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Losing Flavor: Indonesia's WTO Complaint Against the U.S. Ban on Clove Cigarettes

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COMMENT

**LOSING FLAVOR: INDONESIA’S WTO
COMPLAINT AGAINST THE U.S. BAN ON
CLOVE CIGARETTES**

LUCAS BALLETT*

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INTRODUCTION

On June 22, 2009, President Obama signed into law the Family Smoking Prevention and Tobacco Control Act (the “Act”), which banned the sale of all flavored cigarettes except for menthol.¹ On July 20, 2010, Indonesia requested the establishment of a Panel of the World Trade Organization’s (“WTO”) Dispute Settlement Body (“DSB”)² to determine if the ban is “inconsistent with various U.S. obligations” as a member of the WTO.³ Indonesia, the largest

1. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (codified in scattered sections of 21 U.S.C.); see Jeff Zeleny, *Occasional Smoker, 47, Signs Tobacco Bill*, N.Y. TIMES, June 23, 2009, at A15 (describing President Obama’s statements that the new law is an important step in youth smoking prevention).

2. See *Dispute Settlement: Dispute DS406: United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WORLD TRADE ORG. (Sept. 21, 2010), http://www.wto.org/english/Tratop_e/dispu_e/cases_e/ds406_e.htm (last visited Oct. 24, 2010) [hereinafter *Dispute DS406*] (explaining that on September 9, 2010, the parties agreed to the formal composition of the Panel).

3. See Request for Consultations by Indonesia, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 5, WT/DS406/1 (Apr. 14,

exporter of clove cigarettes to the United States (“U.S.”) before the ban,⁴ argues that the Act discriminates against Indonesian-produced clove cigarettes, thereby violating Article III of the General Agreement on Tariffs and Trade (“GATT”). Indonesia further argues that GATT Article XX, which enumerates exceptions for trade distorting behavior in certain circumstances, does not provide the United States with a valid public health justification for the ban.⁵

This Note argues that the U.S. ban on clove cigarettes is inconsistent with WTO member obligations arising from current interpretations of GATT Articles III and XX. Part II provides background on the law that mandates the ban, GATT Articles III and XX, and the content of the Indonesian complaint. Part III analyzes the Indonesian complaint and argues that menthol and clove cigarettes are “like products” under GATT Article III:4 and that the United States unfairly discriminates against clove cigarettes. Part III also contends that GATT Article XX(b) does not provide the United States with a reasonable justification for the ban on public health grounds. Part IV offers legislative recommendations for Congress to modify the Act to bring the United States into conformity with its WTO obligations.

I. LEGAL BACKGROUND ON AND PROCEDURAL HISTORY OF THE DISPUTE

A. LEGISLATIVE BACKGROUND ON THE U.S. STATUTORY BAN OF FLAVORED CIGARETTES

The Family Smoking Prevention and Tobacco Control Act gives the Food and Drug Administration (“FDA”) broad new statutory authority to regulate tobacco products under the Federal Food, Drug, and Cosmetic Act (“FDCA”).⁶ Specifically, section 101 of the Act

2010) [hereinafter *U.S. – Clove Cigarettes*] (setting forth Indonesia’s allegations that the United States is violating specific WTO agreements, including Articles III and XX of GATT).

4. See, e.g., Press Release, World Trade Org. [WTO], U.S. Blocks Indonesian Request for Panel on Clove Cigarettes (June 22, 2010) [hereinafter U.S. Blocks Indonesian Request], available at http://www.wto.org/english/news_e/news10_e/dsb_22jun10_e.htm (noting that before the ban Indonesia exported ninety-nine percent of clove cigarettes consumed in the United States).

5. See *id.*; *U.S. – Clove Cigarettes*, *supra* note 3, ¶ 5(b).

6. See Family Smoking Prevention and Tobacco Control Act, § 101(b);

adds chapter IX, section 907(a)(1)(A) to the FDCA, which bans the sale of cigarettes that contain an herb or spice that is a “characterizing flavor of the tobacco product.”⁷ Importantly, section 907(a)(1)(A) exempts menthol cigarettes from the ban.⁸ Advocates for the ban contend that flavored cigarettes appeal primarily to children and encourage them to start smoking.⁹ The Act does not exempt menthol cigarettes from any new regulations, but section 907(e) requires the creation of a Scientific Advisory Committee to issue a report on the impact of menthol cigarettes on public health.¹⁰

B. GATT PROVISIONS RELEVANT TO THE DISPUTE: ARTICLE III:4 AND ARTICLE XX(B)

The GATT seeks to “[reduce] tariffs and other barriers to trade and [eliminate] discriminatory treatment in international commerce.”¹¹ GATT Article III prohibits WTO members from imposing taxes (Article III:2) or other regulations (Article III:4) that treat imports, after passage through customs, “less favorably” than domestic like products.¹² This Article embodies the important

Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399 (2006 & Supp. 2010). In 1996, the FDA claimed the authority to regulate cigarettes, but was subsequently restricted from doing so in the 2000 Supreme Court Decision, *FDA v. Brown & Williamson Tobacco Corp.* See 529 U.S. 120, 161 (2000) (concluding that Congress did not intend to allow the FDA to regulate tobacco products). The Family Smoking Prevention and Tobacco Control Act gives the FDA this regulatory authority under the FDCA. Family Smoking Prevention and Tobacco Control Act, § 101(b)(3). See generally C. STEPHEN REDHEAD & VANESSA K. BURROWS, CONG. RESEARCH SERV., R40196, FDA TOBACCO REGULATION: HISTORY OF THE 1996 RULE AND RELATED LEGISLATIVE ACTIVITY, 1998-2008 (2009) (surveying federal regulation of cigarettes from 1996 through 2009).

7. See Family Smoking Prevention and Tobacco Control Act, §§ 101(b), 907(a)(1)(A); see also FDA, GUIDANCE FOR INDUSTRY AND FDA STAFF: GENERAL QUESTIONS AND ANSWERS ON THE BAN OF CIGARETTES THAT CONTAIN CERTAIN CHARACTERIZING FLAVORS 1, 4 (2d ed. 2009) (outlining the FDA’s stance on the scope of the Family Smoking Prevention and Tobacco Control Act).

8. Family Smoking Prevention and Tobacco Control Act, § 907(a)(1)(A).

9. E.g., Press Release, FDA, Candy and Fruit Flavored Cigarettes Now Illegal in United States; Step is First Under New Tobacco Law (Sept. 22, 2009), available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2009/ucm183211.htm>.

10. Family Smoking Prevention and Tobacco Control Act, § 907(e).

11. General Agreement on Tariffs and Trade pmb., Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

12. See General Agreement on Tariffs and Trade 1994 art. III:1, (2), (4), Apr.

principle of national treatment, which holds that all goods and services, regardless of origin, must be treated equally after they enter into a domestic market.¹³ Article III:4 applies the national treatment principle explicitly to a nation's enforcement of laws, regulations, and other requirements.¹⁴

GATT Article XX enumerates certain "general exceptions" that allow members to violate GATT rules if necessary to pursue legitimate domestic policies.¹⁵ These exceptions exist because the WTO recognizes that members must pursue important policies other than free trade.¹⁶ Article XX(b) allows nations to pursue WTO-

15. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 190 [hereinafter GATT] ("The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production."); see also Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, 16, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 1, 1996) [hereinafter *Japan – Alcohol*] (noting that the "after customs" language in Article III:1 was intended to prevent indirect protectionism); Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 99, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC – Asbestos*] (noting that like product under Article III:4 is broader than under Article III:2).

13. See WTO, UNDERSTANDING THE WTO 10-11 (2010), available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf (describing national treatment as a way to prevent discrimination against foreign products, services, or nationals).

14. See GATT, *supra* note 12, art. III:4 ("The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."); *Japan – Alcohol*, *supra* note 12, at 14 (calling the prevention of protectionist measures the "broad and fundamental purpose" of Article III).

15. GATT, *supra* note 12, art. XX; see also Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 121, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *U.S. – Shrimp*] (stating that the enumerated exceptions in GATT Article XX are recognized as embodying domestic policies that are "important and legitimate in character").

16. See BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND* 339 (2d ed.

inconsistent measures if they are “necessary to protect human, animal, or plant health.”¹⁷ Should a member pursue a policy that falls under the scope of Article XX, it does not have to preemptively defend the policy unless challenged by another member through the GATT’s Dispute Resolution Mechanism.¹⁸ The burden of proof falls on the member invoking the Article XX exception.¹⁹

C. INDONESIA’S WTO COMPLAINT

Indonesian diplomats argue that banning clove cigarettes, while continuing to allow the sale of menthol cigarettes, would discriminate against Indonesian products and therefore violate the U.S. obligation to avoid nondiscriminatory trading practices as a member of the WTO.²⁰ Indonesia believes that the Act discriminates against clove cigarettes because clove cigarettes sold in the United States before the ban were imported primarily from Indonesia, whereas virtually all menthol cigarettes sold in the United States are produced domestically.²¹ On April 7, 2010, the Indonesian delegation

2001) (recognizing that certain non-economic objectives are vital to countries’ public policies).

17. GATT, *supra* note 12, art. XX(b).

18. See HOEKMAN & KOSTECKI, *supra* note 16, at 339 (explaining that the lack of a notification requirement means that the affected party must initiate the dispute if it believes the challenged policy does not fall under an Article XX exception).

19. See Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 20-21, WT/DS2/9 (May 20, 1996) [hereinafter *U.S. – Gasoline*] (placing the burden of proof on the United States to show, as the party invoking the exception, that the discrimination against imported gasoline was justified under Article XX when challenged under the Dispute Settlement Mechanism).

20. See 155 CONG. REC. E912, E913-14 (daily ed. Apr. 21, 2009) (statement of Rep. Virginia Foxx) (introducing into the Congressional Record letters from Indonesian Ambassador Parnohadiningrat to the Chairman of the House Energy and Commerce Committee Henry Waxman on July 25, 2008, and from the Indonesian Minister of Trade, Mari Elka Pangestu, to former Ambassador Schwab on August 28, 2007, both of which raised concerns about a ban on flavored cigarettes).

21. See *U.S. Blocks Indonesian Request*, *supra* note 4 (referencing data provided by Indonesia that it produces ninety-nine percent of clove cigarettes sold in the United States); see also *US blocks Indonesian request for panel on clove cigarettes* (June 22, 2010), http://www.wto.org/english/news_e/news10_e/dsb_22_jun10_e.htm (reporting that over ninety-nine percent of clove cigarettes sold in the U.S. were produced in Indonesia, and that more than six million Indonesian jobs have been affected by the U.S. ban on clove cigarettes); Arti Ekawati & Faisal Maliki Baskoro, *Clove Tobacco Industry Faces Dual Challenges*, JAKARTA GLOBE

initiated the WTO's Dispute Resolution Process by circulating a Request for Consultations with the United States.²² Indonesia alleges that section 907 of the Act violates GATT Article III:4.²³ Indonesia maintains that because clove and menthol cigarettes are "like products," and because the ban applies to clove cigarettes, but not to menthol cigarettes, it violates the nondiscrimination clause of Article III:4.²⁴ Furthermore, Indonesia contends that Article XX(b), which allows for limited exceptions to discriminatory trade policies if they are necessary to protect human health, does not apply because the Act "unjustifiably" and "arbitrarily" discriminates against the Indonesian product.²⁵ The United States rejects Indonesia's arguments.²⁶

(June 22, 2010), <http://www.thejakartaglobe.com/business/clove-tobacco-industry-faces-dual-challenges/382003> (adding to the mounting pressure against clove cigarettes, the World Health Organization has proposed a ban on all flavored cigarettes in its Framework Convention on Tobacco Control).

22. *U.S. – Clove Cigarettes*, *supra* note 3, ¶¶ 1-2. *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401. The WTO Dispute Resolution Process is administered by the Dispute Settlement Body ("DSB"). *Id.* Should Consultations between members involved in the dispute fail, a Dispute Resolution Panel will be formed and will rule on the dispute. *Id.* art. 4 ¶ 7. Any party to the dispute can appeal the judgment of the Panel to the Appellate Body, which may "uphold, modify, or reverse" the Panel's findings. *Id.* art. 17, ¶¶ 4, 13. After the Appellate Body releases its report, the member who is found to have violated its obligations must state its intention to bring its trade practices into conformity with its WTO obligations. *Id.* art. 21, ¶ 3.

23. *Dispute DS406*, *supra* note 2, ¶ 5(a).

24. *Id.*

25. *See id.* ¶¶ 2-5 (outlining Indonesia's allegations that section 907 of the FDCA, in addition to violating GATT, also violates other WTO provisions, including the Agreement on Technical Barriers to Trade ("TBT") and the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS")). SPS sets allowable constraints regarding food safety and sets standards for animal and plant health. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 401. TBT insures that technical standards do not result in unnecessary barriers to trade. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 401.

26. *See U.S. Blocks Indonesian Request*, *supra* note 4 (stating the U.S. position that Indonesia's WTO complaint is premature, given the ongoing FDA investigation of flavored cigarettes).

II. ANALYSIS

A. THE U.S. BAN ON CLOVE CIGARETTES IS INCONSISTENT WITH OBLIGATIONS ARISING UNDER GATT ARTICLE III:4 BECAUSE CLOVE CIGARETTES AND MENTHOL CIGARETTES ARE “LIKE PRODUCTS” AND THE BAN DISCRIMINATES AGAINST CLOVE CIGARETTES.

GATT Article III:4 prohibits WTO members from passing laws, regulations, or other requirements that treat an imported product less favorably than a “like” domestically-produced product after it passes through customs.²⁷ Section 907 of the FDCA violates Article III:4 because clove cigarettes and menthol cigarettes are “like products” and the Act discriminates against foreign-produced clove cigarettes by allowing the sale of menthol cigarettes. This conclusion is based on an Appellate Body determination in *EC – Asbestos* that broadly interpreted “like products” to refer to products that are in a competitive relationship.²⁸

After analyzing the competitive relationship between clove and menthol cigarettes, the Dispute Resolution Panel should conclude that imported clove cigarettes and domestically produced menthol cigarettes are “like products” under Article III:4.²⁹ Consequently, the Panel should determine that the treatment of these “like products” is discriminatory under GATT because the United States provides clove cigarettes with drastically unequal competitive opportunities compared to the opportunities afforded to menthol cigarettes.³⁰

27. GATT, *supra* note 12, art. III:4; *see also Japan – Alcohol*, *supra* note 12, at 15-16 (emphasizing that members can still tax or regulate items to further domestic agendas as long as such taxation or regulation does not violate Article III or any other WTO agreement and that the “after customs” interpretation is aimed at preventing indirect protectionism).

28. *See EC – Asbestos*, *supra* note 12, ¶¶ 99-100 (acknowledging that the Appellate Body’s interpretation of “like products” gives the “provision a relatively broad product scope”).

29. *See GATT*, *supra* note 12, art. III:4; *EC – Asbestos*, *supra* note 12, ¶¶ 97-99 (mandating that the term “like product” in Article III:4 be interpreted in light of the “general principle” of Article III to avoid protectionism and “ensure ‘equality of competitive conditions’”).

30. *See Panel Report, United States – Standards for Reformulated and Conventional Gasoline*, ¶ 6.10, WT/DS2/R (Jan. 29, 2009) [hereinafter Panel Report, *U.S. – Gasoline*] (affirming that “less favorable treatment” is interpreted to mean whether a product is afforded unequal competitive opportunities than a

1. Domestically Produced Menthol Cigarettes and Imported Clove Cigarettes Are “Like Products” Under Article III:4 Because They Are in a Competitive Relationship

In determining whether products are in a competitive relationship, the Appellate Body endorsed a four-prong analysis created by a 1970 GATT Working Party Report on Border Taxes, which noted that the analysis was neither mandatory authority from a treaty nor a “closed list of criteria that will determine the legal characterization of products.”³¹ This framework includes an analysis of: (1) the products’ physical properties; (2) the extent to which the products are capable of serving the same end-use; (3) consumers’ perceptions and behavior towards the products; and (4) the products’ international classification for tariff purposes.³² Further, the Appellate Body cautioned that this list was to be used merely as a tool to examine relevant evidence and stressed the need to examine “all . . . pertinent evidence.”³³ The Panel, utilizing this four-prong framework and examining all relevant evidence, should conclude that clove and menthol cigarettes are “like products.”³⁴

“like” domestically-produced product). The Panel found that the U.S. treated imported gasoline less favorably than domestic gasoline under Article III:4 because government regulations forced certain importers to import gasoline at a lower price, which meant that importers had to “make cost and price allowances” because they had to import other types of gasoline to comply with the U.S. regulations. *Id.*

31. See *EC – Asbestos*, *supra* note 12, ¶¶ 101-02; GATT General Counsel, *Report by the Working Party on Border Tax Adjustments*, ¶ 18, L/3464 (Nov. 20, 1970) [hereinafter *Working Party Report*]; see also Robert E. Hudec, “*Like Product*”: *The Difference in Meaning in GATT Articles I and III*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 101, 101 (Thomas Cottier and Petros C. Mavroidis eds., 2000) (distinguishing between the notion that the meaning of “like product” varies depending on the policies behind the GATT provision at issue and the idea that “like product” cannot be “reduced to definable criteria”).

32. *EC – Asbestos*, *supra* note 12, ¶ 101; see, e.g., Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 7.415, WT/DS332/R (June 12, 2007) (showing that the Panel considers “physical characteristics, . . . end use, . . . tariff headings, . . . and evidence of any difference in consumers’ perceptions and behavior” in a like product analysis).

33. *EC – Asbestos*, *supra* note 12, ¶ 102.

34. See *id.*, ¶¶ 101-103 (noting that although the criteria of the Working Party provides a framework for analyzing “like product” questions, this does not “dissolve the duty or the need to examine, in each case, all of the pertinent evidence”).

First, the “properties, nature and quality” of menthol and clove cigarettes are very similar.³⁵ That is, both are cigarettes comprised primarily of tobacco.³⁶ Though clove cigarettes are made from a mixture of tobacco and approximately 30% to 40% minced cloves,³⁷ menthol cigarettes generally contain between 0.1% and 1.0% “of their tobacco weight in menthol.”³⁸ While it is evident that the percentage composition of the flavoring ingredient is much greater in clove cigarettes than in menthol cigarettes, the Appellate Body stated that an analysis of physical properties must be examined in the context of how those properties influence the “competitive relationship between products in the marketplace.”³⁹ The use of both clove and menthol serve as masking agents that mute the harshness of regular cigarettes.⁴⁰ The Appellate Body in *EC – Asbestos*

35. *See id.* ¶ 120 (clarifying that the physical properties of the products being compared for likeness are important but must be analyzed in the context of all relevant evidence).

36. *See* Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1332 (2006) (defining cigarette as “(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco in the filler, or its packaging and labeling, is likely to offered to, or purchased by, consumers as a cigarette described in subparagraph (A)”). Menthol and clove cigarettes, regardless of dimensions, fit this definition. Menthol and Clove cigarettes also fit the physical description of cigarettes as defined by common dictionaries. *See, e.g.*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 406 (1993) (defining cigarette as “a tube of finely cut tobacco enclosed in paper, designed for smoking and [usually] narrower and shorter than a cigar”). *See also* C. L. Gaworski et al., *Toxicologic Evaluation of Flavor Ingredients Added to Cigarette Tobacco: 13-week Inhalation Exposures in Rats*, 10 INHALATION TOXICOLOGY 357, 360 (1998) (describing the typical composition of cigarettes).

37. *See* Tee L. Guidotti et al., *Clove Cigarettes: The Basis for Concern Regarding Health Effects*, 151 W. J. MED. 220, 221 (1989) (describing the chemical composition of clove cigarettes and remarking that clove cigarettes have a higher tar content than “most domestic American brands”).

38. *See* Jennifer M. Kreslake et al., *Tobacco Industry Control of Menthol in Cigarettes and Targeting of Adolescents and Young Adults*, 98 AM. J. PUB. HEALTH 1685, 1685 (2008) (describing the properties and effects of the menthol in menthol cigarettes as a “monocyclic terpene alcohol that acts as a stimulant for cold receptors” which gives menthol cigarettes a “cooling sensation and mintlike flavor” when smoked).

39. *EC – Asbestos*, *supra* note 12, ¶ 114.

40. *See id.* at 1685; Guidotti et al., *supra* note 37, at 221-22; *cf.* Bhimrao K. Jadhav et al., *Formulation and Evaluation of Mucoadhesive Tablets Containing Eugenol for the Treatment of Periodontal Diseases*, 30 DRUG DEV. & INDUS. PHARMACY 195, 196 (2004) (describing the physiological effects of Eugenol, the

considered toxicity to be a factor in determining products' physical properties.⁴¹ However, this consideration included other factors, such as consumer preference for, or aversion to, such toxicity.⁴² Here, because both clove and menthol cigarettes are known to be carcinogens,⁴³ the presence of toxicity should not be considered an influencing factor as in *EC - Asbestos*.⁴⁴ Additionally, toxicity should also be excluded from the Panel's likeness determination because both menthol and clove cigarettes are tobacco delivery systems which are federally mandated to carry health warnings regarding the dangers of their toxicity.⁴⁵

The United States may have a valid argument that the percentage composition of the constituent ingredients of these two types of cigarettes is sufficiently different so as to result in dissimilar levels of toxicity.⁴⁶ This claim, however, is weakened by evidence suggesting that other additive-flavored cigarettes banned under the FDCA have a similar composition and level of toxicity as that found in menthol cigarettes.⁴⁷ Considering that the U.S. ban extends to

chemical found in clove, and its use as an anesthetic for dentistry procedures).

41. See *EC - Asbestos*, *supra* note 12, ¶ 122 (finding that evidence related to consumer demand was relevant to determining whether health risks were posed by chrysotile asbestos and PCG fibers because "[i]f the risks posed by a [product] are sufficiently great, the [consumer] may simply cease to buy the product").

42. *Id.*

43. See, e.g., DEP'T OF HEALTH & HUMAN SERV., CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, OFFICE ON SMOKING & HEALTH, THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL 3-8 (2004) [hereinafter Office on Smoking and Health Report] (identifying multiple forms of cancer linked to smoking and stating that every report the U.S. Surgeon General has issued found that smoking causes many diseases and harmful health effects).

44. See *EC - Asbestos*, *supra* note 12, ¶¶ 122-24 (finding that evidence of consumer demand is particularly relevant to "like product" determinations when toxicity is present in one product but lacking in another).

45. See Comprehensive Smoking Education Act of 1984, 15 U.S.C. § 1333 (2006) (mandating that cigarette manufacturers place stringent warnings on packs of cigarettes, regardless of flavor or inclusion of additives).

46. See *EC - Asbestos*, *supra* note 12, ¶ 114 (identifying toxicity as a fundamental physical property of chrysotile asbestos fibers, but not of PCG fibers, and concluding that the varying levels of toxicity between the two types of fibers must be a major factor in the Panel's likeness determination).

47. See Family Smoking Prevention and Tobacco Control Act, § 907 (banning cigarettes containing additives, artificial flavors, and herbs and spices); Report of the Panel, *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 42, 63-89, DS10/R - 37S/200 (Nov. 7, 1990) [hereinafter *Thailand -*

other flavored cigarettes with similar percentages of flavor additives as menthol cigarettes, this argument is unconvincing.⁴⁸ Therefore, even after consideration of the U.S. counter-argument, the first prong of the test is met.

Second, clove and menthol cigarettes perform the same end-use because they are both “nicotine delivery devices” for human beings.⁴⁹ The Appellate Body in *EC – Asbestos* defined end-use as “capable of performing the same, or similar, functions.”⁵⁰ Cigarette manufacturers use additives, such as clove or menthol, to enhance nicotine delivery by making the act of smoking more palatable for smokers.⁵¹ Because menthol cigarettes and clove cigarettes share this end-use, a Panel should find this prong met.⁵²

Cigarettes] (restating the U.S. argument that all manufactured cigarettes, even though they may have varying tobacco mixtures, are nonetheless “like products”). The Panel did not rule on this specific U.S. claim.

48. Cf. E.L. Carmines, *Evaluation of the Potential Effects of Ingredients Added to Cigarettes. Part I: Cigarette Design, Testing Approach, and Review of Results*, 40 FOOD & CHEMICAL TOXICOLOGY 77, 79-85 (2002) (describing the amount of flavoring ingredients involved in the manufacture of commercial cigarettes and showing that menthol, cocoa, and licorice all have similar concentrations). See Gaworski et al., *supra* note 36, at 360-62 (displaying that in a test comparing other flavor additives with menthol, where flavored cigarette additives were analyzed in the amount typically used in the manufacturing process, cocoa powder had a higher concentration and vanilla extract had a much lower concentration per cigarette).

49. Cf. Kreslake et al., *supra* note 38, at 1689 (stating that additive ingredients in cigarettes affect the “uptake” of the active drugs in cigarettes).

50. See *EC – Asbestos*, *supra* note 12, ¶ 117 (establishing that end-use of a product is linked explicitly to whether the products are in a competitive relationship).

51. See J. S. WIGAND, ADDITIVES, CIGARETTE DESIGN AND TOBACCO PRODUCT REGULATION TBD (2006), available at <http://www.jeffreywigand.com/WHOFinal.pdf> (listing the physiological effects of additives in cigarettes, including the amelioration of the effects of smoking by “making it more palatable either through the use of sweeteners or chemical agents that negate the normal airway aversion to smoke or have pharmacological action”).

52. Compare Kreslake, *supra* note 38, at 1689 (showing that scientific evidence supports the proposition that menthol cigarettes and clove cigarettes share the same end-use because they both have ingredients that affect the user’s uptake of the smoke produced by the product), with *EC – Asbestos*, *supra* note 12, ¶ 144 (positing that the Appellate Body could not conclusively determine whether products containing asbestos fibers could fulfill all the same end-uses as products without asbestos fibers and therefore could not determine whether the two products generally fulfilled the same end-use).

Third, consumers use clove and menthol cigarettes for the same purpose: to fulfill a desire to smoke a tobacco product.⁵³ The Appellate Body in *EC – Asbestos* stated that evidence regarding the extent to which consumers chose one product over another is “highly relevant evidence in assessing the ‘likeness’ of those products under Article III:4.”⁵⁴ Consumers’ tastes and habits clearly show that they buy cigarettes, regardless of flavor, to fulfill a pharmacological, social, or personal need.⁵⁵ The fact that menthol cigarettes have a much larger market share is not directly relevant under the *EC – Asbestos* interpretation, which instead focuses on consumers’ ability to choose between the products.⁵⁶ Before the ban, consumers were able to exercise a choice; now they cannot.⁵⁷

Finally, the tariff classifications of menthol and clove cigarettes are very comparable.⁵⁸ Though the *EC - Asbestos* Appellate Body Report downplayed the importance of the tariff classification factor in determining whether products are like, it is still a relevant element in the “like product” analysis.⁵⁹ According to the U.S. International Trade Commission’s Harmonized Tariff Schedule, all cigarette

53. See Martin J. Jarvis, *ABC of Smoking Cessation: Why People Smoke*, 328 BRIT. MED. J. 277, 277 (2004) (recognizing that “smoking is primarily a manifestation of nicotine addiction” but also that people smoke cigarettes for a number of reasons besides their pharmacological effects, including personal, social, economic, and political reasons).

54. *EC – Asbestos*, *supra* note 12, ¶ 117.

55. See Jarvis, *supra* note 53, at 277 (averring that “[s]ocial, economic, personal, and political influences [help] determin[e] patterns of smoking”); Kreslake, *supra* note 38, at 1685 (stating that the cigarette industry constantly “develops product innovations to encourage experimentation and use” among smokers).

56. See *EC – Asbestos*, *supra* note 12, ¶ 117 (finding that if there is no competitive relationship between two products, then there is no way to comparatively measure consumers’ taste and habits with regard to those products).

57. See Family Smoking Prevention and Tobacco Control Act, § 907 (banning the sale of all flavored cigarettes except for menthol cigarettes).

58. See U.S. Int’l Trade Comm’n, *Harmonized Tariff Schedule of the United States*, ch. 24-12 (2010), available at <http://www.usitc.gov/publications/docs/tata/hts/bychapter/1000htsa.pdf> [hereinafter *Harmonized Tariff Schedule*] (showing that all cigarettes, including clove and menthol cigarettes, share the same tariff heading).

59. See *EC – Asbestos*, *supra* note 12, ¶ 140 (finding that the divergent tariff headings for chrysotile asbestos fibers and PCG fibers tended to indicate that the products were not “like products” under Article III:4).

tariffs are located under the heading 2402.20.⁶⁰ For international tariff purposes, clove cigarettes and menthol cigarettes are treated identically, and thus the fourth prong is unequivocally met.⁶¹ Application of the four-pronged *EC – Asbestos* analysis therefore reveals that menthol and clove cigarettes are “like products” because they share the same end-use, have an identical tariff classification, are physically similar, and are employed by consumers to fill an analogous need.⁶²

2. The Ban on Clove Cigarettes is Discriminatory Under Article III:4 Because the Competitive Opportunities for Clove Cigarettes are Less than Those for Menthol Cigarettes.

After finding that clove and menthol cigarettes are “like products,” the Panel should conclude that the United States gives imported clove cigarettes less favorable treatment than domestically produced menthol cigarettes.⁶³ In *U.S. – Gasoline* the Panel determined that less favorable treatment exists where an imported product has fewer equal competitive opportunities than a domestically produced product.⁶⁴

60. See Harmonized Tariff Schedule, *supra* note 58, at 24-12 (showing that cigarettes containing tobacco generally have the tariff heading 2402.20, and that clove cigarettes are a subset of cigarettes containing tobacco and have the sub-heading 2402.20.10); see generally Office of the U.S. Trade Representative, *Tariff Schedules: Harmonized System and World Customs Organization*, <http://www.ustr.gov/trade-topics/industry-manufacturing/industrial-tariffs/tariff-schedules> (explaining that the U.S.’ harmonized tariff schedule is based on the classification scheme created by the International Harmonized Commodity Description and Coding System (“HS”) administered by the World Customs Organization, which sets the global standard tariff classification system). This tariff system is used by over 200 countries and economies around the world and more than ninety-eight percent of goods traded internationally are categorized by the HS. *Id.*

61. Harmonized Tariff Schedule, *supra* note 58.

62. See *EC – Asbestos*, *supra* note 12, ¶ 101 (outlining the four-pronged test).

63. See GATT, *supra* note 12, art. III:4 (providing that imported products “shall be accorded treatment no less favourable” than like domestic products).

64. See Panel Report, *U.S. – Gasoline*, *supra* note 30, ¶ 6.10 (finding, *inter alia*, that U.S. standards for gasoline cleanliness were more burdensome for imported gasoline than domestically produced gasoline, making imported gasoline more expensive); see also Appellate Body Report, *Korea – Measures Affecting Import of Fresh, Chilled, and Frozen Beef*, ¶ 139, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter *Korea – Beef*] (finding that Korea violated Article III:4 by requiring that imported beef be sold separately from

In the present case, the Panel will have little trouble determining that the Act treats menthol cigarettes more favorably than it does clove cigarettes. The Indonesian complaint is analogous to *U.S. – Gasoline* because the competitive conditions surrounding menthol cigarettes are much more favorable than the conditions afforded to clove cigarettes; FDCA allows the former to be sold in the United States but bans the latter.⁶⁵ Therefore, because menthol and clove cigarettes are “like products,” and because the United States affords clove cigarettes less favorable treatment than menthol cigarettes, the Panel should find that the U.S. ban is a discriminatory trade practice under current interpretation of Article III:4.

B. THE PUBLIC HEALTH EXCEPTION OF ARTICLE XX(B) DOES NOT APPLY BECAUSE THE BAN ON CLOVE CIGARETTES IS NOT NECESSARY AND IT IS INCONSISTENT WITH THE BINDING GOAL OF THE ARTICLE’S CHAPEAU.

The ban cannot be justified as an exception under Article XX(b).⁶⁶ An Article XX(b) exception will be valid only if a member country establishes three elements: (1) the policy in question protects human, animal, or plant life or health; (2) the policy is necessary to reach the policy objective; and (3) the measures meet the requirements of the introduction, or *chapeau*, of Article XX.⁶⁷ While the United States

domestic beef). In *Korea – Beef*, the government mandated “dual-retail system” for sales of beef was less favorable to imported beef products because 1) consumers were hindered from comparing the products; 2) retailers had to substitute imported beef for all domestic beef; 3) market-opportunities for imported beef were curtailed; and 4) consumers were led to believe that imported and domestic beef were different even though they were “like products” under Article III:4. *Id.*

65. See Family Smoking Prevention and Tobacco Control Act, § 907; Panel Report, *U.S. – Gasoline*, *supra* note 30, ¶ 6.10 (noting that an Article III:4 violation occurs when competitive conditions are different between domestic and imported products).

66. See GATT, *supra* note 12, art. XX(b) (exempting measures “necessary to protect human, animal or plant life or health”); *cf.* *EC – Asbestos*, *supra* note 12, ¶¶ 162-163, 192 (finding that asbestos was a health risk and holding that its adverse treatment was appropriate under the Article XX(b) exception).

67. See GATT, *supra* note 12, art. XX (“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures [falling within one of the expressly provided exceptions.]”); *see also*

can prove that its policy is designed to protect human health, it cannot prove that the ban is necessary or that it conforms to the binding goal of the *chapeau* of Article XX.⁶⁸

1. The Ban on Clove Cigarettes Is a Policy Designed to Protect Human Life and the Health of American Children.

The United States will likely argue that the ban is defensible under an XX(b) exemption because the ban on flavored cigarettes protects U.S. children from the harms of smoking cigarettes.⁶⁹ To determine whether a policy's purpose is to protect human health, the Panel generally considers the design and structure of the policy.⁷⁰ The United States can offer data on the dangers of child smoking⁷¹ to

Panel Report, *U.S. – Gasoline*, *supra* note 30, ¶ 6.20 (noting that the party that invokes the exception has the burden of proof for demonstrating that the inconsistent measure is within the scope of Article XX exceptions). Though the *U.S. – Gasoline* dispute was not reviewed by the Appellate Body, the Panel also used this test in *EC – Asbestos* and *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*. See Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.184, WT/DS135/R (Sept. 18, 2000) [hereinafter *EC – Asbestos Panel Report*] (using the *U.S. – Gasoline* test to determine if the ban on asbestos-containing products fit within an Article XX(b) exception); Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 7.198–7.199, WT/DS246/R (Dec. 1, 2003) [hereinafter *EC – Tariff Preferences*] (employing the *U.S. – Gasoline* test to determine whether arrangements to combat drug production and trafficking in developing countries were justified under Article XX(b)).

68. GATT, *supra* note 12, art. XX.

69. See, e.g., World Health Org. (“WHO”), *The Scientific Basis of Tobacco Product Regulation*, at 36-37, No. 945 (2007), http://www.who.int/tobacco/global_interaction/tobreg/9789241209458.pdf (indicating that flavored cigarettes tend to target youths by “promoting youth initiation and helping young occasional smokers to become daily smokers by reducing or masking the natural harshness and taste of tobacco smoke”); see also discussion *infra* Part III(B)(2) (noting that the upcoming 2011 scientific study, required by the Family Smoking Prevention and Tobacco Control Act, will investigate the effects of menthol cigarettes and report its findings by March 2011).

70. See *EC – Tariff Preferences*, *supra* note 67, ¶¶ 7.201-202, 7.207 (finding that the policy behind the EC's Drug Arrangements, which granted certain tariff preferences, was designed to fulfill sustainable development and poverty objectives and not to protect human health).

71. See OFFICE ON SMOKING AND HEALTH REPORT, *supra* note 43, at 3 (outlining the “diseases and other adverse health effects” linked to smoking); 29 *Surgeon General's Reports on Smoking and Health, 1964–2006*, U.S. OFFICE OF THE SURGEON GENERAL (2006), <http://www.surgeongeneral.gov/library/second>

prove that the ban on clove cigarettes protects children from the dangers of smoking.

The present case is factually analogous to *Thailand – Cigarettes*, where the Panel, using an older Article XX(b) analysis that stressed whether other alternative measures were reasonably available, found that smoking was a risk to human health and that policies designed to reduce the number of smokers fell within the scope of Article XX(b).⁷² The Appellate Body in *EC – Asbestos* found that asbestos-containing products were scientifically shown to cause human harm.⁷³ Here, the U.S. Congress passed a law with a designed intent similar to the questioned policy in *Thailand – Cigarettes*: reducing the number of children who smoke cigarettes.⁷⁴ By banning the sale of flavored cigarettes, Congress sought to remove an opportunity for children to become regular, daily smokers and to reduce the risk of tobacco-related disease.⁷⁵ The Panel will have no difficulty finding that Indonesian-produced clove cigarettes pose a health risk to U.S. children, and therefore, the United States will fulfill the first element required for an Article XX(b) exception.⁷⁶

handsmoke/factsheets/factsheet8.html (summarizing the findings of the twenty-nine U.S. Surgeon General reports that found adverse health consequences related to smoking cigarettes).

72. See *Thailand – Cigarettes*, *supra* note 47, ¶¶ 73-74 (explaining that the meaning of “necessary” under Article XX(b) is the same as that under Article XX(d)); see also Family Smoking Prevention and Tobacco Control Act, §§ 2(14), (30)-(31) (elucidating Congressional findings that reducing the number of children who smoke is a goal of the legislation).

73. See *EC – Asbestos*, *supra* note 12, ¶ 157 (finding that asbestos-containing products cause certain human illnesses).

74. Compare *Thailand – Cigarettes*, *supra* note 47, ¶ 38 (noting that the goal of the Thai policy was to reduce the harm to the public caused by cigarettes), with Family Smoking Prevention and Tobacco Control Act §§ 2(1)-(7), (13)-(14) (stating that tobacco regulation is in the U.S.’ public interest and expressing concern with the adverse health consequences associated with smoking, particularly those that affect youth smokers).

75. See Enforcement of General Tobacco Standard Special Rule for Cigarettes, 74 Fed. Reg. 48974 (FDA Sept. 25, 2009) (notice) [hereinafter FDA Notice] (explaining that from Congress’ perspective, “[t]he removal from the market of cigarettes that contain certain characterizing flavors is an important step in the FDA’s efforts to reduce the burden of illness and death caused by tobacco products” because flavored cigarettes appeal to children and make it more likely that youth smokers will become addicted to smoking).

76. See *EC – Asbestos*, *supra* note 12, ¶ 175 (clarifying that if a Panel recognizes a credible health risk, then the member has established a *prima facie*

2. *The Ban on Clove Cigarettes Is Unnecessary Because the United States Can Pursue Other Nondiscriminatory Policy Measures That Accomplish Its Public Health Objectives.*

Though the ban on clove cigarettes prevents children from smoking clove cigarettes, the policy by which the goal is achieved fails the Article XX(b) “necessary” requirement.⁷⁷ For a measure to be necessary, the Appellate Body requires that the measure be close to “indispensable” to protect human health.⁷⁸ The Appellate Body in *Brazil – Tyres* reaffirmed an established balancing test in evaluating whether a policy is “necessary”: the trade restricting elements of the questioned policy are weighed against the degree to which it protects human, plant, or animal health.⁷⁹ Furthermore, a member’s policy is necessary only if no other alternative would satisfy the policy’s goals while remaining consistent with its obligations under GATT.⁸⁰

The United States faces a difficult task in proving the nonexistence of other, less intrusive means to achieve the policy’s goal that do not discriminate against foreign products and are consistent with GATT.⁸¹ The Appellate Body addressed a similar problem in *EC –*

case for an Article XX(b) exception).

77. See *EC – Tariff Preferences*, *supra* note 67, ¶¶ 7.197(2), 7.211–7.213 (stating that to invoke an Article XX(b) exception, a party must show that the “inconsistent measures for which the exception was being invoked were necessary” to fulfill the policy objective)(emphasis omitted).

78. See *id.* ¶ 7.211 (describing a continuum of policies that could be considered necessary, and opining that the policy should be closer to “indispensable” in protecting human health, rather than merely “making a ‘contribution to’” protecting human health).

79. See Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 24, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter *Brazil – Tyres*] (“Weighing and balancing involves, first, an individual assessment of each element (importance of the objective pursued; trade restrictiveness of the measure; contribution of the measure to the achievement of the objective) and, then, a consideration of the role and relative importance of each element together with the other elements, for the purposes of deciding whether the challenged measure is necessary to achieve the relevant objective.”).

80. See *Thailand – Cigarettes*, *supra* note 47, ¶¶ 74-75 (finding that Thailand’s restrictions on cigarette imports would be considered “necessary . . . only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives”).

81. See *EC – Tariff Preferences*, *supra* note 67, at ¶¶ 7.176, 7.236, 8.1 (determining that the EC’s Drug Arrangements, which suspended the Generalized System of Preferences (“GSP”), were inconsistent with GATT because they did

Asbestos, where they inquired whether there was an alternative policy that would restrict trade less severely than an outright ban on asbestos-containing products.⁸² However, unlike the Appellate Body determination in *EC – Asbestos*, which found that the ban on asbestos-containing fibers was necessary because there were no other feasible alternative policies, the United States has other ways to fulfill its health policy objectives.⁸³ For example, the United States could pass legislation that would place all flavored cigarettes in the same regulatory framework.⁸⁴ Additionally, the United States could rescind the ban on flavored cigarettes and replace it with a tax that would apply to all flavored cigarettes, including menthol cigarettes.⁸⁵ Besides taxation-based solutions, the United States could enact legislation that would include menthol cigarettes in the ban on all flavored cigarettes.⁸⁶ Any of these alternative solutions would fulfill the health policy goals of the Act without violating GATT's nondiscrimination obligations.⁸⁷

The United States claims that a scientific report mandated by the Act will aid in determining how menthol cigarettes will be regulated in the future.⁸⁸ Specifically, section 907(e) of the Act mandates the creation of a report that will study the “impact of the use of menthol

not apply equally to all countries).

82. See *EC – Asbestos*, *supra* note 12, ¶ 174 (concluding that there was no viable alternative to a blanket ban on products containing asbestos that could achieve the desired health objective of reducing exposure to carcinogens).

83. See *id.*; see also discussion *infra* Part IV (discussing potential legislative solutions).

84. See discussion *infra* Part IV (describing four potential GATT-consistent legislative solutions that would, to varying degrees, fulfill the Act's policy goals).

85. See *id.* (discussing taxation and other possible regulatory solutions that are GATT-consistent and that would fulfill the policy goals of the Act).

86. Such a solution could entail deleting the legislative exception for menthol cigarettes in Section 907(a)(1)(A) of the FDCA. See Family Smoking Prevention and Tobacco Control Act, §§ 101, 907(a)(1)(A) (amending the FDCA to include provisions of the Act and exempting menthol cigarettes from the flavored cigarette ban).

87. See *id.* § 2 (observing that youth smoking is a serious public health problem); see also GATT, *supra* note 12, art. XX (requiring that any policy used to protect human health not discriminate against foreign goods).

88. See Jonathan Lynn, *US Rejects Panel on Clove Cigarette Ban*, REUTERS, June 22, 2010, available at <http://www.reuters.com/article/idUSLDE65L1O920100622> (citing a U.S. official who argued that a request for a Panel ruling was premature because the legislation calls for a scientific Panel to investigate and issue a report on the effects of menthol cigarettes by March 2011).

in cigarettes on the public health, including such use among children, African-Americans, Latinos, and other racial and ethnic minorities,” before taking further action.⁸⁹ If the United States plans to defend the section 907(e) policy on the grounds that it is necessary to protect human health and that it is based on sound scientific evidence, it will fall short for two reasons. First, the argument likely fails because it does not convincingly explain why the policy must violate GATT Article III:4 by discriminating against all non-menthol flavored cigarettes.⁹⁰ Second, the reliance on the particular scientific study mandated by section 907(e) is unlikely to convince the Panel that the ban is necessary. The Appellate Body in *EC – Asbestos* addressed the role of scientific evidence in determining policies “necessary” to protect health.⁹¹ The Appellate Body stated: “A [m]ember is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion.”⁹² *EC – Asbestos* best explained the treatment of scientific evidence by stating that “responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources.”⁹³ The United States seems to argue that, by mandating a scientific study on the health effects of menthol cigarettes, it is performing needed scientific assessments before considering further legislation that would place restrictions on menthol cigarettes.⁹⁴ This argument provides weak justification for treating menthol differently. Current scientific

89. Family Smoking Prevention and Tobacco Control Act, § 908(e).

90. *See id.*; GATT, *supra* note 12, art. III:4 (declaring that foreign products must be given treatment “no less favourable” than that given to similar domestic products).

91. *See EC – Asbestos*, *supra* note 12, ¶ 167 (discussing the scientific evidence regarding whether exposure to asbestos-containing cement products was harmful to human health).

92. *See id.* ¶¶ 29, 178 (concluding that a Panel does not need to reach a decision based on the preponderance of the evidence standard when reaching a decision on an Article XX(b) issue).

93. *See id.* ¶¶ 177-81 (quoting Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, ¶ 194, WT/DS26/AB/R, WT/DS48/AB/R, (Feb. 13, 1998)) (holding that where France relied in good faith on scientific evidence showing that certain asbestos-containing products were harmful to human health, that scientific evidence was a legitimate basis for its policy decision).

94. *See* Family Smoking Prevention and Tobacco Control Act, § 907(e) (calling for the scientific study on menthol cigarettes).

literature, including extensive research released by the U.S. Surgeon General, overwhelmingly and uniformly supports the conclusion that all cigarettes, including menthol cigarettes, are harmful to human health.⁹⁵ It is therefore highly dubious that the United States can offer this argument in good faith as required by the clear interpretation given by the Appellate Body in *EC – Asbestos*.

3. *The Ban on Clove Cigarettes Violates the Chapeau of Article XX Because It Discriminates Against Indonesian Imports of Clove Cigarettes.*

If Indonesia proves that, under subparagraph (b), the U.S. ban is not necessary to protect human health, the analysis ends and the U.S. would be found in violation of its WTO obligations.⁹⁶ However, even if the United States succeeds in convincing the Panel that the ban is necessary, the ban would still fail under the requirements of the *chapeau*.⁹⁷ The *chapeau* prohibits measures that constitute arbitrary and unjustifiable discrimination between countries where the same conditions prevail and are a hidden restriction on international trade.⁹⁸ GATT's negotiators constructed the *chapeau* with the goal of preventing abuse of the Article XX exceptions.⁹⁹ According to the Appellate Body in *U.S. – Shrimp*, three constituent elements must be

95. See 29 *Surgeon General's Reports*, *supra* note 71 (listing and surveying Surgeon Generals' Reports from 1964 through 2006 addressing the impact of smoking on health, all of which conclude that all cigarettes have deleterious health effects); see also *About the Office of the Surgeon General*, OFFICE OF THE SURGEON GENERAL, <http://www.surgeongeneral.gov/about/index.html> (last visited Nov. 4, 2010) (stating the mission of the Surgeon General is to "provid[e] Americans [with] the best scientific information available on how to improve their health and reduce the risk of illness and injury").

96. See *U.S. – Gasoline*, *supra* note 19, at 22-23 (explaining that an Article XX analysis is a "two-tiered" test because it is subject to the particular exceptions listed in Article XX(a)-(j) and to the introductory requirements of Article XX's *chapeau*).

97. *Id.*

98. See *id.* at 22-24 (clarifying that the *chapeau* is to be applied reasonably with regard to the particular exceptions of Article XX, and construed broadly to avoid arbitrary or discriminatory trade violations, unless one of the listed exceptions applies).

99. See *U.S. – Shrimp*, *supra* note 15, ¶ 157 (noting that pursuant to the negotiation history of the *chapeau*, the Article XX exceptions should be applied in a "limited and conditional" manner).

present before a policy violates the *chapeau*:¹⁰⁰ (1) the applied measure must be discriminatory;¹⁰¹ (2) the discrimination must be arbitrary or unjustifiable;¹⁰² and (3) the discrimination must be found between countries where “the same conditions prevail.”¹⁰³

The U.S. ban meets all three elements of this test and thus violates the Article XX *chapeau*. When considering the first two elements of the test, the Panel should find that the U.S. ban on clove cigarettes is discriminatory because it is “arbitrary or unjustifiable.”¹⁰⁴ In *EC – Asbestos*, the Panel Report observed that in order to find a policy arbitrary or unjustifiably discriminatory, the Panel must examine the manner in which a member applies the questioned policy.¹⁰⁵ Here, the Panel found that a French ban on all white asbestos, including those produced domestically, did not violate the *chapeau* because it did not unfairly or unjustifiably discriminate against imported asbestos.¹⁰⁶ In *U.S. – Gasoline*, the Appellate Body found that a U.S. policy of regulating imported gasoline differently than domestic gasoline was unjustifiable under the *chapeau* partly because the United States did not consider the cost of its policies on other

100. See *id.* ¶ 150 (stating that these elements underlie the concept of “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” as stated in the *chapeau*).

101. See *id.* ¶ 176 (deciding that the application of U.S. law to various countries that export shrimp was discriminatory, and finding that discrimination is an element in determining whether a country’s policy violates the *chapeau*).

102. See *id.* ¶ 184 (finding that a U.S. certification process for applicant countries seeking to meet U.S. standards for shrimp imports was discriminatory in that it was both “arbitrary” and “unjustifiable,” causing the Appellate Body to hold that the certification policy violated the *chapeau*).

103. See GATT, *supra* note 12, art. XX; *U.S. – Shrimp*, *supra* note 15, ¶ 184 (finding that arbitrary discrimination occurred in countries with like conditions where shrimp caught using methods acceptable to U.S. regulations were banned from the U.S. because they were caught in the waters of countries that were not certified by the U.S.); *U.S. – Gasoline*, *supra* note 19, at 23-24 (finding that the standard of “where the same conditions prevail” applies to both conditions in importing and exporting countries, as well as conditions found only in exporting countries).

104. GATT, *supra* note 12, art. XX.

105. See *EC – Asbestos Panel Report*, *supra* note 67, ¶ 8.226.

106. *Id.* ¶¶ 2.3-2.5, 8.222-8.224 (noting that the French ban was applied equally to like exports and domestic products, and that the ban was intended to protect workers and consumers from the hazardous health effects associated with asbestos).

countries.¹⁰⁷

The present case can be distinguished from *EC – Asbestos* because the ban on flavored cigarettes singles out nations that are large exporters of clove cigarettes and leaves U.S. menthol producers with a monopoly on legally-available flavored cigarettes.¹⁰⁸ In this respect, the U.S. ban is similar to actions that prompted the Venezuelan complaint in *U.S. – Gasoline*.¹⁰⁹ In the present case, there is little evidence that the U.S. Congress substantively considered the trade implications of the Family Smoking Prevention and Tobacco Control Act.¹¹⁰ The Indonesian economy feels the impact of the U.S. ban on clove cigarettes much more acutely than the U.S. economy because “the [U.S.] does not produce clove cigarettes, whereas ninety-nine percent of the clove cigarettes imported by the [U.S.] come from Indonesia.”¹¹¹

107. See *U.S. – Gasoline*, *supra* note 19, at 28-29 (finding that the U.S. discrimination against imported gasoline was unjustifiable because it “must have been foreseen” and was likely avoidable). The Panel held that the nature of discrimination under the *chapeau* of Article XX was different than that needed under Article III:4, and noted that the U.S. policy went “beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place.” See *id.*

108. See Family Smoking Prevention and Tobacco Control Act, § 907(a) (banning all flavored cigarettes except for menthol flavored cigarettes); *EC – Asbestos*, *supra* note 12, ¶ 2 (noting that France’s ban on asbestos products was a blanket ban, prohibiting use of asbestos from manufacture to sales in the French domestic marketplace).

109. See *U.S. – Gasoline*, *supra* note 19, at 28-29 (finding that the U.S. failed to account for the cost to refiners in importing countries by not cooperating with foreign governments to help mitigate the impact of imposing statutory baselines under the U.S. Gasoline Rule).

110. See 155 CONG. REC. E912-13 (daily ed. Apr. 21, 2009) (accounting for what was the only statement in the Congressional Record during debate on the bill that raised the potential implications of the Act on the U.S.-Indonesia trade relationship).

111. See 155 CONG. REC. E913-14 (daily ed. Apr. 21, 2009) (Letter from Mari Elka Pagestu, Minister of Trade, Republic of Indonesia, to Ambassador Susan Schwab, United States Trade Representative) (contrasting the fact that the U.S. does not produce clove cigarettes with the fact that menthol cigarettes are produced “almost exclusively” in the U.S. and highlighting the fact that clove cigarettes accounted for only 0.1% of the total U.S. cigarette market); see also Mark Drajem & Lorraine Woellert, *Clove Cigarettes May Prompt U.S., Indonesia Dispute (Update 1)*, BLOOMBERG (May 19, 2009), <http://www.bloomberg.com/apps/news?pid=21070001&sid=a9YjoELUY1jU> (stating that about one-fifth of Indonesia’s \$500 million per year export value of clove cigarettes were imported to

The third element is satisfied because the ban applies to all cigarettes, except menthol, regardless of where they were manufactured.¹¹² *U.S. – Gasoline* clarifies that the discrimination may refer to differences in the conditions imposed on an exporting country versus an importing country, as well as to differences in conditions between various exporting countries.¹¹³ In the present case, U.S. firms may manufacture and sell menthol cigarettes in the United States, but Indonesia cannot export clove cigarettes to the United States.¹¹⁴ Therefore, due to the structure and impact of the U.S. ban on flavored cigarettes, it violates the *chapeau* because it is unjustifiably discriminatory between countries where the same conditions prevail.

III. RECOMMENDATIONS

Presuming the Panel will find the United States in violation of its trade obligations under GATT, Congress will likely be compelled to pass legislation that ends the discrimination against Indonesian-produced clove cigarettes. Congress can enact four policies that would bring the United States into compliance with GATT while still retaining the policy goals of the Family Smoking Prevention and Tobacco Control Act.

First, Congress can legislate the ban to apply equally across all flavored-cigarette categories. A blanket ban on all flavored cigarettes would ensure that all flavored cigarettes, regardless of where they were manufactured, would be consistent with the nondiscrimination principles of Article III:4.¹¹⁵ This solution is the simplest and most effective way to create a public policy that keeps children from smoking flavored cigarettes.¹¹⁶ If the legislative history of the Family

the United States).

112. Family Smoking Prevention and Tobacco Control Act, §§ 101, 907.

113. See *U.S. – Gasoline*, *supra* note 19, 23-24 (stating that the assumption that the *chapeau* applies to both importing and exporting countries was a “common understanding” between the parties).

114. See Family Smoking Prevention and Tobacco Control Act, §§ 101, 901, 907(a)(1)(A) (expanding the authority of the FDA to regulate tobacco-based products, but excepting menthol under a special provisional rule).

115. GATT, *supra* note 12, art. III:4.

116. See Press Release, David T. Tayloe, Jr., President, Am. Acad. of Pediatrics, Press Statement on FDA Ban on Flavored Cigarettes a Strong First Step Under Family Smoking Prevention and Tobacco Control Act (Sept. 23, 2009) (arguing

Smoking Prevention and Tobacco Control Act is an indication, any further legislation seeking to ban all flavored cigarettes, including menthol, will likely face political challenges that will limit any prospects for enactment.¹¹⁷ The U.S. domestic cigarette industry and other interested groups lobbied vigorously for the menthol exception.¹¹⁸ Thus, it is doubtful whether the political capital necessary to legislate such a ban in the near future exists.

Second, Congress can create other regulatory tools that can potentially realize the policy goal of reducing youth smoking. Such regulations could include any combination of the following policies, as long as the United States implements them consistently across all types of flavored cigarettes: taxation, packaging guidelines, or educational programs. The United States often employs punitive taxation as a disincentive for smokers, but its effectiveness on consumer behavior is questionable.¹¹⁹ Alternatively, warning labels specific to flavored cigarettes may have an effect on consumer behavior.¹²⁰ Finally, there is evidence that comprehensive programs

that "the strongest possible tobacco regulation is necessary to protect [America's] children and adolescents").

117. See Associated Press, *Committee OKs Tobacco Rules Critics Question Cooperation from Philip Morris*, AUGUSTA CHRON., Aug. 2, 2007, at A10 (noting that the Act was the product of several years of negotiations between Senators, "health groups," and "tobacco giant Philip Morris," and recognizing that the legislation passed despite concerns from representatives of tobacco producing states that the Act would increase Philip Morris' already dominant market share).

118. See Alicia Mundy & Lauren Etter, *Senate Passes FDA Tobacco Bill*, WALL ST. J., June 12, 2009, at B5 (reporting that, since 1998, the cigarette industry has paid out \$308 million lobbying against the Act and that the Congressional Black Caucus pushed for the menthol exception because "[a]bout 75% of African-American smokers buy menthol brands").

119. See, e.g., The Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, § 701, 123 Stat. 8, 99-101 (codified at I.R.C. § 5701(a)-(g) (Supp. III 2009)) (increasing federal cigarette taxes); Bruce Kennedy, *Tobacco Taxes Grow Globally, But Do They Really Work?*, DAILY FINANCE (July 8, 2010, 11:00 AM), <http://www.dailyfinance.com/story/taxes/global-tobacco-taxes/19545924/> (citing the comments of Randal Kuhn, Director of the Global Health Affairs Program at the University of Denver, regarding the influence that higher cigarette taxes have on smoker behavior and reporting that smokers tend to buy cheaper brands when prices rise rather than stop smoking altogether). Additionally, any taxation of cigarettes must comply with the requirements of GATT Article III:2 on the application of internal taxation measures on foreign products. GATT, *supra* note 12, art. III:2.

120. See David Hammond et al., *Text and Graphic Warnings on Cigarette Packages: Findings from the International Tobacco Control Four Country Study*,

aimed at curtailing youth smoking can be effective.¹²¹ Such steps, if implemented evenly across all types of flavored cigarettes, are compliant with Article III:4.

Third, the United States can treat all flavored cigarettes equally by placing a temporary moratorium on the sale of all flavored cigarettes pending the result of a congressionally mandated scientific study. This policy would be similar to the study on menthol cigarettes mandated by section 907(e) of the Act.¹²² If the study includes other flavored cigarettes, and if it is consistent with other scientific, peer-reviewed literature on the unique dangers of flavored cigarettes, then it may provide Congress with enough political cover to pass a blanket ban on all flavored cigarettes. The most glaring shortcoming of this recommendation is that it temporarily leaves flavored cigarettes on the market contrary to the intent of the original Family Smoking Prevention and Tobacco Control Act.

Finally, Congress can institute a temporary ban on menthol cigarettes that would “sunset” after the conclusion of the scientific report.¹²³ After a temporary ban sunsets, Congress can choose to extend or eliminate it entirely.¹²⁴ However, the cigarette industry groups that advocated for the menthol exception in the Act would likely oppose such a measure.¹²⁵ A sunset provision may serve as a

32 AM. J. OF PREVENTIVE MED. 202, 202 (2007) (comparing the “size, position, and design” of warning labels on cigarette packages in the United States, United Kingdom, Canada, and Australia, and finding that large, visible warnings have a high correlation with increased effectiveness).

121. See, e.g., Melanie Wakefield & Frank Chaloupka, *Effectiveness of Comprehensive Tobacco Control Programmes in Reducing Teenage Smoking in the USA*, 9 TOBACCO CONTROL 177, 184 (2000) (concluding that there is evidence that comprehensive tobacco control programs can alter the factors that influence teenage smoking, ultimately reducing the number of teens who smoke).

122. Family Smoking Prevention and Tobacco Control Act, § 907(e); see discussion *supra* Part II(A) (discussing the § 907(e) requirement that the FDA Tobacco Products Scientific Advisory Committee study “the impact of the use of menthol in cigarettes on the public health” with particular focus on minorities).

123. See BLACK’S LAW DICTIONARY 1574 (9th ed. 2009) (defining a sunset law as “a statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed”).

124. See generally VIRGINIA A MCMURTY, CONG. RESEARCH SERV., RS22181, A SUNSET COMMISSION FOR THE FEDERAL GOVERNMENT: RECENT DEVELOPMENTS CRS-1 (July 21, 2006) (stating that the sunset legislative concept allows for programs to expire automatically unless expressly renewed).

125. See C. STEPHEN REDHEAD & VANESSA K. BURROWS, CONG. RESEARCH

vehicle to bring the United States into compliance with its WTO obligations, while also providing legislative cover to politicians adverse to an outright departure from the Act.¹²⁶

CONCLUSION

The U.S. ban on flavored cigarettes violates its WTO obligations. Under an Article III:4 analysis, clove and menthol cigarettes are “like products” because they are in a competitive relationship, share the same end-use and are used by consumers to fulfill that end-use, have almost identical tariff classifications, and are physically similar.¹²⁷ The United States discriminates against Indonesian-produced clove cigarettes because it allows for the sale and manufacture of domestically produced menthol cigarettes while banning the sale of clove cigarettes. Furthermore, the United States cannot rely on an Article XX(b) exception because, while the flavored cigarette ban was designed to protect human health, the policy is unnecessarily discriminatory and violates the *chapeau* of Article XX.¹²⁸ Though there are numerous ways that the United States can change its current policy, the political feasibility of these options remains uncertain.

SERV., R40475, FDA TOBACCO REGULATION: THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT 3-4 (May 28, 2009) (noting that the decision to exempt menthol cigarettes was widely viewed as a compromise between congressional leaders and lobbyists for Phillip Morris in order to secure the company’s support for the Act and that tobacco companies generally oppose giving the FDA “unfettered authority” to regulate their products); *Lobbying Tobacco Industry Profile, 2009*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/indusclient.php?lname=A02&year=2009> (showing that in 2009, the tobacco industry spent \$24 million on 175 lobbyists, 137 of whom were former government officials, to influence federal legislation and regulations).

126. See Chris Mooney, *A Short History of Sunsets*, LEGAL AFF., Jan.-Feb. 4, 2004, at 67, available at http://www.legalaffairs.org/issues/January-February-2004/story_mooney_janfeb04.msp (maintaining that sunset provisions can buy politicians time to deal with controversial issues in the short term, but will create pressure for those politicians when they expire, as the politicians will be forced to make decisions).

127. See discussion *supra* Part III(A)(1) (describing the elements needed to determine whether products are considered “like products” under Article III:4).

128. See discussion *supra* Part III(B)(2) (finding that other nondiscriminatory policy options exist for the United States).