

February 28, 2012

Volume 16, Issue 6

## Cigarettes and Public Health at the WTO: The Appeals of the TBT Labeling Disputes Begin

By Tania Voon



### Introduction

In 2011, three panel reports in the World Trade Organization (“WTO”) dispute settlement system shed new light on a lesser-known but controversial WTO agreement: the Agreement on Technical Barriers to Trade (“TBT Agreement”).<sup>[1]</sup> Each case concerned a U.S. regulatory measure: a ban on clove cigarettes (*US—*

*Clove Cigarettes*),<sup>[2]</sup> regulations on labeling tuna “dolphin-safe” (*US—Tuna II (Mexico)*),<sup>[3]</sup> and an elaborate country-of-origin labeling scheme for meat (*US—COOL*).<sup>[4]</sup>

Although the United States successfully defended some claims, each panel found a U.S. violation of at least one key TBT provision. The United States has appealed the decisions in *US—Clove Cigarettes* and *US—Tuna II (Mexico)*<sup>[5]</sup> and will reportedly appeal the *US—COOL* decision as well.<sup>[6]</sup> Mexico has also cross-appealed in *US—Tuna II (Mexico)*.<sup>[7]</sup> The appeals are now underway.

This *Insight* considers certain key TBT Agreement issues examined in *US—Clove Cigarettes*, frames it within the context of the other current TBT cases, and previews some of the issues on appeal. The U.S. legislation targeted by Indonesia in this dispute bans cigarettes and component parts containing a flavor, herb, or spice that gives a characterizing flavor to the product.<sup>[8]</sup> The measure thus prohibits clove cigarettes—which account for 0.1 percent of the U.S. market and the vast majority of which are imported from Indonesia—while expressly exempting menthol cigarettes, which are used by a quarter of the U.S. smoking population, and most of which are domestically manufactured.<sup>[9]</sup>

### Like Products and Less Favorable Treatment: TBT Article 2.1

*US—Clove Cigarettes*, *US—Tuna II (Mexico)*, and *US—COOL* all involve claims under TBT Article 2.1, which was previously subject to very limited examination by WTO panels and the WTO Appellate Body.<sup>[10]</sup> Article 2.1 requires WTO Members to ensure that, “in respect

### RELATED ASIL INSIGHTS

[Australians Get Their First Taste of New Zealand Apples in Ninety Years](#)

[Orange Juice, Shrimp, and the United States Response to Adverse WTO Rulings on Zeroing](#)

[Trade Remedies and Non-Market Economies: The WTO Appellate Body's Report in United States—Definitive Antidumping and Countervailing Duties on Certain Products from China](#)

[The WTO EC - Aircraft Panel and Appellate Body Reports on Subsidies to Airbus](#)

[NAFTA Chapter 19 Panel Follows WTO Appellate Body in Striking Down Zeroing](#)

[The WTO Seal Products Dispute: A Preview of the Key Legal Issues](#)

[Court of Appeals for the Federal Circuit Announces Equal Protection Exception for Customs Cases: \*Totes-Isotoner v. United States\*](#)

[The Bush Administration and Democrats Reach a Bipartisan Deal on Trade Policy](#)

[The WTO Doha Round Negotiation: Suspended Indefinitely The Free Trade Agreement of the Americas and Legal Harmonization June 1996 The WTO Seal Products Dispute: A Preview of the Key Legal Issues](#)

[Insights Archive>>](#)

### DOCUMENTS OF NOTE

[Panel Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes](#)

[Panel Report, United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products](#)

[Panel Report, United States—Certain Country of Origin Labelling \(COOL\)](#)

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.” This provision may be seen as embodying the obligations of both national treatment and most-favored-nation (“MFN”) treatment contained in the General Agreement on Tariffs and Trade 1994 (“GATT 1994”).<sup>[11]</sup>

Following previous case law on both TBT Article 2.1<sup>[12]</sup> and GATT Article III:4,<sup>[13]</sup> the *Clove Cigarettes* panel identified three elements required to establish that a challenged measure is inconsistent with the national treatment aspect of TBT Article 2.1: (i) the measure is a “technical regulation” within the meaning of TBT Annex 1 (and therefore subject to the obligations in Article 2);<sup>[14]</sup> (ii) the relevant domestic and imported products are “like” within the meaning of Article 2.1; and (iii) the imported products are treated less favorably than the like domestic products.<sup>[15]</sup> Finding all three elements satisfied, the panel concluded that the U.S. measure violates Article 2.1.<sup>[16]</sup> The United States appealed this conclusion, including the panel’s rulings on likeness and less favourable treatment.

In assessing likeness, the panel emphasized that WTO jurisprudence under GATT Article III:4, while relevant, cannot be automatically transposed to the different context of TBT Article 2.1, because, *inter alia*, Article 2.1 applies only to technical regulations and contains no equivalent to the overarching national treatment principle in GATT Article III:1.<sup>[17]</sup> The panel therefore applied the four traditional criteria of likeness<sup>[18]</sup> in the light of the specific context of the TBT Agreement.

Taking on board the regulatory context of the ban, the panel explained that “the declared legitimate public health objective” of the measure, namely “the reduction of youth smoking, must permeate and inform our likeness analysis,”<sup>[19]</sup> especially given that WTO Members recognize in the preamble to the TBT Agreement that “no country should be prevented from taking measures necessary . . . for the protection of human . . . life or health . . . at the level it considers appropriate.”<sup>[20]</sup> The panel also identified the “immediate purpose” of the U.S. measure as being “to regulate certain tobacco products with additives that provide them with a characterizing flavour.”<sup>[21]</sup> In this context, the panel concluded that imported clove cigarettes are like domestic menthol cigarettes<sup>[22]</sup> because, *inter alia*, both “contain an additive that substantially imparts flavour to the cigarette and reduces the harshness of tobacco,”<sup>[23]</sup> both “are harmful to human health and may cause cancer and several cardiovascular and respiratory diseases,”<sup>[24]</sup> and both “appeal to youth.”<sup>[25]</sup>

Significantly, the *Clove Cigarettes* panel may be seen as having revived the “aim-and-effect” test for TBT Article 2.1, even though the Appellate Body previously rejected this test in the context of the GATT 1994.<sup>[26]</sup> The panel explicitly acknowledged the relevance of the aim of the measure in assessing likeness, indicating that clove and menthol cigarettes might not be considered “like” in the context of some measures.<sup>[27]</sup>

On appeal, the United States supports the panel’s reliance on the public health objective of the measure in assessing the likeness of the relevant products. However, the United States objects to the panel’s analysis of the criteria of “end-uses” and “consumer tastes and habits” in conducting that assessment. According to the United States, the panel erred in identifying the end-use of clove and menthol cigarettes as simply “to be smoked,”<sup>[28]</sup> given that the former are used “primarily as an experimental, special occasion activity” and the latter “primarily by individuals on a regular basis to satisfy an addiction to nicotine.” For similar reasons, the United States maintains that the panel erroneously excluded from its analysis

## Requirements

[Agreement on Technical Barriers to Trade TBT Agreement](#)

[General Agreement on Tariffs and Trade 1994](#)

[Marrakesh Agreement Establishing the World Trade Organization](#)

[Agreement on the Application of Sanitary and Phytosanitary Measures](#)

[Vienna Convention on the Law of Treaties](#)

[ASIL EISIL>>](#)

## ORGANIZATIONS OF NOTE

[ASIL International Economic Law Interest Group](#)

[World Trade Organization](#)

Copyright 2012 by The American Society of International Law ASIL

The purpose of ASIL Insights is to provide concise and informed background for developments of interest to the international community. The American Society of International Law does not take positions on substantive issues, including the ones discussed in this Insight. Educational and news media copying is permitted with due acknowledgement.

The Insights Editorial Board includes: [Cymie Payne](#), UC Berkeley School of Law; [Amelia Porges](#); and [David Kaye](#), UCLA School of Law. [Djurdja Lazic](#) serves as the managing editor.

the tastes and habits of current consumers. The United States explains that it has determined that banning menthol cigarettes, to which millions of U.S. adults are addicted, “could have an overall negative effect on the public health and welfare, for example by straining the health care system or exacerbating the illegal market.”<sup>[29]</sup>

The United States alleges that the panel acted inconsistently with Article 11 of the WTO’s Dispute Settlement Understanding (“DSU”)<sup>[30]</sup> in assessing both likeness and less favorable treatment, in the latter case leading to incorrect factual conclusions that no domestic cigarettes fell within the scope of the ban and that no U.S. entity incurred costs as a result. As regards less favorable treatment, the United States submits that the panel failed to demonstrate “that any detrimental effect to the competitive conditions for clove cigarettes compared to menthol cigarettes was related to the origin of the products.” In addition, the panel is said to have incorrectly compared the treatment of “one banned imported product (Indonesian clove cigarettes) and one non-banned like domestic product (domestically-produced menthol cigarettes)” instead of comparing the treatment of all like imported products, as a group, and all like domestic products, as a group (that is, all imported and domestic cigarettes with characterizing flavors).<sup>[31]</sup> In view of the inconsistent case law on this point, the Appellate Body’s response may assist in clarifying how to assess less favorable treatment for the purposes of the national treatment and MFN treatment obligations in the TBT Agreement, the GATT 1994, and other WTO agreements.<sup>[32]</sup>

### **Legitimate Objectives and Trade-Restrictiveness: TBT Article 2.2**

*US—Clove Cigarettes* and the other TBT cases will also provide greater clarity regarding Article 2.2 of the TBT Agreement, a provision previously underexplored and never actually applied in WTO jurisprudence.<sup>[33]</sup> Article 2.2 prohibits technical regulations that are “more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.” Article 2.2 also contains non-exhaustive lists of legitimate objectives (including “protection of human health or safety”) and “relevant elements” to consider in assessing the risks of non-fulfilment (including “available scientific and technical information”).

The relationship between Articles 2.1 and 2.2 is complex. Violation of one does not necessarily entail violation of the other. Thus, while the meat labeling requirements were found inconsistent with both provisions in *US—COOL*, the tuna labeling requirements were found consistent with Article 2.1 and inconsistent with Article 2.2 in *US—Tuna II (Mexico)*, and, conversely, the ban on flavored cigarettes was found inconsistent with Article 2.1 and consistent with Article 2.2 in *US—Clove Cigarettes*.

In *US—Clove Cigarettes*, the panel did not consider discrimination between clove and menthol justified under Article 2.1 on the basis of the additional costs that the United States asserted it would incur in extending the ban to menthol.<sup>[34]</sup> At the same time, the panel accepted the U.S. argument that the objective of banning clove cigarettes is to reduce youth smoking, which falls within the description of protecting human health, one of the legitimate objectives specified in Article 2.2.<sup>[35]</sup> The panel also agreed with the United States that the ban is not more trade-restrictive than necessary to achieve that objective.<sup>[36]</sup> The panel discussed at length the “extensive scientific evidence supporting the conclusion that banning clove and other flavoured cigarettes could contribute to reducing youth smoking,”<sup>[37]</sup> as well as guidelines calling on parties to the WHO Framework Convention on Tobacco Control to restrict ingredients that may increase palatability of tobacco products.<sup>[38]</sup> In reaching this conclusion, the panel sought guidance (contrary to the United

States' submissions) from WTO jurisprudence on GATT Article XX(b), which provides an exception to GATT disciplines for measures necessary to protect human health. [39]

The United States conditionally appealed part of the panel's reasoning on Article 2.2, arguing that the "analytical framework" of Article 5.6 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") [40] "provides better guidance [than GATT Article XX(b)] to interpret the ordinary meaning of the terms of Article 2.2." [41] However, the condition for this appeal—namely that Indonesia itself appeal the panel's findings that the U.S. measure is consistent with TBT Article 2.2—has not been met: Indonesia has not appealed. [42] The United States raised similar concerns on appeal in *US—Tuna II (Mexico)*. [43] so the Appellate Body can be expected to deal with these issues in that case.

### **Legislative Activity in the WTO and TBT Article 2.12**

Article 2.12 of the TBT Agreement provides that, except in urgent circumstances, Members are to allow a "reasonable interval" between publication and entry into force of technical regulations in order to allow time for exporting producers to adapt. A WTO Ministerial Decision—adopted by consensus at the WTO Ministerial Conference held in Doha in 2001 [44]—provides in paragraph 5.2 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."

Before the *Clove Cigarettes* panel, Indonesia relied on paragraph 5.2 in arguing that the United States had violated Article 2.12 by allowing only ninety days before the ban took effect. The United States rejected Indonesia's characterization of the Ministerial Decision as an "interpretative decision" [45] pursuant to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization ("Marrakesh Agreement"). [46] Article IX:2 grants the WTO Ministerial Conference and the General Council "the exclusive authority to adopt interpretations" of the WTO agreements, imposing procedural requirements for adopting interpretations of the TBT Agreement (among others) by three-fourths majority and on the basis of a recommendation by the relevant committee.

The panel acknowledged that paragraph 5.2 of the Ministerial Decision did not appear to be based on a recommendation by the Council for Trade in Goods or the TBT Committee. However, the panel decided that "it must be guided by" paragraph 5.2 in its interpretation of Article 2.12 because the Ministerial Conference, "the highest level organ of the WTO where all Members meet," had agreed on the interpretation in that paragraph and appeared to have intended it to be binding. The panel also regarded paragraph 5.2 as a "subsequent agreement" for the purposes of treaty interpretation in accordance with Article 31(3)(a) of the Vienna Convention on the Law of Treaties ("VCLT"). [47] The panel went on to find that the United States had acted inconsistently with TBT Article 2.12. [48]

On appeal, the United States objects to the panel's reading of the Ministerial Decision, suggesting that the panel's approach would convert the Decision into "some form of 'stealth' interpretation that circumvented the requirements of Article IX and bound Members without their knowledge or intent." According to the United States, paragraph 5.2 is "at most" a means of supplementary interpretation pursuant to Article 32 of the VCLT. [49]

The specific issue facing the Appellate Body here reflects larger questions, including: What is the legal effect of Ministerial Decisions taken by consensus or by vote in accordance with

Article IX:1 of the Marrakesh Agreement? Must decisions concerning interpretation of WTO provisions be instead taken under Article IX:2? How are such interpretative decisions identified? The answers to these questions may have implications for other WTO decisions (such as those concerning public health and the Agreement on Trade-Related Aspects of Intellectual Property Rights)<sup>[50]</sup> and other Ministerial functions (such as granting waivers under Article IX:3 and agreeing on accession of new Members under Article XII:2). This aspect of the dispute also brings to the fore the complex relationship between the “legislative” and “judicial” arms of the WTO, as exemplified in the strained interaction between Article IX:2 of the Marrakesh Agreement and Article 3.2 of the DSU, which indicates that one of the purposes of the dispute settlement system is “to clarify [WTO provisions] in accordance with customary rules of interpretation of public international law.”

## Conclusion

*US—Clove Cigarettes* and the other two panel reports in the “TBT trifecta” provide rich and detailed analysis of a number of TBT provisions. The Appellate Body decisions expected in these cases will draw the line, for now, between a Member’s right to regulate to pursue social and other objectives and the right of other WTO Members not to face discrimination or undue restrictions against their products. They are also likely to have systemic implications for WTO dispute settlement and the institution as a whole.

## About the Author:

Tania Voon, an ASIL member, is Associate Professor at Melbourne Law School, Editorial Board Member of the *Journal of International Economic Law*, and a former Legal Officer of the Appellate Body Secretariat of the WTO.

## Endnotes:

[1] Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120, available at [http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm).

[2] Panel Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R (Sep. 2, 2011) [hereinafter *US—Clove Cigarettes*].

[3] Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 15, 2011) [hereinafter *US—Tuna II (Mexico)*].

[4] Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, WT/DS386/R (Nov. 18, 2011) [hereinafter *US—COOL*].

[5] Notification of an Appeal by the United States, *US—Clove Cigarettes*, WT/DS406/6 (Jan. 10, 2012); Notification of an Appeal by the United States, *US—Tuna II (Mexico)*, WT/DS381/10 (Jan. 24, 2012).

[6] According to press reports, the U.S. government met with domestic stakeholder interests to try to agree on administrative changes that could settle the dispute. As no agreement has been reached, the U.S. government is likely to appeal. *USTR Abandons Regulatory COOL ‘Fix’ In Face Of Stakeholder Division*, Inside US Trade (Feb. 3, 2012).

[7] Notification of an Other Appeal by Mexico, *US—Tuna II (Mexico)*, WT/DS381/11 (Jan. 27, 2012).

[8] Federal Food, Drug and Cosmetic Act (as amended by the Family Smoking Prevention and Tobacco Control Act 2009), § 907(a)(1)(A).

[9] *US—Clove Cigarettes*, ¶¶ 2.4, 2.25, 2.26, 7.289. See also Appellant Submission of the United States, *US—Clove Cigarettes*, ¶¶ 30-31, 33-34, 58 (Jan. 5, 2012), available at [http://www.ustr.gov/webfm\\_send/3225](http://www.ustr.gov/webfm_send/3225) [hereinafter U.S. Appellant Submission].

[10] The only substantive analysis of this provision appeared in Panel Report, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complaint by Australia)*, ¶¶ 7.444, 7.463-7.476, WT/DS290/R (Mar. 15, 2005) [hereinafter Panel Report, *EC—Trademarks and Geographical Indications (Australia)*]. Declining to Rule on Article 2.1: Panel Reports, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶¶ 7.2524, 7.2528, 7.3414, WT/DS291/R, WT/DS292/R, WT/DS293/R; Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶ 313, WT/DS231/AB/R (Sept. 26, 2002) [hereinafter Appellate Body Report, *EC—Sardines*]; Panel Report, *European Communities—Trade Description of Sardines*, ¶ 7.152, WT/DS231/R (May 29, 2002) [hereinafter Panel Report, *EC—Sardines*]; Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 83, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter Appellate Body Report, *EC—Asbestos*].

[11] General Agreement on Tariffs and Trade 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/06-gatt\\_e.htm](http://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm).

[12] Panel Report, *EC—Trademarks and Geographical Indications (Australia)*, ¶ 7.444 (cited in Panel Report, *US—Clove Cigarettes*, ¶ 7.77).

[13] See, e.g., Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 133, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) (cited in Panel Report, *US—Clove Cigarettes*, ¶ 7.75).

[14] Paragraph 1 of Annex 1 of the TBT Agreement defines a technical regulation as a “[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.”

[15] Panel Report, *US—Clove Cigarettes*, ¶¶ 7.75-7.79.

[16] *Id.* ¶ 7.293.

[17] See, e.g., Panel Report, *US—Clove Cigarettes*, ¶¶ 7.96, 7.98, 7.99, 7.103, 7.105, 7.207.

[18] The four criteria are the products’ properties, nature and quality; end-uses; and tariff classification; as well as consumers’ tastes and habits concerning the products: Panel Report, *US—Clove Cigarettes*, ¶ 7.121, referring, *inter alia*, to Appellate Body Report, *EC—Asbestos*, ¶ 101.

[19] Panel Report, *US—Clove Cigarettes*, ¶ 7.116. See also ¶ 7.119.

[20] *Id.* ¶¶ 7.113-7.114 (quoting TBT Agreement, preamble).

[21] *Id.* ¶ 7.182.

[22] *Id.* ¶ 7.248.

[23] *Id.* ¶ 7.182.

[24] *Id.* ¶ 7.186.

[25] *Id.* ¶¶ 7.217, 7.231.

[26] Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶¶ 216, 241, WT/DS27/AB/R (Sept. 9, 1997). For further discussion, see Robert Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an ‘Aim and Effects’ Test*, 32 Int’l Law. 619 (1998); Donald Regan, *Regulatory Purpose and “Like Products” in Article III:4 of the GATT (With Additional Remarks on Article III:2)*, 36 J. World Trade 443 (2002); Joseph Weiler, *Law, Culture, and Values in the WTO – Gazing into the Crystal Ball*, in *Oxford Handbook of International Trade Law* 749, 758-72 (Daniel Bethlehem et al. eds., 2009); Nicolas Diebold, *Standards of Non-Discrimination in International Economic Law*, 60 Int’l & Comp. L.Q. 831, 839-841 (2011); Tania Voon, *Cultural Products and the World Trade Organization* 82-85 (2007).

[27] Panel Report, *US—Clove Cigarettes*, ¶¶ 7.246-7.247.

[28] *Id.* ¶ 7.199.

[29] U.S. Appellant Submission, *supra* note 9, ¶¶ 3, 6, 41, 44, 46, 49, 50, 54, 58, 59, 61.

[30] Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm](http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm).

[31] U.S. Appellant Submission, *supra* note 9, ¶¶ 64, 74, 75, 77, 79, 97, 98, 107, 109.

[32] See Lothar Ehring, *De Facto Discrimination in World Trade Law: National and Most-Favoured-Nation Treatment—or Equal Treatment?*, 36 J. World Trade 921 (2002); see also Diebold, *supra* note 26, at 842-848.

[33] See, e.g., Panel Report, *EC—Trademarks and Geographical Indications (Australia)*, ¶ 7.515 (finding Article 2.2 inapplicable); Appellate Body Report, *EC—Sardines*, ¶¶ 286, 308, 311; Panel Report, *EC—Sardines*, ¶¶ 7.118, 7.120; Appellate Body Report, *EC—Asbestos*, ¶¶ 59, 80; Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, ¶ 8.55 (Sept. 18, 2000).

[34] Panel Report, *US—Clove Cigarettes*, ¶¶ 7.289-7.291.

[35] *Id.* ¶¶ 7.347, 7.350.

[36] *Id.* ¶¶ 7.428, 7.432.

[37] *Id.* ¶ 7.415.

[38] *Id.* ¶¶ 7.414, 7.427 (referring to *Partial Guidelines for Implementation of Articles 9 and 10 of the WHO Framework Convention on Tobacco Control (Regulation of the Contents of Tobacco Products and Regulation of Tobacco Product Disclosure)* FCTC/COP4(10) (Nov. 20, 2010)).

[39] Panel Report, *US—Clove Cigarettes*, ¶¶ 7.368-7.369. The United States relied on Article XX(b) in response to Indonesia's claim under GATT Article III:4, but it did not invoke Article XX(b) as a defense to Indonesia's claims under the TBT Agreement, and it described as "radical" the notion of interpreting TBT Article 2.2 in the light of jurisprudence on GATT Article XX(b): ¶¶ 7.307-7.308, 7.321.

[40] Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 U.N.T.S. 493, available at [http://www.wto.org/english/docs\\_e/legal\\_e/15sps\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/15sps_01_e.htm).

[41] U.S. Appellant Submission, *supra* note 9, ¶ 158.

[42] *Indonesia Will Not Appeal WTO Ruling on US Tobacco Ban*, Jakarta Post (Jan. 14, 2012), <http://www.thejakartapost.com/news/2012/01/14/indonesia-will-not-appeal-wto-ruling-us-tobacco-ban.html>.

[43] Appellant Submission of the United States, *US—Tuna II (Mexico)*, n.186, AB-2012-2/DS381 (Jan. 20, 2012), available at [http://www.ustr.gov/webfm\\_send/3251](http://www.ustr.gov/webfm_send/3251).

[44] *Doha Ministerial Decision on Implementation-Related Issues and Concerns of 14 November 2001*, WT/MIN(01)/17 (Nov. 20, 2001).

[45] Panel Report, *US—Clove Cigarettes*, ¶¶ 7.552-7.554, 7.557, 7.569, 7.570, 7.574.

[46] Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm).

[47] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), available at [http://www.oas.org/dil/Vienna\\_Convention\\_on\\_the\\_Law\\_of\\_Treaties.pdf](http://www.oas.org/dil/Vienna_Convention_on_the_Law_of_Treaties.pdf).

[48] Panel Report, *US—Clove Cigarettes*, ¶¶ 7.575, 7.576, 7.595.

[49] U.S. Appellant Submission, *supra* note 9, ¶¶ 8, 125, 126.

[50] Agreement on Trade-Related Aspects of Intellectual Property Rights, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm). See, e.g., *Doha Ministerial Declaration on the TRIPS Agreement and Public Health of 14 November 2001*, WT/MIN(01)/DEC/2 (Nov. 20, 2001); General Council Decision on the *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health of 30 August 2003*, WT/L/540 (Sept. 1, 2003). For further discussion, see Andrew Mitchell & Tania Voon, *Patents and Public Health in the WTO, FTAs and Beyond: Tension and Conflict in International Law*, 43 J. World Trade 571, 580-81 (2009).