

[11] *EC – Asbestos (AB)*, para. 109; Panel Report, para. 7.148.

7. In reaching its conclusion that Section 907(a)(1)(A) accords less favorable treatment to imported clove cigarettes than to like domestic products, the Panel erred in several respects. First, the Panel erred in its interpretation of which products should be compared. The Panel Report compares only the treatment accorded to Indonesian clove cigarettes to domestic menthol cigarettes, and fails to compare the treatment accorded to like imported products, as a group, with that accorded to like domestic products, as a group.[12] Second, the Panel Report fails to assess the full effect of Section 907(a)(1)(A) on U.S. products, and instead considers only whether domestic products were on the market at the time the ban went into effect. Third, in reaching its conclusion on the effect on U.S. production, the Panel acted inconsistently with Article 11 of the DSU by finding that there were no domestic cigarettes with characterizing flavors other than menthol on the U.S. market at the time of the ban. Fourth, the Panel Report applies an incorrect legal framework to examine whether the identified detriment to the competitive situation of clove cigarettes could be explained by factors or circumstances unrelated to the origin of the products. The Panel Report erroneously considers whether the United States included or excluded certain products so as not to incur costs. Finally, the Panel acted inconsistently with Article 11 of the DSU in finding that Section 907(a)(1) imposes no costs on any U.S. entity.

C. The Panel Erred in Finding That Section 907(a)(1)(A) Is Inconsistent with Article 2.12 of the TBT Agreement

8. The United States appeals the Panel's finding that "by not allowing an interval of no less than six months between the publication and the entry into force of Section 907(a)(1)(A), the United States acted inconsistently with Article 2.12 of the *TBT Agreement*."[13] The Panel's analysis contains three errors that led it to this erroneous conclusion. First, the Panel attributes an incorrect "interpretative value" to paragraph 5.2 of the *Doha Ministerial Decision on Implementation-Related Issues and Concerns of 14 November 2001* (the "Doha Ministerial Decision") in interpreting the meaning of Article 2.12 of the TBT Agreement. The legal value of paragraph 5.2 is at most a means of supplement interpretation within the meaning of Article 32 of the *Vienna Convention on the Law of Treaties* ("VCLT"). But in any event, the Panel erred in interpreting paragraph 5.2 as supplanting the terms of Article 2.12. Second, and notwithstanding the weight given to the Doha Ministerial Decision, the Panel incorrectly finds that Indonesia had established a *prima facie* case of inconsistency with Article 2.12. The Panel thus erred in finding that Indonesia established a *prima facie* case under the terms of Article 2.12 as it did not demonstrate that the interval period was unreasonable in light of the impact on foreign producers. Alternatively, the Panel erred in finding that Indonesia established a *prima facie* case under the terms of paragraph 5.2 of the Doha Ministerial Decision. Third, and notwithstanding whether the Panel is correct in finding that Indonesia had established a *prima facie* case, the Panel also incorrectly determines that the United States did not rebut Indonesia's *prima facie* case.

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[12] *EC – Asbestos (AB)*, para. 100; *see also US – Tuna (Panel)*, paras. 7.293, 7.299, 7.373.

[13] Panel Report, para. 7.595.

D. The United States Conditionally Appeals That the Panel Erred in Concluding That the Jurisprudence Developed Under Article XX(b) of the GATT 1994 Is "Relevant" to the Interpretation of Article 2.2 of the TBT Agreement

9. The United States conditionally appeals the findings and legal interpretations developed in the Panel Report to consider the consistency of Section 907(a)(1)(A) with the requirement of Article 2.2 of the TBT Agreement that a technical regulation "not be more trade-restrictive than necessary to fulfill a legitimate objective . . . ." Specifically, and subject to Indonesia appealing any part of the Panel's findings with respect to Article 2.2, the United States appeals the Panel's findings and legal interpretations underlying the Panel's finding that the jurisprudence developed under 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."[14] The erroneous analysis contained in this section of the Panel Report provides the basis for the Panel's three part analytical framework for considering the consistency of Section 907(a)(1)(A) with Article 2.2. This analytical framework is in error in that it directs the Panel to examine whether the challenged measure makes a "material contribution" to achieving its legitimate objective, rather than examining the question posed by Article 2.2 of the TBT Agreement – whether an alternative measure exists that establishes that the challenged measure is more trade-restrictive than necessary to fulfil a legitimate objective.

10. The Panel erred in each of the four parts of its analysis. In particular, the Panel erred in finding that the terms of Article 2.2 of the TBT Agreement are "very similar" to the terms of Article XX(b) of the GATT 1994 where the two provisions ask different questions – Article XX(b) asks whether the measure *itself* is necessary, while Article 2.2 asks whether the *trade-restrictiveness* of the measure is necessary. This difference in the respective texts (as well as functions and burden of proof allocations) creates significant differences in the respective analytical frameworks of the two provisions. In contrast to what the Panel determined, to prove a Article 2.2 claim the complaining party must adduce sufficient evidence and argument to prove that (1) there is a reasonably available alternative measure (2) that fulfills the objectives of the measure at the level that the Member imposing the measure has determined is appropriate, which (3) is significantly less trade-restrictive.

II. FACTUAL BACKGROUND

A. The Public Health Crisis in the United States Caused by Cigarettes

11. Smoking has been recognized as the leading cause of preventable death in the United States.[15] Approximately 400,000 people in the United States die prematurely each year due to

[14] Panel Report, paras. 7.353-7.369.

[15] Panel Report, para. 2.8; U.S. First Written Submission, para. 14.

their own smoking, and tens of thousands more die due to secondhand smoke.[16] Smoking causes, among other ailments, lung cancer, emphysema, and heart disease.[17] The United States is in step with the majority of the global community in recognizing the vast harms caused by tobacco. The WHO and the scientific community recognize that cigarettes are inherently harmful to human health.[18] One hundred seventy-two countries, including the United States, signed the Framework Convention on Tobacco Control ("FCTC"), administered under the World Health Organization ("WHO"), in response to concerns about a globalized tobacco epidemic.[19]

12. Regulators and public health authorities in the United States began to address the problem of smoking over the last fifty years.[20] Progress has been slow for a number of reasons: cigarettes are chemically and psychologically addictive, and people become dependent on the nicotine they deliver;[21] the dangers of smoking only started to be understood by public health officials in the 1950s and 1960s,[22] at which point millions of people in the United States already were addicted to cigarettes and smoking had become a normalized aspect of American culture;[23] and, as became clear in the 1990s, major tobacco firms had long made efforts to conceal the dangers of cigarettes, while at the same time recruiting new smokers by actively marketing cigarettes to young people.[24]

13. Given the difficult, widespread nature of the problem, a wholesale prohibition on smoking has never been regarded as a workable response in the United States, or in virtually any other country. U.S. regulators have considered that a total ban on cigarettes likely would not be effective, and very likely could backfire, for example by resulting in increased illegal smuggling, which already constitutes a billion-dollar black market in the United States and elsewhere.[25]

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[16] Panel Report, para. 2.8; U.S. First Written Submission, para. 15.

[17] U.S. First Written Submission, para. 14.

[18] Panel Report, para. 7.1.

[19] Panel Report, paras. 2.29-30 (Indonesia is not a signatory).

[20] Panel Report, paras. 2.12-2.23; U.S. First Written Submission, paras. 79-81; U.S. Second Written Submission, paras. 17-32.

[21] U.S. First Written Submission, para. 22.

[22] Panel Report, para. 2.12; *See also*, U.S. First Written Submission, para. 79

[23] U.S. First Written Submission, para. 13.

[24] U.S. First Written Submission, para. 81.

[25] U.S. First Written Submission, paras 24-26, 108, 132-134; U.S. Second Written Submission, para. 30; Answer to Panel Q90(a), paras. 32-33. Exhibit US-27, Exhibit US-30; Exhibit US-138, Exhibit US-140, Exhibit US-141.

Morever, the process of overcoming addiction includes its own health ramifications, and forcing millions of people off cigarettes at the same time could overwhelm the health system.[26]

14. Accordingly, regulators have approached the problem of smoking incrementally. For example, the first major U.S. legislation addressing cigarettes in 1965 focused on labeling and advertising practices.[27] Over the years, the U.S. federal government, as well as states and municipalities, have enacted advertising and sponsorship restrictions and eventually started to limit the venues where cigarettes can be purchased or smoked.[28] At the same time, state governments and the U.S. federal government pursued legal actions against cigarette manufacturers to recover damages for public health costs associated with smoking and to prevent deceptive marketing practices.[29] As discussed below, the Tobacco Control Act, enacted in 2009, marked a significant milestone in tobacco control in the United States, as the U.S. Congress authorized the U.S. FDA to regulate tobacco products, set product standards and enact other new restrictions to protect the public health.[30]

15. Given the addictive nature of smoking, efforts to reduce smoking naturally focus in preventing new persons from starting to smoke. Young people are a critical demographic in efforts to decrease the prevalence of smoking, as 98% of smokers begin before the age of 26.[31] Accordingly, health regulators regard the "window of smoking initiation" to be approximately between the ages of 12 and 25,[32] and much of tobacco control efforts have focused on reducing young people's exposure and access to cigarettes. These efforts need to include responding to new products that may induce young people to begin smoking. In 1999, cigarette companies began launching new cigarette flavors such as "splash of citrus flavor" and "hint of vanilla."[33] Section 907(a)(1)(A) of the Tobacco Control Act was a response to this growing niche of products targeted at and used by almost exclusively young people.[34]

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[26] U.S. First Written Submission, paras 22-23, 134; Answer to Panel Q90(a), para. 31; Answer to Panel Q90(b), paras. 34-35. Exhibit US-25, Exhibit US-26; Exhibit US-138.

[27] U.S. First Written Submission, para. 80; U.S. Second Written Submission, para. 18.

[28] Panel Report, paras. 2.13-2.14; U.S. Second Written Submission, paras. 18-19.

[29] Panel Report, paras. 2.13-2.14; U.S. First Written Submission, paras. 81, 101.

[30] Panel Report, paras. 2.16-2.18; U.S. First Written Submission, paras. 79-81.

[31] U.S. First Written Submission, para. 17.

[32] U.S. Second Written Submission, para. 33.

[33] U.S. First Written Submission, para. 48.

[34] U.S. First Written Submission, paras. 43-55 and 124-130; Exhibit US-53 at 7.

B. The Measure At Issue And Its Immediate Context

16. The Tobacco Control Act represents the most far-reaching tobacco legislation in the United States to date, representing the culmination of years of legislative effort to regulate tobacco products for the protection of the public health.[35] The Tobacco Control Act states that, among the purposes of the legislation, is "to ensure that the Food and Drug Administration has the authority to address issues of particular concern to public health officials, especially the use of tobacco by young people and dependence on tobacco."[36] The Tobacco Control Act authorizes the U.S. FDA to regulate the manufacture, sale, and distribution of tobacco products, including the authority to review new tobacco products before they enter the U.S. market and to set product standards "as appropriate for the public health."[37] The Tobacco Control Act also contains direct prohibitions and restrictions on advertising, labeling, and distribution.[38]

17. Significantly, the U.S. FDA's mandate under the Tobacco Control Act with respect to tobacco products is *not* the typical mandate to determine whether products are "safe and effective" for the *individual* consumer; rather, the U.S. FDA's mandate with respect to tobacco products (which are inherently dangerous and offer no health benefits to the individual consumer) is to regulate "as appropriate for the *public health."*[39] In other words, the Tobacco Control Act is premised on the reality that tobacco products cannot be made safe and effective for the individual consumer but, as a matter of public health, can be regulated to reduce the harms on an individual and aggregate level, taking into account the population as a whole.

18. Section 907(a)(1)(A), the measure at issue in this dispute, is a tobacco product standard contained in Section 907 of the Tobacco Control Act, which sets out the public health guidelines, goals and considerations by which all tobacco product standards must be established or revised (*i.e.*, Section 907(a)(2)-(4) and Section 907b)).[40] The context offered by Section 907 demonstrates that the concern underlying Section 907 is "[...]the protection of the public health,"[41] including based on considerations related to:

a. the risks and benefits to the population as a whole;

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[35] Panel Report, para. 2.16; U.S. First Written Submission, paras. 103-110.

[36] U.S. First Written Submission, para. 111.

[37] U.S. First Written Submission, paras. 115, 124.

[38] U.S. First Written Submission, paras. 114-118.

[39] U.S. First Written Submission, paras. 106-110.

[40] Exhibit US-7; Exhibit IND-1.

[41] Section 907(a)(3)(A), Exhibit US-7; Exhibit IND-1.

b. the increased or decreased likelihood that those who do not use tobacco products will start using tobacco products;
c. the countervailing effects of the [ban] on the health of adolescent tobacco users, adult tobacco users, or nontobacco users, such as the creation of a significant demand for contraband or other tobacco products that do not meet the requirements of [the Tobacco Control Act] and the significance of such demand.[42]

Accordingly, the Tobacco Control Act contemplates that product standards be established with a view to risks and benefits of the population as a whole, the effects on initiation, and other possible countervailing effects. These factors add dimension to what is intended by the mandate that the U.S. FDA regulate tobacco products as appropriate for the public health.

19. Within this context, Section 907(a)(1)(A), establishes the standard that:

> 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.[43]

This measure was first inserted into a draft of the Tobacco Control Act in 2004, in response to the campaign among domestic producers to launch new product lines of flavored cigarettes. At the time, several U.S. states had enacted bans on certain cigarettes with characterizing flavors and had entered into litigation settlement agreements with certain cigarette manufacturers designed to slow or halt the market penetration of cigarettes with characterizing flavors.[44]

20. When the U.S. Congress adopted the measure, it specifically found that the banned cigarettes were uniquely appealing to young people and thus posed a specific public health threat. As the legislative history documents:

> Consistent with the overall intent of the bill to protect the public health, including by reducing the number of children and adolescents who smoke cigarettes, section 907(a)(1) is intended to prohibit the manufacture and sale of cigarettes with certain "characterizing flavors" *that appeal to youth*. Examples of these products include, but are not limited to, those introduced in recent years such as "Mandalay Lime," "Warm Winter Toffee," "Mocha Taboo," and "Midnight Berry," which

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[42] U.S. Second Written Submission, para. 11; FFDCA Section 907 (a)(3)(B) (Exhibit US-7).

[43] Panel Report, para. 2.4; U.S. First Written Submission, para. 125.

[44] *See*, *e.g.* U.S. First Written Submission, paras. 82-95.

> were the subject of an investigation and subsequent settlement agreement between one cigarette manufacturer and the attorneys general of 40 states in October 2006.[45]

21. The legislation was based on the broad scientific consensus that flavored cigarettes are a threat because they are appealing to young people and thus likely would increase the rate of smoking initiation.[46] At the same time, the legislation would not wipe out those products used heavily by the adult population in the United States. This approach was consistent with decades of incremental tobacco regulation in the United States. The legislative history clarified that the measure was targeting a class of cigarettes appealing to youth but not widely smoked by adults:

> The Committee has reviewed the products that will be banned after 90 days under this section and has concluded that the ban will not lead to negative public health effects, because of how affected products generally are used and because of their low overall use by adult smokers. Specifically, none of the cigarettes covered by the ban – including those with the characterizing flavors of fruit, chocolate or clove – is used regularly by a large number of addicted adult smokers. Instead, these cigarettes tend to be used only occasionally, either by regular users of other products, by individuals who are experimenting with tobacco use, or by those who smoke only in certain social settings. Given that few adult smokers ever use flavored cigarettes that will be banned and that most adult smokers name other products as their regular brand, it is likely that regular use of these products by heavily addicted adult smokers is negligible. All of these factors – irregular, experimental and social setting use and low overall use with the U.S. population – support the Committee's conclusion that precipitous removal of these products from the market will not result in a large number of heavily addicted smokers facing the sudden withdrawal of the products to which they are addicted, with unknown consequences for the health of the individual users or the overall population.[47]

In other words, the U.S. Congress developed Section 907(a)(1)(A) specifically to remove those types of cigarettes that were used by young people as "experimental" cigarettes, but that were *not* used by a large number of addicted smokers.

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[45] U.S. First Written Submission, para. 234; Exhibit US-67.

[46] *See*, *e.g.*, U.S. First Written Submission, para. 132

[47] U.S. First Written Submission, para. 132; HR Report, at 38. Exhibit US-67. *See also* U.S. First Written Submission, para. 134, Exhibit US-67, HR Report at 38 ("The Committee notes that prohibition of a product that is used regularly by a large number of heavily addicted adult users would pose different questions of public health than those posed by the ban in section 907(a)(1).").

C. Section 907(a)(1)(A) Is Consistent With Global Trends in Tobacco Regulation

22. The world health and scientific community has identified flavored cigarettes as a particular threat to young people and to efforts to curb smoking initiation. Partial guidelines developed under the FCTC recognize that "[r]egulating ingredients aimed at reducing tobacco product attractiveness can contribute to reducing the prevalence of tobacco use and dependence among new and continuing users,"[48] and recommend "prohibiting or restricting[] ingredients that may be used to increase palatability in tobacco products."[49] The Panel recognized that "'drawing on the best available scientific evidence and experience of Parties,' [these guidelines] do show a growing consensus within the international community to strengthen tobacco-control policies through regulation of the content of tobacco products, including additives that increase the attractiveness and palatability of cigarettes."[50]

23. The Panel also noted, however, that the WHO's guidelines with respect to flavor additives "do not necessarily apply directly to the particular regulatory needs of a particular country."[51] The WHO also has expressed this principle by stating that:

> the regulation of these flavoured products is challenging. It is a basic public health principle that toxic consumer products should not be contaminated with substances that hide potential harm from the product's odour or taste, such as the addition of sugar to contaminated food products. [...] Regulatory strategies need to focus on outcomes at the population level as well as the individual level.[52]

In other words, the world public health community recognizes that regulatory strategies must focus not just on the threat of specific cigarettes to individual consumers, but must take account of the population as a whole and effects that different measures may have on overall objectives to curb smoking and promote the public health.

24. With respect to the relevant market in this dispute, the public health and scientific community also acknowledge that both clove and menthol cigarettes contain an additive that make them more appealing to youth.[53] The United States submitted that despite some similarities

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[48] Panel Report, para. 2.31.

[49] Panel Report, para. 2.32.

[50] Panel Report, para. 7.230.

[51] Panel Report, para. 7.230.

[52] U.S. Answer to Panel Q97, para. 60.

[53] Panel Report, para. 7.230

between menthol and clove cigarettes, menthol cigarettes are different than clove and other flavored cigarettes based on how they are used and by whom in the United States.[54] Menthol cigarettes are smoked by millions of adults in the United States. This fact presents unique regulatory challenges that do not exist for clove cigarettes and other flavored cigarettes. The widespread use of menthol cigarettes among adults meant that they must be regulated from the perspective of a heavy-use cigarette, and not as a niche, "starter" cigarette.

D. The U.S. Cigarette Market

a. Tobacco and menthol flavored cigarettes

25. Sales of cigarettes in the United States were approximately 360 billion units in 2007, 346 billion units in 2008, and 317 billion units in 2009.[55] The U.S. cigarette market is dominated by tobacco and menthol flavored cigarettes, produced by a handful of domestic manufacturers, including three companies whose products collectively account for 89.4% of the market – Phillip Morris USA, Reynolds American, and Lorillard.[56] Philip Morris's tobacco-flavored Marlboro cigarettes comprised 41.8% of the market in 2009.[57] Reynolds American makes regular Camel cigarettes, as well as menthol flavored Camel cigarettes and the menthol brands Kool and Salem.[58] Lorillard makes mainly menthol cigarettes, including Newport cigarettes.[59] Menthol cigarettes make up approximately 26% of the market.[60]

26. There also are imported regular and menthol flavored cigarettes on the U.S. market, which comprise a small share U.S. market. World Trade Atlas shows that, between 2000 and 2009, approximately 95% of this share of cigarette imports into the United States were cigarettes that did not contain clove – meaning that, aside from the small portion that contained other characterizing flavors, the vast majority of imports were regular or menthol flavored and thus not affected by Section 907(a)(1)(A) and are still permitted on the U.S. market.[61] In 2008 and 2009

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[54] *See*, *e.g.* U.S. Answer to Panel Q97, paras. 54-61.

[55] Panel Report, para. 2.24.

[56] U.S. First Written Submission, paras. 28-29. It is not the case, and Indonesia has never alleged, that before Section 907(a)(1)(A) went into force any U.S. measure artificially influenced the make-up of the U.S. cigarette market.

[57] U.S. First Written Submission, para. 29.

[58] U.S. First Written Submission, para. 29.

[59] U.S. First Written Submission, para. 29.

[60] Panel Report, para. 2.24, U.S. First Written Submission, para. 27.

[61] Exhibit US-100.

(the most recent dates for which data were available), 28 different brands of menthol cigarettes were exported to the United States by producers in 12 different countries.[62]

b. Cigarettes with Other Characterizing Flavors

27. Indonesian companies first started exporting clove cigarettes to the United States in 1968.[63] Around the same time, cigarette manufacturers – including U.S. domestic companies and Indonesia's major exporter, Kretek – had been researching and developing the use of flavored cigarettes to appeal to young people and expand the cigarette market.[64] Internal corporate documents obtained through litigation in the 1990s show that Philip Morris, RJ Reynolds, and Brown and Williamson had been researching and testing different flavored cigarettes specifically to market to young people.[65] For example, a previously secret internal Philip Morris presentation in 1992 discussed the benefits of flavored cigarettes:

> there has been a flavor-variety explosion in virtually every category of consumables except cigarettes. …New flavors could cut across current and menthol segments, creating a new category. …The concept (new flavors) could have the potential to be the most innovative change in cigarette marketing, reviving taste enjoyment and conscious purchase – selection excitement.[66]

Similarly, a Brown & Williamson report from 1972 suggested consideration of developing cola-flavored and apple-flavored cigarettes, stating: "It's a well-known fact that teenagers like sweet products. Honey might be considered."[67]

28. In 1999, RJ Reynolds launched the Camel Exotic Blends line. The original cigarettes: Twist ("splash of citrus flavor"), CBEMA ("a hint of vanilla"), and Izmir Stinger (berry flavored), were followed in 2000 with the release of Cinnabar ("a touch of cinnamon and spice").[68] In 2004, a leading U.S. business newspaper reported that sweet-flavored cigarettes

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[62] U.S. Answer to Panel Q88, paras. 22-23; Exhibit US-136.

[63] U.S. First Written Submission, para. 35.

[64] U.S. First Written Submission, para. 43, note 62.

[65] U.S. First Written Submission, para. 44-47.

[66] U.S. First Written Submission, para. 44.

[67] Panel Report, para. 7.410; U.S. First Written Submission, para. 45.

[68] U.S. First Written Submission, para. 48; Exhibit US-35.

were "one of the hottest new product categories in the tobacco industry."[69] Consistent with this assessment, RJ Reynolds' Camel brand family experienced a 9.8% sales volume increase for 2004.[70] By 2005, RJ Reynolds had released sixteen additional flavored brands.[71]

29. The volume of imported clove cigarettes was the only data regularly obtained by the United States on the basis of cigarette flavor. This was because clove cigarettes enjoyed a different, more favorable tariff rate and so were tracked separately.[72] However, organizations such as the American Lung Association and ACNielsen[73] compiled data showing that other U.S. manufacturers followed RJ Reynolds' trend. Following the success of RJ Reynolds' new products, in 2004 Brown & Williamson began adding flavors to their menthol cigarettes, including a berry flavor ("Midnight Berry") and a chocolate flavor ("Mocha Taboo").[74] By 2008, ACNielsen,[75] found that at least four U.S. cigarette companies were producing flavored cigarettes: RJ Reynolds (22 brands), Lorillard (2 brands), Ligget & Myers (1 brand), and Smokin' Joes (1 brand).[76] In addition, individual U.S. states retained lists of cigarette brands that registered as "fire safe" so that they could be authorized for sale in the particular state.[77] Available lists for several states for 2008 and 2009 (the year Section 907(a)(1)(A) went into effect) show that at least 20 different brands of cigarettes with characterizing flavors other than menthol were authorized for sale.[78] Cigarettes with characterizing flavors other than tobacco or menthol also were imported by producers from India, Belgium, Germany, the Netherlands and Indonesia.

c. Imported Cigarettes From Indonesia

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[69] U.S. First Written Submission, para. 50.

[70] U.S. First Written Submission, para. 50.

[71] U.S. First Written Submission, para. 48; Exhibit US-35.

[72] Exhibit US-91. The United States also was able to obtain specific data for menthol cigarettes, because, due to their prevalence on the market, the U.S. FDA, U.S. Center for Disease Prevention and Control ("U.S. CDC") and other agencies have gathered such data.

[73] U.S. First Written Submission, para. 51.

[74] U.S. First Written Submission, para. 51, Exhibit US-35.

[75] U.S. First Written Submission, para.; 51 Exhibit US-52.

[76] U.S. First Written Submission, para. 51; Exhibit US-52.

[77] Exhibits US-52 and US-62; *see also* Exhibits US-63 and US-64.

[78] Exhibits US-52 and US-62; *see also* Exhibits US-63 and US-64.

30. In the recent past, the United States has imported from Indonesia cigarettes with regular, tobacco flavor, clove flavor, menthol flavor, and other characterizing flavors, such as cappuccino, tea, and "splash."[79] Indonesian cigarettes without clove made up over 20% of Indonesian cigarette exports to the United States in 2003, and Indonesia continued to export regular cigarettes as recently as 2009.[80]

31. Clove cigarettes have never occupied a large market share in the United States, and between 2000 and 2009, clove cigarette consumption accounted for approximately 0.1% of the U.S. cigarette market.[81]

d. Patterns of Use

32. Ninety-eight percent of current U.S. smokers began smoking before the age of 26. Over 20% of the adult population in the United States smokes (an estimated 46 million adults),[82] of which 78.1% (approximately 36.4 million American adults) are daily smokers.[83] Approximately 19% of the youth population in the United States smokes (an estimated 3.5 million adolescents).[84] The vast majority of these smokers, young and adult alike, are smoking regular or menthol cigarettes.

33. The patterns of use of clove and menthol cigarettes by young people compared to older adults in the United States is an issue of dispute between the parties, and the Panel, for the most part, did not make findings on this issue. The United States submitted data showing the following: Approximately 31% of smokers between the ages of 12 and 25 and approximately 27% of smokers over the age of 25 smoke menthol cigarettes.[85] Overall, 6.8% of the population over age 25, or over 12 million people, are menthol smokers. By contrast, 5.5% of smokers between the ages of 12 and 25 and 1% of smokers over 25 years of age smoked clove cigarettes.[86] Overall, 0.3% of the population over age 25, or approximately 560,000 people, smoked clove cigarettes.

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[79] U.S. Answer to Panel Q 81, paras. 4-5; U.S. Answer to Panel Q84, para. 9; Indonesia Answer to Q84, para. 15; Indonesia Answer to Panel Q85, para. 18; U.S. Comment to Indonesia Answer to Panel Q85, para. 6.

[80] Exhibit US-134.

[81] Panel Report, para. 2.25.

[82] Panel Report, para. 2.24; U.S. First Written Submission, para. 13.

[83] U.S. First Written Submission, para. 107.

[84] Panel Report, para. 2.24; U.S. First Written Submission, para. 13.

[85] Exhibit US-53 at 7.

[86] Panel Report, para. 7.391; Exhibit US-53 at 7.

34. Indonesia disputed the validity of these data and the Panel did not resolve the issue. However, it is not disputed that millions of adults smoked menthol cigarettes as their regular, habitual cigarette.[87] Also, the Panel acknowledged that clove cigarettes were smoked by a very small and disproportionately young segment of the population.[88]

35. Also in dispute was *how* cigarettes in the United States tended to be used. It is undisputed that tens of millions of adults smoke tobacco and menthol flavored cigarettes as their regular habitual cigarette. Beyond this fact, the parties disagreed on types of use. The United States also presented evidence showing that clove and other banned flavors were used in a very specific way: they tended to be smoked as an occasional (rather than habitual) cigarette and tended to be smoked very little overall (and at a prevalence of 1% among smokers over 25). Such cigarettes were used primarily as an experimental cigarette because of their unique appeal to novice smokers.[89] Indonesia disputed this point, and the Panel did not make a finding on the matter. However, it was on this basis that the United States deemed clove and the other banned cigarettes with characterizing flavors to be "starter" or "trainer" cigarettes.

36. The key difference in terms of patterns of use between clove cigarettes and menthol cigarettes, from the perspective of the Tobacco Control Act, is that millions of adults smoke menthol cigarettes and these are their regular, habitual cigarettes. This issue is discussed further below.

III. ARGUMENT

A. The Panel Erred in Finding That Clove Cigarettes and Menthol Cigarettes Are "Like Products" Under Article 2.1 of The TBT Agreement

37. The Panel's conclusion that clove and menthol cigarettes should be deemed "like products" in this dispute is based on a flawed analysis. While the Panel's overall approach was generally correct, its specific application was incomplete and unjustifiably narrow. As described below, clove cigarettes and menthol cigarettes are not like products.

38. The Panel began its "like product" analysis by considering the immediate context of Article 2.1 of the TBT Agreement and the TBT Agreement itself.[90] The Panel found that "the fact that Section 907(a)(1)(A) is a technical regulation and has as its immediate purpose to

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[87] *See*, *e.g.*, Indonesia First Written Submission, para. 40.

[88] Panel Report, para. 7.391.

[89] *See*, *e.g.*, U.S. Answer to Panel Q41, paras. 102-106; U.S. Answer to Panel Q91, paras. 36-41; U.S. First Written Submission, para. 132.

[90] Panel Report, paras. 7.103, 7.106-107.

regulate product characteristics (characterizing flavors) for certain types of products (cigarettes) should have some weight, and potentially great weight, in the determination of whether the products at issue are like."[91] The Panel found further that, in the context of the TBT Agreement (and its object and purpose, as expressed in the preambular recitals), the Panel should "bear in mind the significance of the public health objective of a technical regulation and how certain features of the relevant products, their end-uses, as well as the perception consumers have about them, must be evaluated in light of that objective."[92] The Panel then noted that the "declared objective" of Section 907(a)(1)(A) – which it described as the "reduction of youth smoking" – must "permeate and inform our likeness analysis."[93] The Panel also found that the "jurisprudence under Article III:4 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), which provision also serves as context, albeit not immediate, may also be considered," and is relevant because of its nearly identical wording.[94] The Panel stated that it did not, however, consider that, in this case, the interpretation of Article 2.1 of the TBT Agreement should be approached primarily from a competition perspective, because the provision at issue is a technical regulation "having the immediate purpose of regulating cigarettes with a characterizing flavor for public health reasons" and, therefore, it must "pay special notice to the significance of the public health objective.[95]

39. After articulating the relevant context for the like product analysis in this case, and before turning to its specific analysis, the Panel considered which products should be considered as possible "like products." The Panel rejected Indonesia's argument that the Panel should issue findings on the likeness of clove flavored cigarettes compared to both menthol and regular flavored cigarettes, because Indonesia's panel request referred only to menthol cigarettes.[96]

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[91] Panel Report, para. 7.108.

[92] Panel Report, para. 7.116.

[93] Panel Report, para. 7.116 (noting that the "declared" legitimate public health objective of Section 907(a)(1)(A) is the reduction of youth smoking); Panel Report, paras. 2.6-2.7 (noting that the objective of Section 907(a)(1)(A) is not set forth in the Tobacco Control Act itself but that a report by the House Energy and Commerce Committee explains the objective as follows: "Consistent with the overall intent of the bill to protect the public health, including by reducing the number of children and adolescents who smoke cigarettes, section 907(a)(1) is intended to prohibit the manufacture and sale of cigarettes with certain 'characterizing flavors' that appeal to youth."). *See also* Panel Report, para. 2.6 (quoting Guidance on the measure issued by the U.S. Food and Drug Administration, including, *inter alia*, that "In addition to being more attractive to young people, flavored products make it easier for new smokers to start smoking by masking the unpleasant flavor of tobacco. . . . Removing these flavored products from the market is important because it removes an avenue that young people can use to begin regular tobacco use.").

[94] Panel Report, para. 7.117.

[95] Panel Report, para. 7.119.

[96] Panel Report, para. 7.147.

40. Finally, the Panel stated that it would apply its analysis through the framework of the traditional likeness criteria (properties, nature and qualities, end-uses, consumer tastes and habits, and tariff classification).[97] With respect to "properties, nature, and qualities," the Panel placed significant weight on the fact that both clove and menthol cigarettes contain an additive which imparts a characterizing flavor, taste, and aroma and reduces the harshness of the tobacco.[98] With respect to "end-uses," the Panel found that clove and menthol cigarettes share the same end-use, *i.e.*, to be smoked.[99] With respect to "consumer tastes and habits," the Panel limited the scope of consumers to only novice and potential smokers (excluding current, established smokers) and found that, among these uninitiated smokers, "arguably any cigarette would be fine to start smoking," and noted that flavored cigarettes are particularly appealing to youth.[100] Finally, with respect to "tariff classification," the Panel noted that clove, menthol, and regular cigarettes share the same six-digit heading in the Harmonized System. The Panel did not mention that clove cigarettes are classified differently than other cigarettes under the U.S. Tariff schedules at the 8-digit level.[101] The Panel concluded that while clove and menthol cigarettes may not be deemed "like" in every context, in this dispute they should be deemed "like" products.[102]

41. In general, the Panel was correct to note that the "likeness" of products in this dispute should be determined in light of the legal provision at issue (Article 2.1 of the TBT Agreement), and in light of the measure being challenged – in this case, a public health measure. The Panel also was correct, generally, to find that the public health nature of Section 907(a)(1)(A) must "permeate and inform" the like product analysis.

42. However, the Panel nonetheless conducted an incomplete and flawed analysis with respect to two important criteria: end-uses and consumer tastes and habits. As the Appellate Body found in *EC – Asbestos*, where a Panel adopts the four *Border Tax Adjustment* criteria as the framework for its analysis, the Panel is obligated to examine thoroughly the evidence related to each individual element, and not to dismiss *a priori* any evidence relating to a particular

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[97] Panel Report, paras. 7.120-123, 7.148.

[98] Panel Report, para. 7.187.

[99] Panel Report, para. 7.199.

[100] Panel Report, para. 7.214.

[101] U.S. Opening Statement at the First Substantive Meeting of the Panel, para. 40. Exhibit-US 91. Clove cigarettes also enjoy more favorable tax treatment compared to other cigarettes under Indonesia's tax system. U.S. First Written Submission, para. 192.

[102] Panel Report, para. 7.246-248.

criterion.[103] The Appellate Body was clear that a legal conclusion on "like product" requires "evaluat[ion] of *all* relevant evidence."[104] In reversing the Panel's like product conclusion in that case, the Appellate Body found that the Panel erred by excluding evidence *a priori* from its examination of "likeness."[105] Similarly, in this dispute, the Appellate Body should find that the Panel dismissed evidence on an *a priori* basis, and, thereby, ignored evidence that would have complicated its conclusion and led to a different result.

1. The Panel Performed an Incomplete Analysis of the Different End-Uses of the Products at Issue

43. The Panel erred by failing to perform a complete analysis of the different end-uses of clove and menthol cigarettes. The Panel over-simplified its analysis in finding that the end-use of both products is only "to be smoked." As discussed below, the two products are used by different populations for distinct purposes and, therefore, their end-uses are different.

44. In considering the end-uses of clove and menthol cigarettes, the Panel noted that the end-use criterion is distinct from the criteria of physical characteristics and consumer tastes and habits, and that end-use concerns the extent to which products are capable of performing the same functions.[106] The Panel then proceeded to consider the different end-uses presented by the United States – in particular the end-uses of satisfying an addiction to nicotine and creating a pleasurable experience associated with the taste of the cigarette and aroma of the smoke – and dismissed these possible end-uses as having to do with the reasons that a person might smoke a cigarette rather than its end-uses.[107] The Panel then concluded that clove cigarettes and menthol cigarettes have the same end-use: to be smoked.[108] This conclusion was in error.

45. The Panel's conclusion is based on an overly narrow analysis of end-uses. When conducting an end-use analysis, a panel must consider the different uses of the products – not just the use which is a common denominator between the products. The Appellate Body criticized the panel report in *EC – Asbestos* for a similar analysis, noting that "the Panel's analysis of end-uses is based on a 'small number of applications' for which the products are substitutable."[109]

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[103] *EC – Asbestos (AB)*, para. 109; Panel Report, para. 7.148.

[104] *EC – Asbestos (AB)*, para. 113.

[105] *EC – Asbestos (AB)*, para. 113.

[106] Panel Report, para. 7.192.

[107] Panel Report, para. 7.198.

[108] Panel Report, para. 7.199.

[109] *EC – Asbestos (AB)*, para. 119.

The Appellate Body stated further that "[a]lthough we agree it is certainly relevant that products have similar end-uses for a 'small number of applications', or even for a 'given utilization', we think that a panel must also examine the other, *different* end-uses for products. It is only by forming a complete picture of the various end-uses of a product that a panel can assess the significance of the fact that products share a limited number of end-uses."[110]

46. The United States does not dispute that both clove cigarettes and menthol cigarettes are used for smoking. For that matter, cigars, pipes, tobacco, and any other herb, spice or product to which one lights fire and inhales share this end-use, as well. There are, however, other relevant end-uses for clove cigarettes and menthol cigarettes in the U.S. market that should be considered as part of a complete analysis. Menthol cigarettes are used to satisfy the nicotine addictions of millions of smokers in the United States.[111] Clove cigarettes are primarily used for experimentation and special social settings and generally are not used to satisfy addiction in the U.S. market.[112] The United States submitted arguments and evidence on these points, and submitted that Indonesia failed to meet its burden of establishing likeness on these end-uses.[113] The Panel failed to consider these factors in its analysis on the basis that, conceptually, such different end-uses were related to the reasons that a person would smoke, *i.e.*, to consumer tastes and habits.[114]

47. In conflating these end-uses with consumer tastes and habits the Panel committed a legal error. The Appellate Body has noted that while the *Border Tax Adjustment* criteria are separate elements, they also are "interrelated."[115] In other words, how consumers actually use different products (*i.e.* consumers tastes and habits) is a separate likeness criterion, but also is relevant to how products are capable of being used (*i.e.*, the products' end-uses). The Appellate Body further stated that "the physical properties of a product shape and limit the end-uses to which products can be devoted. *Consumer perceptions may similarly influence – modify or even render obsolete – traditional uses of the products."*[116]

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[110] *EC – Asbestos (AB)*, para. 119.

[111] U.S. First Written Submission, paras. 32-34, 134.

[112] *See*, *e.g.*, U.S. Answer to Panel Q41, paras. 102-106; U.S. Answer to Panel Q91, paras. 36-41; U.S. First Written Submission, para. 132.

[113] *See*, *e.g.*, U.S. First Written Submission, paras. 178-181; U.S. Second Written Submission, para. 108; U.S. Answer to Panel Q41, paras. 102-106 and Q91, paras. 38-41.

[114] Panel Report, paras. 7.197-198. Significantly, the Panel did not consider the evidence in its analysis of that criterion, either.

[115] *EC – Asbestos (AB)*, para. 102.

[116] *EC – Asbestos (AB)*, para. 102 (emphasis added).

48. Accordingly, the Panel erred by disregarding the different end-uses for clove cigarettes and menthol cigarettes on the basis that the end-uses of products and how consumers choose to use them are mutually exclusive concepts. For example, based on the Panel's logic, it would be appropriate to conclude that a car, a bus and a truck all have the same end-use: to be driven. Indeed it is obviously true that all these vehicles are capable of being driven. However, it does not seem obvious that, in a given context, it would help in the sorting and examining of evidence to stop the end-use analysis after this simple observation. These vehicles are all capable of other uses, in differing and overlapping degrees. For example, even though each of these vehicles also is capable of transporting people and items, how these vehicles are commonly used differ, and thus their end-uses also differ. In comparing the end-uses of products, it is relevant to consider how consumers in the relevant market actually put the products to use (and how different physical characteristics might relate to different end-uses). This is not to suggest that these three criteria (end-uses, physical characteristics, consumer tastes and habits) should not or cannot be examine separately; they are separate criteria. But the Panel was incorrect to consider end-uses absent the relevant, real-world context of how the products are used in the relevant market.

49. Clove and menthol cigarettes are used for smoking. But their different end-uses (*i*.e. habitual use and satisfying addiction versus occasional, experimental use) are multi-faceted and cannot be reduced to this one simple fact. This is particularly true in the circumstances of this dispute, where the relevant public health context pertains to the different ways that cigarettes are used in the United States. The Panel erred by failing to consider the "complete picture" and deeming evidence related to the different end-uses of clove and menthol cigarettes, such as the use of cigarettes to satisfy nicotine addiction or to create a pleasurable "special occasion" as irrelevant to the issue before it.

2. The Panel Erred by Failing to Examine All of the Evidence Related to the Consumer Tastes and Habits Criterion

50. In addition to the errors in the analysis of end-uses, the Panel erred by performing an incomplete analysis of consumer tastes and habits related to clove and menthol cigarettes. First, the Panel made a legal error by excluding the tastes and habits of current consumers – a highly relevant demographic in this dispute. Second, the Panel acted inconsistently with Article 11 of the DSU by refusing to examine evidence submitted by the parties relevant to how consumers in the relevant market use clove and menthol cigarettes.

51. In its analysis, the Panel first considered that this criterion traditionally has involved an analysis of the extent to which consumers are – or would be – willing to choose one product instead of another to perform the end-use (which the Panel had defined as smoking).[117] The Panel then reasoned that, in the context of the present dispute, which involves a measure with the immediate "declared" objective to reduce youth smoking, the Panel should consider only the

[117] Panel Report, para. 7.200.

tastes and habits of "potential consumers, i.e., youth that do not as yet smoke or that do so sporadically and thus is not addicted."[118] The Panel then dismissed the evidence submitted by the parties related to consumer tastes and habits – in particular, survey evidence to which both parties dedicated substantial argumentation – on the basis that it "may not provide clear guidance"[119] and that it was "not directly comparable."[120] Having dismissed actual evidence submitted by the parties, the panel then speculated that, for young smokers and those ready to become smokers, "arguably any cigarette likely would be fine to start smoking."[121] Finally, the Panel found, based on its incomplete analysis, that "[t]he inevitable conclusion is that both menthol and clove cigarettes appeal to youth because of the presence of an additive that gives them a characterizing flavor having the effect of masking the harshness of tobacco."[122]

a. The Panel Erred in Determining That It Need Not Examine the Tastes and Habits of Current Consumers as Part of Its Analysis

52. The Panel was required to consider the tastes and habits of current consumers as part of its analysis of the "consumer tastes and habits" criterion. Moreover, the Panel's exclusion of current consumers is not justified by its finding that the "declared legitimate objective" of Section 907(a)(1)(A) is to reduce youth smoking.

i. The Tastes and Habits of Current Consumers Are Essential to an Analysis of the "Consumer Tastes and Habits" Criterion and Are Especially Relevant in This Dispute

53. As articulated in *EC – Asbestos*, the Panel, having adopted an approach based on the four criteria set forth in *Border Tax Adjustments*, was required to examine evidence related to *each* of those four criteria, and to weigh *all* of the evidence.[123] In this dispute, the Panel excluded, *a priori*, an element essential to an analysis of consumers' tastes and habits – *i.e.*, how current consumers perceive and use the products at issue.[124] Excluding from its analysis consumers in

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[118] Panel Report, paras. 7.119, 7.206.

[119] Panel Report, para. 7.209.

[120] Panel Report, para. 7.210.

[121] Panel Report, para. 7.214.

[122] Panel Report, para. 7.231.

[123] *EC – Asbestos (AB)*, para. 109.

[124] Panel Report, para. 7.201, 7.206, and 7.214.

the relevant market who currently use the products at issue was a fundamental error, which dramatically skewed the Panel's findings on this criterion. The United States is aware of no precedent in prior WTO or GATT reports where a panel has adopted consumer tastes and habits as a criterion for measuring likeness, on one hand, and then, on the other hand, limited that criterion to exclude the consumers currently using the products in the relevant market.

54. Moreover, given the particular nature of this dispute, the tastes and habits of current consumers are highly relevant. The patterns of use of clove and menthol cigarettes by young, potential consumers, compared to established, current consumers, is central to the distinctions drawn by the U.S. measure.[125] Section 907(a)(1)(A) made regulatory distinctions among cigarettes based not only on their appeal to potential smokers, but on their use by current adult smokers as well. This second component – use by current adult smokers – is integral to understanding the public health nature of the product distinctions made under Section 907(a)(1)(A). Cigarettes that are used by adults on a regular, habitual basis to satisfy addiction pose a different public health challenge. Banning these cigarette outright runs the risk of straining the healthcare system or exacerbating the illicit market for cigarettes (which intentionally evade product controls).[126]

55. Evidence comparing the tastes and habits of younger, potential smokers and the tastes and habits of older, established smokers is directly relevant to the issue of consumer tastes and habits. For example, in the United States clove and the other flavored cigarettes banned under the measure were used disproportionately by young people, while the proportionality was more even in the case of menthol cigarettes.[127] Clove and other flavored cigarettes besides menthol are "trainer" or "starter" cigarettes precisely because of this disproportionate use – that is, clove cigarettes and other flavored cigarettes were used in very small numbers and almost exclusively by youth.[128] As such, clove and other flavored cigarettes are different than menthol cigarettes

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[125] *See* U.S. Answer to Q92, para. 42; *see also* U.S. Comment to Indonesia's Answer to Q92(a), para. 17 ("Third, how different consumers use different cigarettes – that is, the patterns of use as between young people in the window of initiation and older, regular smokers – is directly relevant to the like product, as well. The United States has submitted that Section 907(a)(1)(A) distinguishes among cigarettes based on their role in initiation, on the one hand, and the degree to which they are used by older adults as their regular cigarette, on the other hand. Accordingly, each of these patterns of use should be evaluated and considered in the 'consumer tastes and preferences' criterion of the like product analysis, and in relationship to the public health basis for the measure.").

[126] U.S. First Written Submission, paras 24-26, 108, 132-134; U.S. Second Written Submission, para. 30; Answer to Panel Q90(a), paras. 32-33. Exhibit US-27, Exhibit US-30; Exhibit US-138, Exhibit US-140, Exhibit US-141.

[127] Exhibit US-53 at 7 (illustrating that young smokers within the age window of initiation smoke clove cigarettes at a prevalence of approximately 5 to 1 compared with adults and smoke menthol cigarettes at relatively even prevalence compared with adults); *See also* U.S. Second Written Submission, paras. 59-65, U.S. Answer to Panel Q91, para. 39.

[128] *See*, *e.g.*, U.S. Answer to Panel Q41, paras. 102-106 and Q91, paras. 36-41.

from a public health perspective; the former present a unique risk to young, uninitiated smokers and have little to no impact on adults; the latter also are a risk to young, uninitiated smokers, but have a significant impact on adults. Indeed, it is the contrast of use as between potential users and current users that largely defines the different public health challenges presented by the cigarettes at issue in this dispute. By excluding half of this equation from its analysis, the Panel's analysis was fatally flawed.

56. The Appellate Body's analysis of the health risks of the products at issue in *EC – Asbestos* provides an instructive example. The Panel in *EC – Asbestos* excluded from its consideration of likeness the different health risks associated with the products at issue.[129] In reversing this finding, the Appellate Body noted that there was no basis in the text of the Agreement nor in prior panel or Appellate Body practice to suggest that "any evidence should be excluded *a priori* from a panel's examination of 'likeness,'" and that "in examining the 'likeness' of products, panels must evaluate *all* of the relevant evidence."[130] The Appellate Body further recognized that evidence relating to the health risk associated with a product may be pertinent in an examination of "likeness" under Article III:4 of the GATT 1994.[131]

57. In *EC – Asbestos*, the different health risk associated with chrysotile asbestos fibres compared to PCG fibres was its carcinogenicity or toxicity, which the Appellate Body considered would have an influence over individual consumers' behavior.[132] While the present dispute involves a different situation from a public health standpoint, the same principle applies. All cigarettes are known to be carcinogenic, so the public health considerations in this dispute do not include whether one cigarette is more harmful than another cigarette to an individual consumer.[133] With respect to Section 907(a)(1)(A), the public health risk of the products is gauged or defined by how different groups of consumers perceive and use the products at issue. Accordingly, a relevant issue with respect to "consumer tastes and habits" in this dispute is whether clove cigarettes are similar to menthol cigarettes in terms of how they are used by different U.S. consumers. The public health issue, for purposes of Section 907(a)(1)(A), is a matter of how different segments of society – young, novice smokers on one hand, and established, adult smokers on the other hand – use different cigarettes.

58. In this context, it should be recalled that clove cigarettes accounted for approximately 0.1

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[129] *EC – Asbestos (AB)*, para. 113.

[130] *EC – Asbestos (AB)*, para. 113.

[131] *EC – Asbestos (AB)*, para. 113.

[132] *EC – Asbestos (AB)*, paras. 116, 121.

[133] *See* Panel Report, para. 7.384 ("...[T]he measure at issue in this case does not ban clove and certain other flavoured cigarettes on the grounds that they are more toxic than other kinds of cigarettes.").

percent of the U.S. cigarette market between 2000 and 2009,[134] and among the consumers who smoked clove cigarettes, a disproportionate number were youth.[135] At the same time, approximately 20 to 26 percent of the U.S. adult population smokes menthol cigarettes.[136] Accordingly, from a public health perspective, clove cigarettes are indeed "like" flavored cigarettes (such as chocolate, spice, and "champagne"), because they are used in very small quantities and almost exclusively by young experimental smokers; and clove cigarettes are not "like" menthol cigarettes, which are smoked by millions of regular adult smokers who are chemically and psychologically addicted to them. In other words, the particular flavor matters. Consumers do not perceive clove and menthol cigarettes to be "like" in the sense that adult smokers rarely use clove flavored cigarettes and do not perceive them to be like menthol cigarettes. The Panel erred by limiting the scope of consumer tastes and habits so that its criterion only captured one aspect of the public health basis for Section 907(a)(1)(A) – use by young people – and failed to capture the other aspect of the public health basis – use by adult smokers. The Panel should not have systematically extracted from its analysis factors relevant to the public health. Limiting the scope of consumers so as not to examine all of the relevant evidence effectively nullified "consumer tastes and habits" as a meaningful criterion in the like product determination.

ii. The Panel's Finding on the "Declared Legitimate Objective" of Section 907(a)(1)(A) Does Not Justify the Exclusion of Current Consumers' Tastes and Habits

59. The Panel not only erred in general by excluding current consumers, it also was incorrect to find that such exclusion was justified because Section 907(a)(1)(a) is focused on preventing new young smokers from becoming addicted to cigarettes.[137] As an initial matter, the Panel was correct to focus on the public health reasons for the distinctions made between the products at issue in this dispute, given that Section 907(a)(1)(A) is a technical regulation that regulates

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[134] Panel Report, para. 2.25.

[135] Panel Report, para. 7.391 (The Panel found that "the NSDUH surveys relied upon by both parties actually show that even if 'youth' is understood to mean only those under again 18, it is still the case that *clove cigarettes were used disproportionately by 'youth.*'") (emphasis added).

[136] Panel Report, para. 2.24.

[137] Panel Report, paras. 7.116, 7.119,7.201, and 7.206 ("In our view, the legitimate objective of the technical regulation at issue, Section 907(a)(1)(A), i.e., reducing youth smoking, delimits the scope of the consumers whose tastes and habits we should examine under this criterion[...]"); Panel Report, para. 7.214 ("In our view, it is appropriate to examine the substitutability of clove and menthol cigarettes from the perspective of the relevant group of consumers which, as we explained above, *includes young smokers and those ready to become smokers*.")

products to protect the public health.[138] In this context, the Panel was generally correct that the public health basis of the measure should weigh heavily into the determination of whether the products should be deemed "like products."[139] The Panel correctly identified that Article 2.1 required the Panel, in its likeness analysis, to consider the characteristics of the products in light of the measure at issue. This was appropriate because Section 907(a)(1)(A) is a technical regulation that lays down product characteristics in the interest of the public health; therefore, the fact that the distinction among products is being made on the basis of public health considerations should be accorded significant weight.[140]

60. However, nothing in the text of Article 2.1 of the TBT Agreement provides a basis for the Panel to limit its considerations of the public health distinctions drawn under the measure according to what the Panel construed to be the immediate objective of the measure.[141] Unlike Article 2.2, Article 2.1 contains no direct reference to the legitimate objective of the measure.[142]

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[138] Panel Report, para. 7.119 (The Panel correctly identified the principles that, for purposes of Article 2.1 of the TBT Agreement, "likeness" should be determined in the context of the measure at issue, and that "weighing of evidence relating to the likeness criteria should be influenced by the fact that Section 907(a)(1)(A) is a technical regulation having the immediate purpose of regulating cigarettes with characterizing flavors for public health reasons.").

[139] Panel Report, paras. 7.245-249 (explaining that clove and menthol cigarettes may be considered "like" in the context of certain measures but not others. For example, "clove cigarettes and menthol cigarettes might 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," but might not be considered "like" in the context of a measure regulating products on the basis of shared characteristics).

[140] Panel Report, paras. 7.107-109 ("The fact that Section 907(a)(1)(A) is a technical regulation and has as its immediate purpose to regulate product characteristics (characterizing flavours) for certain types of products (cigarettes) should have some weight, and potentially great weight, in the determination of whether the products at issue are like. Indeed, cigarettes with characterizing flavours are regulated by Section 907(a)(1)(A) as a single group of products."). *See also* Panel Report, paras. 7.244-47 ("As we have explained, we believe that such legitimate objective must permeate and inform our likeness analysis. In the weighing of these criteria, we have therefore carefully considered the relevance of those traits that are significant for the public health objective of Section 907(a)(1)(A), i.e., to reduce youth smoking.").

[141] Panel Report para. 7.116 ("We agree that, in the context of the *TBT Agreement* and in the light of its object and purpose expressed by the preambular recitals referred to above, we must bear in mind the significance of the public health objective of a technical regulation and how certain features of the relevant products, their end-uses as well as the perception consumers have about them, must be evaluated in the light of that objective. In the present case, 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.").

[142] The Panel Report is inconsistent on what it refers to here as the "declared legitimate objective" of the measure (Panel Report paras. 7.116, 7.119). For example, in its factual findings, the Panel Report expressly notes that Section 907(a)(1)(A) does not *have* a declared legitimate objective. (*See* Panel Report para. 2.6, noting that "the objective of Section 907(a)(1)(A) is not set forth in the [Tobacco Control Act] itself."). The Panel Report then proceeds to quote the legislative history and U.S. FDA guidance, which provide a number of purposes and objectives. In the context of Article 2.2, where the Panel *was* charged with determining the legitimate objective, the

The like product analysis under Article 2.1 fundamentally concerns an assessment of similarities and differences among products in the context of a technical regulation. As the Panel noted, Section 907(a)(1)(A) is a technical regulation "and has as its immediate purpose to regulate product characteristics[...]."[143] Accordingly, a like product analysis under Article 2.1 must take account of the regulatory distinctions drawn under the measure at issue.

61. These distinctions are not necessarily limited to an immediate or primary objective of a measure. In addition, technical regulations often reflect a balancing of other considerations relevant to the public welfare. The Appellate Body expressed this principle in *EC – Asbestos* when it recognized that, in the context of assessing whether a measure meets the definition of a technical regulation under the TBT Agreement, "the measure at issue is to be examined as an integral whole, taking into account, as appropriate, prohibitive and permissive elements that are part of it."[144] Likewise, in this context, the Panel was required to assess evidence relevant to the measure as a whole, including the regulatory basis for the products that are not banned, and not just evidence relevant to a portion of the measure. The decision to ban specialty cigarettes that are uniquely appealing to youth, and not ban heavily-used cigarettes smoked regularly by millions of adults, was based on the additional health considerations associated with heavily-used cigarettes (including possible countervailing public health factors, such as possible increases in unregulated black market cigarettes or strain to the healthcare system).[145] In short, the Panel was not justified in excluding current consumers from its analysis based on a narrow view of the measure's objective. Section 907(a)(1)(A) did not draw product distinctions solely on the basis of appeal to youth; if so, all (or at least most) tobacco products would fall under the ban. Rather, the measure drew production distinctions with the objective of targeting a group of tobacco products that *uniquely* appeal to youth, without precluding adult access to those cigarettes that are most heavily used in the U.S. market.

62. Accordingly, even though the primary or immediate purpose of Section 907(a)(1)(A) is to reduce youth smoking (and thereby reduce smoking initiation in general), the measure was not developed, and feasibly could not have been developed, *only* taking account of the particular, singular health risk posed by the appeal of cigarettes to youth smokers. The standard was developed based on a consideration of the health benefits, risks and consequences to the

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Panel noted that "[i]ndeed, defining the objective of Section 907(a)(1)(A) in terms of 'reducing youth smoking' may already be more specific than required under Article 2.2, which refers generally to the 'protection of human health' as a legitimate objective." (Panel Report, para. 7.340, n.635). The Panel Report added that "it is not clear that we need to resolve the disagreement between the parties on te precise objective of Section 907 (a)(1)(A)" because it is sufficient to find that the objective is the protection of human health, and that the "evidence before us is not free of ambiguity." (Panel Report, paras. 7.340-41).

[143] Panel Report, para. 7.109.

[144] *EC – Asbestos (AB)*, para. 64.

[145] *See*, *e.g.*, U.S. First Written Submission, para. 134.

population as a whole, including possible negative consequences of banning a cigarette to which millions of adults are chemically and psychologically addicted.

63. Finally, even assuming, for the sake of argument, that the Panel was correct to limit its assessment of the product distinctions under Section 907(a)(1)(A) according to the primary legitimate objective of "the reduction of youth smoking," this finding did not provide a basis for the Panel to disregard the tastes and habits of current consumers of clove and menthol cigarettes. As explained above, the Panel erroneously considered that, because the objective of the measure was to target cigarettes appealing to young people, the Panel need not concern itself with how adult, established smokers use cigarettes.[146] In fact, the opposite approach was required. Precisely because Section 907(a)(1)(a) distinguished between cigarettes that were *uniquely* appealing to young people and those that are heavily used by adults, an appropriate analysis must take account of the comparative patterns of use in the relevant market. Cigarettes that posed a risk to young people and were *not* widely smoked by adults were banned (*e.g.* clove, fruit, candy). Cigarettes that pose a health risk to young people *and are* widely smoked by adults (*i.e.*, menthol and tobacco-flavored cigarettes) were not banned. This distinction is consistent with the objective of the measure, even as characterized by the Panel – *i.e.*, the reduction of youth smoking – and required an assessment of adult patterns of use compared to novice patterns of use. In other words, the Panel's apparent justification for excluding current consumers fails even on its own terms.

b. The Panel Acted Inconsistently With Article 11 of the DSU by Finding that Clove Cigarettes and Menthol Cigarettes Are Similar for the Relevant Consumers at Issue in this Case

64. Not only did the Panel err by excluding *a priori* a crucial aspect of the "consumer tastes and habits" criterion – use by current consumers – the Panel also acted inconsistently with Article 11 of the DSU in finding that clove cigarettes and menthol cigarettes are similar for the consumers at issue in this case (*i.e.* potential young smokers).[147] To reach this conclusion, the Panel disregarded critical evidence on how consumers use and perceive the products at issue.

65. As explained above, a central U.S. argument with respect to like products was that clove cigarettes are smoked disproportionately by young, novice smokers (and smoked hardly at all by

[146] Panel Report, para. 7.206 ("In our view, the legitimate objective of the technical regulation at issue, Section 907(a)(1)(A), i.e., reducing youth smoking, delimits the scope of the consumers whose tastes and habits we should examine under this criterion[...]"); Panel Report, para. 7.214 ("In our view, it is appropriate to examine the substitutability of clove and menthol cigarettes from the perspective of the relevant group of consumers which, as we explained above, *includes young smokers and those ready to become smokers*.")

[147] Panel Report, para. 7.232.

adults)[148] while menthol cigarettes are smoked more evenly as between young people and adults (and by millions of adults overall).[149] Both the United States and Indonesia presented evidence, in particular a set of surveys, demonstrating the tastes and habits of consumers in the United States for clove cigarettes and menthol cigarettes. Indeed, significant portions of each party's submissions were dedicated to explaining and drawing inferences from these data.[150]

66. The Panel, however, disregarded this evidence and declined to issue findings on how consumers in the relevant market use and perceive the products at issue, having concluded erroneously that it could not "rely on the information [the surveys] provide on market shares for purposes of analyzing the consumers' tastes and habits criterion."[151] The Panel's justification for ignoring this evidence is contradicted, however, later in the Report, where the Panel *does* rely upon the information in the surveys on market share. In the context of Article 2.2, the Panel issued several findings based on the survey evidence on cigarette market share in the United States, including the finding that "the NSDUH surveys relied upon by both parties actually show that even if 'youth' is understood to mean only those under age 18, it is still the case that clove cigarettes were used disproportionately by 'youth.'"[152] This finding was indeed relevant to the "consumer tastes and habits" analysis under Article 2.1, as well.

67. The Panel's justification for disregarding the survey evidence cannot be sustained. Article 11 of the DSU calls for the Panel to objectively assess the facts of the case, a panel has the duty to examine and consider all the evidence before it, [...] and to evaluate the relevance and

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[148] *See*, *e.g.*, U.S. Answer to Panel Q41, paras. 102-106; U.S. Answer to Panel Q91, para. 36-41; US-53 at 7.

[149] *See*, *e.g.*, U.S. Second Written Submission, paras. 59-65; U.S. Answer to Panel Q 91, para. 39; Exhibit US-53 at 7.

[150] *See*, *e.g.*, U.S. First Written Submission, paras. 54-78, 246-249; U.S. Opening Statement at the First Substantive Meeting, paras. 15-20; U.S. Second Written Submission, paras. 50-78; U.S. Opening Statement at the Second Substantive Meeting, paras. 5-16; U.S. Comments to Indonesia's Answer to Panel Q106, paras. 42-51 and Q107, paras. 52-61; Indonesia First Written Submission paras. 92-99; Indonesia's Second Written Submission, paras. 50-78; Indonesia's Opening Statement at the Second Substantive Meeting, paras. 15-44; Indonesia's Answer to Panel Q106, paras. 47-99 and Q107, paras. 56-58.

[151] Panel Report, para. 7.209-210 (The Panel noted that "the evidence on consumer preferences submitted by the parties may not provide clear guidance." The Panel provided examples of arguments made by the parties, and then noted further that "in order to support these arguments, both parties rely on a series of surveys addressing smoking patterns in the United States." The Panel then decided to disregard the survey evidence submitted by the parties, on the basis that they "do not share the same research parameters;" "they examine different age groups, pose different questions and are based on different methodological approaches;" and the information presented is "not directly comparable." The Panel concluded that it).

[152] Panel Report, para. 7.391. (In the context of the Article 2.2 claim, the Panel recognized that "the NSDUH surveys relied upon by both parties actually show that even if 'youth' is understood to mean only those under again 18, it is still the case that clove cigarettes were used disproportionately by 'youth.').

probative force of each piece thereof."[153] The Panel in this dispute erred by disregarding the survey evidence on the basis that it was not clear and that the information presented is "not directly comparable,"[154] without examining the evidence based on its probative force (as it did elsewhere in the Report). Among the relevance of the survey data is the fact that it provides evidence of how consumers and potential consumers used and perceived different cigarettes *in the United States*. In other words, the evidence was directly relevant to the question before the Panel, how consumers in the relevant market use the products at issue.

68. The Panel's finding with respect to consumer tastes and habits was fatally flawed because of this error. After disregarding the evidence submitted with respect to consumer tastes and habits in the United States, the Panel proceeded to base its conclusions entirely on speculation and conjecture. First, the Panel offered a hypothetical comparison between current smokers and soda drinkers, speculating that in either case, consumers may be willing to substitute products when their preference was unavailable.[155] The Panel then dismissed its own hypothetical, clarifying that the only relevant consumers in any case are potential consumers (not current consumers), and that "for them, arguably, any cigarette would likely be fine to start smoking." The Panel offered this statement without any evidentiary support as to how consumers in the relevant market – the United States – actually use the cigarettes at issue. Instead, the Panel justified this conclusion by citing the voluminous evidence on the record showing that – as a general matter – cigarettes with characterizing flavors mask the harshness of tobacco and are particularly appealing to youth.[156] Accordingly, the Panel based its finding that the relevant consumers view clove and menthol as substitutable on the basis that they are both cigarettes with characterizing flavors that mask the harshness of tobacco and are particularly appealing to youth.[157]

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[153] *Korea – Dairy (AB)*, para. 137.

[154] Panel Report, para. 7.210.

[155] Panel Report, para. 7.213. Here, the Panel appears to consider the substitutability of clove cigarettes and menthol cigarettes among current adult smokers, where it recites and builds upon a hypothetical situation presented by Indonesia involving Coca Cola and Pepsi. However, the Panel characterizes this musing as an "example" of "some" competitive relationship" (Panel Report paras. 7.212-213), and then notes in the following paragraph (Panel Report para. 7.214) that, "[i]n our view, it is appropriate to examine the substitutability of clove and menthol cigarettes from the perspective of the relevant group of consumers which, as explained above, includes young smokers and those ready to become smokers." In other words, after musing over a hypothetical situation, the Panel turned to what it took to be the "relevant" question of substitutability or competition, *i.e.*, that among young and potential smokers. This statement can only be taken to mean that the Panel deliberately decided to make no findings with regard to the substitutability of clove and menthol cigarettes among established, current smokers, having specifically reiterated its finding that the "relevant" group of consumers is "young smokers and those ready to become smokers."

[156] Panel Report, para. 7.215-232.

[157] Panel Report, para. 7.231.

69. The United States recognizes the relevance, and importance, of the overwhelming scientific consensus that cigarettes with characterizing flavors are particularly appealing to youth. However, these reports on the appeal of cigarettes with characterizing flavors do not present the whole picture with respect to how cigarettes actually are used and perceived in the United States, the relevant market in this dispute.[158] The parties presented survey data to show how different cigarettes actually are used and perceived in the United States. The survey data show that consumers and potential consumers use and perceive clove and menthol cigarettes differently – even though they are both cigarettes with characterizing flavors that appeal to youth. The survey data were presented by the parties to support the competing claims as to the role of clove and menthol cigarettes in initiation among young people in the United States (also as compared to the use of those cigarettes by established smokers). The Panel was required to examine *all* the evidence. The reports by the U.S. FDA, NGOs, and the WHO cited by the Panel – while valid and relevant – do not tell the whole story. The Panel's disregard for evidence relevant to consumer tastes and habits – and in particular the survey data on how consumers actually use the products at issue – was a serious error. As the Appellate Body has put it, "[t]he deliberate disregard, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts."[159]

B. The Panel Erred in Concluding That Section 907(a)(1)(A) Accords to Imported Clove Cigarettes Treatment Less Favorable Than That Accorded to Like Products of National Origin

70. Having found incorrectly that clove cigarettes and menthol cigarettes are like products, the Panel proceeded to analyze whether Section 907(a)(1)(A) accords less favorable treatment to Indonesian clove cigarettes than to like domestic products. The Panel began by noting that weight should be accorded to the fact that the "wording of Article 2.1 of the *TBT Agreement* appears to be modeled on that of Article III:4 of the GATT 1994;"[160] however, the Panel qualified that it should accord weight cautiously, in light of the context and object and purpose of the provision at issue and of the covered agreement in which it appears.[161] The Panel also recounted its finding, in the likeness analysis, that the legitimate objective of reducing youth smoking must permeate and inform the analysis, and stated that it would take a similar approach in its examination of the "less favorable treatment" element.[162]

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[158] U.S. Answer to Panel Q44, para. 110; Indonesia Answer to Panel Q44, para. 97.

[159] *EC – Hormones (AB)*, para. 133.

[160] Panel Report, para. 7.253

[161] Panel Report, para. 7.254.

[162] Panel Report, para. 7.116 ("We agree that, in the context of the TBT Agreement and in light of its object and purpose expressed by the preambular recitals referred to above, we must bear in mind the significance of the public health objective of a technical regulation [...] . In the present case, the declared legitimate public health

71. After explaining its broad approach to the "less favorable treatment" analysis, the Panel took note that Section 907(a)(1)(A) does not explicitly ban certain kinds of cigarettes on the basis of origin, and that, therefore, *de jure* less favorable treatment would be excluded, and only a *de facto* analysis would be undertaken.[163] The Panel then set out what it considered the guidance provided by the "Appellate Body's jurisprudence on the less favourable treatment element under Article III:4 of the GATT 1994, "[164] comprised of four points: "(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* the 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."[165]

72. In applying these guiding points to the facts of the dispute, the Panel began by deciding which products should be compared.[166] The Panel concluded that it must compare the imported product at issue, Indonesian clove cigarettes, with the domestic cigarette it had determined to be a like product, menthol cigarettes.[167] The Panel then determined that imported clove cigarettes and domestic menthol cigarettes are treated differently because the former are banned and the latter are not,[168] and that this treatment modified the conditions of competition to the detriment of the imported products.[169] Finally the Panel considered whether the detriment could be explained by factors or circumstances unrelated to the foreign origin of the product. Under its analysis of this final point, the Panel found that the reasons presented for not banning menthol cigarettes appear to relate "in one way or another to the costs that might be incurred by the United

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objective of Section 907(a)(1)(A) [...] must permeate and inform our likeness analysis."); *see also* 7.255 ("We think that our approach to interpreting 'likeness' under Article 2.1 of the *TBT Agreement* should also apply, for the same reasons, to our analysis of whether imported clove cigarettes were accorded 'less favourable treatment' than that accorded to the like domestic product, i.e., menthol cigarettes. We explained before that, in our view, the legitimate objective of reducing youth smoking must permeate and inform our likeness analysis. We will follow a similar approach in our examination of this element.").

[163] Panel Report, paras. 7.260-261.

[164] Panel Report, para. 7.269.

[165] Panel Report, para. 7.269.

[166] Panel Report, para. 7.270.

[167] Panel Report, para. 7.274.

[168] Panel Report, para. 7.280.

[169] Panel Report, para. 7. 281.

States."[170] Based on this flawed finding, the Panel concluded erroneously that Section 907(a)(1)(A) is inconsistent with Article 2.1 of the TBT Agreement because Article 2.1 does not permit the United States to adopt a measure with a legitimate objective that accords less favorable treatment to Indonesian clove cigarettes than to a domestic like product for reasons of avoiding potential costs.[171]

73. In reaching its conclusion that Section 907(a)(1)(A) accords less favorable treatment to imported clove cigarettes than to like domestic products, the Panel erred in several respects. First, the Panel erred in its interpretation of which products should be compared. The Panel Report compares only the treatment accorded to Indonesian clove cigarettes and to domestic menthol cigarettes, and fails to compare the treatment accorded to like imported products, as a group, with that accorded to like domestic products, as a group.[172] Second, the Panel Report fails to assess the full effect of Section 907(a)(1)(A) on U.S. products, and instead considers only whether domestic products were on the market at the time the ban went into effect. Third, in reaching its conclusion on the effect on U.S. production, the Panel acted inconsistently with Article 11 of the DSU by finding that there were no domestic cigarettes with characterizing flavors other than menthol on the U.S. market at the time of the ban. Fourth, the Panel Report applies an incorrect legal framework to examine whether the identified detriment to the competitive situation of clove cigarettes could be explained by factors or circumstances unrelated to the origin of the products. The Panel Report erroneously considers whether the United States included or excluded certain products so as not to incur costs. Finally, the Panel acted inconsistently with Article 11 of the DSU in finding that Section 907(a)(1) imposes no costs on any U.S. entity.

1. The Panel Erred by Limiting the Scope of Products It Would Consider to One Banned Imported Product and One Non-banned Like Domestic Product

74. The Panel improperly limited its "less favorable treatment" analysis by limiting, in advance, the scope of products it would consider to one banned imported product (Indonesian clove cigarettes) and one non-banned like domestic product (domestically-produced menthol cigarettes). Limiting the field of like products in this way inappropriately dictated the flawed conclusion that Indonesian clove cigarettes are treated less favorably than like domestic products.

75. The Panel erred by failing to compare the treatment accorded to like imported products, as a group, with the treatment accorded to like domestic products, as a group. The Panel Report should not have compared the treatment accorded only to clove cigarettes and only to menthol

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[170] Panel Report, para. 7.289.

[171] Panel Report, paras. 7.289-290.

[172] *EC – Asbestos (AB)*, para. 100; *see also US – Tuna (Panel)*, paras. 7.293, 7.299, 7.373.

cigarettes, and excluded consideration of the treatment of other domestic and imported cigarettes with characterizing flavors.[173] The United States does not disagree with the Panel's reasoning that, in determining whether Section 907(a)(1)(A) accords *de facto* less favorable treatment to imported cigarettes compared to like domestic cigarettes, one relevant factor is the distribution of like products that are banned and not banned. However, as the Appellate Body articulated in *EC – Asbestos*, a Member may draw distinctions between like products without necessarily according less favorable treatment to an imported product;[174] the relevant analysis is how the measure treats like imported products, as a group, and like domestic products, as a group.[175]

76. The Panel's reasoning in *US – Tuna* is instructive on this point. The *US – Tuna* panel found, with respect to this point in *EC – Asbestos*, that:

> In this respect, we find that the Appellate Body's suggestion, in *EC – Asbestos*, that an enquiry into less favourable treatment involves a comparison of how the group of domestic like products and the group of like imports are treated, provides useful guidance. It suggests that the starting point for the analysis should be the *entire groups of both products identified as like products*. Accordingly, we approach this analysis on the basis of a comparison between the treatment afforded to the groups of US and Mexican tuna products *as a whole*, as well as Mexican tuna products compared to tuna products originating *in any other country*, in order to assess the relative situation of these products in respect of access to the dolphin safe label regulated by the US dolphin safe provisions.[176]

The *US – Tuna* panel correctly reasoned that, to determine whether a measure accords less favorable treatment, the starting point should be the entire group of both products identified as like products, in order to assess the relative situation of these products in respect of the measure.

77. In this dispute, the Panel was required to consider the treatment of <u>all</u> domestic and imported cigarettes with characterizing flavors other than tobacco in its treatment analysis, and not just the treatment of domestic menthol cigarettes.[177] Section 907(a)(1)(A) banned all

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[173] Panel Report, paras. 7.274, 7.277.

[174] *EC – Asbestos (AB)*, para. 100.

[175] *EC – Asbestos (AB)*, para. 100; U.S. Second Submission, para. 123 ("The Appellate Body affirmed that the relevant comparison for purposes of the "less favorable treatment" is not between an import as compared to the "best" treated like domestic product, but rather "a complaining Member must [...] establish that the measure accords to the *group* of 'like' *imported* products 'less favorable treatment' than that it accords to the group of 'like' *domestic* products.")

[176] *US – Tuna (Panel)*, para. 7.295 (emphasis added).

[177] *See, e.g.*, U.S. Second Written Submission, paras. 121, 136, note 223; U.S. Comments on Indonesia's Answer to Panel Q85(a), para. 3.

domestic and imported cigarettes with characterizing flavors other than menthol or tobacco. However, the Panel considered the treatment accorded only to one like domestic product – one that was not banned, menthol cigarettes.[178]

78. The Panel made clear that all cigarettes with characterizing flavors other than tobacco would meet its criteria of "like products" in this dispute. The Panel concluded that clove and menthol cigarettes belong to a category of cigarettes that should be deemed "like products" because they both possess the "defining feature" (a characterizing flavor) and health risk (appeal to youth) regulated by the measure at issue.[179] Setting aside for the moment that the United States disagrees that the public health considerations associated with clove cigarettes and menthol cigarettes are the same (they are not), it is undeniable that other cigarettes with characterizing flavors – such as cherry, grape, vanilla, coffee, liquor, etc. – would meet the Panel's criteria and thus belong to the category of cigarettes deemed by the Panel to be like products. The obvious result of the Panel's finding is that *all* cigarettes with a characterizing flavor other than tobacco are "like products" as the Panel defined them.

79. The Panel improperly excluded a whole range of like domestic and like imported products. With respect to like domestic products, the Panel failed to consider the treatment accorded to domestic cigarettes with characterizing flavors that were banned by Section 907(a)(1)(A) (such as domestic cigarettes with other characterizing flavors, such as fruit, coffee, liquor, nut or candy which producers in the United States and other countries developed and offered for sale in the U.S. market (and which were even mentioned by name in the measure itself)).[180] With respect to like imported cigarettes, the Panel failed to consider the treatment accorded to menthol cigarettes imported from other countries that were not banned (for example, producers from at least 12 different countries exported at least 28 different brands of menthol cigarettes to the United States in 2008 and 2009 (the most recent years for which data are

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[178] Panel Report, para. 7.277 (In determining the scope of products to consider in its "less favorable treatment analysis," the Panel stated that "[o]n the domestic side, we recall that we have found that menthol cigarettes are 'like' clove cigarettes for the purposes of Article 2.1 of the *TBT Agreement*, because, *inter alia*, they both contain an additive that provides them with a characterizing flavour which makes them appealing to youth.").

[179] Panel Report, para. 7.247 ("The measure at issue in this case plainly regulates cigarettes on the basis of a characteristic that clove cigarettes and menthol cigarettes have in common ... which in the words of Section 907(a)(1)(A) is the shared characteristic that they 'contain, as a constituent ... or additive, an artificial or natural flavor ... or an herb or spice ... that is a characterizing flavor'. In the context of this particular measure, which regulates tobacco products on the basis of this particular characteristic – which may be regarded as perhaps the defining feature of each type of product – we find it very difficult to see how clove cigarettes and menthol cigarettes would not be considered to be 'like'."). Indeed, all of the evidence cited by the Panel as demonstrating the "likeness" of clove cigarettes and menthol cigarettes also demonstrates that other flavors should be deemed "like" as well. Panel Report, paras. 7.214-7.222 (citing Exhibit US-67, Exhibit US-113, Exhibit US-35, Exhibit US-38, Exhibit IND-41, Exhibit IND-25, and Exhibit IND-66); Panel Report, paras. 7.109-110.

[180] Section 907(a)(1)(A) expressly bans such characterizing flavors as strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee.

available).[181] The Panel failed to issue any findings regarding these facts, even though the Panel was required to consider the distribution of all like imported products and like domestic products in its analysis.

80. The United States expressly argued that the Panel was required to consider all cigarettes affected by the ban under Section 907(a)(1)(A) that meet the criteria of "like products" – and not just one like domestic product not affected by the ban.[182]

81. An appropriate "less favorable treatment" analysis – based on an assessment of the full scope of like domestic and like imported products – demonstrates that Section 907(a)(1)(A) banned a group of cigarettes with characterizing flavors, comprising a very small market segment in the United States. Section 907(a)(1)(A) bans all imported cigarettes and all domestic cigarettes with characterizing flavors other than tobacco or menthol, and does not alter the conditions of competition as between like imported products, as a group, and like domestic products, as a group.

82. The Panel's legal bases for confining its comparison only to imported clove cigarettes and domestic menthol cigarettes are in error. The Panel initially articulated what appeared to be the correct standard, when it set out the elements to guide its "less favorable treatment" analysis. The Panel stated that "the less favourable treatment test relates to the impact of the measure on the competitive relationship of *groups of products of imports versus groups of domestic like products*."[183] The Panel later noted that prior WTO reports do not support that less favorable treatment can be established by showing that "some imported products" are treated less favorably than "some like domestic product."[184] This statement appears to reject the notion that "less

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[181] U.S. Answer to Panel Q88, para. 23; Exhibit US-136.

[182] Panel Report, para. 7.72 (noting the U.S. argument that the Panel should "compare the treatment accorded to *all* imported cigarettes (to the extent that they are like) , and not just clove cigarettes, with the treatment accorded to *all* domestically produced cigarettes (to the extent they are like); *see, e.g.,* U.S. First Written Submission, paras. 203-25; U.S. Second Written Submission para. 121 ("The relevant comparison is the treatment accorded to imported "products" and like domestic "products" – not single imports and compared to single like domestic products. There is no textual basis to interpret either [Article 2.1 of the TBT Agreement or Article III:4 of the GATT 1994] as providing for treatment of "an imported product" that is no less favorable than the treatment of "a domestic product."); U.S. Opening Statement at the First Substantive Meeting of the Panel, paras. 44, 47-50; U.S. Opening Statement at the Second Substantive Meeting of the Panel, paras. 54-57, 59-60; U.S. Second Written Submission, para. 136 ("[I]t is not the case that section 907(a)(1)(A) targets Indonesian cigarettes or imports generally. Both imported and U.S. products are affected by the measure, and in each case, it is products with a relatively small market share.").

[183] Panel Report, para. 7.266 (emphasis added); *see also* Panel Report, para. 7.266 (noting the Appellate Body finding that a WTO Member may draw distinctions between products which have been found to be like without, for that reason alone, according to the group of like imported products less favorable treatment than that accorded to the group of like domestic products).

[184] Panel Report, para. 7.273.

favorable treatment" can be established by showing that *any* imported product is treated less favorably than *any* like domestic product. In fact, the Panel disagreed with Indonesia on this point, and called this approach "extreme."[185]

83. However, after discrediting the validity of a one-to-one comparison, the Panel nevertheless proceeded to apply that very analysis by comparing the treatment of only one imported product, clove cigarettes to only one like domestic product, menthol cigarettes.[186] This analysis was based on the Panel erroneous legal finding that "for purposes of the "less favourable treatment" analysis, Indonesia is correct in its conclusion that the comparison should be between (i) imported *clove* cigarettes (as opposed to all kinds of cigarettes imported to the United States from all countries); and (ii) the domestically produced cigarettes that the Panel has found to be "like" products, i.e., menthol cigarettes."[187] As explained below, this legal finding was in error and the resulting analysis flawed.

a. The Panel's Legal Basis for Excluding Like Imported Products Is Incorrect

84. The Panel misread Article 2.1 of the TBT Agreement as excluding consideration of like imported products as a group, and as only permitting consideration of the imported products of the complaining party, Indonesian clove cigarettes.[188] The Panel Report concluded that because Article 2.1 concerns the treatment accorded to the imported products from the territory of "*any other* Member," only the treatment accorded to the complaining Member's products should be considered relevant in the comparison.[189] This conclusion misconstrues the purpose of comparing how a measure affects imported products versus like domestic products. The reason it is appropriate to take account of how the ban affects like products, generally, is that the purpose of the analysis is to discern whether Section 907(a)(1)(A) legitimately draws distinctions among like products – which is consistent with Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994[190] – or whether the measure draws product distinctions as a proxy for singling out the like products of the complaining Member for less favorable treatment. This is the central question of the *de facto* analysis. In order to provide evidence as to whether or not the measure draws legitimate product distinctions, the analysis in this case must consider the entire range of like products addressed by the measure.

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[185] Panel Report, paras. 7.271-7.273.

[186] Panel Report, paras. 7.274-279.

[187] Panel Report, para. 7274.

[188] Panel Report, para. 7.274.

[189] Panel Report, para. 7.275.

[190] *EC – Asbestos (AB)*, para. 100.

85. The panel in *US – Tuna* expressed this principle when it stated that:

> That these measures may, through the operation of origin-neutral regulatory categories, have a detrimental impact on certain imports does not, in our view, necessarily imply that the measures afford less favourable treatment to such imported products within the meaning of Article 2.1. We acknowledge, in this respect, that different products *of various origins* may be affected differently by a measure that lays down certain product characteristics with which compliance is mandatory. However, as observed above, what matters for the purposes of determining whether there is a violation of Article 2.1 is not only the existence of some adverse impact on some imported products, but *whether the group of imported products is placed at a disadvantage, in this respect, compared to the groups of like domestic and imported products originating in any other country*."[191]

Similarly, in this dispute, the question of less favorable treatment is not answered by the sole fact that clove cigarettes were banned while a single like domestic product, menthol cigarettes, was not – without regard to how other like products were treated, including other like imported products. As the Panel itself acknowledged, less favorable treatment cannot be established merely by showing that there are some imported products that are treated less favorably than some like domestic products.[192] In this case, the ban affected both imported and domestic products; and did not affect other domestic and imported like products.

b. The Terms of Reference Did Not Justify the Panel's Legal Mistake of Comparing Only Imported Clove Cigarettes and Domestic Menthol Cigarettes

86. With respect to domestic cigarettes with characterizing flavors, the Panel Report provides little explanation for limiting the scope of like products considered in its treatment analysis to only domestic menthol cigarettes. It is possible that the Panel may have reached its conclusion on which domestic products to compare based on the misguided view that the Panel was limited by the terms of reference to consider only the products mentioned in Indonesia's panel request – clove and menthol cigarettes. In interpreting the terms of reference, the Panel Report states that "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

[191] *US – Tuna (Panel)*, para. 7.373 (emphasis added).

[192] Panel Report, para. 273.

cigarettes *versus* domestic menthol cigarettes."[193] In this discussion, the Panel considered, but rejected, the inclusion of regular cigarettes as part of Indonesia's like product claims.[194] The Panel Report does not mention other cigarettes regulated by section 907(a)(1)(A).

87. The Panel erred fundamentally to the extent that it concluded that Indonesia, as the complaining party, set the field of products to be compared in its panel request. The terms of reference define which *measures* and *which claims* a panel may consider. They do not define the scope of relevant products to analyze with respect to a discrimination claim, nor do they limit which defenses a responding party may invoke. A complaining Member cannot limit the scope of the less favorable treatment comparison, in advance, by its selection of products in its panel request. Article 2.1 of the TBT Agreement requires that Members accord treatment no less favorable to imported products than to like domestic products. In this dispute, which products should be compared in the "less favorable treatment" analysis was a point of argument between the parties, and not an aspect of Indonesia's claim. The United States argued that cigarettes with characterizing flavors other than tobacco or menthol – such as cherry, chocolate, coffee, etc. – were relevant to the Panel's analysis at every stage of the national treatment analysis.[195] The United States argued, in particular, that the Panel could only adequately assess the treatment accorded to Indonesian clove cigarettes by comparing the treatment accorded to like imported products and like domestic products.[196] Indonesia, on the other hand, asked the Panel entirely to disregard the treatment accorded to all cigarettes with characterizing flavors other than clove, menthol, and tobacco.[197]

88. The Panel erred by failing to consider the treatment of domestic cigarettes with

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[193] Panel Report, para. 7.147 (emphasis in original). *See also* Panel Report, paras. 7.147, 7.274, 7.277 (noting that the domestically produced cigarettes that should be compared in the "less favorable treatment" analysis are those the panel determined to be "like" products, *i.e.*, domestic menthol cigarettes). The United States argued that the terms of reference did not limit the Panel's consideration of possible like domestic products, and that "[t]he domestic products to be considered in the [...] like product analysis are elements of the disputing parties argumentation in support of (and in opposition to) the national treatment claim, and should be set out in the parties' written and oral submissions to the panel." U.S. Answer to Panel Q83, para. 7.

[194] *See* Panel Report, paras. 7.124-7.147 (Concluding that, "[i]n 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.").

[195] *See*, *e.g.*, U.S. Second Written Submission, para. 90 ("U.S.-produced cigarettes with characterizing flavors banned under section 907(a)(1)(A) are relevant in each phase of the national treatment analysis"); U.S. comments to Indonesia's Answer to Q85(a), para. 12; U.S. Second Written Submission para. 105-106; U.S. Second Oral Statement, paras. 33-34, 39; U.S. Answer to Panel Q83, para. 7.

[196] *See, e.g.,* U.S. First Written Submission, paras. 203-25; U.S. Opening Statement at the First Substantive Meeting of the Panel, paras. 44, 47-50; U.S. Opening Statement at the Second Substantive Meeting of the Panel, paras. 54-57, 59-60; U.S. Second Written Submission, paras. 131-136.

[197] *See, e.g.,* Indonesia Second Written Submission, para. 92. Indonesia Answer to Panel Q27, para. 71.

characterizing flavors other than menthol as part of its "less favorable treatment" analysis. The Panel Report does not explain the basis for limiting its consideration in its "less favorable treatment" analysis to domestic menthol cigarettes. To the extent the decision may have been based on a flawed legal interpretation that the terms of reference precluded such analysis, that conclusion would also constitute legal error.

89. Where a panel has deemed it unnecessary and inappropriate to render findings on treatment accorded to the full scope of like imported and like domestic products, and to conduct a treatment analysis taking all like products into account, its conclusion on "less favorable treatment" is materially and irredeemably flawed. The Appellate Body should reverse the Panel's conclusion on less favorable treatment.

c. The Panel Applied an Overly Narrow Test to Determine the Effect on U.S. Products

90. As explained above, the Panel expressly limited its "less favorable treatment" analysis to a comparison of imported clove cigarettes and domestic menthol cigarettes.[198] Later in the Panel Report – when considering whether the less favorable treatment accorded to imported clove cigarettes could be explained by factors or circumstances unrelated to the products' origin – the Panel stated that "at the time of the ban, there were no cigarettes with characterizing flavours other than menthol."[199] The Panel Report makes no linkage between this statement and the decision to limit the comparison of the products to imported clove cigarettes and domestic menthol cigarettes.

91. However, to the extent that this statement in the Panel Report may have factored into the Panel's like product comparison, it reflects a mis-application of the legal standard under Article 2.1 of the TBT Agreement. In a *de facto* "less favorable treatment" analysis, a panel is required to consider the effect of the measure on like domestic products. There is no rigid temporal limitation on this analysis. The Panel improperly limited the scope of its consideration to the effect on U.S. products only at the time the ban went into effect – a limitation without any basis in the text of the Article 2.1 of the TBT Agreement. Article 2.1 of the TBT Agreement requires a panel to assess the treatment of like domestic and imported products, taking account of all relevant evidence. Restricting a comparison to only products on the market at the time a measure goes into effect, without regard to the years preceding or forthcoming, improperly restricts the legal analysis.[200]

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[198] Panel Report para. 7.279-7.281.

[199] Panel Report, para. 7.289. The statement is offered in the context of whether the competitive detriment to clove cigarettes can be explained by factors or circumstances unrelated to the origin of the product.

[200] *See*, *e.g.*, *US – Tuna (Panel)*, para. 7.298 (Recognizing the need to consider all evidence related to the effect of a measure on domestic production, and that there was no reason to exclude, *apriori*, aspects from consideration.).

92. First, there is no rigid temporal limitation to the evidence a panel may consider in performing a less favorable treatment analysis. For example, in *Mexico Soft Drinks*, the panel considered the products on the market over a five year period from 1997 to 2001.[201] In this dispute, the Panel should have taken into account the fact that there were domestic cigarettes with characterizing flavors on the market in the years closely preceding the effective date of the ban and that were a reason for adopting the ban in the first place. It is undisputed that domestic cigarettes with characterizing flavors other than menthol were sold from 2001 through 2006,[202] and there was evidence on the record that they were sold as recently as 2006-2008 (the year before the ban went into effect).[203]

93. Second, an appropriate analysis is not limited to products on the market at the date a measures enters into force. The Panel was required to take into consideration all the circumstances of this dispute, in particular that Section 907(a)(1)(A) was enacted specifically to respond to an *emerging* trend of products, and in this sense the effect on U.S. production was at least in some part pre-emptive. Just as WTO panels and the Appellate Body often place weight on "potential competition" in like product analyses,[204] so the Panel in this case should have assessed the extent to which Section 907(a)(1)(A) closed off a potential market, that U.S. producers were actively exploring.

94. The impetus for Section 907(a)(1)(A) was a well-documented concern among the public health community and U.S. public health authorities that U.S. cigarette manufacturers, most notably RJ Reynolds, were pushing new lines of flavored cigarettes specifically designed to attract young, novice smokers.[205] The public health community immediately mobilized to fight these products at the level of individual states, and by 2004, draft federal legislation for Section 907(a)(1)(A) had been introduced in the U.S. Congress to remove these cigarettes from the U.S. market. The focus of the measure, as documented in the legislative history, was primarily U.S. production. Section 907(a)(1)(A) took several years to become law, and producers were aware of the impending legislation. In this situation, it is not uncommon that producers will stop investing in products even before the ban goes into effect. That the legislation was proposed, and subsequently enacted, before manufacturers were able to saturate the market with cigarettes with

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[201] *Mexico – Soft Drinks (Panel)*, paras. 8.119-120.

[202] Indonesia First Written Submission, para. 22, note 29 (acknowledging the presence of domestic cigarettes with characterizing flavors on the U.S. market until 2006).

[203] *See*, *e.g.*, U.S. First Written Submission, para. 51; Exhibit US-52, Exhibit US-62, Exhibit US-63, Exhibit US-64.

[204] *See*, *e.g.*, *Korea – Alcohol (AB)*, paras. 114-118 (Noting that in the context of the first sentence of Article III:2 of the GATT 1994, the concept of competition encompasses latent and extant demand and should not be narrowly or temporally construed).

[205] *See*, *e.g.*, U.S. First Written Submission, paras. 48-50.

new characterizing flavors was a legislative victory, and should not be construed as evidence that U.S. production was not affected.

95. The broader context is also important here. As the Panel Report recognizes, Section 907(a)(1)(A) makes a material contribution to reduce smoking initiation among young people.[206] By reducing youth smoking, the measure thereby reduces subsequent demand for all cigarettes, as nearly every smoker begins by the age of 26. Moreover, Section 907(a)(1)(A) is part of broader legislation specifically designed to reduce demand for cigarettes and thus to shrink the U.S. cigarette market, which is comprised almost entirely of U.S.-produced cigarettes (95%).

96. In sum, to the extent that the Panel may have considered the effect of Section 107(a)(1)(A) on all domestic cigarettes *at the time the measure entered into force*, it erred by limiting the scope of any such analysis and excluding, *a priori*, evidence relevant to that inquiry. The Panel offered absolutely no explanation as to its legal reasoning for considering only the cigarettes on the market "at the time of the ban." The Panel applied an overly narrow standard, with no basis in the treaty or prior panel or Appellate Body reports, without explanation. As a result, the Appellate Body should reverse this finding.

2. The Panel Acted Inconsistently with Article 11 When It Concluded That There Were "No" Domestic Cigarettes with Characterizing Flavors Other Than Menthol at the Time of the Ban

97. Moreover, the Panel failed to act consistently with its mandate under Article 11 of the DSU to make an objective assessment of the facts in the case when it concluded that there were "no" domestic cigarettes with characterizing flavors other than menthol at the time of the ban. The facts on the Panel record do not support this finding. The Panel had already found that there were at least *some* cigarettes with characterizing flavors on the market "prior to" the ban[207] (including a domestically-produced clove cigarette),[208] The Panel also stated that the United States submitted lists of cigarettes certified as "fire safe" – meaning they were authorized for sale – in 2008 and 2009 in several states.[209] These lists included at least 20 different brands of domestic cigarettes with characterizing flavors other than menthol. In addition, other evidence demonstrated that by 2008 – just a year before the ban went into effect – at least four U.S. cigarette companies were producing flavored cigarettes: RJ Reynolds (22 brands), Lorillard (2

[206] Panel Report, para. 7.417

[207] Panel Report, para. 2.28; *see* Section II.D.b, above.

[208] Panel Report, para. 2.27.

[209] Panel Report, para. 7.289, n.524 (citing Exhibits US-52 and US-62). *See also* Exhibits US-63 and US-64.

brands), Ligget & Myers (1 brand), and Smokin' Joes (1 brand).[210]

98. The Panel's statement ignores unrebutted evidence showing that such cigarettes were marketed in the United States at the time of the ban. Article 11 of the DSU called for the Panel to make an objective assessment of the facts, and to refrain from issuing "affirmative findings that lack a basis in the evidence contained in the panel record."[211] There was no basis in the Panel record to conclude that there were "no" domestic cigarettes with characterizing flavors other than menthol on the market at the time of the ban. Accordingly, the Appellate Body should reverse this finding.

3. The Panel Erred in Concluding That Any Detriment to the Competitive Conditions for Clove Cigarettes Could Not Be Explained by Factors Unrelated to the Foreign Origin of the Products

99. For the reasons discussed above, the Panel Report improperly set out the comparison of the like imported products and the like domestic products. Based on this erroneous comparison, the Panel concluded that imported clove cigarettes were accorded less favorable treatment than like domestic menthol cigarettes. The Panel then addressed whether any detriment to the competitive conditions suffered by imported clove cigarettes could be explained by factors unrelated to the foreign origin of those products. Assuming *arguendo* that the Panel had done the correct comparison, its analysis of whether the less favorable treatment is related to the national origin of the imported products was in error.

100. First, the Panel erred by applying the wrong legal framework to its analysis. Second, the Panel failed to meet its obligation under Article 11 of the DSU in finding that there were no "costs" incurred by "any U.S. entity" as a result of Section 907(a)(1)(A).

a. The Panel Failed to Apply an Appropriate Legal Framework to Its Analysis of Whether the Identified Detriment to the Competitive Conditions for Clove Cigarettes Could Be Explained by Factors or Circumstances Other Than the Origin of the Products

101. The Panel correctly recognized that, even where a technical regulation adversely affects the competitive situation of imported products compared to like domestic products, this does not constitute less favorable treatment when the detrimental effect is unrelated to the foreign origin of the product.[212] The premise behind this consideration is the recognition that inevitably

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[210] U.S. First Written Submission, paras. 51; Exhibit US-52.

[211] *Canada – Wheat (AB)*, para. 181.

[212] Panel Report, para. 7.269; *Dominican Republican – Cigarettes (AB)*, para. 96.

regulatory measures, in this instance technical regulations, will result in some costs to those affected, and that there is no guarantee that those costs will be uniformly distributed. Many factors can affect the costs flowing from a particular technical regulations, including transportation costs, production method, the age of the producer's facility, size, efficiency, productivity, and marketing strategy. As a result, under Article 2.1 a technical regulation may impose burdens or costs on imported products compared to like domestic products without necessarily according "less favorable treatment," where the burdens or costs are explained by a factor or circumstance other than the origin of the products.[213] The Panel – after adopting this principle as a guiding consideration in its "less favorable treatment" analysis – failed, however, to render any such analysis. Instead, the Panel erred by focusing its analysis on whether the United States decided not to ban menthol in order to avoid incurring "costs".

102. Prior Appellate Body and panel reports provide examples of an appropriate legal framework to analyze whether less favorable treatment is related to the origin of the product. In *DR – Cigarettes*, the Appellate Body noted that any increased cost for the imported product resulting from the Dominican tax measure was related to the size of the import's market share, and thus did not support a finding that the measure targeted the import based on its origin.[214] Likewise, in *EC – Biotech*, the panel considered that the complaining Member had not properly alleged "less favorable treatment," because the facts presented did not make clear whether the measure at issue differentiated between biotech and non-biotech products on the basis of their origin, or, for instance, on the basis of the perceived safety of biotech versus non-biotech products.[215] Recently, the *US –Tuna* panel acknowledged that the producers of Members are private actors, and may decide to respond to origin-neutral measures with restrictive effects in varying ways,[216] and that the existence of adaption costs based on importing producers' existing practices does not necessarily mean that a measure accords less favorable treatment to that imported product.[217] Accordingly, there are a number of examples in prior WTO reports where a detrimental effect to an imported product is unrelated to the product's origin: the detriment could be associated with the product's particular market share or import profile; or associated with a different product distinction, such as a difference in the real or perceived safety of the products at issue; or associated with the choices of the producers themselves, as private actors.

103. However, in this dispute, the Panel failed to consider any arguments or evidence bearing upon these or other relevant factors. For example, the Panel did not examine – at any stage of the analysis – evidence and arguments related to the "architecture, structure and design" of the

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[213] *See, e.g.*, U.S. Second Written Submission, paras.137-144.

[214] U.S. Second Written Submission, para. 138; *DR – Cigarettes (AB)*, para. 96.

[215] U.S. Second Written Submission, para. 140; *EC – Biotech*, para. 7.2514.

[216] *US – Tuna (Panel)*, paras. 7.331-332.

[217] *US – Tuna (Panel)*, para. 7.340.

measure to assess the U.S. argument that the product distinctions were based on factors other than origin (such as public health and other regulatory considerations).[218] Nor did the Panel consider the choices of Indonesian cigarette producers, including the fact that historically Indonesian producers have exported to the United States regular tobacco cigarettes, and did so as recently as 2009,[219] and also appear to have exported to the United States menthol-flavored cigarettes.[220] Relatedly, the Panel also did not consider that Indonesia's overall volume of cigarette imports to the United States – including clove, regular and menthol cigarettes – has historically been very low,[221] and Section 907(a)(1)(A) allows Indonesia to import and sell the two types of cigarettes, regular and menthol, which are most popular among adult established smokers in the U.S. market.

104. To be clear, the Panel was not required to *accord weight* to any particular piece of evidence, as it is within the Panel's discretion to determine on what evidence to base a finding. However, the Panel needed to apply the appropriate legal framework to its analysis. In this instance, the Panel should have examined whether the detriment to the competitive situation of clove cigarettes could be explained by factors or circumstances unrelated to its origin, and was required at least to *analyze* all of the relevant evidence and arguments, and, ultimately to base its finding on evidence relevant to that particular question.

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[218] *See*, *e.g.*, U.S. First Written Submission, paras. 103-139, 207, 209; U.S. Second Written Submission, paras. 142-144; U.S. Opening Statement at the First Substantive Meeting of the Panel, paras. 70-76; U.S. Opening Statement at the Second Substantive Meeting of the Panel, paras. 52-55. As explained above, the Tobacco Control Act directs the U.S. FDA to set tobacco product standards "as appropriate for the public health." This encompasses the reality that not all ostensibly positive measures in fact are likely to be effective, achievable, or overall positive for the public health. For example, removing nicotine altogether from cigarettes would make them less harmful to individual consumers. But whether doing so would be appropriate for the public health in the United States depends on a range of factors, including smoking behavior and addiction rates, the cultural acceptance of smoking, and the opportunity for an unregulated black market. These are not factors of simple economic or other cost, but factors of whether a measure would be effective, or would cause ancillary harms that would undermine the public health objective of eliminating nicotine addiction or otherwise be inconsistent with the public welfare.

In considering whether to ban cigarettes with characterizing flavors because they are appealing to youth, the U.S. Congress appropriately took into consideration how different cigarettes are used by adults, and the various risks associated with different regulatory measures. The U.S. Congress adopted Section 907(a)(1)(A) after weighing the public health considerations and determining that, because menthol and tobacco cigarettes are the most widely smoked cigarettes in the United States, and millions of adults are chemically and psychologically addicted to them, they require a different regulatory approach. The U.S. Congress determined that, at that point in time, banning the two most pervasive cigarettes in the United States could be against the interest of the overall public health, by, for example, overwhelming the healthcare system or significantly exacerbating the unregulated market for cigarettes. These effects are matters of consequence to the public welfare. The Panel did not discuss or examine these regulatory considerations as presented by the United States, but merely equated them with efforts to avoid "costs."

[219] U.S. Answer to Panel Q81, paras. 4-5; Exhibit US-134; Indonesia Answer to Panel Q81, paras. 2, 3.

[220] U.S. Answer to Panel Q84(a), para. 9 ; Indonesia Answer to Panel Q84(a), para. 15.

[221] U.S. Answer to Panel Q16, paras. 37-40; U.S. Answer to Panel Q81, paras. 4-5; Exhibit US-100; Exhibit US-134.

105. The Panel Report completely fails to examine whether the detriment to the competitive situation of clove cigarettes is related to their origin. In analyzing this aspect, the Panel found that the U.S. reasons for "not including menthol cigarettes" appears to relate "in one way or another to the costs that might be incurred by the United States were it to ban menthol cigarettes."[222] The Panel concluded that: "It seems to us that the effect of banning cigarettes with characterizing flavors 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."[223] In other words, to determine whether the competitive disadvantage to clove cigarettes is related to their origin, the Panel conducted a comparison between the "costs" the measure allegedly *imposes* on Indonesian clove cigarette *producers* and *avoids* imposing on "*any U.S. entity.*"[224]

106. The Panel Report's legal framework is inconsistent with Article 2.1 of the TBT Agreement, which concerns the comparative treatment of like imported and like domestic products. As an initial matter, it is unclear exactly what the Panel Report means by "costs." Article 2.1 requires that imported products be "accorded treatment no less favorable than that accorded to like products of national origin." The Panel was required to focus on the comparative treatment of products. The Panel Report failed to perform that examination. There is no basis in the text of Article 2.1 of the TBT Agreement for a comparison of costs imposed on foreign producers with those avoided by "any U.S. entity." The Panel was required to examine whether the effect on the competitive conditions for imported products relative to like domestic products was related to their origin; the Panel did not meet this requirement by purporting to examine, instead, whether the United States sought to save itself "costs."

107. Moreover, the Panel's finding, on its face, does not show what the Panel purports that it shows, namely, that any detrimental effect to the competitive conditions for clove cigarettes compared to menthol cigarettes was related to the origin of the products. Rather, the finding – assuming for the sake of argument it were correct – would seem to show only that the United States excluded a like domestic product not because of where it is produced, but because by banning it the *United States* would incur costs. The costs the Panel took note of – *i.e*, "the potential impact on the health care system and the potential development of a black market and smuggling of cigarettes"[225] – do <u>not</u> refer to costs that would be incurred by U.S. menthol cigarette producers, but by U.S. regulatory enforcement and health care system. In other words, these costs would be incurred regardless of where menthol cigarettes are produced, and even if all menthol cigarettes were imported. Accordingly, this finding does not relate to the issue of product origin, and therefore does not support the conclusion that clove and menthol cigarettes

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[222] Panel Report, para. 7.289.

[223] Panel Report, para. 7.289.

[224] Panel Report, paras. 7.289-291.

[225] Panel Report, para. 7.289.

were treated differently because of their origin of production.

108. In conclusion, the Panel failed to apply the legal standard it correctly adopted – whether any detrimental effect to the competitive conditions for clove cigarettes, as compared to like domestic products, is related to their origin. The Panel's finding that the United States acted to avoid incurring costs is unrelated to this factor, and does not support a finding of "less favorable treatment."

b. The Panel Failed to Make an Objective Assessment of the Facts in Finding That There Were No Costs Imposed on Any U.S. Entity

109. Moreover, the Panel Report failed to provide an objective assessment of the facts, as called for by Article 11of the DSU, by finding that Section 107(a)(1)(A) did not impose *any* costs on *any* U.S. entity.

110. Article 11 of the DSU requires a panel to refrain from issuing "affirmative findings that lack a basis in the evidence contained in the panel record."[226] In this dispute, there was no basis in the panel record to conclude that Section 907(a)(1)(A) avoids costs to *any* U.S. entity[227] – a point underscored by the fact that the Panel barely cited the record. As an initial matter, the U.S. FDA was charged with enforcing the measure, which unquestionably involves "costs" to a U.S. entity.

111. Moreover, as demonstrated above, Section 907(a)(1)(A) imposed "costs" on U.S. producers of cigarettes with characterizing flavors. Section 907(a)(1)(A) was enacted specifically to respond to an emerging trend of products, and the effect on U.S. production was pre-emptive and closed off a potential market that U.S. producers were actively exploring. The Panel's statement also ignores what the Panel itself took to be the goal of the measure – reducing smoking. By reducing youth smoking, the measure thereby reduces subsequent demand for all cigarettes and thus shrinks the U.S. adult cigarette market, which comprises almost entirely U.S.-produced cigarettes.

112. Finally, the statement that there were no "costs" imposed on any U.S. entity ignores unrebutted evidence showing that domestic cigarettes with characterizing flavors other than tobacco or menthol were marketed in the United States at the time of the ban.

113. The Appellate Body should reverse this finding as it lacks a basis in the evidence contained in the panel record.

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[226] *Canada – Wheat (AB)*, para. 181.

[227] Panel Report, para. 7.289.

C. The Panel Erred in Finding That Section 907(a)(1)(A) Is Inconsistent with Article 2.12 of the TBT Agreement

114. Article 2.12 of the TBT Agreement states:

> Except in those urgent circumstances referred to in paragraph 10, 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.

115. Section 907(a)(1)(A) was published on June 22, 2009 and took effect on September 22, 2009.[228] Indonesia challenged this three month interval period as being inconsistent with Article 2.12, which, according to Indonesia, "oblige[s] the United States to allow *as a minimum* a period of *six months* between the publication and the entry into force of Section 907(a)(1)(A)."[229] The United States disagreed, contending that no such *per se* six month rule exists, and that Indonesia had failed to establish a *prima facie* case that the three-month interval period was unreasonable given the facts and circumstances of this case.[230]

1. The Panel's Analysis

116. After finding that Section 907(a)(1)(A) provided a three-month interval period for purposes of Article 2.12,[231] and that the "urgent circumstances" referred to in Article 2.12 were not present here,[232] the Panel began its analysis of whether the three month interval was "reasonable" for purposes of Article 2.12.[233] The Panel initially examined what "interpretative value" to give the *Doha Ministerial Decision on Implementation-Related Issues and Concerns of 14 November 2001* ("Doha Ministerial Decision").[234] Paragraph 5.2 of the Doha Ministerial Decision states:

> Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement

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[228] Panel Report, para. 7.567.

[229] Panel Report, para. 7.561 (emphasis in original).

[230] Panel Report, para. 7.556.

[231] Panel Report, para. 7.561.

[232] Panel Report, para. 7.565.

[233] Panel Report, para. 7.567.

[234] WT/MIN(01)/17.

> 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.[235]

117. Without formally deciding whether paragraph 5.2 is "legally binding" (as Indonesia argued),[236] or whether it is, at most, a supplementary means of interpretation under Article 32 of the *Vienna Convention on the Law of Treaties* ("VCLT") (as the United States argued),[237] the Panel concluded that it:

> must be guided by [the Doha Ministerial Decision] in its interpretation of the phrase "reasonable interval", as it was agreed by all WTO Members meeting in the form of Ministerial Conference, the highest ranking body of the WTO. Furthermore, the Panel is of the view that paragraph 5.2 of the Doha Ministerial Decision could be considered as a subsequent agreement of the parties within the meaning of Article 31(3)(a) of the VCLT, on the interpretation of "reasonable interval" within Article 2.12 of the *TBT Agreement*.[238]

118. In looking at paragraph 5.2, the Panel determined that the use of the term "normally" qualifies the length of the interval, finding that "the six-month guideline does not apply to all non-urgent cases, and that there may be non-urgent cases where it would be reasonable to have a shorter interval while in others, such an interval should be of more than six months."[239] Moreover, the Panel agreed with the United States that whether an interval is "reasonable" for the purposes of Article 2.12 must be determined on a "case-by-case basis."[240]

119. Next, the Panel acknowledged the evidence and argumentation the United States had put forward that the difference between three month and six month interval periods had no impact on Indonesian producers,[241] and that, in fact, Indonesia had spent *years* trying to convince senior U.S. Government officials to amend Section 907(a)(1)(A) so that it would not ban clove cigarettes.[242]

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[235] *See also* Panel Report, para. 7.568 (quoting same).

[236] Panel Report, para. 7.569.

[237] Panel Report, para. 7.570.

[238] Panel Report, para. 7.576.

[239] Panel Report, para. 7.580.

[240] Panel Report, para. 7.581.

[241] Panel Report, para. 7.583.

[242] Panel Report, para. 7.584.

120. However, the Panel declared that the "rule" contained in paragraph 5.2 requires an examination of whether a six month interval period "would be ineffective in fulfilling the legitimate objectives pursued."[243] In this regard, as discussed below, the Panel Report took into account eight statements, only three of which Indonesia made in relation to its Article 2.12 claim.[244] Based on these eight statements, the Panel concluded that Indonesia had established a *prima facie* case of the final element of paragraph 5.2 that allowing at least six months between the date of publication of Section 907(a)(1)(A) and its entry into force would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective.[245] In short, the Panel treated paragraph 5.2 as though it were an authoritative interpretation of the Ministerial Conference within the meaning of Article IX of the *Marrakesh Agreement Establishing the World Trade Organization* ("Marrakesh Agreement"), despite not having found that it had this legal status.

121. Citing *US – Wool Shirts and Blouses*, the Panel shifted the burden to the United States, stating that "[t]he onus was thus on the United States to demonstrate why the interval between the publication and the entry into force of Section 907(a)(1)(A) should be considered to be outside the rule and thus why it must have been less than the 'normal' 'no less than six months.'"[246] Determining that "[t]he United States has advanced no argumentation nor presented evidence in this regard," the Panel concluded that the United States had not rebutted Indonesia's *prima facie* case.[247] Accordingly, the Panel found, "by not allowing an interval of no less than six months between the publication and the entry into force of Section 907(a)(1)(A), the United States acted inconsistently with Article 2.12 of the *TBT Agreement*."[248]

122. For the reasons discussed below, the Panel erred, both in its analysis and in its conclusion.

2. The Panel's Analysis Contains Three Errors That Led It to Find, Incorrectly, That Section 907(a)(1)(A) Is Inconsistent with Article 2.12

123. The Panel's analysis contains three errors that led it to find, incorrectly, that Section 907(a)(1)(A) is inconsistent with Article 2.12. First, the Panel attributes an incorrect "interpretative value" to the Doha Ministerial Decision in interpreting the meaning of Article

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[243] Panel Report, paras. 7.585-.7.586.

[244] Panel Report, paras. 7.587-7.590.

[245] Panel Report, para. 7.592.

[246] Panel Report, para. 7.592.

[247] Panel Report, paras. 7.592-7.593.

[248] Panel Report, para. 7.595.

2.12. Second, and notwithstanding the weight given to the Doha Ministerial Decision, the Panel incorrectly finds that Indonesia had established a *prima facie* case of inconsistency with Article 2.12. Third, notwithstanding whether the Panel Report is incorrect in finding that Indonesia had established a *prima facie* case, the Panel also incorrectly determines that the United States did not rebut Indonesia's arguments.

a. The Panel Attributes the Incorrect "Interpretative Value" to Paragraph 5.2 of the Doha Ministerial Decision in Interpreting the Meaning of Article 2.12

124. As noted above, the Panel declined to formally determine whether paragraph 5.2 is an authoritative interpretation of Article 2.12, only saying that it "must be guided" by paragraph 5.2 "as [the text] was agreed by all WTO Members meeting in the form of Ministerial Conference, the highest ranking body of the WTO."[249] The Panel further speculated that paragraph 5.2 "could be considered as a subsequent agreement of the parties within the meaning of Article 31(3)(a) of the VCLT."[250] Notwithstanding this limited finding, the Panel applied paragraph 5.2 as a "rule,"[251] completely and improperly supplanting the text of Article 2.12,[252] and in so doing disregarding the express provisions of Article IX:2 of the Marrakesh Agreement.

125. Paragraph 5.2 of the Doha Ministerial Decision does not contain an authoritative interpretation of Article 2.12.[253] Article IX:2 of the Marrakesh Agreement established that only the General Council and Ministerial Conference are authorized to adopt binding interpretations of the WTO Agreement, and any amendments of a covered agreement (such as the TBT Agreement) may only be made in accordance with the provisions set forth in Article X of the Marakesh Agreement. Yet such procedures were not followed. In fact, the Doha Ministerial Decision preceded by several months a TBT Committee decision on this issue,[254] indicating that the Doha Ministerial Conference did not act – indeed could not have acted – on a recommendation of the TBT Committee as Article IX:2 requires for the adoption of binding interpretations. Not surprisingly, the Ministerial Decision does not purport to set forth an interpretation of the WTO Agreement – nothing in the text of that decision refers to Article IX:2 of the Marrakesh Agreement nor indicates that the procedures set out in Article IX:2 for adopting

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[249] Panel Report, para. 7.576.

[250] Panel Report, para. 7.576.

[251] Panel Report, para. 7.585.

[252] *See* Panel Report, paras. 7.586-7.593.

[253] *See* U.S. Answer to Panel Q6, paras. 3-5; U.S. Second Opening Statement, para. 103.

[254] The relevant TBT Committee decision was adopted in May 2002 while the Ministerial Decision was adopted in November 2001. *See* G/TBT/M/26, 6 May 2002.

such interpretations were followed. A panel is not authorized to waive the requirements of Article IX:2 or to impose on Members an interpretation that is not adopted in the manner required. In so doing, the Panel added to or diminished "rights and obligations provided in the covered agreements," contrary to Article 19.2 of the DSU. The Panel's error here is troubling. In essence, the Panel has found that even though there was no agreement among Members that the Ministerial Decision was an exercise of the authority of the Ministerial Conference under Article IX of the Marrakesh Agreement, the Decision should be treated as such an authoritative interpretation. In other words, the Decision was some form of "stealth" interpretation that circumvented the requirements of Article IX and bound Members without their knowledge or intent. According to the Panel's approach, Members are not entitled to rely on the procedural protections in Article IX or have agreed to silently and by implication add another form of altering the terms of the covered agreements other than those expressly set forth in the Marrakesh Agreement. Such an approach hardly contributes to Members confidence in the security and predictability of the multilateral trading system.

126. Accordingly, the legal value of paragraph 5.2 is at most a means of supplemental interpretation within the meaning of Article 32 of the VCLT. At most it may be used together with other supplemental means of interpretation to confirm the meaning of Article 2.12 based on an analysis of the ordinary meaning of the terms of that provision in their context and in light of the TBT Agreement's object and purpose in accordance with Article 31 of the VCLT. While paragraph 5.2 together with any other supplemental means of interpretation may be used to confirm the meaning of the term "reasonable interval," it may not be applied as a "rule" that can be relied upon as the exclusive basis for concluding that the term "reasonable interval" means "not less than six months."[255]

127. The ordinary meaning of the term "normally" as used in paragraph 5.2 also supports the conclusion that paragraph 5.2 does not represent a "rule."[256] While the Panel correctly recognizes that "to read the word 'normally' . . . as meaning 'except in urgent circumstances,'" would effectively read either "normally" or "except in urgent circumstances" out of the text of

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[255] A conclusion that paragraph 5.2 is a "subsequent agreement" of the parties for purposes of Article 31 of the VCLT does not create a different result. *See* Panel Report, para. 7.576. Under Article 31, a determination that the parties to a treaty have made a subsequent agreement can only be used as "context" for interpreting "the ordinary meaning to be given to the terms of the treaty." VCLT, art. 31(1). Under no circumstances, however, can such "context" be used to amend the terms of the treaty as the Panel Report appears to have done by finding that Indonesia had established a *prima facie* case exclusively on the text of paragraph 5.2. *See* Panel Report, paras. 7.586-7.594.

[256] Again, paragraph 5.2 of the Doha Ministerial Decision states that:

> Subject to the conditions specified in [Article 2.12 of the TBT Agreement], 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." (emphasis added).

paragraph 5.2,[257] the Panel then does this very thing by reading "normally" as modifying only "a period of 6 months" when the term actually modifies the entire clause "a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued." Leaving aside the issue of "urgent circumstances," under the Panel's reading of paragraph 5.2, the only time an interval period of less than six months would be reasonable would be when a six month period "would be ineffective in fulfilling the legitimate objective pursued". This reading renders the term "normally" unnecessary. That is to say, under the Panel's interpretation, paragraph 5.2 has the same meaning whether or not the text includes the term "normally." In contrast, a correct reading of the term "normally" as modifying the entire final clause makes clear that paragraph 5.2 does not create a "rule," but rather an interpretative guidepost – what is "normally" reasonable. The term "normally" provides for a degree of flexibility – six months will be the most common but not the only interval. Thus the term "normally" expressly contemplates that instances in which the interval will be less than six months and this will be reasonable and unremarkable. Even aside from the fact that Members did not agree to paragraph 5.2 as an authoritative interpretation, Members' agreement to the guideline in paragraph 5.2 was based on this flexibility. The Panel's interpretation of paragraph 5.2 removed this flexibility, incorrectly applying paragraph 5.2 as a "rule" and in this manner it also is inconsistent with the agreement of the Members reflected in the Doha Ministerial Decision.

128. However, and as is clear from paragraphs 7.586 through 7.594 of the Panel Report, the Panel based its finding that Indonesia had established a *prima facie* case *exclusively* on the text of paragraph 5.2. The Panel thus required no proof from Indonesia as to whether the three month interval period was unreasonable in light of a type of facts and circumstances other than those mentioned in paragraph 5.2, including the importance of the public health rationale underlying the measure and the actual impact the three month interval period had on foreign producers. With regard to the former, the United States considers that the fact that the measure is designed to protect the public health is relevant to whether extending the interval period to six months would not be reasonable.[258] With regard to the latter, the Panel's *prima facie* analysis is entirely divorced from the terms contained in the actual provision it is applying. Under the Panel

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[257] Panel Report, para. 7.580. The Panel reasoned:

> The Panel has considered whether 'normally' could be understood to mean 'in any case other than in urgency circumstances,' and has concluded that as a matter of textual analysis this cannot be the case. As explained above, the first sentence of Article 2.12 of the TBT Agreement already provides that it applies '[e]xcept in those urgent circumstances referred to in paragraph 10.' Accordingly, if we were to read the word 'normally' in paragraph 5.2 of the Doha Ministerial Decision as meaning 'except in urgent circumstances,' we would effectively be reading the latter terms out of the first sentence out of the text of Article 2.12 of the TBT Agreement, or the word 'normally' out of the text of paragraph 5.2 of the Doha Ministerial Decision.

[258] This point has equal force even when analyzing the consistency of the measure with Article 2.12 based exclusively on the terms of paragraph 5.2, as the Panel did. Consistent with the above discussion, the fact that measure protects the public health is relevant to determining whether this is, in fact, a "normal" situation where the interval period should be no less than six months.

Report's analysis, a Member could breach Article 2.12 by establishing an interval period of less than six months even where the exporting Member's producers had adjusted their product lines prior to the "publication" of the technical regulation (based on a draft technical regulation, consultations with the importing Member, etc.).[259]

129. For the above reasons, the Panel erred by interpreting paragraph 5.2 of the Doha Ministerial Decision as a "rule" that amended the text of Article 2.12.

b. The Panel Erred in Finding that Indonesia Had Established a *Prima Facie* Case of Inconsistency with Article 2.12

130. As the Appellate Body stated, a "prima facie case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to *each* of the elements of the claim."[260] While the nature and scope of the evidence needed to make out a *prima facie* case will vary from case to case depending on the measure and the provisions at issue,[261] "the complainant must prove its claim."[262]

131. The Panel Report correctly stated, "a prima facie case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favor of the complaining party presenting the prima facie case."[263] Yet the evidence and arguments relied on by the Panel do not allow, let alone require, as a matter of law, a finding in favor of Indonesia. First, the Panel erred in finding that Indonesia had established a *prima facie* case where it did not establish that the interval period was unreasonable in light of the impact on the ability of producers of exporting Members to adapt to the new requirement. Second, even assuming *arguendo* that the Panel was correct in deciding that the elements of the *prima facie* case may be drawn exclusively from paragraph 5.2, the Panel erred in finding that Indonesia had established a

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[259] In addition, the United States also notes that the ordinary meaning of the term "conditions" as used in paragraph 5.2 indicates that the Members intended that an analysis of whether an interval period is "reasonable" include an assessment of whether the period chosen allowed time for the producers of the exporting Members "to adapt their products or methods of production to the requirements of the importing Member." By using the plural, "conditions," the drafters clearly intended that paragraph 5.2 be subject to at least two conditions. One of the "conditions" appears to refer to the reference in Article 2.12 to "urgent circumstances." The United States submits that the other condition must be the reference to the possible impact on the exporting Member's producers. Accordingly, the Panel erred into not taking into account the evidence regarding the impact on Indonesian clove cigarette companies in its *prima facie* analysis.

[260] *US – Gambling (AB)*, para. 140 (quoting *US – Wool Shirts and Blouses (AB)*, p. 16) (emphasis in original).

[261] *US – Wool Shirts and Blouses (AB)*, p. 14.

[262] *EC – Sardines (AB)*, para. 281.

[263] Panel Report, para. 7.591 (quoting *EC – Hormones (AB)*, para. 104).

prima facie case based on the terms of paragraph 5.2.

i. Indonesia Did Not Establish a *Prima Facie* Case Under the Terms of Article 2.12 Because It Did Not Establish That the Interval Period Was Unreasonable in Light of the Impact on Foreign Producers

132. As discussed above, no matter what weight one attributes to the Doha Ministerial Decision, the terms of Article 2.12 must be interpreted in light of whether the three-month period was a reasonable period to allow producers in other Members time to adapt their products to the requirements of Section 907(a)(1)(A).[264]

133. However, Indonesia never provided *any* evidence that demonstrates that the three-month interval period prejudiced the ability of any foreign producer, including Indonesian producers, to adapt to Section 907(a)(1)(A) by the close of the interval period. *All* evidence and argument on this point proved the contrary – the three-month interval period (as opposed to a six-month period) did not prejudice the Indonesian producers' ability to adjust to the new requirement as the Indonesian producers never intended to do so, regardless of the length of the interval period. As the Panel Report recounts, it was uncontested that the Indonesian producers did not adjust their production lines or distribution channels to replace exports of the now banned clove cigarettes with exports of tobacco and menthol cigarettes *16 months* after the measure's publication,[265] even though the record indicates that Indonesian companies produced both tobacco and menthol cigarettes for sale in the U.S. market in the years leading up to the enforcement of Section 907(a)(1)(A).[266]

134. Given that Indonesia provided no evidence or argumentation to support its claim that the interval period was not reasonable in light of the factors explicitly mentioned in Article 2.12,[267] the Panel Report erred in finding that Indonesia had established a *prima facie* case of inconsistency with Article 2.12.[268] "Only after such a *prima facie* determination had been made by the Panel may the onus be shifted to the [responding party] to bring forward evidence and

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[264] *See* Panel Report, para. 7.582.

[265] Panel Report, para. 7.583 (citing U.S. First Written Submission, para. 303).

[266] *See* Exhibit US-134 (demonstrating that Indonesia exported non-clove cigarettes in each of the 12 years preceding Section 907(a)(1)(A) entering into force (1998-2009)); Exhibit US-63, at 8 (demonstrating the presence in the U.S. market of two different types Indonesian-produced (Djarum) menthol-flavored cigarettes).

[267] Panel Report, paras. 7.591-7.592.

[268] *US – Gambling (AB)*, para. 139 ("A panel errs when it rules on a claim for which the complaining party has failed to make a prima facie case.") (citing *Japan – Agricultural Products II (AB)*, para. 129).

arguments to disprove the complaining party's claim."[269] By not so requiring Indonesia to establish such a *prima facie* case, as discussed above, the Panel also erred by shifting the burden of proof to the United States.

ii. Indonesia Did Not Establish a *Prima Facie* Case Under the Terms of Paragraph 5.2 of the Doha Ministerial Decision

135. Even assuming *arguendo* that the Panel was correct in deciding that the elements of the *prima facie* case could be drawn exclusively from paragraph 5.2, the Panel erred in finding that Indonesia has succeeded in making such a case. Again, paragraph 5.2 states:

> 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.

136. Accordingly, Indonesia would have to establish with evidence and argument a presumption in relation to each of the following elements:

1) "urgent circumstances" did not exist;
2) the interval period was less than six months;
3) this is a "normal" situation; and
4) allowing an interval period of at least six months would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective.

137. Neither the first nor second element was in dispute between the parties. As discussed below, however, Indonesia did not establish the existence of either the third element (which the Panel did not require) or the fourth element (which the Panel did require but mis-applied). As such, the Panel erred in finding that Indonesia had established a *prima facie* case of inconsistency even if the Panel attributed the correct "interpretative value" to paragraph 5.2 in interpreting Article 2.12.

138. With respect to the third element, it was thus incumbent upon Indonesia to establish that Section 907(a)(1)(A) presents a "normal" situation and is not one of the non-urgent cases "where it would be reasonable to have a shorter interval." Yet, the Panel Report never recounts that Indonesia proffered any evidence or argument on this point. In fact, Indonesia never referenced this element in any of its written materials regarding its Article 2.12 claim, a point the United States made to the Panel in the second meeting.[270] As such, the Panel erred by declaring that

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[269] *EC – Hormones (AB)*, para. 109.

[270] *See* U.S. Second Opening Statement, para. 104.

Indonesia established a *prima facie* case.

139. With respect to the fourth element, the Panel Report erred in finding that Indonesia has made a *prima facie* case as to this element, which required that the allowance of an interval period of at least a six months "would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective."[271] The Panel appears to have made this finding based exclusively on the eight statements recounted in paragraphs 7.587 through 7.590, only three of which were assertions made by Indonesia in relation to its Article 2.12 claim. These three statements are:

i. "In this respect, Indonesia argues that 'neither the Act itself nor any other statement by the United States indicates that having [Section 907(a)(1)(A)] enter into force 90 days after signing was necessary to fulfil the objectives of the Act.'"[272]

ii. "[Indonesia] further argues that the United States concedes that Section 907(a)(1)(A) did not address an 'urgent problem' within the meaning of Article 2.10 of the *TBT Agreement*."[273]

iii. "We also note that it is not in dispute that clove cigarettes had already been sold in the United States for approximately 40 years at the time of the ban..."[274]

140. As discussed above, the "initial burden lies on the complaining party,"[275] and it is the

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[271] Panel Report, para. 7.592.

[272] Panel Report, para. 7.587 (quoting Indonesia's First Written Submission, para. 145).

[273] Panel Report, para. 7.587 (quoting Indonesia's Second Written Submission, para. 151).

[274] Panel Report, para. 7.590; *see also* Indonesia First Opening Statement, para. 178 ("It is also uncontested in this dispute that Indonesia has been exporting clove cigarettes to the U.S. for over 40 years."). The other five statements are: (i) "The United States argues that the FSPTCA 'directly addresses a serious problem - youth smoking' and that 'Congress intended to limit this behaviour as much as practicable'", Panel Report, para. 7.588 (quoting U.S. First Written Submission, para. 302); (ii) "We recall the long legislative history of the FSPTCA", Panel Report, para. 7.589; (iii) "We further recall our findings that, in the absence of any evidence or argument that urgent problems of, *inter alia*, health, arose or threatened to arise upon adoption of Section 907(a)(1)(A), these urgent circumstances were not present", Panel Report, para. 7.589 (citing section VII.I.2(c) of the Panel Report); (iv) "[We also note that it is not in dispute that clove cigarettes] had a flat market share for at least the 10 years preceding the ban", Panel Report, para. 7.590; and (v) "In addition, the other flavoured cigarettes banned by Section 907(a)(1)(A) had been introduced into the U.S. market a number of years prior to the ban, and had no sizeable market share at the time of the ban." Panel Report, para. 7.590.

[275] *EC – Hormones (AB)*, para. 98.

complaining party, and the complaining party alone, that must meet this burden.[276] A panel may not "make the case for a complaining party."[277] Accordingly, the question of whether Indonesia established a *prima facie* case lies with, *and only with*, the evidence and arguments *Indonesia* put forward in relation to this element – that is, whether the allowance of an interval period of at least a six months "would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective."[278]

141. Guidance on what the Panel should have required Indonesia to prove in relation to this element (but did not) can be found in the Appellate Body's discussion of Peru's claim in *EC – Sardines* that the EC had acted inconsistently with Article 2.4 of the TBT Agreement. Article 2.4, which provides a similar element to the one provided for in paragraph 5.2, states that:

> [w]here technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations *except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued*, for instance because of fundamental climatic or geographical factors or fundamental technological problems.[279]

142. After reversing the *EC – Sardines* panel and finding that complaining party has the burden to prove each element of Article 2.4,[280] the Appellate Body examined what the complaining party must establish for its *prima facie* case of this element. For purposes relevant

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[276] *EC – Sardines (AB)*, para. 281.

[277] *See Japan – Agricultural Products II (AB)*, para. 129; *see also id.* at paras. 125-131 (holding that the panel acted inconsistently with the rules on burden of proof by concluding from the evidence on the record that there was a *prima facie* case that "the determination of sorption levels" is an alternative measure under Article 5.6 of the SPS Agreement where the complaining party had not argued such, notwithstanding that the complaining party may have had "views which were consistent with" this position).

[278] *See US – Gambling (AB)*, para. 140 (A "prima facie case must be based on evidence *and* legal argument put forward by the complaining party in relation to *each* of the elements of the claim".) (emphasis in original) (internal quotes omitted).

[279] Emphasis added.

[280] *EC – Sardines (AB)*, para. 282 ("We, therefore, reverse the finding of the Panel, in paragraph 7.52 of the Panel Report, that, under the second part of Article 2.4 of the *TBT Agreement*, the burden rests with the European Communities to demonstrate that Codex Stan 94 is an 'ineffective or inappropriate' means to fulfil the 'legitimate objectives' pursued by the European Communities through the EC Regulation. Accordingly, we find that Peru bears the burden of demonstrating that Codex Stan 94 is an effective and appropriate means to fulfil the 'legitimate objectives' pursued by the European Communities through the EC Regulation."); *see also US – Tuna (Panel)*, para. 7.628 (relying on *EC – Sardines (AB)* in finding that the complaining party had the burden to prove each element of its Article 2.4 claim).

here, the Appellate Body agreed with the panel's view that:

> the term ineffective refers to something which is not having the function of accomplishing, having a result, or brought to bear . . . Thus, in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued . . . The question of effectiveness bears upon the results of the means employed . . .[281]

143. The relevant question in *EC – Sardines* was whether Peru discharged its burden of showing that the relevant international standard was effective to fulfill the measure's legitimate objectives in the sense that the relevant international standard "would be effective" such that "it had the capacity to accomplish" the legitimate objectives of the importing Member.[282] Likewise, the Panel should have required Indonesia to adduce sufficient evidence and argument to prove that a six month interval period would be effective in fulfilling the legitimate objective of Section 907(a)(1)(A). The Panel erred by not doing so, as discussed below.

144. Indonesia put forward no evidence and very little argumentation in support of its Article 2.12 claim. As discussed above, the Panel Report cites to only three statements in relation to its Article 2.12 claim. Looking at these statements one by one, it is clear that the Panel erred in finding that Indonesia established a *prima facie* case that allowing an interval period of at least six months "would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective."

145. The first statement, which provides that the United States has "concede[d]" that the measure "did not address an 'urgent problem,'"[283] does not address whether allowing an interval period of at least a six months "would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective." It cannot be the case that only where "urgent circumstances" exist for purposes of Article 2.10 would a period of less than six months be reasonable for purposes of paragraph 5.2. As discussed above,[284] it cannot be the case that the determination that "urgent circumstances" do not exist is dispositive of the question of whether an interval period of at least six months "would not render the fulfilment of the objective pursued by Section

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[281] *EC – Sardines (AB)*, para. 286 (internal quotes omitted); *see also US – Tuna (Panel)*, para. 7.723 (quoting same).

[282] *EC – Sardines (AB)*, para. 288.

[283] Panel Report, para. 7.587 ("[Indonesia] further argues that the United States concedes that Section 907(a)(1)(A) did not address an 'urgent problem' within the meaning of Article 2.10 of the *TBT Agreement*.").

[284] *See supra*, section III.C.2.a.

907(a)(1)(A) ineffective."[285] To make such an interpretation reads the latter condition out of the text. Accordingly, the fact that the United States did not assert that "urgent circumstances" exist,[286] does not address whether Indonesia has established a *prima facie* case that an interval period of at least six months "would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective."

146. The second statement, which provides that it is undisputed that clove cigarettes have been sold in the United States for approximately 40 years,[287] also does not address whether allowing an interval period of at least six months "would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective."[288] In other words, it does not identify the legitimate objective of the measure, nor explain why a six-month interval period would be effective in fulfilling that legitimate objective, as was required in *EC – Sardines*.

147. Given that neither the first nor second statements contribute to Indonesia's *prima facie* case of this element, the Panel's finding that Indonesia did, in fact, establish a *prima facie* case hinges *entirely* on the third statement, a single allegation Indonesia made in its first written submission, without evidentiary support, and never repeated, or expanded upon, in later submissions. As quoted above, this statement provides:

> In this respect, Indonesia argues that 'neither the Act itself nor any other statement by the United States indicates that having [Section 907(a)(1)(A)] enter into force 90 days after signing was necessary to fulfil the objectives of the Act.'[289]

148. As was the case with the other statements, the Panel cannot properly use this statement to establish, or even to contribute to, a *prima facie* case that allowing an interval period of at least

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[285] *See* Panel Report, para. 7.580 ("[I]f we were to read the word 'normally' in paragraph 5.2 of the Doha Ministerial Decision as meaning 'except in urgent circumstances,' we would effectively be reading the latter terms out of the first sentence out of the text of Article 2.12 of the TBT Agreement, or the word 'normally' out of the text of paragraph 5.2 of the Doha Ministerial Decision.").

[286] Panel Report, para. 7.565.

[287] As indicated earlier, although the Panel did not cite to an Indonesian submission here, it appears that Indonesia had made the same allegation as part of its Article 2.12 claim. *See* Indonesia's First Opening Statement, para. 178 ("It is also uncontested in this dispute that Indonesia has been exporting clove cigarettes to the U.S. for over 40 years.").

[288] The sentence provided in the Panel Report states in full that: "We also note that it is not in dispute that clove cigarettes had already been sold in the United States for approximately 40 years at the time of the ban, and had a flat market share for at least the 10 years preceding the ban." Panel Report, para. 7.590. The latter half of the sentence was not an allegation that Indonesia made in relation to its Article 2.12 claim. *See* Indonesia's First Written Submission, paras. 143-145; Indonesia's First Opening Statement, paras. 176-179; Indonesia's Answer to the Panel's Questions 5-7, paras. 16-32; Indonesia's Second Written Submission, para. 151.

[289] Panel Report, para. 7.587 (quoting Indonesia's First Written Submission, para. 145).

six months "would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective." Most obviously, Indonesia's allegation does not address any element referred to in paragraph 5.2, but a different point – whether a three month interval period "was necessary to fulfil the objectives of the Act." While the two concepts may overlap in certain circumstances it seems more than conceptually possible that a three month interval period would be unnecessary to fulfil the objectives of the measure, but a six month interval period would, in fact, render the fulfillment of the measure's objective ineffective. That is to say, the truth of one does not mean, inexorably, that the other is true as well.

149. In fact, Indonesia has never *even alleged* (much less proven) the claim upon which the Panel found Indonesia had established its *prima facie* case – that allowing an interval period of at least six months would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective. As such, the Appellate Body's statement in *Japan – Agricultural Products II* that a complaining party cannot be found to have established a *prima facie* case for an element that it had *not even argued*, appears to be directly on point.[290] The Panel's error is further highlighted by the fact that the Panel faulted the United States for not rebutting this element – an element that the Panel did not require Indonesia to even allege, much less prove.[291] In any event, Indonesia's assertion does not demonstrate what the Panel claimed Indonesia needed to prove – that a six month interval period would be effective in fulfilling the legitimate objective of Section 907(a)(1)(A).[292]

150. In finding that Indonesia had established a *prima facie* case that the three month interval period was inconsistent with Article 2.12 based on this paucity of "evidence and argument" put forward by Indonesia, the Panel paid "little more than lip-service" to the Appellate Body's ruling in *US – Wool Shirts and Blouses*,[293] committing reversible, legal error in the process.

151. For the above reasons, the Panel erred in finding that Indonesia had established a *prima facie* case that Section 907(a)(1)(A) is inconsistent with Article 2.12.

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[290] *Japan – Agricultural Products II (AB)*, para. 126 ("Pursuant to the rules on burden of proof set out above, we consider that it was for the United States to establish a *prima facie* case that there is an alternative measure that meets all three elements under Article 5.6 in order to establish a *prima facie* case of inconsistency with Article 5.6. Since the United States did not even claim before the Panel that the 'determination of sorption levels' is an alternative measure which meets the three elements under Article 5.6, we are of the opinion that the United States did not establish a *prima facie* case that the 'determination of sorption levels' is an alternative measure within the meaning of Article 5.6.") (emphasis added).

[291] Panel Report, para. 7.593 ("The United States has not explained the Panel why it deemed that allowing a 90 day/three month interval between the publication and entry into force of Section 907(a)(1)(A) was not ineffective in fulfilling the objective pursued by Section 907(a)(1)(A), while a six-month interval would be.").

[292] *See EC – Sardines (AB)*, paras. 286-288.

[293] *EC – Hormones (AB)*, para. 99.

c. Even if Indonesia Did Establish a *Prima Facie* Case, the Panel Improperly Found That the United States Did Not Rebut That *Prima Facie* Case

152. As discussed above in section III.C.2.b.i, any interpretation of what "reasonable" means for purposes of Article 2.12 must take into account whether the interval period chosen allowed time for foreign producers to adapt their products to the requirements of Section 907(a)(1)(A). The evidence and argument to the Panel on this point was clear – the difference between the three and six month interval periods had *no impact* on Indonesian producers. The Panel summarized the U.S. argument in paragraph 7.583:

> The United States argues that Indonesia has adduced no evidence to suggest that the difference between a three-month period and a six-month period had any impact on the ability of Indonesian producers 'to adapt their products or methods of production to the requirements of the importing Member.' According to the United States, Indonesian producers have been and are able to market tobacco-flavoured and menthol-flavoured cigarettes in the United States' market. However, as far as the United States is aware, Indonesian producers, even 16 months after the enactment of the FSPTCA, have not adjusted their product lines to produce tobacco or menthol-flavoured cigarettes. Thus, it argues, whether the United States waited three months or six months after the measure's enactment to allow it to enter into force appears not to have affected Indonesian producers in any way.[294]

153. This evidence and argument is sufficient to rebut the *prima facie* case that the Panel found Indonesia to have established. The Panel thus committed legal error in finding that "the United States has not rebutted" Indonesia's *prima facie* case.[295]

3. Conclusion

154. For the above reasons, the Panel erred in finding that, "by not allowing an interval of no less than six months between the publication and the entry into force of Section 907(a)(1)(A), the United States acted inconsistently with Article 2.12 of the TBT Agreement."[296]

D. The United States Conditionally Appeals That the Panel Erred in Concluding That the Jurisprudence Developed Under Article XX(b) of the GATT 1994 Is "Relevant" to the Interpretation of Article 2.2 of the TBT

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[294] Panel Report, para. 7.583 (citing U.S. First Written Submission, para. 303).

[295] Panel Report, para. 7.594.

[296] Panel Report, para. 7.595.

Agreement

1. Introduction

155. The United States conditionally appeals the findings and legal interpretations developed in the Panel Report to consider the consistency of Section 907(a)(1)(A) with the requirement of Article 2.2 of the TBT Agreement that a technical regulation "not be more trade-restrictive than necessary to fulfill a legitimate objective . . . ." This appeal is "conditional" in that the United States makes this appeal only if Indonesia appeals any of the Panel's findings with respect to Article 2.2. If Indonesia does not make such an appeal, the United States does not appeal the findings and legal interpretations developed in the Panel Report, as discussed below.

156. To the extent that Indonesia does appeal any of the Panel's findings with respect to Article 2.2, the United States appeals the Panel's findings and legal interpretations contained in section VII(F)(2)(d)(i) of the Panel Report where the Panel analyzed "[w]hether jurisprudence developed under 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."[297] The erroneous analysis contained in this section of the Panel Report provides the basis for the Panel's three part analytical framework for considering the consistency of Section 907(a)(1)(A) with Article 2.2.[298] This analytical framework is in error in that it directs the Panel to first examine whether the challenged measure makes a material contribution to achieving its legitimate objective, rather than examining the question posed by Article 2.2 – whether an alternative measure exists that establishes that the challenged measure is more trade-restrictive than necessary to fulfil a legitimate objective.

157. Overall, the Panel conducted a two-step analysis of Indonesia's Article 2.2 claim. First, the Panel analyzed whether the U.S. measure pursues a "legitimate objective."[299] Finding that this was so,[300] the Panel then considered whether "the ban on clove cigarettes is 'more trade-restrictive than necessary' to fulfill the legitimate objective of reducing youth smoking."[301] Prior to considering the substantive arguments of the parties on this second question, the Panel first analyzed what analytical framework to employ in answering this question. The Panel framed this question as "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

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[297] Panel Report, paras. 7.353-7.369.

[298] *See* Panel Report, sections VII(F)(2)(d)(ii)-(iv) (paras. 7.370-7.428).

[299] Panel Report, paras. 7.334-7.350.

[300] Panel Report, paras. 7.343, 7.350.

[301] Panel Report, para. 7.351.

Agreement."[302]

158. Concluding that such jurisprudence is, in fact, "relevant," the Panel judged the consistency of the measure with Article 2.2 in light of a three part test: (i) "whether the ban on clove cigarettes exceeds the level of protection sought by the United States"; (ii) "whether the ban on clove cigarettes makes a material contribution to the objective of reducing youth smoking"; and (iii) "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."[303] In creating this analytical framework, which draws heavily on a framework developed to interpret Article XX(b) of the GATT 1994,[304] the Panel appears to reject the applicability of the framework developed to analyze claims under Article 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "SPS Agreement"). The analytical framework of Article 5.6, which is the parallel provision to Article 2.2 of the TBT Agreement, provides better guidance to interpret the ordinary meaning of the terms of Article 2.2, read in context and in light of the object and purpose of the TBT Agreement, than does Article XX(b) of the GATT 1994.

2. The Panel Erred by Concluding That the Jurisprudence of Article XX(b) of the GATT 1994 Is "Relevant" to the Interpretation of the "No More Trade-Restrictive Than Necessary" Requirement in Article 2.2 of the TBT Agreement

159. The Panel concluded that the analysis developed by the Appellate Body to interpret Article XX(b) of the GATT 1994 is "relevant" to the interpretation of Article 2.2 of the TBT Agreement.[305] First, the Panel Report analyzed the text of Article 2.2, determining that the wording of the second sentence (which contains the operative language) is "very similar" to the wording of Article XX(b), going as far as to say "where the 'legitimate objective' at issue is the 'protection of human health,' the terms appear to be *interchangeable*."[306] Second, the Panel considered that the "context" of Article 2.2 "establishes a direct link to Article XX(b)" in that "the sixth recital of the preamble to the TBT Agreement essentially reproduces the language contained in Article XX of the GATT 1994."[307] Third, the Panel determined that no "significant

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[302] Panel Report, paras. 7.352, 7.353-7.369.

[303] Panel Report, para. 7.352. The Panel discusses these three issues in sections VII(F)(2)(d)(ii), (iii), and (iv) of the report, respectively. *See id.* paras. 7.370-7.428.

[304] *See* Panel Report, paras. 7.370, 7.379, and 7.418 (citing to *Brazil – Retreaded Tyres (AB)*).

[305] Panel Report, para. 7.369.

[306] Panel Report, para. 7.358 (emphasis added).

[307] Panel Report, para. 7.359.

differences" exist between the Article XX(b) test and the test of Article 5.6 of the SPS Agreement, or "any aspect of the Article XX(b) jurisprudence relating to the interpretation of the term 'necessary' that would be inapplicable to Article 2.2 of the TBT Agreement."[308] In this regard, the Panel Report responds to some of the arguments the United States made and discounts each one.[309] Fourth, the Panel contends that the nature of the U.S. argument proves that no significant differences exist between the Article 2.2 of the TBT Agreement and Article XX(b) of the GATT 1994 analyses as the United States advanced "substantially the same arguments" under Article XX(b) of the GATT 1994 that it has advanced in the context of Article 2.2 of the TBT Agreement.[310] The Panel then concluded "that the jurisprudence developed under Article XX(b) is relevant to the interpretation of Article 2.2 of the TBT Agreement," and thus will look for guidance in the Article XX(b) of the GATT 1994 jurisprudence.[311]

160. Each of the four parts of the Panel's analysis that led it to conclude that it should look for guidance in the Article XX(b) of the GATT 1994 jurisprudence in interpreting the meaning of the phrase "not more trade-restrictive than necessary" is in error. Thus, the Panel erred in concluding that: (a) the terms of Article 2.2 of the TBT Agreement are "very similar" to the terms of Article XX(b) of the GATT 1994; (b) the context of Article 2.2 "establishes a direct link to Article XX(b)"; (c) no "significant differences" exist between the analyses of Article XX(b) and of Article 5.6 of the SPS Agreement; and (d) no significant differences exist between the Article 2.2 and Article XX(b) analyses in light of the U.S. argument. The United States will discuss each part in turn.

a. The Texts of Article 2.2 of the TBT Agreement and Article XX(b) of the GATT 1994 Are Not "Very Similar"

161. As discussed above, the Panel considered that the operative language of Article 2.2 of the TBT Agreement is "very similar" to the wording of Article XX(b) of the GATT 1994, and that "where the 'legitimate objective' at issue is the 'protection of human health,' the terms appear to be interchangeable."[312] Nothing could be farther from the truth. In fact, the only similarity the two texts share is that both use the term "necessary." But simply because two provisions use one word in common is not a basis to interpret the two provisions similarly, particularly where the two provisions are otherwise dissimilar. In the current instance, there are three important contextual differences between how the term "necessary" is used in the two provisions that prove

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[308] Panel Report, para. 7.362.

[309] *See* Panel Report, paras. 7.363-7.367.

[310] Panel Report, para. 7.367.

[311] Panel Report, para. 7.368.

[312] Panel Report, para. 7.358.

how dissimilar the two provisions are.[313]

162. First, the two provisions are asking very different questions. The question posed in Article XX(b) of the GATT 1994 is whether the measure *itself* is "necessary," whereas under Article 2.2 the question is whether the amount of *trade-restrictiveness* of the measure is necessary.[314] The Panel addresses this key point only once, in footnote 662, where it concedes this difference.[315] Nonetheless, the Panel fails to attribute any difference in the respective analyses of the two provisions, arguing that because a panel would need to analyze whether the measure contributed to the objective under either provision, the respective analyses are the same.[316]

163. The United States considers that if the two provisions are asking different questions then the two provisions cannot be considered "very similar," much less "interchangeable."[317] The *US – Tuna* panel's view in this regard is instructive. In comparing the texts of Article 2.2 and Article XX(b), the *US – Tuna* panel found that significant differences existed between the two texts, and that, "[g]iven the fact that, under Article 2.2, the 'necessity' to be assessed is that of the 'trade-restrictiveness' of the measures rather than of the measures themselves, we understand the term 'necessary' in the second sentence of Article 2.2 to mean essentially that the trade-restrictiveness must be 'required' for the fulfilment of the objective."[318] The fact that panels must analyze the contribution to the fulfillment of the objective in the course of analyzing both claims does not change the conclusion that the two provisions are using the term "necessary" is two different senses, in the course of asking two different questions.

164. Second, the analysis under Article 2.2 of the TBT Agreement involves comparing two presumptively WTO-consistent measures, while to the extent that alternatives are compared under Article XX of the GATT 1994, the WTO-inconsistent measure (for which the exception is being invoked) is compared to a hypothetical measure that is WTO-consistent. Third, unlike

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[313] *See also* U.S. Second Written Submission, para. 181; U.S. Answer to the Panel Question 55, paras. 123-125; U.S. First Written Submission, paras. 267-268.

[314] *See also US – Tuna (Panel)*, para. 7.459 ("[W]e note that Article 2.2 of the TBT Agreement refers to technical regulations that are more trade restrictive than necessary to fulfil a legitimate objective, whereas Article XX of the GATT 1994 refers to 'measures necessary' to protect public morals, to protect human, animal or plant life or health, to secure compliance with laws or regulations.").

[315] *See* Panel Report, n.662 ("We agree with the United States that Article XX(b) is drafted in terms of whether the trade-restrictive measure is necessary to fulfil its objective, whereas Article 2.2 is drafted in terms of whether the degree of trade-restrictiveness of that measure is necessary to fulfil its objective.").

[316] *See* Panel Report, n.662.

[317] Panel Report, para. 7.358.

[318] *US – Tuna (Panel)*, para. 7.460.

under Article XX of the GATT 1994, it is the complaining party (not the responding one) that has the burden of establishing that the measure is "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement.[319] The Panel Report dismisses both of these points, agreeing with the EU that "the 'functional difference' between the two provisions affects only the burden of proof between the parties, and not the meaning of the terms of a provision."[320] But in doing so, the Panel misunderstands that this "functional difference" – one measure is a positive obligation, while the other is an exception to positive obligations – is consistent with the fact that the two provisions are, fundamentally, asking different questions.[321] One asks whether the measure is necessary, while the other asks whether the trade-restrictiveness of the measure is necessary. The fact that the two provisions have different functions, with different allocations of the burden of proof, supports the proposition that the two provisions are, in fact, different, not interchangeable.[322]

165. For these reasons, the analytical framework developed under Article XX(b) of the GATT 1994 should not guide the interpretation of Article 2.2 of the TBT Agreement. Instead, and as discussed below, it is the Appellate Body's analytical framework to analyze the parallel provision in the SPS Agreement, Article 5.6, which informs the interpretation of Article 2.2 of the TBT Agreement.

b. The Context of Article 2.2 of the TBT Agreement Does Not Establish a "Direct Link" With Article XX(b) of the GATT 1994

166. The Panel found support for its conclusion in the "context" of Article 2.2 of the TBT Agreement based on the relationship between Article XX(b) of the GATT 1994 and the preamble to the TBT Agreement, which, according to the Panel Report, establishes a "direct link" between

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[319] *See* Panel Report, paras. 7.363-7.364 (summarizing the U.S. argument).

[320] Panel Report, para. 7.363.

[321] *See also US – Tuna (Panel)*, para. 7.458 ("At the same time, we note that there are differences in the wording of Article 2.2 of the TBT Agreement, as compared to Article XX of the GATT 1994 or Article XIV of the GATS, which reflect also the different positions of the provisions within their respective agreements. In particular, we note that Article 2.2 of the TBT Agreement sets out a positive obligation, and is not formulated as an exception.").

[322] The Panel Report also discounts the relevance of footnote 3 to Article 5.6 of the SPS Agreement, which provides that the appropriate standard to be applied is whether an alternative measure exists that is "significantly" less restrictive to trade, noting that the Panel was "unaware of any GATT or WTO panel or Appellate Body report which suggests that a different standard applies under Article XX(b)." *See* Panel Report, paras. 7.365-7.366. However, the Panel appears to mis-understand the U.S. argument regarding the relevance of footnote 3 to Article 5.6 and the GATT Director-General's 1993 letter on the interpretation of Article 2.2. As the United States explained to the Panel, this point is more relevant to understanding the context of Article 2.2 than to the comparison of the texts of Article 2.2 and Article XX(b). *See* U.S. Second Written Submission, para. 178. As such, we will address the Panel's comment in the next section.

the two provisions.[323] In this regard, the Panel Report noted that "the sixth recital of the preamble to the TBT Agreement essentially reproduces the language contained in Article XX of the GATT 1994."[324] The Panel Report also noted that the *EC – Asbestos* panel had found that given this connection between the preamble of the TBT Agreement and Article XX of the GATT 1994, "the TBT Agreement is a development of the GATT."[325]

167. The United States does not, of course, disagree with the Panel that the sixth recital of the preamble to the TBT Agreement recalls, in part, the general exception provided for in Article XX(b), but it does not follow from this fact that Article 2.2 is to be interpreted using the same analytical framework used to interpret Article XX(b), particularly given the significant textual differences between the two provisions.

168. First, to the extent there is a "direct link" between Article XX(b) of the GATT 1994 and the TBT Agreement it is with the sixth recital of the preamble to the TBT Agreement, not with Article 2.2. Each preambular recital applies to the TBT Agreement *as a whole* and there is no indication in the sixth recital that it should affect the interpretation of Article 2.2 *in particular*. For the same reason, there is no reason to believe Article 2.2 should be interpreted similarly to Article XXI of the GATT 1994 simply because the seventh preambular recital recalls the security exceptions to the GATT.

169. Moreover, to the extent that such a "direct link" may exist, it surely exists *even more* so between Article XX(b) and to Article 5.6 of the SPS Agreement, where the preamble, and, in fact, the *entire* agreement, is much more explicitly "a development" of Article XX(b). Yet the Appellate Body has not required that measures must be proved to be "necessary," consistent with Article XX(b), in order to meet the obligation of Article 5.6 of the SPS Agreement. Rather, the Appellate Body in *Australia – Salmon* held that in order to establish a breach of Article 5.6, the claimant must prove "there is an SPS measure which: (1) is reasonably available taking into account technical and economic feasibility; (2) achieves the Member's appropriate level of sanitary or phytosanitary protection; and (3) is significantly less restrictive to trade than the SPS measure contested."[326]

170. Notably, the Panel does not squarely explain why the analysis of Article 5.6 of the SPS Agreement is inapplicable to analysis of Article 2.2 of the TBT Agreement. Not only are the

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[323] Panel Report, para. 7.359.

[324] Panel Report, para. 7.359.

[325] Panel Report, para. 7.360. The *EC – Asbestos* panel continued by stating: "the preparatory work on the Agreement on Technical Barriers to Trade in the Tokyo Round show that the TBT Agreement that should have emerged from the Tokyo Round was already seen as being a development of the existing rules of the GATT, notably Article XX." Panel Report, para. 7.360 (quoting *EC – Asbestos (Panel)*, n.41).

[326] *Australia – Salmon (AB)*, para. 194; *see also Australia – Apples (AB)*, para. 337 (quoting same).

texts of Article 2.2 and Article 5.6 similar, the two provisions play an equivalent role in their respective agreements.[327] It thus makes sense to interpret Article 2.2 of the TBT Agreement similarly to Article 5.6 of the SPS Agreement. The 1993 letter from the Director-General of the GATT to the Chief U.S. Negotiator concerning the application of Article 2.2 further confirms that the two provisions should be interpreted in a similar manner.[328]

171. Accordingly, the context of Article 2.2 of the TBT Agreement does not create the "direct link" to Article XX(b) asserted by the Panel Report. Rather, the context of Article 2.2 supports interpreting it in the same manner that the Appellate Body has interpreted Article 5.6 of the SPS Agreement where the focus of the examination is whether an alternative measure exists that demonstrates that the challenged measure is "more trade-restrictive than necessary to fulfill a legitimate objective." To make such a showing under Article 2.2, the complaining party must adduce sufficient evidence and argument to prove that (1) there is a reasonably available alternative measure (2) that fulfills the objectives of the measure at the level that the Member imposing the measure has determined is appropriate, which (3) is significantly less trade-restrictive.[329]

c. There Are Significant Differences Between the Analyses of Article XX(b) of the GATT 1994 and Article 2.2 of the TBT Agreement

172. The Panel concluded that no "significant differences" exist between the tests of Article XX(b) of the GATT 1994 and Article 5.6 of the SPS Agreement, nor is there "any aspect of the Article XX(b) jurisprudence relating to the interpretation of the term 'necessary' that would be

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[327] Article 5.6 of the SPS Agreement requires a Member to ensure that its SPS measures are "not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection" while Article 2.2 of the TBT Agreement prohibits measures that are "more trade-restrictive than necessary to fulfill a legitimate objective." *See also US – Tuna (Panel)*, para. 7.461 ("We find further support for our interpretation of the terms of Article 2.2 in the text of Article 5.6 of the SPS Agreement, which contains language very similar to that of Article 2.2 of the TBT Agreement . . .").

[328] That letter explains that while "it was not possible to achieve the necessary level of support for a U.S. proposal [concerning a clarifying footnote to Article 2.2 and 2.3 of the TBT Agreement] . . . it was clear from our consultations at expert level that participants felt it was obvious from other provisions of the [TBT] Agreement that the Agreement does not concern itself with insignificant trade effects nor could a measure be considered more trade restrictive than necessary in the absence of a reasonably available alternative." Letter from Peter D. Sutherland, Director-General of the GATT, to Ambassador John Schmidt, Chief U.S. Negotiator (December 15, 1993), Exhibit US-79. This letter provides supplemental means of interpretation within the meaning of Article 32 of the VCLT, in particular as circumstances of the TBT Agreement's conclusion, that confirms the meaning derived from the ordinary meaning, in context, and in light of the object and purpose of the TBT Agreement.

[329] *See also US – Tuna (Panel)*, para. 7.465 ("To the extent that a measure is capable of contributing to its objective, it would be more trade-restrictive than necessary if an alternative measure that is less trade-restrictive is reasonably available, that would achieve the challenged measure's objective at the same level.").

inapplicable to Article 2.2 of the TBT Agreement."[330] Yet it is clear that such significant differences exist. Most obviously, the starting points – indeed the entire focuses – of the Article XX(b) and Article 5.6 analyses are different. For the Article XX(b) analysis, that focus is largely on whether the measure makes a "material contribution" to the objective, while the focus of the analyses of Article 2.2 and Article 5.6 is different – whether an alternative measure exists that demonstrates that the challenged measure is more trade restrictive than necessary/required.

173. Consistent with these differing focuses, whether a measure makes a "material contribution" to its objective is not a test of whether a measure is consistent with Article 2.2 of the TBT Agreement, a point that is also true of the analysis of Article 5.6 of the SPS Agreement.[331] The text of Article 2.2 makes no such reference to "material contribution," and a measure is not *per se* inconsistent with Article 2.2 *solely* because it does not meet some minimum threshold of contribution to its objective, as Indonesia repeatedly claimed during the panel proceedings.[332] Rather, the measure is inconsistent *only* if the complaining party is able to establish that a less restrictive alternative measure exists that also makes at least this level of contribution to the objective. Again, the question posed by Article 2.2 is not whether the technical regulation *itself* is "necessary."

174. This is not to say that the level the measure contributes to the objective is irrelevant to the Article 2.2 analysis – it is part of the analysis, but plays a different role from the one stated in the Panel Report. In evaluating the complaining party's Article 2.2 claim, a panel will need to understand at what level the measure fulfills its objective in order to determine whether an alternative measure exists which to compare to the challenged measure. This is very different from requiring that the measure's contribution to its objective meets some minimum threshold. The U.S. view is supported by the preamble to the TBT Agreement, which "makes clear that a Member is entitled to take measures 'at the level it considers appropriate', in pursuance of a legitimate objective under the Agreement."[333] In other words, "it is up to the Members to decide

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[330] Panel Report, para. 7.362.

[331] *See Australia – Salmon (AB)*, para. 194.

[332] *See, e.g.*, Indonesia Opening Statement for the Second Panel Meeting, para. 84 (stating that the challenged measure "does not materially contribute to the objective of reducing youth smoking and, thus, not banning clove cigarettes would pose no significant risk to the fulfilment of the measure's objective to reduce youth smoking. Since Indonesia has demonstrated that the [challenged measure] is not necessary, there is no need to examine whether less trade restrictive measures were available."); Indonesia Second Written Submission, para. 120 (stating that the challenged measure "does not materially contribute to the objective of reducing youth smoking and, thus, not banning clove cigarettes would pose no significant risk to the fulfilment of the measure's objective to reduce youth smoking. At this point whether there are less-trade restrictive measures is moot as the [challenged measure] cannot be necessary if it does not fulfill its objective.").

[333] *See also US – Tuna (Panel)*, para. 7.460 ("[W]e recall that the preamble of the TBT Agreement makes clear that a Member is entitled to take measures 'at the level it consider appropriate', in pursuance of a legitimate objective under the Agreement. This implies, in our view, that an assessment of whether any trade-restrictiveness

which policy objectives they wish to pursue and the levels at which they wish to pursue them."[334] By requiring the Members to impose only those technical regulations that satisfy a minimum threshold in their contribution to their objectives, the Panel's legal framework runs counter to not only the ordinary meaning of the text of Article 2.2, but to the preamble of the TBT Agreement.[335]

175. For the above reasons,"significant differences" exist between the analysis of Article XX(b) of the GATT 1994 on the one hand and the analyses of Article 2.2 of the TBT Agreement and Article 5.6 of the SPS Agreement on the other.[336]

d. Nothing in the U.S. Argument Indicates That It Is Appropriate to Adopt the Analysis of Article XX(b) of the GATT 1994 in Order to Interpret Article 2.2 of the TBT Agreement

176. Finally, the Panel finds support for its conclusion regarding the interpretative value of the jurisprudence of Article XX(b) of the GATT 1994 in the fact that the United States supported its affirmative defense under Article XX(b) of the GATT 1994 with cross-references to its defense to Indonesia's claim under Article 2.2 of the TBT Agreement.[337] However, the manner in which the United States argued its affirmative defense under Article XX(b) in no way indicates that the Article XX(b) analysis determines the elements to be proved (and defended) in a Article 2.2 claim. Rather, it is an acknowledgment of the unsurprising proposition that certain facts may be

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arising under the measures at issue is 'necessary' within the meaning of Article 2.2 must be understood as an enquiry into whether such trade-restrictiveness is required to fulfil the legitimate objectives pursued by the Member at its chosen level of protection.").

[334] *EC – Sardines (Panel)*, para. 7.120.

[335] The United States did take the position, as the Panel notes, that "[w]hile Article 2.2 does not require that the measure fulfill its objective, it is difficult to believe that a measure fails to fulfill its objective completely – that is to say, a measure that does not even make a marginal contribution to its objective – could be found consistent with Article 2.2." Panel Report, n.662 (quoting U.S. Answer to Panel Question 103(a), para. 79). But this proposition is true not because the measure fails to make a material contribution to the objective, but because *any* less trade-restrictive alternative measure will establish a violation with Article 2.2, given that the challenged measure makes *no* contribution to the objective.

[336] *See also US – Tuna (Panel)*, para. 7.465 ("In light of the above, we find that in order to determine whether a measure is more trade restrictive than necessary within the meaning of Article 2.2, we must assess the manner in which and the extent to which the measures at issue fulfil their objectives, taking into account Member's chosen level of protection, and compare this with a potential less trade restrictive alternative measure, in order to determine whether such alternative measure would similarly fulfil the objectives pursued by the technical regulation at the Member's chosen level of protection. To the extent that a measure is capable of contributing to its objective, it would be more trade-restrictive than necessary if an alternative measure that is less trade-restrictive is reasonably available, that would achieve the challenged measure's objective at the same level.").

[337] *See* Panel Report, para. 7.367.

relevant to both arguments, depending on the particular facts and circumstances of the case. The United States never indicated, either explicitly or implicitly, that the Article XX(b) jurisprudence is relevant to interpreting the ordinary meaning of the terms contained in Article 2.2, read in context, in light of the object and purpose of the TBT Agreement, nor that the Article 2.2 analysis must include a determination as to whether the challenged measure makes a "material contribution" to its objective.

e. Conclusion

177. The Panel concludes by acknowledging that not all "Article XX(b) jurisprudence can be transposed in its entirety onto Article 2.2 of the TBT Agreement," and there may be "certain aspects of Article XX(b) jurisprudence that are not applicable in the context of Article 2.2 of the TBT Agreement."[338] However, the Panel relied heavily on the Article XX(b) analysis, including requiring a "material contribution" analysis, and going as far as to state:

> We see nothing in the text, context or purpose of Article 2.2 of the TBT Agreement to suggest that a different standard should be applied in the context of examining whether a measure is 'more trade-restrictive than necessary to fulfil a legitimate objective' for the purpose of that provision.[339]

178. For the reasons discussed above, the Panel erred in coming to this conclusion. Rather, a reading of the ordinary meaning of the terms of Article 2.2 of the TBT Agreement, read in context, in light of the object and purpose of the TBT Agreement leads, inexorably, to the conclusion that Article XX(b) of the GATT 1994 does not inform as to the meaning of Article 2.2 TBT Agreement. In contrast, the parallel provision of Article 5.6 of the SPS Agreement does provide valuable guidance in interpreting Article 2.2. As discussed, the difference between the analyses of Article XX(b) of the GATT 1994 and Article 5.6 of the SPS Agreement is not merely theoretical, but creates significant differences in the respective analytical frameworks.

IV. CONCLUSION

179. For the reasons set forth in this submission, the United States respectfully requests that the Appellate Body reverse the Panel's findings with respect to Indonesia's claims under Article 2.1, 2.12, and conditionally under Article 2.2

[338] Panel Report, para. 7.369.

[339] Panel Report, para. 7.379.