

**UNITED STATES – MEASURES AFFECTING THE PRODUCTION  
AND SALE OF CLOVE CIGARETTES**

Notification of an Appeal by the United States  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 5 January 2012, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel in *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (WT/DS406/R) ("Panel Report") and certain legal interpretations developed by the Panel.

1. The United States seeks review of the Panel's conclusion that Section 907(a)(1)(A) of the Family Smoking Prevention and Tobacco Control Act (the "Tobacco Control Act"),<sup>1</sup> is inconsistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* (the "TBT Agreement").<sup>2</sup> The United States appeals this finding based on a series of erroneous legal interpretations developed by the Panel, and on failure by the Panel to make an objective assessment of the facts of the case as called for by Article 11 of the DSU.

2. The United States seeks review of the Panel's finding that clove cigarettes and menthol cigarettes are like products.<sup>3</sup> In making this erroneous finding, the Panel erred in its legal interpretation of Article 2.1 by excluding, *a priori*, evidence related to particular criteria and failing to analyze each criteria completely.<sup>4</sup> Specifically the Panel erred by failing to perform a complete analysis of the end-uses<sup>5</sup> of clove cigarettes and menthol cigarettes and failing to perform a complete analysis of consumer tastes and habits.<sup>6</sup> In developing this faulty legal interpretation, the Panel also acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts in the case by refusing to consider certain evidence related consumer tastes and habits.<sup>7</sup>

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

<sup>2</sup>*See, e.g.*, Panel Report, paras. 7.293, 8.1(b).

<sup>3</sup>*See, e.g.*, Panel Report, para. 7.248.

<sup>4</sup>*See, e.g.*, Panel Report, paras. 7.116, 7.119, 7.197-199, 7.206, 7.209-210, 7.214, 7.230-231.

<sup>5</sup>*See, e.g.*, Panel Report, paras. 7.197-199.

<sup>6</sup>*See, e.g.*, Panel Report, paras. 7.116, 7.119, 7.206-7.232.

<sup>7</sup>*See, e.g.*, Panel Report, para. 7.210.

3. The United States also seeks review of the Panel's finding that Section 907(a)(1)(A) accords less favorable treatment to imported clove cigarettes.<sup>8</sup> In making this finding, the Panel erred in its legal interpretations that the only products to be compared are imported clove cigarettes and domestic menthol cigarettes,<sup>9</sup> and that the effect of Section 907(a)(1)(A) on U.S. production can be assessed by looking only at what products were on the market at the time the measure went into effect.<sup>10</sup> The Panel also erred by applying an incorrect legal framework to assess whether the alleged detriment to the competitive conditions for clove cigarettes could be explained by factors or circumstances unrelated to the foreign origin of the products.<sup>11</sup> In developing these faulty legal interpretations, the Panel also acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts of the case in finding that at the time of the ban, there were no domestic cigarettes with characterizing flavors other than menthol cigarettes,<sup>12</sup> and that Section 907(a)(1)(A) imposes no costs on any U.S. entity.<sup>13</sup>

4. The United States seeks review by the Appellate Body of the Panel's conclusion and related findings that by not allowing an interval of no less than six months between the publication and the entry into force of Section 907(a)(1)(A), the United States acted inconsistently with Article 2.12 of the TBT Agreement.<sup>14</sup> This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations with respect to Article 2.12 of the TBT Agreement.<sup>15</sup>

5. Finally, the United States also makes a conditional appeal regarding the Panel's legal analysis with respect to Indonesia's claims under Article 2.2 of the TBT Agreement. Should Indonesia seek review by the Appellate Body of the Panel's findings with respect to Indonesia's claims under Article 2.2, the United States seeks review by the Appellate Body of the Panel's finding that it could draw upon jurisprudence developed under Article XX(b) of the *General Agreement on Tariffs and Trade 1994* when assessing the consistency of Section 907(a)(1)(A) with the requirement that technical regulations "not be more trade-restrictive than necessary to fulfill a legitimate objective ...".<sup>16</sup> While the United States agrees with the ultimate conclusion in the Panel Report regarding Indonesia's claims under Article 2.2 of the TBT Agreement, the United States considers the Panel's analysis on this particular aspect to be based on erroneous findings on issues of law and related legal interpretations with respect to Article 2.2 of the TBT Agreement.

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<sup>8</sup>See, e.g., Panel Report, para. 7.292.

<sup>9</sup>See, e.g., Panel Report, paras. 7.274, 7.277.

<sup>10</sup>See, e.g., Panel Report, para. 7.289.

<sup>11</sup>See, e.g., Panel Report, paras. 7.269, 7.286-7.291.

<sup>12</sup>See, e.g., Panel Report, para. 7.289.

<sup>13</sup>See, e.g., Panel Report, para. 7.289.

<sup>14</sup>See e.g., Panel Report, paras. 7.595, 8.1(h).

<sup>15</sup>See e.g., Panel Report, paras. 7.561-7.595.

<sup>16</sup>Panel Report, paras. 7.351-7.369.