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Memo

From: Todd Tucker, Public Citizen[1]
To: Consumer and Health Groups
Date: April 27, 2012
Re: Summarizing WTO Appellate Body Decision on U.S. Flavored Tobacco Ban

Summary

On September 2, 2011, a panel report ruling against the U.S. ban on flavored cigarettes (which are often used to hook teenagers) was circulated to World Trade Organization (WTO) members after Indonesia successfully challenged the measure.[2] The panel found that the ban constituted a mandatory technical regulation that "is inconsistent with Article 2.1 of the [Technical Barriers to Trade] *TBT Agreement* because it accords to imported clove cigarettes treatment less favourable than that it accords to like menthol cigarettes of national origin…"[3] The panel ruling also created a new WTO requirement that has never been formally approved by Congress, the U.S. or other WTO member countries, which is that there must be a six-month lag between publication and entry into force of regulations. The panel found that because there was only a lag of three months before the ban on flavored cigarettes went into effect, the U.S. had violated TBT Article 2.12.[4] On April 4, 2012, the WTO's Appellate Body upheld the lower panel ruling on both counts, and on April 24, the Appellate Body adopted both reports.

In nearly 200 rulings over 16 years, this was the first time that the WTO ever found a violation under this article, which has long been of concern to consumer advocates.[5] It was one of the first rulings under the TBT, which is one of 17 agreements administered by the WTO. (The lower panel ruling was quickly followed by two other rulings against two other popular U.S. consumer policies (dolphin-safe tuna labels and country-of-origin labels on meat) under novel interpretations of the TBT. Appellate Body review of these other cases will be circulated in the coming months.) Given the popularity and importance of the tobacco control policy, the U.S. should be poised to maintain the policy and challenge the legitimacy of any sanctions authorized by the WTO's Dispute Settlement Body (DSB).

Brief summary of details of the ruling and its implications

Legislative background

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

> "Beginning 3 months after the date of enactment of the Family Smoking Prevention and Tobacco Control Act, a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or

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> additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke. Nothing in this subparagraph shall be construed to limit the Secretary's authority to take action under this section or other sections of this Act applicable to menthol or any artificial or natural flavor, herb, or spice not specified in this subparagraph."[6]

The FSPTCA – which was championed in Congress by U.S. Rep. Henry Waxman (D-Calif.) – became law on June 22, 2009, and the above provisions entered into effect three months later, on September 22, 2009.[7]

Was the menthol exclusion justified, as a matter of policy? As USTR noted, the U.S. often addresses difficult issues incrementally, and there was a public health basis for doing so in this case.[8] Moreover, the FSPTCA clearly contemplates the extension of the ban onto menthol cigarettes as well, provided that such a ban was found appropriate.

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

> "the FDA found that, because of the high level of addiction among tobacco users, a ban would likely be 'dangerous.' In particular, current tobacco users could suffer from extreme withdrawal, the health care system and available pharmaceuticals might not be able to meet the treatment demands of those suffering from withdrawal, and a black market offering cigarettes even more dangerous than those currently sold legally would likely develop. The FDA therefore concluded that, 'while taking cigarettes and smokeless tobacco off the market could prevent some people from becoming addicted and reduce death and disease for others, the record does not establish that such a ban is the appropriate public health response under the act.'"[9]

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

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

Enter the WTO

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

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(Japan) and Hugo Cayrús (Uruguay). While making the unconvincing rhetorical overture that "the WTO Agreements fully recognize and respect the sovereign right of Members to regulate in response to legitimate public health concerns…"[10] the panel nonetheless found that the FSPTCA violated the TBT.

Next, the WTO's Appellate Body released their ruling upholding the lower panel on April 4, 2012. Appellate cases are heard by a three-member panel (i.e. "division") selected from the WTO's Appellate Body (AB), which is composed of seven Members[11] who are appointed by the DSB to serve for four-year terms.[12] The division ended up consisting of Peter Van den Bossche (Belgium), Ricardo Ramirez-Hernandez (Mexico) and Shotaro Oshima (Japan). All have spent most of their careers on trade and international economic law rather than public health matters.[13]

Article 2.1 finding – Discrimination: lower panel ruling

Article 2.1 of the TBT reads:

> "2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country."

It is clear that, on its face, the FSPTCA doesn't discriminate against foreign producers, or protect domestic ones. However, Indonesia stated "that a ban on clove cigarettes, which are mainly imported from Indonesia, but not on regular or menthol cigarettes, which are mainly locally produced, creates unequal conditions of competition in the U.S. market. Indonesia clarifies that, although facially neutral, Section 907(a)(1)(A) results in *de facto* discrimination against imported products."[14]

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

> "that the imported and domestic products at issue are 'like products', that the measure at issue is a 'law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use'; and that the imported products are accorded 'less favourable' treatment than accorded to like domestic products."[15]

There was no dispute that the FSPTCA constituted a "measure," so the lower panel went on to examine the likeness and less favorable treatment issues.

Likeness analysis

In evaluating "likeness" under the GATT, panels and the Appellate Body have often conducted a four-plank approach, considering (a) the properties, nature and quality of the products; (b) the end-uses of the products; (c) consumers' tastes and habits (i.e. consumers' perceptions and

behavior in respect of the products); and (d) the tariff classification of the products.[16] (These are known as the Border Tax Adjustments criteria, after a GATT ruling from the 1970s.[17]) If the evidence on these four planks suggests that the products are "like," then they will likely be deemed "like" for the purposes of the discrimination analysis.

The clove panel essentially adopted the Border Tax Adjustments approach, with minor modifications, because Indonesia had noted in its April 2010 Request for Consultations…

> "In Section 907 of the [FSPTCA], the United States applied a ban on all flavoured cigarettes except menthol beginning 90 days after the Act is signed. The Act prohibits, among other things, the production or sale in the United States of cigarettes containing certain additives, including clove, but would continue to permit the production and sale of other cigarettes, including cigarettes containing menthol… Indonesia sees that these measures discriminate against imported clove cigarettes where clove cigarettes sold in the United States are imported (primarily from Indonesia), while virtually all of the menthol cigarettes sold in the United States are produced domestically (imports are negligible)."[18]

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

The panel established that neither party strongly objected to the panel broadening the likeness analysis to include other flavored cigarettes.[19] Nonetheless, the panel argued that it would be a violation of the due process rights of the parties and of third parties to expand their terms of reference to include additional products.[20]

The panel then proceeded to conduct the Border Tax Adjustments likeness analysis. On the question of product characteristics, menthol and clove were each seen as a flavor that "reduces the harshness of tobacco."[21] The panel determined that both clove and menthol have the end use of being smoked,[22] and have similar tariff classifications.[23]

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

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

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

Less favorable treatment

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

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

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

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

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

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

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

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

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

On these bases, the panel found that the FSPTCA violated Article 2.1.[39] (For an analysis of other planks of that ruling, see: http://www.citizen.org/documents/memo-appellate-review-of-clove-ruling-01-13-12.pdf.

Article 2.1 finding – Appellate Body

The Appellate Body not only did not overturn the September 2011 lower panel ruling – it doubled down. Indeed, it seems that **the Appellate Body was almost determined to show how poorly suited the WTO is to considering matters of public health. In several key respects, the Appellate Body ruling was even more anti-health than the lower panel ruling.**

The ruling proceeded in several steps. First, it considered the nature of Article 2.1, which had never been decisively interpreted by the Appellate Body. Second, it examined the concept of likeness in Article 2.1, specifically in the context of the U.S. appeals on the end-use and consumer taste Border Tax Adjustments criteria. Finally, it examined whether the FSPTCA afforded less favorable treatment for Indonesian clove cigarettes.

Preliminary considerations

In the first step, the AB examined the preamble to the TBT, which is composed of nine "recitals" or paragraphs. It zeroed in on the second, fifth and sixth recitals, which read…

> "*Desiring* to further the objectives of GATT 1994;…
> *Desiring* however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;
> *Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;…" (underline added)

The panel concluded that the GATT and TBT have to be interpreted in a "coherent and consistent manner," and noted that the "right to regulate" is constrained by the requirement to comply with the TBT.[40] It would use these observations to state that judicial balancing exercises under the GATT consist of weighing obligation provisions (like GATT Article III on national treatment) against exception provisions (like GATT Article XX), while balancing in the TBT (because of the context provided by the preamble) appears to consist of weighing obligations and exceptions within the same provision.[41]

Likeness

At this stage, the AB admonished the lower panel for considering regulation as much as it did.

First, the AB disagreed with the panel that "the legitimate objectives and purposes of the technical regulation" should be a (or the) focus of an analysis of whether products are "like." Rather, the focus of a WTO analysis should be "on the competitive relationship between and among the products,"[42] which is defined in the marketplace.[43] The AB stated that "a panel that is tasked with determining whether two products are like may not be able to reach a coherent result if, in determining likeness, it has to rely on various possible regulatory objectives of the measure."[44] The AB made clear in this passage that coherent trade law (with its traditional competition focus) was to be placed above rigorous public health analysis. Indeed, the AB

argued that the panel didn't fully appreciate how "like" cloves and menthols were, since both can have the end use of satisfying an addiction to nicotine.[45]

The AB then turned to the consumer tastes criteria, and disagreed with the panel that teenage consumers were the most relevant consumer to examine when considering a measure to reduce teen smoking. The US, in its Appellant Submission, wrote that:

> "Approximately 31% of smokers between the ages of 12 and 25 and approximately 27% of smokers over the age of 25 smoke menthol cigarettes. 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. Overall, 0.3% of the population over age 25, or approximately 560,000 people, smoked clove cigarettes… 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…"[46]

In other words, far fewer people are impacted by restrictions on clove than menthol (which was an incrementalist approach dictated in part by the U.S. Supreme Court). Moreover, children are more than five times more likely than adults to smoke cloves, which is in line with the targeted nature of the FSPTCA.

The AB did not even comment on these statistics, and instead wrote...

> "it is the market that defines the scope of consumers whose preferences are relevant. The proportion of youth and adults smoking different types of cigarettes may vary, but clove, menthol, and regular cigarettes are smoked by both young and adult smokers. To evaluate the degree of substitutability among these products, the Panel should have assessed the tastes and habits of all relevant consumers of the products at issue, not only of the main consumers of clove and menthol cigarettes, particularly where it is clear that an important proportion of menthol cigarette smokers are adult consumers…. the mere fact that clove cigarettes are smoked disproportionately by youth, while menthol cigarettes are smoked more evenly by young and adult smokers does not necessarily affect the degree of substitutability between clove and menthol cigarettes."[47]

In other words, patterns of current consumption are irrelevant as far as the WTO is concerned. Instead, what the agency is going to worry about is "the market." This doesn't mean actual patterns observed in any actual market. Instead, the possibility that even one adult consumer (at the margin) might switch from menthol to clove shows that substitution is possible in the market, and competitive conditions can be established.

Third, the AB admonished the panel for not thoroughly evaluating the survey data on consumer preferences presented by the U.S. and Indonesia.[48] However, what should have been a legal failure was thrown out the door by the AB, which wrote that, because it had ruled that cloves and menthol were substitutable enough, the legal error was of no consequence.[49]

Conclusion on likeness

In short, the AB found that the panel did not fundamentally err by comparing only cloves and menthols. Because this seemed to diverge from the AB's own "likeness" conclusions in the *EC-Asbestos* case, it had to explain why the cloves case was different. In that case (where the EU's right to uphold an asbestos ban was allowed to pass through a GATT exception provision), European consumers treated asbestos-infused products differently from non-asbestos substitutes because the former were less healthy and they demanded fewer of them in the marketplace.[50] Not so with cigarettes, which are all unhealthy and demanded (in part) because of it. They are all "like" in that sense.

The standard trade law logic is clearly problematic when applied to addictive drugs, since people start smoking despite the health risks and other negative social externalities. Indeed, it is precisely because consumers don't internalize the full costs of their decisions (i.e. there is a market failure, in conventional economic terms) that a government intervention is warranted. A TBT that cannot incorporate this into deciding what products to compare is not one well-suited to exploring delicate issues of public health.

Less Favorable Treatment

The first part of the AB's argument in this section consisting of returning to the preliminary considerations on the preamble noted above, that judicial balancing to consider regulatory prerogatives should be allowed – so long as the TBT rules are followed. This balance – which continues to weigh heavily against regulation that violates TBT provisions – led the AB to create a new "exception" type concept: "detrimental impacts on competitive opportunities stemming exclusively from legitimate regulatory distinctions" (DIOCOSEFLRD) can be allowed under the TBT.[51] (The creation of this non-textual concept is itself an example of the uncertainty that WTO panels and the AB foster.)

This is likely to further confuse the ongoing debate about preambles in trade and investment agreements, which we explore in more detail in a separate memo.[52] Because there is no science to attributing weight to preambles, they can be (and usually are) used to interpret core provisions in anti-regulatory ways. While, in some sense, it is positive that the AB chose to use the preamble to assign some weight to the virtues of regulation, the DIOCOSEFLRD test that it developed continues to assign much more weight to trade flows than reasonable regulation.

Because the issue of likeness was so determinative of the outcome of the case, it is not surprising that USTR also attempted to work some of these considerations into its appeal on the less favorable treatment plank, arguing that the treatment accorded to the groups of imported products and domestic products as a whole (including other flavored cigarettes, cloves from multiple sources, etc.) should have been examined.[53]

The AB was not having any of it. They stated definitively that – just because Indonesia wanted to compare only menthol and cloves in its likeness analysis – the WTO panel was not foreclosed from examining a broader set of products.[54] This was a good finding, as that was the justification

that the panel used for excluding cola and other flavors from the likeness analysis. But, in another indication of the AB's doubling down on a flawed analysis, it suggested that it was nonetheless correct to examine only these products because most cloves come from Indonesia and Indonesia didn't export other types of cigarettes.[55]

The AB appeared to give no appreciation to the implication of this logic: if a nation wants to engage in incremental regulation, and if that incremental regulation happens to heavily affect a product that happens to be imported primarily from a single country, then that type of regulation is not permissible and imports have to be excluded. In effect, this makes governments liable for the preexisting trading patterns in the market, even in instances where there was no evidence of discriminatory intent, or a desire to protect domestic producers. (There was no such evidence in this case: the tobacco industry consistently ranks among the least popular industries,[56] and the pro-public health legislators that passed the legislation have no desire to protect tobacco sector jobs, only to protect consumers.)

As for the argument that cola and other flavored cigarettes should have been included in the analysis, the AB wrote that…

> "Aside from the Panel's finding that, 'at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol cigarettes' in the US market – which is challenged by the United States and addressed below – the Panel did not have evidence on the record that flavoured cigarettes other than menthol cigarettes had 'any sizeable market share in the United States prior to the implementation of the ban in 2009'. To the contrary, in response to a Panel question, the United States confirmed that the non-clove-flavoured cigarettes banned under Section 907(a)(1)(A) 'were on the market for a relatively short period of time and represented a relatively small market share'. Therefore, we consider it safe to assume that, given their relatively low share in the US market, the inclusion of domestically produced flavoured cigarettes in the comparison would not have altered the Panel's ultimate conclusion that the group of like domestic products essentially consisted of domestic menthol cigarettes."[57]

In other words, all of the U.S. evidence that tobacco companies were developing sweet cigarettes aimed at teens, and all of Congress' intention to stop the epidemic before it starts, or even that a Philip Morris subsidiary actually does make sweet flavored cigars popular with teens (thanks to an unfortunate loophole in FSPTCA),[58] is irrelevant to the WTO. There needs to be massive penetration of the product the country is trying to keep off the market (and perhaps sufficient evidence of health damage) before the WTO will consider a broader likeness argument.

In conclusion, and circling back to the DIOCOSEFLRD test, the AB writes:

> "Moreover, we are not persuaded that the detrimental impact of Section 907(a)(1)(A) on competitive opportunities for imported clove cigarettes does stem from a legitimate regulatory distinction. We recall that the stated objective of Section 907(a)(1)(A) is to reduce youth smoking. One of the particular characteristics of flavoured cigarettes that makes them appealing to young people is the flavouring that masks the harshness of the tobacco, thus making them more pleasant to start smoking than regular cigarettes. To the

> extent that this particular characteristic is present in both clove and menthol cigarettes, menthol cigarettes have the same product characteristic that, from the perspective of the stated objective of Section 907(a)(1)(A), justified the prohibition of clove cigarettes. Furthermore, the reasons presented by the United States for the exemption of menthol cigarettes from the ban on flavoured cigarettes do not, in our view, demonstrate that the detrimental impact on competitive opportunities for imported clove cigarettes does stem from a legitimate regulatory distinction. The United States argues that the exemption of menthol cigarettes from the ban on flavoured cigarettes aims at minimizing: (i) the impact on the US health care system associated with treating 'millions' of menthol cigarette smokers affected by withdrawal symptoms; and (ii) the risk of development of a black market and smuggling of menthol cigarettes to supply the needs of menthol cigarette smokers. Thus, according to the United States, the exemption of menthol cigarettes from the ban on flavoured cigarettes is justified in order to avoid risks arising from withdrawal symptoms that would afflict menthol cigarette smokers in case those cigarettes were banned. We note, however, that the addictive ingredient in menthol cigarettes is nicotine, not peppermint or any other ingredient that is exclusively present in menthol cigarettes, and that this ingredient is also present in a group of products that is likewise permitted under Section 907(a)(1)(A), namely, regular cigarettes. Therefore, it is not clear that the risks that the United States claims to minimize by allowing menthol cigarettes to remain in the market would materialize if menthol cigarettes were to be banned, insofar as regular cigarettes would remain in the market."[59]

As the previous few paragraphs show, the AB engaged in aggregate market competition analysis at some moments, and per-unit market competition analysis in others. However, in both approaches, the interpretive approach selected tended to count against the FSPTCA. On the one hand, cola flavored cigarettes were excluded from the universe of products whose treatment would be compared because of "their relatively low share in the US market." On the other hand, individual hypothetical consumers were considered for the purpose of the substitutability between cloves and menthols (in the likeness analysis) and between menthols and regular tobacco (in the DIOCOSEFLRD analysis), regardless of market shares or actual usage patterns. If the AB had simply applied its substitutability analysis across the board, it would have concluded that a hypothetical consumer might have also substituted between cola and other cigarettes (which would have brought cola into the Article 2.1 analysis and favored the FSPTCA). Alternatively, a consistent empirical analysis would have bolstered the U.S. arguments for the legitimacy of the regulatory distinctions under the FSPTCA. In short, the AB appears to have selectively employed interpretive methodologies to increase the likelihood of upholding the lower panel's ruling against the FSPTCA. Unfortunately, there is no check on this type of freelancing within the WTO system.

Moreover, it's surprising that there is not even a footnote to something on the substitution patterns between regular tobacco and menthol. The point of this passage seems to be to suggest that the feared increase in black market activities will not happen because menthol smokers will simply switch to regular tobacco. What's the real score? Maybe some will, but others might not. It seems likely that there would be at least some increase in black market activity. Moreover, the WTO seems to be suggesting that the approach endorsed by countless nations and the World Health Organization of incremental regulation is fundamentally flawed. After all, why even

target reductions in sweet flavored cigarettes? Under the WTO's logic, these teens would simply start smoking regular tobacco.

Article 2.12 claim

Perhaps the most significant additional finding by the lower panel on various other claims brought by Indonesia was that WTO members will be obligated under normal circumstances to allow a minimum of six months between the publication and entry into force of regulations. Because the FSPTCA had a lag of only three months (enacted in July 2009 and implemented in September 2009), the panel found the U.S. in violation of TBT Article 2.12.[60] The correct lag, in the panel's view, would have been a December 2009 implementation. In other words, the WTO found that the U.S. began fighting cancer three months too soon, even though Indonesia had weighed in extensively over the years of rolling out the regulation.[61] The AB upheld the lower panel's ruling.

At the crux of this issue is what kind of weight to accord to a "Decision on Implementation-related concerns and issues" made by trade ministers at the WTO's November 2001 Doha Ministerial Conference. This obscure document has a very uncertain legal status. It's definitely not a treaty or international agreement, which would have to be approved by Congress.

One could argue that it's an official interpretation of WTO rules. It certainly reads like one. It states that TBT Article 2.12 (which reads in part "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...") means that "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."[62]

However, the "decision" did not go through the correct channels to be an official interpretation (which are outlined in Article IX(2) of the Marrakesh Agreement Establishing the World Trade Organization.) In other words, Congress signed off on a specific means of clarifying WTO rules, and this "decision" didn't follow them.

Nonetheless, the AB concluded that the "decision" imposes a binding obligation on WTO members. How? The AB argued that the Vienna Convention on the Law of Treaties (VCLT) states that treaty interpreters shall take into account "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."[63] While a "subsequent agreement" in the WTO context would seem to be only an Article IX(2) interpretation, the AB in this case used a passing mention in a previous AB report that "multilateral interpretations adopted pursuant to Article IX:2 of the WTO Agreement are *most akin* to subsequent agreements within the meaning of Article 31(3)(a) of the Vienna Convention" to mean that other agreements "*less akin*" could still constitute "subsequent agreements."[64] (italics added)

The AB then noted another precedent that said that a subsequent agreement can also be "a further

authentic element of interpretation," defined as "agreements bearing specifically upon the interpretation of the treaty."[65] The AB then noted that the Doha "decision" was very specific as to Article 2.12 of the TBT, so that the "decision" became a pseudo interpretation of WTO rules.[66] This is a troubling line of logic. Countries realized that binding interpretations of WTO rules might be needed, and established procedures for producing them. However, the AB opened up a backdoor for interpretation of WTO rules that countries never intended. (The AB seemed to realize it was playing with fire, and wrote that the Doha "decision" doesn't "replace or override the terms" agreed to by national legislatures, but that it's just "an interpretative clarification to be taken into account."[67] This overly formal distinction is unlikely to calm many in Congress.)

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There were a few other comments that also challenged national sovereignty. First, the AB notes the hedge word "normally" in the Doha "decision," which USTR argued means that it's not an iron bound rule. Selectively consulting dictionary definitions that relate to the word "norm," the AB said that norms equal "rules."[68] "As a rule" is of course one synonym of "normally." But there are others, like "usually" or "ordinarily", which make clearer that many times, the normal course of action will not be followed. These latter synonyms make it seem less binding than a rule, which is likely what the delegates to the Doha Ministerial had intended**.**

Second, the AB noted that, if the U.S. wants to go quicker than six months, the burden of proof is on the U.S. to show "that producers in Indonesia could have adapted to the requirements of [FSPTCA] within a three-month interval."[69] This will also cause some consternation in Congress. Before they pass laws – hard enough in this climate, as anyone working on legislation knows – they have to do field work to see if producers in remote corners of the globe can adapt?

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Finally, a bit of context is in order for the Doha "decision" itself.

First, the selection of Doha as a site for trade negotiations circa November 2001 – where civil society actions were severely restricted – seriously undermined the legitimacy of anything that was produced there. This is part of the reason why there were dozens of rallies and public events at other locations throughout the world.[70] Moreover, anything trade-related coming just weeks after the confusion of 9-11 should probably be discounted, at a time when civil society and Congress were distracted from trade matters.

Second, a thorough search on the Thomas, Uncle Sam Google and Inside U.S. Trade website revealed no indication that this Doha "decision" was discussed at all in Congress. So, if the Doha Decision was intended to put sand in the wheels of the legislative process, no one told the legislators. It's highly unlikely that any of them would have agreed to such shackles, as a norm, as a rule, or otherwise.

Compliance Timeline and Options

What comes next after the AB ruling? There is a strong presumption under the WTO's Dispute Settlement Understanding (DSU) that the U.S. will begin to remove the ban on clove cigarettes in 60 days, i.e. early June 2012.

There are several stages in compliance proceedings. First, there is report circulation, which the WTO's Dispute Settlement Body (DSB) already did on April 4, 2012. Next comes report adoption. By Article 17.14 of the WTO's Dispute Settlement Understanding,

> "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. (8) This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report. (footnote original) 8 If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose."

This part happened on April 24. Third comes U.S. implementation report-back and presumptive commencement of compliance. Article 21.3 of the DSU states in part: "At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB…." The next meeting has been set for May 24.[71]

As Article 21.1 states: "Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." And there is a strong presumption that compliance steps begin immediately. In a previous compliance case (Chile-Alcoholic Beverages (Article 21.3)), a WTO arbitrator stated "'prompt' compliance is, in principle, 'immediate' compliance."[72]

And in another case (*US-1916 Act (Article 21.3*)), a WTO arbitrator said an implementing Member "may reasonably be expected to use all the flexibility available within its normal legislative procedures to enact the required legislation as speedily as possible." And in a third case (*EC-Hormones (Article 21.3*)), a WTO arbitrator wrote that "withdrawal of an inconsistent measure is the preferred means of complying with the recommendations and rulings of the DSB in a violation case…"

However, there is an alternative compliance timeline. Articles 21.3-4 of the DSU state that…

> "…If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be: (a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval, (b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement, (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.(12) In such arbitration, a guideline for the arbitrator(13) should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of

adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months."

According to the *US — Offset Act (Byrd Amendment) (Article 21.3)* arbitrator, "the term 'reasonable period of time' has been consistently interpreted to signify the 'shortest period possible within the legal system of the Member'."

Taking the 15 month timeline as a guide would make it late May 2013. (In theory, the US and Indonesia could agree to a longer time horizon, although it seems unlikely that Indonesia would agree to this.)

Since a key issue in the Indonesia-U.S. dispute was the fact that the FSPTCA was implemented in three months rather than six, it's not unimaginable that a WTO panel would require a three-month compliance after adoption of the report, which would make it summer 2012 – right in the middle of our election season. Indeed, the compliance arbitrator in U.S.-Gambling noted that, "Antigua also points to the fact that the United States Congress took just five months to pass the 2000 amendments to the IHA. I take note of this fact. Given that these amendments relate to the same field as the one in which the United States intends to implement in this case, I consider it relevant that Congress was able to act so expeditiously on a prior occasion."[73]

Does the fact that Indonesia is a developing country matter for the U.S. compliance timeline? It might. Article 21.2 reads: "Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement." In the *U.S.-Gambling* compliance case, Antigua attempted to argue that its developing country status merited a faster U.S. compliance, in order to kickstart job creation in the Internet gambling sector. However, since Antigua hadn't made a very compelling case as to the development damage of the measure, the arbitrator didn't rule on any Article 21.2 arguments.[74] However, Indonesia has already documented to the lower panel that it experienced $15 million in lost exports. So the Southeast Asian nation may be more likely to get preferential compliance treatment.

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If the U.S. chooses to comply, how should it?

One of the more creative suggestions being advanced is that the U.S. should comply by just extending the flavored cigarette ban to menthol. It seems very unlikely that such a ban would

pass. First, there likely aren't the votes in Congress for such a ban, nor will they be anytime in the next 3, 10, 15 or 18 months. Most Republicans would vote against such a ban, on the grounds that it interferes with business interests. Only 13 sitting House Republicans cosponsored the FSPTCA, and only 71 voted for final passage – several of whom are no longer around. There would also be opposition from some in the Congressional Black Caucus. Presumably, if there were the votes on the Democratic side to make the ban happen, Waxman would have passed a wider ban back in 2009, when Democrats controlled Congress. If there weren't the votes then, there certainly will not be now or in the foreseeable future. Political handicappers say that it is almost impossible that Democrats will take back the House.[75] (Even if through some miracle the Obama administration could be convinced in private to ban menthol, campaign advisors would likely block the move on the ground that it could play poorly in an election where "economic freedom" is appealing to many voters.)

Second, even if a menthol ban somehow did get through Congress, would it survive scrutiny in the U.S. courts, which have been ruling against other aspects of the FSPTCA? There's some indication that Congress structured the bill the way it did because of the adverse Supreme Court ruling in 2000 striking down FDA jurisdiction over tobacco.

In sum, it seems like the path of least resistance would be a deregulatory one: exempting clove. Yet Waxman and medical and consumer groups have pushed back against this, and may be able to maintain the ban.[76]

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Would any of these adjustment considerations matter for the U.S. compliance timeline? In a phrase, probably not. Compliance arbitrators have said that determination of a "reasonable period of time" under WTO rules needn't take into account "time or opportunity to control and manage economic or social conditions which antedate or are contemporaneous with the adoption of the WTO-inconsistent governmental measure" (*Argentina – Hides and Leather (Article 21.3*)). A WTO arbitrator did not look kindly on Japan's request for a 23-month compliance period due to the intricacies of the legislative process (*Japan – Alcoholic Beverages II (Article 21.3*)). Likewise, Canada was rebuffed when it argued that it would be more convenient to phase in a WTO compliance measure at the same time as it was slated to adopt changes to customs legislation (*Canada – Autos (Article 21.3*)). A compliance arbitrator in *U.S.-Gambling* noted that…

> "The United States also submits that I should take account of the fact that several previous Congresses have considered bills related to internet gambling, but that none of these bills has passed. The United States did not, however, provide me with any explanation as to the reasons why such bills have not been enacted into law. I am, therefore, unable to determine whether Congress' inability to pass previous bills was related to their complexity—a relevant particular circumstance—or to their contentiousness—something that would not constitute a relevant particular circumstance for purposes of my determination…. I am not persuaded that several other factors invoked by the United States (to date, Congress has not been able to pass any of the bills relating to internet gambling that have been proposed) or Antigua (the asserted

> availability of partial implementation through a presidential executive order, the fact that the 109th Congress has already passed 15 laws in approximately 6 months of work, or Antigua's status as a developing country Member) are properly characterized as particular circumstances relevant to my determination in this case"[77]

In that case, the WTO arbitrator deemed that a "reasonable period of time" was 11 months and 2 weeks.

These examples show that the WTO is unlikely to give the U.S. additional time to build the votes in Congress, or to pave the way for a socially disruptive menthol ban whose impact will be felt in a racially disproportionate way (since working class African American adults are the primary consumers of menthol).

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This leads to a final point. What if the U.S. doesn't comply? Possibly, trade sanctions.

When? According to Article 22 of the DSU, Indonesia could launch trade sanctions on the U.S. within 30-60 days of the expiration of the "reasonable period of time." Based on our speculations, that would put it in July 2013.

What? According to Article 22.4: "The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment." Article 22.3 lays out a hierarchy of preferred sanctions, beginning with (as it would apply in this case), sanctioning U.S. flavored tobacco exports to Indonesia, U.S. exports subject to some sort of TBT discipline, or (if all else fails) any U.S. export Indonesia wants to sanction.

How much? As the lower panel wrote, "It is also not in dispute that, as a result of the ban, U.S. imports of clove cigarettes produced in Indonesia have declined from approximately $15 million in 2008 to zero in 2010."[78] This means that Indonesia could suspend (say) tariff concessions or intellectual property protections with respect to U.S. products valued up to $15 million. The U.S. exports about $7 billion to Indonesia a year, or about $800,000 an hour. In other words, Indonesia could sanction at the outer bound what the U.S. exports to the country in a typical 19-hour period every year.

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An alternative compliance proposal has been forward by trade lawyer Rob Howse.[79] Howse has advanced a novel interpretation of Article 21.5 of the DSU, which reads:

> "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons

for the delay together with an estimate of the period within which it will submit its report."

Howse has said that an Article 21.5 compliance panel might be able to deem that the U.S. is acting consistently with the ruling if it maintained the current structure of the ban, changed nothing else, but produced more data and studies justifying the U.S. exemption of menthol. This argument that the U.S. could comply without changing its measures seems to hinge on the notion that the TBT Article 2.1 contains its own internal balancing exercise (similar to the balancing exercise in the GATT and GATS between obligation and exception provisions). Accordingly, even if the U.S. is out of line with its WTO obligations, it may be able to make a better argument that its measures can now take advantage of an exception. Translated to the new TBT Article 2.1 jurisprudence, the U.S. could still be according less favorable treatment to Indonesia's like cloves relative to U.S. menthols, but it may be better able (with new info) to show that the FSPTCA should better meet the DIOCOSEFLRD test.

How good an argument is this? Howse cites the 21.5 compliance panels in *EC-Bed Linen* and *US-Shrimp*. The first was not an exception case, the second was an older GATT case where the U.S. had actually done something to comply and it was Malaysia that was effectively religitating the underlying merits of the case.[80]

In contrast, the more relevant and recent case may be the Article 21.5 compliance panel in US-Gambling, where the U.S. attempted to better qualify for the exception by providing new evidence, even though it did not dispute that it continued to be non-compliant with the underlying market access obligation.

The compliance panel did not buy the U.S. argument. They stated that:
- In order to bring a measure into conformity with WTO obligations, "some change must come about."
- When a member violates WTO rules, the preferred solution is a prompt withdrawal of the measure.
- A measure to comply would "in principle, be new measures" – not the measure that was the subject of the original dispute. This could include a new application of the old measure.
- A measure that simply moves in the direction of compliance is probably not good enough.
- In sum, "There has been no change to any of these three measures since the original proceeding. There has been no change in the application of these three measures, or even their interpretation, since the original proceeding. There is no evidence of any changes in the factual or legal background bearing on these measures or their effects since the original proceeding that might have brought them into compliance. This indicates that they remain inconsistent with the United States' obligations under the GATS."[81]

The U.S. argued that "it is not asking the Panel to revisit the findings of the Panel and the Appellate Body in this case, but that it is requesting the Panel to examine the issues under the chapeau of Article XIV based on new evidence and arguments not previously available to the Panel or the Appellate Body."[82] This seems to comport closely with Howse's argument that new data may show that the U.S. could better meet the DIOCOSEFLRD test.

But the 21.5 compliance panel noted that such relitigation on the basis of better arguments risks going against the DSU's mandate "would run counter to the prompt settlement of disputes" and the finality of AB decisions.[83]

The U.S. also attempted to invoke the ambiguity as to the factual conclusions of the *US-Gambling* ruling on the GATS exception (Article XIV) to suggest that better evidence could lead to a different conclusion on whether the U.S. would qualify for the exception. But the compliance panel noted that the AB felt that the ambiguity of the facts was not determinative of its decision to find non-compliance.[84] Moreover, the ambiguity was not a matter of poor legal argumentation by USTR, but "a reflection of the ambiguous state of U.S. domestic law" itself.[85] Some of that ambiguity related to a failure of the federal government to prosecute intrastate gambling in the intervening period – a hairy constitutional issue – and the lack of evidence of actual prosecutions.[86]

In other words, the compliance panel in the most closely related compliance case to Howse's hypothetical seemed unfavorably disposed to forgiving a failure to qualify for a WTO exception on the basis of something short of a change in the real world. In the cloves case, like with the gambling case, the ambiguity of the evidence did not seem to be determinative of the outcome. Instead, the key factor was that the AB did not agree with the U.S. regulatory distinction. As USTR put it at the DSB meeting on April 24, "The result in this dispute should be of grave concern to any Member regulating for the benefit of public health… [T]he Appellate Body erred in substituting its own judgment – instead of that of the regulator – with regard to whether additional regulations should be adopted in the face of potential harms,… In essence, the Appellate Body is stating that it has a different approach than the U.S. regulators for weighing the potential risks and benefits from including additional types of cigarettes in the ban."[87]

Now, Howse could state that it is precisely because the DIOCOSEFLRD test hinges in part on the legitimacy of the underlying regulatory distinction that a compliance panel would be willing to consider legitimacy in the light of better understanding of the facts on the ground, even if the facts themselves hadn't changed. But even accepting this (which seems highly unlikely), the U.S. would still have to meet the test that the "detrimental impact on competitive opportunities stems *exclusively* from the legitimate regulatory distinction" (emphasis added). This would be a difficult bar to meet, as competitive opportunities are shaped by many factors. And the FSPTCA itself probably affects competitive opportunities in all sorts of direct and indirect ways, such as by stigmatizing clove consumption. This impact on competitive opportunities could go beyond those impacts caused exclusively by the legitimate regulatory distinction.

In sum, Howse's operational theory on Article 21.5 may buy time for a political resolution, but it seems unlikely to lead to an ultimately satisfactory outcome.

Conclusion

The troubling implications of the WTO ruling on the U.S. tobacco control measures are just beginning to be felt. Indonesia is now threatening Brazil's flavored cigarette ban, which also bans menthols. This move makes clear that Indonesia's bottom line is restarting clove exports – the linking to menthol in the U.S. context was purely tactical.[88]

Some have argued that the U.S. could ban menthol and solve the WTO problem. However, Indonesia would have a battery of other WTO articles to cite – such as GATT Article III (on goods discrimination) or Article XI, which has been construed to forbid quantitative restrictions on importation of products (even when non-discriminatory).[89] Indeed, because the AB seemed to suggest that regular tobacco could be substituted for menthol, which could be substituted for other flavored cigarettes, it does not seem impossible that a new national treatment claim could be brought against a clove-plus-menthol ban under either the GATT or TBT.

The second major finding is just as bad. When Congress authorized U.S. membership in the WTO, it certainly it did not agree to establishment by dispute panels of new WTO rules to which the U.S. would be bound without congressional input. This aspect of the ruling – empowering an unelected WTO body to create a norm of a six-month time lag between publication and entry into force of technical regulations to which U.S. negotiators have also not agreed – is extremely troubling.

In sum, the legitimacy of the WTO has been further undermined by the decision. It is an unacceptable barrier to public health that imported goods have to be excluded from incremental regulation.

ENDNOTES

[1] The author benefited from public and private exchanges and/or views provided by Heather Boushey, Ellen Gould, Robert Howse, Jane Kelsey, Simon Lester, Peter Maybarduk, Benn McGrady, Matt Porterfield, Ellen Shaffer, Srikar, Melinda St. Louis, Bob Stumberg, Riaz Tayob and Lori Wallach. All errors and omissions my own.
[2] Panel Report, *U.S. – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, circulated 2 September 2011. Case documents and status available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm
[3] Panel Report, *U.S.-Clove Cigarettes*, paras. 8.1-8.5.
[4] Panel Report, *U.S.-Clove Cigarettes*, para. 7.595.
[5] When the U.S. Congress debated the Uruguay Round Agreements Implementation Act in a lame-duck session in 1994, Rep. Peter DeFazio (D-Ore.) said: "This agreement will put at risk the environmental, food, consumer, health and safety laws of this Nation to something called a World Trade Organization, an organization that will settle disputes over trade barriers, and trade barriers is interpreted as anything that restricts the free movement of goods, whether it is restrictions against child labor, whether it is restrictions against dangerous substances in food and pesticides…. We are lowering ourselves to the worst standards, to the lowest common denominator, in order to get something that a few multinational corporations desperately want." Senator Robert Byrd (D-W.V.), a noted expert on the legislative process who recently passed, warned: "U.S. laws and State laws in many areas must comport first with the WTO's trade rules, or such laws can be challenged as an 'illegal trade barrier' by other countries. Federal and State laws dealing with toxics and hazardous waste, consumer protection, recycling and waste reduction, pesticides and food safety, energy conservation, wildlife protection, and natural resource and wilderness protection, would all be vulnerable to WTO challenge. The new GATT would prevent countries from rejecting products based on how they are made; for example, with child labor or with ozone depleting chemical processes…. If environmental laws get in the way of trade, they must fall. If consumer protection gets in the way, if standards of innumerable kinds, get in the way of trade, they go. Humane methods of trapping tuna, in order to protect dolphins go out the window. Flipper loses. Rigid pesticide controls which make products more expensive are GATT illegal. Out they go. Child labor laws restricting trade are illegal. Who cares? Only trade matters. What happens when our laws are declared a violation of GATT? The Administration would like us to accept the proposition that no U.S. laws are wiped out here, and technically they are not. What will happen is that other member nations, perhaps prodded, or even dominated by one or a group of multinational corporations, will bring a complaint against the U.S. before the WTO, and a Dispute Panel could rule in secret against a U.S. law, as being GATT illegal. The room for pernicious manufactured claims should be obvious to all of us. This puts great pressure on us to change our laws."
[6] See http://www.govtrack.us/congress/billtext.xpd?bill=h111-1256
[7] Panel Report, *U.S.-Clove Cigarettes*, para. 2.5.
[8] USTR, *U.S. – Measures Affecting the Production and Sale of Clove Cigarettes*, U.S. Second Written Submission, Jan. 17, 2011, at paras. 17-40. Available at: http://www.ustr.gov/webfm_send/2492

[9] Food and Drug Admin. v. Brown & Williamson Tobacco Corp., Supreme Court of the United States, March 21, 2000, 529 U.S. 120120 S.Ct. 1291, at 13.
[10] Panel Report, *U.S.-Clove Cigarettes*, para. 7.2.
[11] More information on the Appellate Body can be found here: http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm By January 2012, the members will be: Peter Van den Bossche (Belgium), Ricardo Ramírez-Hernández (Mexico), Shotaro Oshima (Japan), David Unterhalter (South Africa), Yuejiao Zhang (China), Thomas Graham (US), and Ujal Bhatia (India).
[12] An accessible introduction to the WTO dispute settlement process can be found here: http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm
[13] See CVs at: http://www.maastrichtuniversity.nl/web/Faculteiten/FdR/Thema/OverDeFaculteit/Medewerkers/MedewerkersAbc/BosscheVanDenP.L.H..htm ; http://www.wto.org/english/news_e/pres07_e/pr501_e.htm ; http://www.pp.u-tokyo.ac.jp/en/faculty/professors/ShotaroOshima.htm ; http://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm
[14] Panel Report, *U.S.-Clove Cigarettes*, para. 7.50.
[15] Panel Report, *U.S.-Clove Cigarettes*, para. 7.75.
[16] Panel Report, *U.S.-Clove Cigarettes*, para. 7.121.
[17] Working Party Report, Border Tax Adjustments, L/3464, adopted 2 December 1970, BISD 18S/97.
[18] Request for Consultations by Indonesia, *U.S. – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R/1, 18 April, 2010.
[19] Panel Report, *U.S.-Clove Cigarettes*, paras. 7.132-133.
[20] Panel Report, *U.S.-Clove Cigarettes*, paras. 7.144-147. The panel wrote: "We could easily contemplate the possibility that a WTO Member may have decided not to join as a third party to this dispute in the belief that the dispute only concerned clove and menthol cigarettes. It is thus not unthinkable that there might have been a different reaction among tobacco-producing WTO Members if Indonesia had either included regular cigarettes in its Panel Request or simply referred to domestic cigarettes instead of just to menthol. In light of the above, we feel compelled to conclude that we are bound by Indonesia's summary of the legal basis of its national treatment complaint, which identifies the products at issue as imported clove cigarettes versus domestic menthol cigarettes. In our view, we would be exceeding our terms of reference if we were to expand the scope of Indonesia's national treatment claim by including domestic regular cigarettes in our examination."
[21] Panel Report, *U.S.-Clove Cigarettes*, para. 7.182.
[22] Panel Report, *U.S.-Clove Cigarettes*, para. 7.198.
[23] Panel Report, *U.S.-Clove Cigarettes*, para. 7.239.
[24] Panel Report, *U.S.-Clove Cigarettes*, para. 7.183.
[25] Panel Report, *U.S.-Clove Cigarettes*, para. 7.206.
[26] Panel Report, *U.S.-Clove Cigarettes*, para. 7.210.
[27] USTR, *U.S.-Clove Cigarettes*, First Written Submission, at paras 54-78.
[28] Panel Report, *U.S.-Clove Cigarettes*, para. 7.232.
[29] Panel Report, *U.S.-Clove Cigarettes*, para. 7.255.
[30] Panel Report, *U.S.-Clove Cigarettes*, para. 7.264.
[31] Panel Report, *U.S.-Clove Cigarettes*, para. 7.267.
[32] Panel Report, *U.S.-Clove Cigarettes*, para. 7.266.
[33] Panel Report, *U.S.-Clove Cigarettes*, para. 7.269.
[34] Panel Report, *U.S.-Clove Cigarettes*, para. 7.276.
[35] USTR, *U.S.-Clove Cigarettes*, First Written Submission, at paras. 48-51; USTR, *U.S. – Measures Affecting the Production and Sale of Clove Cigarettes*, U.S. Second Written Submission, Jan. 17, 2011, at para. 79-86. Available at: http://www.ustr.gov/webfm_send/2492
[36] USTR argued: "U.S.-produced flavored cigarettes other than tobacco or menthol were on the market as recently as one year before section 907(a)(1)(A) went into effect, and even if it were the case that they disappeared by 2009, there is no guarantee apart from section 907(a)(1)(A) that they would have been off the market for long. As the United States has demonstrated, U.S. companies had 26 flavored products on the market in 2008 compared to 19 products being sold by foreign companies (17 of which were be Indonesian [sic]). It may be in fact that some of these products remained on the market in 2009, even if discontinued earlier, as retailers sold their purchased stock to customers up until the time it was illegal to do so (i.e., September 22, 2009). Certainly, Indonesia has not put evidence indicating that that is not the case." USTR went on: "85. Moreover, the effect of section 907(a)(1)(A) on U.S. or foreign cigarettes can not be accurately assessed solely by looking at what products were on the market in 2009, immediately before the ban went into effect. Such effect – not surprisingly advocated by Indonesia – fails to take into account the effect of the legislation in the lead up to its taking force. As stated previously, the measure forced U.S. companies to give up an entire product line that they had spent decades developing. Both in the First Submission and further in this submission, the United States presents significant evidence based on the internal corporate documents of the U.S. cigarette companies themselves that they had developed this product line for decades. Indonesia has not contested this fact, leaving the issue, thus far, completely unrebutted. 86. The United States would also note that it is not unusual for a company to withdraw its product from the market where the government is strongly considering whether to ban that product. Two recent examples of this occurring in the United States are in regard to bisphenol A ("BPA"), a chemical that is present in many plastics, and infant cribs

that with sides that move up and down. Moreover, the fact that the marketplace reacted preemptively to an impending ban cannot affect the analysis of whether a Member has acted consistently with its WTO obligations. If that were the case, then the same measure, enforced by two different Members, could be found both to be consistent and inconsistent based solely on the actions (or non-actions) of that Member's domestic industry in the lead up to a measure taking force." See USTR, *U.S.-Clove Cigarettes*, Second Written Submission, at paras 84-86.

[37] Panel Report, *U.S.-Clove Cigarettes*, paras. 7.279-281.

[38] Panel Report, *U.S.-Clove Cigarettes*, para. 7.289.

[39] Panel Report, *U.S.-Clove Cigarettes*, para. 7.293.

[40] Appellate Body Report, *U.S. – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, circulated 4 April 2011, at paras 91, 95.

[41] Appellate Body Report, *U.S.-Clove Cigarettes*, at para 109.

[42] Appellate Body Report, *U.S.-Clove Cigarettes*, at para 112.

[43] Appellate Body Report, *U.S.-Clove Cigarettes*, at para 137.

[44] Appellate Body Report, *U.S.-Clove Cigarettes*, at para 115.

[45] Appellate Body Report, *U.S.-Clove Cigarettes*, at paras 130-131.

[46] USTR, *U.S. – Measures Affecting the Production and Sale of Clove Cigarettes*, U.S. Appellant Submission, Jan. 5, 2012, at paras 33-35.

[47] Appellate Body Report, *U.S.-Clove Cigarettes*, at paras 137, 144.

[48] Appellate Body Report, *U.S.-Clove Cigarettes*, at para. 151.

[49] Appellate Body Report, *U.S.-Clove Cigarettes*, at para. 154.

[50] Appellate Body Report, *U.S.-Clove Cigarettes*, at paras 118-119.

[51] Appellate Body Report, *U.S.-Clove Cigarettes*, at paras 182.

[52] Todd Tucker, "May 2007 Preamble Change Fails to Resolve Concerns with FTA Investment Rules," Public Citizen Memo, June 14, 2011. Available at: http://www.citizen.org/documents/may-2007-preamble-change-fails-to-resolve-concerns-with-fta-investment-rules.pdf

[53] Appellate Body Report, *U.S.-Clove Cigarettes*, at paras 186-188.

[54] Appellate Body Report, *U.S.-Clove Cigarettes*, at para 191.

[55] Appellate Body Report, *U.S.-Clove Cigarettes*, at para 196-197.

[56] See poll here: http://www.prnewswire.com/news-releases/huge-improvement-in-reputation-of-the-auto-industry-and-big-drop-in-reputation-of-airlines-130257338.html

[57] Appellate Body Report, *U.S.-Clove Cigarettes*, at para 200.

[58] http://www.washingtonpost.com/national/health-science/teens-swapping-cigarettes-for-flavored-mini-cigars/2011/11/30/gIQAQuWmqO_story.html; http://www.johnmiddletonco.com/en/cms/Home/default.aspx

[59] Appellate Body Report, *U.S.-Clove Cigarettes*, at paras 224-226, emphasis added.

[60] Panel Report, *U.S.-Clove Cigarettes*, para. 7.595.

[61] Panel Report, *U.S.-Clove Cigarettes*, paras. 7.584, 7.589, 7.636-648.

[62] See paragraph 5.2, available here: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_implementation_e.htm

[63] Text available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

[64] Appellate Body Report, *U.S.-Clove Cigarettes*, *at* para 259-260.

[65] Appellate Body Report, *U.S.-Clove Cigarettes*, *at* para 265.

[66] Appellate Body Report, *U.S.-Clove Cigarettes*, *at* para 266.

[67] Appellate Body Report, *U.S.-Clove Cigarettes*, *at* para 269.

[68] Appellate Body Report, *U.S.-Clove Cigarettes*, *at* para 273.

[69] Appellate Body Report, *U.S.-Clove Cigarettes*, *at* para 292.

[70] See http://www.citizen.org/documents/worldwideeventsN3.PDF

[71] See: http://www.wto.org/english/news_e/news12_e/dsb_24apr12_e.htm

[72] These references to Article 21.3 cases can be found here: http://wto.org/english/res_e/booksp_e/analytic_index_e/dsu_08_e.htm#article21B1

[73] Award of the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/13, August 2005, at para 55.

[74] Award of the Arbitrator, *U.S.-Gambling*, at paras 62-63.

[75] http://rothenbergpoliticalreport.com/ratings/house

[76] http://democrats.energycommerce.house.gov/index.php?q=news/rep-waxman-statement-on-the-wto-ruling-on-clove-cigarettes ; http://www.cpath.org/sitebuildercontent/sitebuilderfiles/support_final_us_position_4-24-12.pdf

[77] Award of the Arbitrator, *U.S.-Gambling*, at paras 48 and 66.

[78] Panel Report, *U.S.-Clove Cigarettes*, para 7.628.

[79] See: http://worldtradelaw.typepad.com/ielpblog/2012/04/implementing-clove-cigarettes.html ; http://worldtradelaw.typepad.com/ielpblog/2012/04/more-from-rob-howse-on-the-clove-cigarettes-case.html ; http://worldtradelaw.typepad.com/ielpblog/2012/04/how-will-the-clove-cigarettes-decision-be-perceived.html

[80] Part of the challenge for this type of analysis is the paucity of Article 21.5 compliance panels for exception cases. Out of the universe of 27 applicable cases, only US-Shrimp and US-Gambling had such panels. US-Shrimp was the only one of these where

the Appellate Body examined an Article 21.5 report, although I wouldn't rule out a similar one for US-Gambling at some point in the future. (Additionally, Argentina-Hides, Brazil-Tyres, Colombia – Ports, DR-Cigarettes, EC-Tariff Preferences, US-Gambling, produced Article 21.3 compliance panels. There were no compliance proceedings in Canada-Periodicals, Canada-Wheat, China-Audiovisual, China-Autos, China-Raw Materials, EC-Trademarks, Korea-beef, Mexico-Soft Drinks, Thailand-Cigarettes, US-Customs Bond, US-Gasoline, US-Shrimp II, and of course EC-Asbestos – the one case where the exception defense was upheld in its entirety.) EC-Hormones – which we also consider a public interest case in this standing tally – did not have a 21.5 panel, and of course in any event this was an SPS panel. See a breakdown of these key cases here: http://citizen.typepad.com/eyesontrade/2011/09/wto-is-the-big-kid-on-the-seesaw.html

[81] Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285/RW, adopted 22 May 2007, at paras 6.14-6.27.

[82] Panel Report, *U.S.-Gambling (21.5)*, at para 6.40.

[83] Panel Report, *U.S.-Gambling (21.5)*, at paras 6.53-6.57.

[84] Panel Report, *U.S.-Gambling (21.5)*, at para 6.76.

[85] Panel Report, *U.S.-Gambling (21.5)*, at para 6.83.

[86] Panel Report, *U.S.-Gambling (21.5)*, at paras 6.120-6.129.

[87] "U.S. Slams WTO Ruling On Cigarettes, Warns Of Public Health Implications," Inside U.S. Trade, April 27, 2012.

[88] See detail at: http://citizen.typepad.com/eyesontrade/2012/04/brazils-flavored-cigarette-ban-now-targeted.html

[89] There is a debate as to the applicability of Article XI to product bans that apply to imports and exports. While two GATT cases (US-Tuna I and US-Tuna II) from the early 1990s ruled against a U.S. ban on dolphin-unsafe tuna on Article XI grounds, the WTO Appellate Body itself has never definitively ruled on the matter. Trade lawyers have advanced seemingly reasonable arguments as to why Article XI on market access should not apply. Predicting whether these interpretations would prevail is a matter of a certain amount of speculation. It's worth noting that many of these same lawyers who disliked the US-Tuna rulings were also dissatisfied with the Appellate Body's conclusion in the *U.S.-Gambling* case, which ruled that non-discriminatory quantitative restrictions (i.e. bans) constituted measures prohibited by the GATS similar market access rule. It seems like the GATT and now WTO often upset the expectations of even the most careful followers.

On this score, see, for instance, Joost Pauwelyn, "Rien Ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS," (2005). Duke Law School Faculty Scholarship Series. Paper 25. Available at: http://lsr.nellco.org/cgi/viewcontent.cgi?article=1024&context=duke_fs Pauwelyn writes that: "A pivotal factor in determining the relation between Articles XI and III of GATT is the Ad Note to Article III, which provides: 'Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.'... Although the Ad Note does not explicitly say so, when it directs application of Article III for measures where Article XI could be seen as relevant (since the measure 'is collected or enforced in the case of the imported product at the time or point of importation'), by implication, it must be read as doing so at the exclusion of Article XI." However, Pauwelyn notes that the Appellate Body has never actually said this, and in a footnote he notes that it has not been established that "there cannot ever be a measure that is subject to both Article III and Article XI." Indeed, it would seem that if the drafters wanted to ensure that Article XI never applied to non-discriminatory bans, they would have said so in this or another Ad Note. The fact that they did not should be given interpretive weight.