

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

**AB-2012-1**

*Report of the Appellate Body*

I.	Introduction.....	1
II.	Arguments of the Participants and the Third Participants .....	5
	A. <i>Claims of Error by the United States – Appellant</i> .....	5
	1. Article 2.1 of the <i>TBT Agreement</i> – "Like Products" .....	5
	(a) End-Uses.....	5
	(b) Consumer Tastes and Habits.....	6
	2. Article 2.1 of the <i>TBT Agreement</i> – "Treatment No Less Favourable" .....	9
	3. Article 2.12 of the <i>TBT Agreement</i> – "Reasonable Interval" .....	13
	B. <i>Arguments of Indonesia – Appellee</i> .....	15
	1. Article 2.1 of the <i>TBT Agreement</i> – "Like Products" .....	15
	(a) End-Uses.....	16
	(b) Consumer Tastes and Habits.....	17
	2. Article 2.1 of the <i>TBT Agreement</i> – "Treatment No Less Favourable" .....	20
	3. Article 2.12 of the <i>TBT Agreement</i> – "Reasonable Interval" .....	23
	C. <i>Arguments of the Third Participants</i> .....	25
	1. Brazil.....	25
	2. Colombia.....	27
	3. European Union .....	27
	4. Mexico .....	29
	5. Norway .....	31
	6. Turkey.....	32
III.	Issues Raised in This Appeal .....	33
IV.	Background.....	34
V.	Article 2.1 of the <i>TBT Agreement</i> .....	37
	A. <i>Introduction</i> .....	37
	B. <i>The Panel's Finding that Clove Cigarettes and Menthol Cigarettes are "Like Products" within the Meaning of Article 2.1 of the TBT Agreement</i> .....	41
	1. "Like Products" under Article 2.1 of the <i>TBT Agreement</i> .....	42
	2. End-Uses.....	48
	3. Consumer Tastes and Habits.....	51
	4. Conclusion on "Like Products" .....	58
	C. <i>The Panel's Finding that Section 907(a)(1)(A) of the FFDCCA Accords Imported Clove Cigarettes Less Favourable Treatment than That Accorded to Domestic Menthol Cigarettes, within the Meaning of Article 2.1 of the TBT Agreement</i> .....	60
	1. Introduction.....	60
	2. "Treatment No Less Favourable" under Article 2.1 of the <i>TBT Agreement</i> .....	61
	3. Product Scope of the "Treatment No Less Favourable" Comparison.....	66
	4. Temporal Scope of the "Treatment No Less Favourable" Comparison.....	72
	(a) Application of Article 2.1 of the <i>TBT Agreement</i> .....	72
	(b) Article 11 of the DSU .....	74
	5. Detrimental Impact on Imported Products.....	75
	(a) Application of Article 2.1 .....	77
	(b) Article 11 of the DSU .....	80
	6. Conclusion on "Treatment No Less Favourable" .....	82

D.	<i>Conclusions under Article 2.1 of the TBT Agreement</i> .....	82
VI.	Article 2.12 of the <i>TBT Agreement</i> .....	83
A.	<i>Introduction</i> .....	83
B.	<i>The Interpretative Value of Paragraph 5.2 of the Doha Ministerial Decision</i> .....	84
C.	<i>The Panel's Finding that the United States Acted Inconsistently with Article 2.12 of the TBT Agreement</i> .....	94
VII.	Findings and Conclusions .....	101
Annex I	Notification of an Appeal by the United States, WT/DS406/6	

CASES CITED IN THIS REPORT

<b>Short Title</b>	<b>Full case title and citation</b>
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
<i>Border Tax Adjustments</i>	Working Party Report, <i>Border Tax Adjustments</i> , L/3464, adopted 2 December 1970, BISD 18S/97
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
<i>Canada – Provincial Liquor Boards (US)</i>	GATT Panel Report, <i>Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies</i> , DS17/R, adopted 18 February 1992, BISD 39S/27
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739
<i>Chile – Alcoholic Beverages</i>	Appellate Body Report, <i>Chile – Taxes on Alcoholic Beverages</i> , WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281
<i>Chile – Alcoholic Beverages</i>	Panel Report, <i>Chile – Taxes on Alcoholic Beverages</i> , WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS87/AB/R, WT/DS110/AB/R, DSR 2000:I, 303
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473)
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, 513
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII, 847
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Bananas III</i>	Panel Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas ("EC – Bananas III")</i> , WT/DS27/R/ECU (Ecuador) / WT/DS27/R/GTM, WT/DS27/R/HND (Guatemala and Honduras) / WT/DS27/R/MEX (Mexico) / WT/DS27/R/USA (US), adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 695 to DSR 1997:III, 1085

Short Title	Full case title and citation
<i>EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
<i>Japan – Alcoholic Beverages II</i>	Panel Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<i>Mexico – Taxes on Soft Drinks</i>	Appellate Body Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, 3
<i>Philippines – Distilled Spirits</i>	Appellate Body Reports, <i>Philippines – Taxes on Distilled Spirits</i> , WT/DS396/AB/R / WT/DS403/AB/R, adopted 20 January 2012
<i>Philippines – Distilled Spirits</i>	Panel Reports, <i>Philippines – Taxes on Distilled Spirits</i> , WT/DS396/R / WT/DS403/R, adopted 20 January 2012, as modified by Appellate Body Reports WT/DS396/AB/R / WT/DS403/AB/R
<i>Thailand – Cigarettes (Philippines)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011

Short Title	Full case title and citation
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
<i>US – Clove Cigarettes</i>	Panel Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/R, circulated to WTO Members 2 September 2011
<i>US – Gasoline</i>	Panel Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, 29
<i>US – Section 337 Tariff Act</i>	GATT Panel Report, <i>United States Section 337 of the Tariff Act of 1930</i> , L/6439, adopted 7 November 1989, BISD 36S/345
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, 513
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117
<i>US – Tuna (II) (Mexico)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R, circulated to WTO Members 15 September 2011
<i>US – Tuna II (Mexico)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R, circulated to WTO Members 15 September 2011 [appeal in progress]
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, 809
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323

ABBREVIATIONS USED IN THIS REPORT

<b>Abbreviation</b>	<b>Description</b>
Doha Ministerial Decision	Doha Ministerial Decision on Implementation-Related Issues and Concerns, Decision of 14 November 2011, WT/MIN(01)/17
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
FDA	United States Food and Drug Administration
FDA Guidance	Guidance for Industry and FDA Staff, "General Questions and Answers on the Ban of Cigarettes that Contain Characterizing Flavors (Edition 2)", 23 December 2009 (Panel Exhibit IND-41)
FFDCA	United States Federal Food, Drug and Cosmetic Act, <i>United States Code</i> , Title 21, Chapter 9
FSPTCA	United States Family Smoking Prevention and Tobacco Control Act, Public Law No. 111-31, 123 Stat. 1776 (22 June 2009) (Panel Exhibit US-7)
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
House Report	House Energy and Commerce Committee Report, H.R. No. 111-58, Pt. 1 (2009) (Panel Exhibits IND-2 and US-67)
ILC	International Law Commission
March 2011 TPSAC Report	Report by the Tobacco Products Scientific Advisory Committee to the FDA, March 2011 available at < <a href="http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM247689.pdf">http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM247689.pdf</a> >
Panel Report	Panel Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/R
Section 907(a)(1)(A)	Section 907(a)(1)(A) of the FFDCA (as amended by the FSPTCA), codified at <i>United States Code</i> , Title 21, Chapter 9, section 387g(a)(1)(A)
<i>TBT Agreement</i>	<i>Agreement on Technical Barriers to Trade</i>
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> , done at Vienna, 23 May 1969, 1155 UNTS, 8 International Legal Materials 679
WHO	World Health Organization
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>

WORLD TRADE ORGANIZATION  
APPELLATE BODY

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

United States, *Appellant*  
Indonesia, *Appellee*

Brazil, *Third Participant*  
Colombia, *Third Participant*  
Dominican Republic, *Third Participant*  
European Union, *Third Participant*  
Guatemala, *Third Participant*  
Mexico, *Third Participant*  
Norway, *Third Participant*  
Turkey, *Third Participant*

**AB-2012-1**

Present:

Oshima, Presiding Member  
Ramírez-Hernández, Member  
Van den Bossche, Member

**I. Introduction**

1. The United States appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*<sup>1</sup> (the "Panel Report"). The Panel was established on 20 July 2010 to consider a complaint by Indonesia with respect to a measure adopted by the United States that prohibits cigarettes with characterizing flavours, other than tobacco or menthol.

2. Before the Panel, Indonesia claimed that the United States acted inconsistently with its substantive and procedural obligations under the *Agreement on Technical Barriers to Trade* (the "TBT Agreement") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). In particular, Indonesia claimed that Section 907(a)(1)(A) of the United States Federal Food, Drug and Cosmetic Act<sup>2</sup> (the "FFDCA")—as amended by the Family Smoking Prevention and Tobacco Control Act<sup>3</sup> (the "FSPTCA")—was inconsistent with Articles 2.1, 2.2, 2.5, 2.8, 2.9, 2.10, 2.12, and 12.3 of the *TBT Agreement*. Alternatively, Indonesia claimed that Section 907(a)(1)(A) was inconsistent with Article III:4 of the GATT 1994<sup>4</sup>, and could not be justified under Article XX(b) thereof.<sup>5</sup>

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<sup>1</sup>WT/DS406/R, 2 September 2011.

<sup>2</sup>Codified at *United States Code*, Title 21, Chapter 9, section 387g(a)(1)(A).

<sup>3</sup>United States Family Smoking Prevention and Tobacco Control Act, Public Law No. 111-31, 123 Stat. 1776 (22 June 2009) (Panel Exhibit US-7).

<sup>4</sup>Panel Report, para. 3.1.

<sup>5</sup>Panel Report, para. 7.299 (referring to Indonesia's first written submission to the Panel, paras. 114-127).



3. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 2 September 2011. The Panel found that Section 907(a)(1)(A) was inconsistent with Article 2.1 of the *TBT Agreement* because it accorded to imported clove cigarettes less favourable treatment than that accorded to like menthol cigarettes of national origin.<sup>6</sup> Having found that Section 907(a)(1)(A) was inconsistent with Article 2.1 of the *TBT Agreement*, the Panel declined to rule on Indonesia's alternative claim under Article III:4 of the GATT 1994 and on the United States' related defence under Article XX(b) of the GATT 1994.<sup>7</sup>

4. The Panel further found that the United States acted inconsistently with Article 2.9.2 of the *TBT Agreement* by failing to notify to WTO Members, through the Secretariat, the products to be covered by the proposed Section 907(a)(1)(A), together with a brief indication of its objective and rationale, at an appropriate early stage when amendments and comments were still possible.<sup>8</sup> The Panel also found that the United States acted inconsistently with Article 2.12 of the *TBT Agreement* 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).<sup>9</sup>

5. Conversely, the Panel rejected Indonesia's claims under Articles 2.2, 2.5, 2.8, 2.9.3, 2.10, and 12.3 of the *TBT Agreement*. More specifically, the Panel found that Indonesia failed to demonstrate that Section 907(a)(1)(A) was inconsistent with Article 2.2 of the *TBT Agreement* to the extent that its ban on clove cigarettes was more trade restrictive than necessary to fulfil the legitimate objective of reducing youth smoking, taking account of the risks non-fulfilment would create.<sup>10</sup> The Panel also concluded that Indonesia failed to demonstrate that the United States had acted inconsistently with Article 2.5 of the *TBT Agreement*, because Indonesia did not request the United States to explain the justification for Section 907(a)(1)(A) "in terms of Articles 2.2 and 2.4 of the *TBT Agreement*".<sup>11</sup> Similarly, the Panel found that Indonesia failed to demonstrate that it would be "appropriate" to formulate the technical regulation in Section 907(a)(1)(A) in terms of "performance" rather than design or descriptive characteristics, within the meaning of Article 2.8 of the *TBT Agreement*.<sup>12</sup>

6. The Panel further found that Indonesia failed to demonstrate that the United States had acted inconsistently with Article 2.9.3 of the *TBT Agreement*, because Indonesia did not request the

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<sup>6</sup>Panel Report, paras. 7.293 and 8.1(b).

<sup>7</sup>Panel Report, paras. 7.294, 7.310, 8.3, and 8.4.

<sup>8</sup>Panel Report, paras. 7.550 and 8.1(f).

<sup>9</sup>Panel Report, paras. 7.595 and 8.1(h).

<sup>10</sup>Panel Report, paras. 7.432 and 8.1(c).

<sup>11</sup>Panel Report, paras. 7.461, 7.463, and 8.1(d).

<sup>12</sup>Panel Report, paras. 7.497, 7.498, and 8.1(e).

United States to provide particulars or copies of Section 907(a)(1)(A) while it was still in draft form.<sup>13</sup> The Panel also found that, in the absence of any evidence or arguments that "urgent problems of safety, health, environmental protection or national security" arose or threatened to arise upon adoption of Section 907(a)(1)(A), Article 2.10 of the *TBT Agreement* would not be applicable to the present dispute.<sup>14</sup> Finally, the Panel found that Indonesia failed to demonstrate that the United States had acted inconsistently with Article 12.3 of the *TBT Agreement* by failing to take account of the special development, financial, and trade needs of Indonesia in the preparation and application of Section 907(a)(1)(A).<sup>15</sup>

7. Accordingly, the Panel recommended that the Dispute Settlement Body (the "DSB") request the United States to bring Section 907(a)(1)(A) into conformity with its obligations under Articles 2.1, 2.9.2, and 2.12 of the *TBT Agreement*.<sup>16</sup>

8. On 5 January 2012, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal<sup>17</sup> and an appellant's submission pursuant to Rules 20 and 21, respectively, of the *Working Procedures for Appellate Review*<sup>18</sup> (the "*Working Procedures*"). On 23 January 2012, Indonesia filed an appellee's submission.<sup>19</sup> On 26 January 2012, Brazil, Colombia, the European Union, Mexico, Norway, and Turkey each filed a third participant's submission.<sup>20</sup> On the same date, the Dominican Republic and Guatemala notified their intention to appear at the oral hearing as third participants.<sup>21</sup>

9. On appeal, the United States claims that the Panel erred in finding that the United States acted inconsistently with Article 2.1 of the *TBT Agreement*. In particular, the United States claims that the Panel erred in finding that imported clove cigarettes and domestic menthol cigarettes were like products within the meaning of Article 2.1. The United States also challenges the Panel's finding that Section 907(a)(1)(A) accords to imported clove cigarettes less favourable treatment than that accorded to domestic like products. The United States claims further that the Panel acted inconsistently with Article 11 of the DSU in reaching these findings. The United States also claims that the Panel erred in finding that the United States acted inconsistently with Article 2.12 of the *TBT Agreement* by not

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<sup>13</sup>Panel Report, paras. 7.549, 7.551, and 8.1(g).

<sup>14</sup>Panel Report, para. 7.507.

<sup>15</sup>Panel Report, paras. 7.649 and 8.1(i).

<sup>16</sup>Panel Report, para. 8.6.

<sup>17</sup>WT/DS406/6 (attached as Annex I to this Report).

<sup>18</sup>WT/AB/WP/6, 16 August 2010.

<sup>19</sup>Pursuant to Rule 22 of the *Working Procedures*.

<sup>20</sup>Pursuant to Rule 24(1) of the *Working Procedures*.

<sup>21</sup>Pursuant to Rule 24(2) of the *Working Procedures*.

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 conditionally appeals the Panel's reliance on the jurisprudence developed under Article XX(b) of the GATT 1994 in its assessment of Indonesia's claims under Article 2.2, should Indonesia appeal the Panel's finding that the United States did not act inconsistently with Article 2.2 of the *TBT Agreement*. Indonesia did not raise an other appeal of any issues under Article 2.2 of the *TBT Agreement*. Therefore, the condition on which the United States bases its appeal of the Panel's findings under Article 2.2 is not met.

10. Two *amicus curiae* briefs were received by the Appellate Body in relation to this appeal: on 24 January 2012 from the Campaign for Tobacco-Free Kids, the American Academy of Pediatrics, the American Cancer Society, the American Cancer Society Cancer Action Network, the American Lung Association, the American Medical Association, and the American Public Health Association; and on 26 January 2012 from the O'Neill Institute for National and Global Health Law at the Georgetown University Law Center. The Appellate Body Division hearing the appeal gave the participants and third participants an opportunity to express their views on the *amicus curiae* briefs referred to above. The Division did not find it necessary to rely on these *amicus curiae* briefs in rendering its decision.

11. On 25 January 2012, the Presiding Member of the Division received a letter from the Director-General of the World Health Organization (the "WHO") expressing interest and offering technical assistance in this appeal in areas covered by the WHO's mandate. The Division thanked the WHO Director-General for her letter, and indicated that it would reflect on the need for such assistance. The Division asked the participants and third participants to comment on the letter from the WHO. Of the participants, the United States submitted comments, and of the third participants, the European Union commented. In the light of the fact that the parties had placed a considerable amount of materials regarding WHO legal instruments and the WHO's work in the area of tobacco control on the Panel record, and mindful of its mandate on appeal under Article 17.6 of the DSU, the Division did not deem it necessary to request assistance from the WHO.

12. The oral hearing in this appeal was held on 9 and 10 February 2012. The participants and six of the third participants (Brazil, Colombia, Guatemala, Mexico, Norway, and Turkey) made oral opening statements. The participants and third participants subsequently responded to questions posed by the Members of the Division hearing the appeal.

## II. Arguments of the Participants and the Third Participants

### A. Claims of Error by the United States – Appellant

#### 1. Article 2.1 of the TBT Agreement – "Like Products"

13. The United States claims on appeal that the Panel erred in its interpretation and specific application of the term "like products" under Article 2.1 of the *TBT Agreement*, and requests the Appellate Body to reverse the Panel's findings in this respect. In particular, while agreeing with the overall approach adopted by the Panel in its like product analysis—that is, one that determines likeness based on the traditional "likeness" criteria, and in the light of the legal provision at issue and of the public health nature of the measure being challenged<sup>22</sup>—the United States contends that the Panel conducted an "incomplete and flawed" analysis with respect to two of the traditional "likeness" criteria, namely, end-uses and consumer tastes and habits.<sup>23</sup>

#### (a) End-Uses

14. The United States claims that the Panel erred by failing to perform a complete analysis of the different end-uses of clove and menthol cigarettes and by concluding that the end-use for both products is "to be smoked".<sup>24</sup> In the United States' view, the Panel improperly dismissed the possible different end-uses presented by the United States—that is, satisfying an addiction to nicotine, and creating a pleasurable experience associated with the taste of the cigarette and aroma of the smoke<sup>25</sup>—and erroneously based its ultimate conclusion on an "overly narrow analysis".<sup>26</sup>

15. The United States submits that a panel, when conducting an end-use analysis, must consider the different uses of the products in question and not just the use that is a "common denominator" between the products. In this regard, the United States relies on statements of the Appellate Body in *EC – Asbestos* that "a panel must also examine the other, *different* end-uses for products" and that "[i]t is only by forming a complete picture of the various end-uses of a product that a panel can assess the significance of the fact that products share a limited number of end-uses."<sup>27</sup> According to the United States, it is undisputed that both clove and menthol cigarettes are used for smoking, but the Panel improperly limited its analysis to considering only such common use between the products while ignoring other relevant end-uses. Menthol cigarettes, the United States posits, are used to

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<sup>22</sup>United States' appellant's submission, paras. 37 and 41.

<sup>23</sup>United States' appellant's submission, para. 42.

<sup>24</sup>United States' appellant's submission, para. 43 (quoting Panel Report, para. 7.199).

<sup>25</sup>United States' appellant's submission, para. 44.

<sup>26</sup>United States' appellant's submission, para. 45.

<sup>27</sup>United States' appellant's submission, para. 45 (quoting Appellate Body Report, *EC – Asbestos*, para. 119 (original emphasis)).

"satisfy the nicotine addictions of millions of smokers in the United States", whereas clove cigarettes are primarily used "for experimentation and special social settings" and generally are not smoked to satisfy nicotine addiction in the US market.<sup>28</sup>

16. The United States further takes issue with the Panel's rejection of the different end-uses of clove and menthol cigarettes based on the argument that these end-uses are related to the reasons why a person might smoke a cigarette, and maintains that the Panel erred in finding that end-uses and consumer tastes and habits are "mutually exclusive concepts".<sup>29</sup> Referring to the Appellate Body report in *EC – Asbestos*, the United States notes that, although consumer tastes and habits constitute a "likeness" criterion separate from end-uses, consumer preferences are nonetheless relevant to how products are capable of being used.<sup>30</sup> However, the United States contends that the Panel incorrectly considered end-uses "absent the relevant, real-world context"<sup>31</sup> of how the products at issue are used in the relevant market. Clove and menthol cigarettes have different and "multi-faceted" end-uses—that is, "habitual use and satisfying addiction versus occasional, experimental use"<sup>32</sup>—which cannot, in the United States' view, be reduced to the simple, undisputed fact that both types of cigarettes are used for smoking. This is particularly true, the United States adduces, where the public health context relates to the different ways in which cigarettes are used in the relevant market. According to the United States, the Panel erred by failing to consider the "complete picture" and by disregarding evidence relating to such differences in use.<sup>33</sup>

(b) Consumer Tastes and Habits

17. The United States claims that the Panel failed to perform a complete analysis of consumer tastes and habits related to clove and menthol cigarettes. In the United States' view, the Panel first made a legal error by excluding the tastes and habits of current adult consumers from its analysis. The United States further contends that the Panel acted inconsistently with Article 11 of the DSU by refusing to examine evidence on how consumers in the relevant market use clove and menthol cigarettes.<sup>34</sup>

18. First, the United States maintains that the Panel erred in determining that it need not examine the tastes and habits of current adult consumers as part of its analysis. In the United States' view, by disregarding how current consumers perceive and use the products at issue, the Panel erroneously

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<sup>28</sup>United States' appellant's submission, para. 46.

<sup>29</sup>United States' appellant's submission, para. 48.

<sup>30</sup>United States' appellant's submission, para. 47 (quoting Appellate Body Report, *EC – Asbestos*, para. 102).

<sup>31</sup>United States' appellant's submission, para. 48.

<sup>32</sup>United States' appellant's submission, para. 49.

<sup>33</sup>United States' appellant's submission, para. 49.

<sup>34</sup>United States' appellant's submission, para. 50.

limited the scope of consumer tastes and habits to one aspect of the public health basis for Section 907(a)(1)(A) of the FFDCA—use by young people—and failed to capture the other aspect—use by adult smokers—thereby nullifying consumer tastes and habits as a meaningful criterion.<sup>35</sup> Consistent with the principle stated by the Appellate Body in *EC – Asbestos*, the Panel was required to examine evidence related to each of the criteria set forth in the GATT Working Party report in *Border Tax Adjustments*, and to weigh "all of the relevant evidence".<sup>36</sup> Accordingly, the United States claims that the Panel committed a fundamental error in excluding, *a priori*, an essential element from the analysis of consumer tastes and habits.<sup>37</sup>

19. Moreover, the United States posits that, given the particular nature of this dispute, the tastes and habits of current adult consumers are highly relevant. First, Section 907(a)(1)(A) draws regulatory distinctions among cigarettes based not only on their appeal to potential smokers, but based on their uses by current adult smokers as well. Banning cigarettes that are used by adults on a regular basis entails a risk of "straining the healthcare system or exacerbating the illicit market".<sup>38</sup> Second, clove and other banned flavoured cigarettes are used in very small numbers and almost exclusively by young people, thus being "trainer" or "starter" cigarettes, whereas menthol cigarettes are consumed by 20 to 26 per cent of adult smokers in the United States.<sup>39</sup> Consequently, the United States argues, the products at issue pose different public health challenges: clove cigarettes present a unique risk to young, uninitiated smokers, while menthol cigarettes also have a significant impact on adults.<sup>40</sup> Finally, the particular flavour matters, in the sense that adult smokers seldom use clove-flavoured cigarettes and do not perceive them to be like menthol cigarettes.<sup>41</sup>

20. The United States further claims that the exclusion of current adult consumer tastes and habits cannot be justified by the Panel's finding on the declared legitimate objective of Section 907(a)(1)(A) to prevent new young smokers from becoming addicted to cigarettes.<sup>42</sup> Albeit agreeing with the Panel that the characteristics of the products at issue must be examined in the light of the public health basis of the measure at issue<sup>43</sup>, the United States contends that there is no textual basis in Article 2.1 of the *TBT Agreement* to limit the consideration of the public health distinctions to the immediate objective

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<sup>35</sup>United States' appellant's submission, para. 58.

<sup>36</sup>United States' appellant's submission, para. 56 (quoting Appellate Body Report, *EC – Asbestos*, paras. 109 (in turn referring to GATT Working Party Report, *Border Tax Adjustments*) and 113 (original emphasis)).

<sup>37</sup>United States' appellant's submission, para. 53.

<sup>38</sup>United States' appellant's submission, para. 54.

<sup>39</sup>United States' appellant's submission, para. 58 (referring to Panel Report, paras. 2.24, 2.25, and 7.391).

<sup>40</sup>United States' appellant's submission, para. 55.

<sup>41</sup>United States' appellant's submission, para. 58.

<sup>42</sup>United States' appellant's submission, para. 59 (referring to Panel Report, paras. 7.116, 7.119, 7.201, and 7.206).

<sup>43</sup>United States' appellant's submission, para. 59 (referring to Panel Report, paras. 7.245-7.249).

of the measure.<sup>44</sup> Rather, technical regulations inevitably reflect a balancing of other considerations relevant to public welfare—in this case, the additional health concerns associated with heavily used cigarettes, such as possible increases in unregulated black market cigarettes or strain on the healthcare system.<sup>45</sup> The United States submits that the Panel based its exclusion of current adult consumers on a narrow view of the measure's objective, which was actually targeting a group of tobacco products "that *uniquely* appeal to youth" without precluding access by adults to those cigarettes that are "most heavily used in the U.S. market".<sup>46</sup> Even assuming that the Panel was correct to limit its assessment of the product distinctions on the basis of the primary legitimate objective of Section 907(a)(1)(A)—that is, the "reduction of youth smoking"—the United States contends that, precisely because of the measure's distinction between adult and youth smoking behaviour, the Panel was required to take into account the comparative patterns of use in the relevant market.<sup>47</sup>

21. Second, the United States claims that the Panel acted inconsistently with Article 11 of the DSU by disregarding critical evidence on how consumers use and perceive the products<sup>48</sup>, and thereby came to a "fatally flawed" conclusion on consumer tastes and habits.<sup>49</sup> In the United States' view, the Panel improperly disregarded critical survey evidence submitted by both parties on the basis that it was not clear and that the information presented therein was "not directly comparable", without duly examining such evidence according to its probative force.<sup>50</sup> According to the United States, the survey data were particularly relevant because the data provided evidence on how consumers and potential consumers "used and perceived different cigarettes *in the United States*".<sup>51</sup> In addition, the United States argues that the Panel based its conclusions entirely on speculation and conjecture, without any evidentiary support on the record, and ultimately concluded that, for potential consumers, arguably, "any cigarette would likely be fine to start smoking".<sup>52</sup> However, the United States submits, the reports used as evidence by the Panel "do not tell the whole story", because they focus on cigarettes with characterizing flavours, but do not present the whole picture as to how cigarettes actually are used and perceived in the United States, the relevant market in this dispute.<sup>53</sup> According

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<sup>44</sup>United States' appellant's submission, para. 60 (referring to Panel Report, para. 7.116).

<sup>45</sup>United States' appellant's submission, para. 61.

<sup>46</sup>United States' appellant's submission, para. 61. (original emphasis)

<sup>47</sup>United States' appellant's submission, para. 63.

<sup>48</sup>United States' appellant's submission, para. 64.

<sup>49</sup>United States' appellant's submission, para. 68.

<sup>50</sup>United States' appellant's submission, para. 67 (quoting Panel Report, para. 7.210). The United States also stresses that, in the section of the Panel Report devoted to its analysis under Article 2.2 of the *TBT Agreement*, the Panel did rely upon the information provided in the surveys on market share. (*Ibid.*, para. 66)

<sup>51</sup>United States' appellant's submission, para. 67. (original emphasis)

<sup>52</sup>United States' appellant's submission, para. 68 (quoting Panel Report, para. 7.214).

<sup>53</sup>United States' appellant's submission, para. 69 (referring to United States' response to Panel Question 44, para. 110; and Indonesia's response to Panel Question 44, para. 97).

to the United States, the handling of the evidence by the Panel falls short of an objective assessment of the facts and is therefore incompatible with the Panel's duty under Article 11 of the DSU.<sup>54</sup>

2. Article 2.1 of the TBT Agreement – "Treatment No Less Favourable"

22. The United States claims that the Panel erred in finding that Section 907(a)(1)(A) of the FFDCA accords to imported clove cigarettes less favourable treatment than that accorded to like domestic products, and requests the Appellate Body to reverse this finding. The United States also requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU when it found: (i) that there were no domestic cigarettes with characterizing flavours other than menthol at the time of the ban; and (ii) that Section 907(a)(1)(A) imposes no costs on any US entity.

23. First, the United States argues that the Panel erroneously limited the scope of the products to be compared for the purposes of its less favourable treatment analysis to one banned imported product—Indonesian clove cigarettes—and one non-banned like domestic product—menthol cigarettes—thereby reaching the "flawed conclusion" that Indonesian clove cigarettes are treated less favourably than like domestic products.<sup>55</sup> Referring to the Appellate Body report in *EC – Asbestos*, the United States posits that "the relevant analysis is how the measure treats like imported products, as a group, and like domestic products, as a group".<sup>56</sup> Accordingly, the Panel was required to consider the "treatment of all domestic and imported cigarettes with characterizing flavors".<sup>57</sup> However, in the United States' view, the Panel improperly excluded, with respect to like domestic products, the treatment accorded by the measure to domestic cigarettes with other characterizing flavours and, with respect to like imported products, the treatment accorded to menthol cigarettes from other countries.<sup>58</sup> According to the United States, a proper less favourable treatment analysis that considers all cigarettes that meet the criteria of "like products" demonstrates that Section 907(a)(1)(A) bans only products comprising "a very small market segment in the United States", and "does not alter the conditions of competition" as between like imported products, as a group, and like domestic products, as a group.<sup>59</sup>

24. For the United States, the reference to treatment accorded to the products imported from the territory of "*any other Member*" in Article 2.1 does not compel the conclusion that only the treatment

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<sup>54</sup>United States' appellant's submission, para. 69 (quoting Appellate Body Report, *EC – Hormones*, para. 133).

<sup>55</sup>United States' appellant's submission, para. 74.

<sup>56</sup>United States' appellant's submission, para. 75 (referring to Appellate Body Report, *EC – Asbestos*, para. 100). See also Panel Report, *US – Tuna II (Mexico)*, para. 7.295.

<sup>57</sup>United States' appellant's submission, para. 77. (original underlining) Albeit disagreeing with the Panel's conclusion that clove and menthol cigarettes are like products, the United States stresses that "other cigarettes with characterizing flavors ... would meet the Panel's criteria and thus belong to the category of cigarettes deemed by the Panel to be like products." (*Ibid.*, para. 78 (referring to Panel Report, para. 7.247))

<sup>58</sup>United States' appellant's submission, para. 79.

<sup>59</sup>United States' appellant's submission, paras. 80 and 81. (original underlining)



accorded to the complaining Member's products are relevant.<sup>60</sup> In the United States' view, the main purpose of a *de facto* less favourable treatment analysis is to assess whether Section 907(a)(1)(A) legitimately draws distinctions among like products or whether it creates "a proxy for singling out the like products of the complaining Member for less favorable treatment".<sup>61</sup> In order to make such an assessment, the analysis should consider the entire range of like products addressed by the measure. The question of less favourable treatment is not answered by the sole fact that clove cigarettes were banned while a single like domestic product (menthol cigarettes) was not. In this case, the United States contends that the ban affected some imported and domestic products, but "did not affect other domestic and imported like products".<sup>62</sup>

25. In addition, to the extent that the Panel took the view that it was limited by its terms of reference to consider only the products mentioned in Indonesia's request for the establishment of a panel<sup>63</sup>, the United States claims that the Panel erred in concluding that Indonesia, as the complaining party, "set the field of products to be compared"<sup>64</sup>—that is, "imported clove cigarettes *versus* domestic menthol cigarettes".<sup>65</sup> While defining which measures and claims a panel may consider, the terms of reference do not define the scope of the relevant products to analyze with respect to a discrimination claim, nor do they limit which defences a responding party may invoke.<sup>66</sup> The United States notes that the question of which products should be compared in the less favourable treatment analysis was a point of argument between the parties in the present dispute, and stresses that the complainant cannot *a priori* limit the scope of the comparison by its selection of products in its panel request.

26. Second, the United States takes issue with the Panel's statement that, "at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol."<sup>67</sup> The United States submits that such a statement reflects a "mis-application of the legal standard" under Article 2.1 of the *TBT Agreement*.<sup>68</sup> The Panel "improperly restrict[ed] the legal analysis" when it limited the comparison to only products that were on the market at the time the ban went into effect, without regard to the years preceding or forthcoming. Article 2.1 of the *TBT Agreement* does not contain any "rigid temporal limitation" to the evidence a panel may consider in conducting a less favourable treatment analysis.<sup>69</sup> Therefore, the Panel should have taken into account the fact that

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<sup>60</sup>United States' appellant's submission, para. 84 (referring to Panel Report, para. 7.275).

<sup>61</sup>United States' appellant's submission, para. 84.

<sup>62</sup>United States' appellant's submission, para. 85. (original underlining)

<sup>63</sup>Request for the Establishment of a Panel by Indonesia, WT/DS406/2.

<sup>64</sup>United States' appellant's submission, para. 87.

<sup>65</sup>United States' appellant's submission, para. 86 (quoting Panel Report, para. 7.147 (original emphasis)).

<sup>66</sup>United States' appellant's submission, para. 87.

<sup>67</sup>United States' appellant's submission, para. 90 (quoting Panel Report, para. 7.289).

<sup>68</sup>United States' appellant's submission, para. 91.

<sup>69</sup>United States' appellant's submission, para. 91.

there were domestic cigarettes with characterizing flavours other than menthol in the years preceding the effective date of the ban.<sup>70</sup> Moreover, the Panel incorrectly dismissed the fact that Section 907(a)(1)(A) was enacted specifically "to respond to an *emerging* trend of products" that US producers "were actively exploring".<sup>71</sup> In that respect, the United States stresses that the focus of Section 907(a)(1)(A) was "primarily U.S. production", and that it is not unusual that producers will stop investing in products "even before the ban goes into effect". This should not be construed, however, as evidence that US production "was not affected".<sup>72</sup>

27. Third, the United States claims that the Panel failed to make an objective assessment of the facts, in violation of Article 11 of the DSU, by ignoring un rebutted evidence showing that cigarettes with characterizing flavours other than menthol were marketed in the United States at the time of the ban. The facts on record do not support the Panel's finding that there were no domestically produced flavoured cigarettes—other than menthol—at the time of the ban. In particular, the United States recalls that the Panel had already found that: (i) there was at least one domestically produced brand of clove cigarettes on the market prior to the ban<sup>73</sup>; (ii) the list of cigarettes authorized for sale in 2008 and 2009 in several US states included at least 20 different brands of domestic flavoured cigarettes other than menthol; and (iii) by 2008, just one year before the ban went into effect, at least four US companies were producing flavoured cigarettes.<sup>74</sup>

28. Fourth, the United States claims that the Panel erred in concluding that any detriment to the competitive conditions for clove cigarettes in the US market could not be explained by factors unrelated to the foreign origin of the products. Even assuming *arguendo* that the Panel had properly identified the like imported and domestic products to be compared, its analysis of whether the less favourable treatment accorded to clove cigarettes was related to the origin of the imported products was in error.<sup>75</sup>

29. For the United States, under Article 2.1 of the *TBT Agreement*, a technical regulation may impose costs or burdens associated with imported products as compared to like domestic products without necessarily according less favourable treatment to the imported product, where these burdens

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<sup>70</sup>United States' appellant's submission, para. 92 (referring to Indonesia's first written submission to the Panel, footnote 29 to para. 22; United States' first written submission to the Panel, para. 51; ACNielsen 2008 Data on Flavored Cigarettes in the United States (Panel Exhibit US-52); Examples of Cigarettes Certified for Sale in the United States as of 2009 (Panel Exhibit US-62); New York List of Fire-Safe Certified Cigarettes as of 20 January 2009 (Panel Exhibit US-63); and Maine List of Fire-Safe Certified Cigarettes as of 29 July 2009 (Panel Exhibit US-64)).

<sup>71</sup>United States' appellant's submission, para. 93. (original emphasis)

<sup>72</sup>United States' appellant's submission, para. 94.

<sup>73</sup>United States' appellant's submission, para. 97 (referring to Panel Report, para. 2.27).

<sup>74</sup>United States' appellant's submission, paras. 97 and 98 (quoting Panel Report, paras. 2.27, 2.28, and footnote 524 to para. 7.289, in turn quoting Panel Exhibits US-52 and US-62 (*supra*, footnote 70)).

<sup>75</sup>United States' appellant's submission, para. 99.

are explained by a factor or circumstance other than the origin of the products.<sup>76</sup> In this regard, the United States stresses that there are a number of prior WTO reports in which a detrimental effect on an imported product was not related to its origin, but rather to other factors—such as the product's particular market share or import profile, a difference in the real or perceived safety of the products at issue, or the choices of the producers themselves, as private actors.<sup>77</sup> According to the United States, the Panel failed to consider any arguments or evidence bearing upon other relevant factors (unrelated to origin) that could have explained the detriment to the competitive situation of imported clove cigarettes.<sup>78</sup>

30. In the United States' view, in finding that the reason for excluding menthol cigarettes from the ban under Section 907(a)(1)(A) related to "the costs that might be incurred by the United States were it to ban menthol cigarettes"<sup>79</sup>, the Panel failed to examine whether the detriment to the competitive situation of clove cigarettes was related to their origin.<sup>80</sup> Besides the fact that "it is unclear" what the Panel meant by "costs", the United States submits that the text of Article 2.1 requires panels to focus on the comparative treatment of products. Therefore, Article 2.1 contains "no basis" for a comparison of costs imposed on foreign producers with those avoided by "any U.S. entity".<sup>81</sup> In any case, the United States posits, the Panel's finding does not show that any detrimental effect to the competitive conditions for clove cigarettes compared to menthol cigarettes was related to the national origin of imported products. In fact, the costs incurred by the United States if it were to ban menthol cigarettes—that is, "the potential impact on the health care system and the potential development of a black market and smuggling of menthol cigarettes"<sup>82</sup>—would remain unaltered regardless of where menthol cigarettes were produced, and even if all menthol cigarettes were imported.<sup>83</sup>

31. In addition, the United States claims that the Panel acted inconsistently with its duties under Article 11 of the DSU by finding, without an appropriate evidentiary basis<sup>84</sup>, that Section 907(a)(1)(A) does not impose "any costs on any U.S. entity".<sup>85</sup> The United States recalls that Article 11 requires a panel to refrain from issuing "affirmative findings that lack a basis in the

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<sup>76</sup>United States' appellant's submission, para. 101 (referring to Panel Report, para. 7.269; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96; and United States' second written submission to the Panel, paras. 137-144).

<sup>77</sup>United States' appellant's submission, para. 102 (referring to Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96; Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.2514; Panel Report, *US – Tuna II (Mexico)*, paras. 7.331, 7.332, and 7.340; and United States' second written submission to the Panel, paras. 138 and 140).

<sup>78</sup>United States' appellant's submission, paras. 103 and 104.

<sup>79</sup>United States' appellant's submission, para. 105 (quoting Panel Report, para. 7.289).

<sup>80</sup>United States' appellant's submission, para. 105.

<sup>81</sup>United States' appellant's submission, para. 106.

<sup>82</sup>United States' appellant's submission, para. 107 (quoting Panel Report, para. 7.289).

<sup>83</sup>United States' appellant's submission, para. 107.

<sup>84</sup>United States' appellant's submission, para. 113.

<sup>85</sup>United States' appellant's submission, para. 109. (original emphasis)

evidence contained in the panel record".<sup>86</sup> In this dispute, the United States posits, there was no basis for the Panel to conclude that the measure avoids costs to any US entity, as underscored by the fact that the Panel "barely cited the record".<sup>87</sup> According to the United States, the Panel ignored the fact that the United States Food and Drug Administration (the "FDA") was charged with enforcing the measure, thereby incurring "costs" as a US entity.<sup>88</sup> Moreover, the Panel did not take into account that the effect of the measure on US production was "pre-emptive and closed off a potential market that U.S. producers were actively exploring", nor did it consider that, by reducing youth smoking, Section 907(a)(1)(A) reduces demand for all cigarettes and thus "shrinks the U.S. adult cigarette market".<sup>89</sup>

3. Article 2.12 of the TBT Agreement – "Reasonable Interval"

32. The United States claims that the Panel's analysis under Article 2.12 of the *TBT Agreement* contains three errors that led it to find, incorrectly, that the United States acted inconsistently with Article 2.12. First, the United States argues that the Panel attributed an incorrect "interpretative value" to the Doha Ministerial Decision on Implementation-Related Issues and Concerns<sup>90</sup> (the "Doha Ministerial Decision") in interpreting the meaning of Article 2.12. Second, the United States argues that the Panel incorrectly found that Indonesia had established a *prima facie* case of inconsistency with Article 2.12. Lastly, the United States argues that, regardless of whether the Panel was correct in finding that Indonesia had established a *prima facie* case of inconsistency with Article 2.12, the Panel incorrectly determined that the United States did not rebut Indonesia's arguments.<sup>91</sup>

33. The United States first claims that the Panel attributed an incorrect "interpretative value" to paragraph 5.2 of the Doha Ministerial Decision by treating paragraph 5.2 as though it were an authoritative interpretation adopted by the Ministerial Conference pursuant to Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), despite not having found that it has this legal status. The United States further argues that the legal value of paragraph 5.2 of the Doha Ministerial Decision is, at most, a "means of supplemental interpretation" under Article 32 of the *Vienna Convention on the Law of Treaties*<sup>92</sup> (the "*Vienna Convention*").<sup>93</sup> Therefore, while paragraph 5.2 of the Doha Ministerial Decision may be used to confirm the meaning of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*, it may not be applied as a

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<sup>86</sup>United States' appellant's submission, para. 110 (quoting Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 181).

<sup>87</sup>United States' appellant's submission, para. 110.

<sup>88</sup>United States' appellant's submission, para. 110.

<sup>89</sup>United States' appellant's submission, para. 111.

<sup>90</sup>Decision of 14 November 2011, WT/MIN(01)/17.

<sup>91</sup>United States' appellant's submission, para. 123.

<sup>92</sup>Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

<sup>93</sup>United States' appellant's submission, para. 126.

"rule" that can be relied upon as the exclusive basis for concluding that the term "reasonable interval" means "not less than six months".<sup>94</sup>

34. According to the United States, the Doha Ministerial Decision "preceded by several months"<sup>95</sup> a TBT Committee decision that took note of paragraph 5.2 of the Doha Ministerial Decision and, therefore, the Ministerial Conference could not have acted on a recommendation of the Council for Trade in Goods, as Article IX:2 of the *WTO Agreement* requires for the adoption of multilateral interpretations of agreements contained in Annex 1 to the *WTO Agreement*.

35. Second, the United States claims that the Panel incorrectly found that Indonesia had established a *prima facie* case of inconsistency with Article 2.12 where it did not establish that the interval period was unreasonable in the light of the impact on the ability of exporting Members to adapt to the requirements of Section 907(a)(1)(A) of the FFDCA.<sup>96</sup> The United States submits that Indonesia never provided any evidence or legal argument that demonstrates that the three-month period allowed by the United States prejudiced the ability of any foreign producer, including Indonesian producers, to adapt to the requirements of Section 907(a)(1)(A).<sup>97</sup>

36. The United States argues further that, "[e]ven assuming *arguendo* that the Panel was correct in deciding that the elements of the *prima facie* case could be drawn exclusively from paragraph 5.2", the Panel erred in finding that Indonesia had succeeded in establishing a *prima facie* case under the terms of that paragraph<sup>98</sup>, because Indonesia would have had to establish "with evidence and argument" that Section 907(a)(1)(A) presents a "normal" situation and does not constitute one of the non-urgent cases where it would be reasonable to have a shorter interval.<sup>99</sup> The United States submits that Indonesia would also have had to establish that "allowing an interval period of at least six months would not render the fulfillment of the objective pursued by Section 907(a)(1)(A) ineffective".<sup>100</sup>

37. According to the United States, the Panel based its finding that Indonesia had established a *prima facie* case entirely on a "single" statement made by Indonesia that "neither the Act itself nor any other statement by the United States indicates that having [Section 907(a)(1)(A)] enter into force 90 days after signing was necessary to fulfill the objectives of the Act".<sup>101</sup> According to the United States, "Indonesia's assertion does not demonstrate what the Panel claimed Indonesia needed

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<sup>94</sup>United States' appellant's submission, para. 126 (quoting Panel Report, para. 7.559). (footnote omitted)

<sup>95</sup>United States' appellant's submission, para. 125.

<sup>96</sup>United States' appellant's submission, para. 131.

<sup>97</sup>United States' appellant's submission, para. 133.

<sup>98</sup>United States' appellant's submission, para. 135.

<sup>99</sup>United States' appellant's submission, paras. 135 and 138.

<sup>100</sup>United States' appellant's submission, para. 136.

<sup>101</sup>United States' appellant's submission, para. 147 (quoting Panel Report, para. 7.587, in turn quoting Indonesia's first written submission to the Panel, para. 145).

to prove—that a six month interval period would be effective in fulfilling the legitimate objective of Section 907(a)(1)(A)".<sup>102</sup>

38. Third, the United States claims that, even if Indonesia did establish a *prima facie* case, the Panel improperly found that the United States did not rebut that *prima facie* case. According to the United States, "no matter what weight"<sup>103</sup> is attributed to the Doha Ministerial Decision, Indonesia was required to establish a *prima facie* case under the terms of Article 2.12 of the *TBT Agreement*. In the United States' view, the evidence and argument before the Panel on whether the interval period chosen allowed time for Indonesian producers to adapt their products to the requirements of Section 907(a)(1)(A) showed that "the difference between the three and six month interval periods had *no impact* on Indonesian producers".<sup>104</sup> According to the United States, the fact that "Indonesian producers, even 16 months after the enactment of the FSPTCA, had not adjusted their product lines to produce tobacco or menthol-flavoured cigarettes"<sup>105</sup> is sufficient evidence to rebut the *prima facie* case that the Panel found Indonesia to have established. Accordingly, the Panel committed legal error in finding that "the United States has not rebutted" Indonesia's *prima facie* case.<sup>106</sup>

B. *Arguments of Indonesia – Appellee*

1. Article 2.1 of the *TBT Agreement* – "Like Products"

39. Indonesia requests the Appellate Body to reject the United States' appeal against the Panel's finding that clove and menthol cigarettes are like products within the meaning of Article 2.1 of the *TBT Agreement*. In Indonesia's view, the United States' objection is not about the legal findings of the Panel, but about the appropriate weight to give to certain evidence and findings of fact. According to Indonesia, in many of its claims, the United States is simply attempting to disguise its disagreement with the Panel's findings of fact as legal error.<sup>107</sup> Indonesia also recalls that the United States did not appeal the Panel's conclusion that clove and menthol cigarettes share similar physical characteristics.<sup>108</sup>

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<sup>102</sup>United States' appellant's submission, para. 149. (footnote omitted)

<sup>103</sup>United States' appellant's submission, para. 132.

<sup>104</sup>United States' appellant's submission, para. 152. (original emphasis)

<sup>105</sup>United States' appellant's submission, para. 152 (quoting Panel Report, para. 7.583).

<sup>106</sup>United States' appellant's submission, para. 153 (quoting Panel Report, para. 7.594).

<sup>107</sup>Indonesia's appellee's submission, para. 65.

<sup>108</sup>Indonesia's appellee's submission, para. 66.

(a) End-Uses

40. Indonesia takes issue with the United States' contention that the Panel "over-simplified" its analysis in finding that the end-use of both products at issue is "to be smoked".<sup>109</sup> In Indonesia's view, the United States' claim that clove and menthol cigarettes have different end-uses because clove cigarettes are smoked only occasionally while menthol cigarettes are used regularly by addicted smokers has no merit and should be rejected by the Appellate Body. At the outset, Indonesia recalls that, in *Philippines – Distilled Spirits*, the United States correctly noted that "there is no support for the [] proposition that a product consumed on special occasions cannot be in competition with a routinely purchased product".<sup>110</sup>

41. Indonesia first submits that the Panel examined end-uses pursuant to prior guidance from the Appellate Body. In particular, in accordance with the Appellate Body's guidance in *EC – Asbestos*, the Panel noted that the definition of "end-uses" is "the extent to which two products are *capable* of performing the same function".<sup>111</sup> According to Indonesia, in its finding with respect to end-uses, the Panel also properly gave special consideration to the fact that Section 907(a)(1)(A) of the FFDCA is a public health measure aimed at addressing youth smoking. In Indonesia's view, moreover, even assuming *arguendo* that the end-uses put forward by the United States were pertinent ones, the United States presented no evidence showing that clove and menthol cigarettes were not both capable of performing the end-uses of satisfying a nicotine addiction and creating a pleasurable experience.<sup>112</sup> In addition, Indonesia contends that the Panel did not dismiss out-of-hand the possibility that products may have more than one end-use, but rather simply concluded that the products at issue in the present case did not have the specific end-uses suggested by the United States.<sup>113</sup>

42. Second, Indonesia submits that the Panel did not ignore the alternative end-uses for the products at issue proposed by the United States, but rather went to great lengths to consider the evidence regarding end-uses, including those additional end-uses put forth by the United States. According to Indonesia, the Panel addressed the question of whether "regular use" is different from "occasional use", and carefully laid out in its Report the United States' argument that delivering nicotine to addicted smokers must be considered as a separate end-use. However, the Panel eventually found that the United States' argument on end-uses was "circular".<sup>114</sup> Indeed, Indonesia

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<sup>109</sup>Indonesia's appellee's submission, para. 67.

<sup>110</sup>Indonesia's appellee's submission, para. 68 (quoting Appellate Body Reports, *Philippines – Distilled Spirits*, para. 71).

<sup>111</sup>Indonesia's appellee's submission, para. 71 (referring to Panel Report, para. 7.191, in turn referring to Appellate Body Report, *EC – Asbestos*, para. 117). (original emphasis)

<sup>112</sup>Indonesia's appellee's submission, para. 73.

<sup>113</sup>Indonesia's appellee's submission, para. 74 (referring to Panel Report, para. 7.198).

<sup>114</sup>Indonesia's appellee's submission, para. 75.

argues, the Panel simply was not persuaded by the merits of the argument of the United States<sup>115</sup> and proceeded to conclude—based on evidence showing that both clove and menthol cigarettes were capable of delivering nicotine<sup>116</sup>—that the end-use of both types of cigarettes was "to be smoked".<sup>117</sup> Although the United States asserted that there was an "occasional"-use cigarette market, it provided little evidence in support of this claim.<sup>118</sup> Accordingly, Indonesia submits that the Panel did not commit errors of law or fail to make an objective assessment of the evidence, and requests the Appellate Body to uphold the Panel's conclusion that clove and menthol cigarettes share the same end-use of "being smoked".<sup>119</sup>

(b) Consumer Tastes and Habits

43. Indonesia first submits that the Panel did not commit a legal error in its analysis of consumer tastes and habits, but rather conducted a thorough analysis, acted consistently with guidance from the Appellate Body and, after weighing all the evidence on the record, concluded that consumer tastes and habits are similar with respect to clove and menthol cigarettes. In Indonesia's view, the United States simply disagrees with the Panel's conclusion.<sup>120</sup> According to Indonesia, when presenting its claims of error, the United States ignored the Appellate Body's view that it is not necessary to show *actual* substitution by consumers when assessing "the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand".<sup>121</sup> Indonesia contends that the United States failed to present evidence showing that consumers, whether adult or youth, would be unwilling to substitute clove and menthol cigarettes for the end-use of smoking. Indonesia argues that the United States is wrong in presuming that consumer tastes and habits must be identical to be like, considering that the Appellate Body found that products that are close to being perfectly substitutable can be like products. Indonesia further submits that there is sufficient evidence on record supporting the fact that young smokers and pre-smoking youth view clove and menthol cigarettes "as *at least* close to substitutable".<sup>122</sup>

44. Indonesia disagrees with the United States' claim that the Panel erred by failing to include addicted adult smokers in the comparison of consumer tastes and habits. In its view, the Panel's first obligation was to determine the objective of the measure, and then determine which consumers to

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<sup>115</sup>Indonesia's appellee's submission, para. 77.

<sup>116</sup>Indonesia's appellee's submission, para. 78 (referring to Panel Report, para. 7.196).

<sup>117</sup>Indonesia's appellee's submission, para. 76 (referring to Panel Report, para. 7.199).

<sup>118</sup>Indonesia's appellee's submission, para. 78 (referring to United States' response to Panel Question 41, paras. 104-106).

<sup>119</sup>Indonesia's appellee's submission, para. 79.

<sup>120</sup>Indonesia's appellee's submission, para. 80.

<sup>121</sup>Indonesia's appellee's submission, para. 81 (quoting Appellate Body Report, *EC – Asbestos*, para. 101). (emphasis added by Indonesia omitted)

<sup>122</sup>Indonesia's appellee's submission, para. 82 (referring to Appellate Body Reports, *Philippines – Distilled Spirits*, para. 149). (original emphasis)



compare "in light of the context and the object and purpose of the provision at issue" and of the measure.<sup>123</sup> Indonesia recalls that the United States initially agreed with the Panel's focus on the public health aspects of Section 907(a)(1)(A), and only subsequently took issue with the Panel's linkage "of the consideration of likeness under Article 2.1 with the objective of the measure".<sup>124</sup> According to Indonesia, the Panel did not fail to consider Section 907(a)(1)(A) as an integral whole. Rather, in the light of the measure's objective of reducing youth smoking, the Panel concluded that "the perception of consumers, or rather potential consumers, can only be assessed with reference to the health protection objective of the technical regulation at issue".<sup>125</sup>

45. Indonesia further submits that, contrary to what the United States alleges, the Panel did not exclude current consumers from its analysis, since it did include current young smokers. According to Indonesia, what the Panel did was not to include the tastes and habits of adults in its analysis<sup>126</sup>, but to lay out very carefully the basis for its decision to focus on current and pre-smoking youth.<sup>127</sup> Indonesia notes that the Panel established that the purpose of Section 907(a)(1)(A) was to reduce youth smoking, whereas it rejected that a second objective of the measure was to avoid the potential negative consequences or costs associated with banning products to which tens of millions of adults are chemically and psychologically addicted.<sup>128</sup> Accordingly, the Panel evaluated the consumer tastes and habits of youth, following the guidance set out by the Appellate Body to consider the "particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply".<sup>129</sup>

46. Second, Indonesia submits that, in considering evidence regarding consumer tastes and habits, the Panel did not exceed its discretion as the trier of facts, and made an objective assessment of the facts in accordance with Article 11 of the DSU. Indonesia notes, at the outset, that the United States inaccurately cited to the Panel Report when adducing that the Panel focused only on potential young smokers.<sup>130</sup> On the contrary, Indonesia posits, the Panel specifically identified the consumers at issue

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<sup>123</sup>Indonesia's appellee's submission, para. 83 (quoting Appellate Body Report, *EC – Asbestos*, paras. 88 and 89). (emphasis added by Indonesia omitted)

<sup>124</sup>Indonesia's appellee's submission, para. 84 (referring to United States' appellant's submission, para. 60).

<sup>125</sup>Indonesia's appellee's submission, para. 86 (quoting Panel Report, para. 7.119).

<sup>126</sup>Indonesia's appellee's submission, para. 87 (referring to United States' appellant's submission, para. 54).

<sup>127</sup>Indonesia's appellee's submission, para. 88 (referring to Panel Report, para. 7.119).

<sup>128</sup>Indonesia's appellee's submission, paras. 90 and 91.

<sup>129</sup>Indonesia's appellee's submission, para. 92 (quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 21, DSR 1996:I, 97, at 114).

<sup>130</sup>Indonesia's appellee's submission, para. 100 (referring to United States' appellant's submission, para. 64).

in this case as "*young smokers and potential young smokers*".<sup>131</sup> In addressing the United States' specific claims, Indonesia argues that the Panel did not wilfully disregard or distort evidence. Rather, in Indonesia's view, the Panel carefully reviewed the survey evidence and devoted two paragraphs and five footnotes in its Report to explain that the survey data did not provide clear guidance on comparing consumer tastes and habits, given that the research parameters varied from survey to survey.<sup>132</sup> Indonesia contends that the Panel's approach to the survey evidence hardly amounts to excluding it *a priori* but, rather, that the Panel, acting within its discretion, simply did not place the same importance on the evidence concerning addicted adult smokers as did the United States.<sup>133</sup>

47. Indonesia further submits that the Panel did not make affirmative findings of fact that were not grounded on evidence. In Indonesia's view, while not relying on certain evidence put forward by the United States, the Panel identified and relied on other evidence on the record proving that both clove and menthol cigarettes were "trainer" or "starter" cigarettes that appeal to youth.<sup>134</sup> According to Indonesia, the Panel methodically described a number of sources of evidence (the FDA, the American Lung Association, the WHO, the National Survey on Drug Use and Health, and the Tobacco Products Scientific Advisory Council) indicating that flavoured cigarettes appeal to youth and novice smokers because their characterizing flavours mask the harshness of tobacco. It was based on this evidence that the Panel concluded that all these flavoured cigarettes are perceived as vehicles to start smoking.<sup>135</sup>

48. Lastly, Indonesia adds that the Panel did not commit an egregious error in declining to accord the same weight as the United States sought regarding the addiction rates of use of clove and menthol cigarettes by youth and adults. Referring to Appellate Body reports in *EC – Bed Linen (Article 21.5 – India)*, *Australia – Salmon*, and *Canada – Wheat Exports and Grain Imports*, Indonesia highlights that panels are given "great latitude"<sup>136</sup> in determining what evidence to consider in evaluating the validity of claims and that a panel's decision not to rely on some of the facts submitted by one of the parties would not by itself constitute legal error.<sup>137</sup> In conclusion, Indonesia requests the Appellate Body to reject the United States' claims with respect to the Panel's findings on consumer tastes and

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<sup>131</sup>Indonesia's appellee's submission, para. 100 (quoting Panel Report, para. 7.232). (emphasis added by Indonesia)

<sup>132</sup>Indonesia's appellee's submission, para. 104 (referring to Panel Report, paras. 7.209 and 7.210 and footnotes 426-430 thereto).

<sup>133</sup>Indonesia's appellee's submission, para. 106.

<sup>134</sup>Indonesia's appellee's submission, para. 111.

<sup>135</sup>Indonesia's appellee's submission, paras. 112-114.

<sup>136</sup>Indonesia's appellee's submission, para. 116.

<sup>137</sup>Indonesia's appellee's submission, paras. 115-117 (referring to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 177; Appellate Body Report, *Australia – Salmon*, para. 267; and Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 186).

habits, and to uphold the Panel's determination that clove and menthol cigarettes are like products for purposes of Article 2.1 of the *TBT Agreement*.<sup>138</sup>

2. Article 2.1 of the *TBT Agreement* – "Treatment No Less Favourable"

49. Indonesia claims that the Panel did not err in finding that, under Section 907(a)(1)(A) of the FFDCA, imported clove cigarettes are treated less favourably than domestic menthol cigarettes for the purposes of Article 2.1 of the *TBT Agreement*. In particular, Indonesia contends that the Panel did not commit error in identifying the products to be compared for its less favourable treatment analysis, and properly found that the less favourable treatment accorded to clove cigarettes cannot be explained by factors unrelated to their foreign origin. Indonesia further maintains that the Panel did not fail to make an objective assessment of the facts in evaluating the evidence before it, thereby acting consistently with Article 11 of the DSU.

50. First, Indonesia argues that the United States misinterprets the Appellate Body report in *EC – Asbestos* and the panel report in *US – Tuna II (Mexico)* as requiring the Panel to have included treatment of cigarettes with characterizing flavours other than clove and menthol in its less favourable treatment analysis.<sup>139</sup> While the panels in both of the above disputes had conducted an initial like product analysis of a group of products<sup>140</sup>, the scope of the like products to be considered in evaluating less favourable treatment was limited to the imported and domestic products at issue, and did not extend to "other potentially 'like' products in general".<sup>141</sup> Since the products at issue in this dispute had been identified as being imported clove cigarettes and domestically produced menthol cigarettes in the United States, the Panel correctly assessed likeness only as between these two categories of products and, as a consequence, properly identified those products for comparison in its less favourable treatment analysis.<sup>142</sup> Moreover, because neither party argued before the Panel that clove cigarettes were like cigarettes with other characterizing flavours, had the Panel included cigarettes with characterizing flavours other than clove and menthol in its analysis, it would have made a finding on a claim that was not before it, thus acting inconsistently with Article 11 of the DSU.<sup>143</sup>

51. Indonesia further rejects the United States' contention that the Panel incorrectly narrowed the scope of products to be compared on the basis of its terms of reference. Indonesia dismisses this

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<sup>138</sup>Indonesia's appellee's submission, para. 118.

<sup>139</sup>Indonesia's appellee's submission, para. 121 (referring to United States' appellant's submission, para. 77).

<sup>140</sup>Indonesia's appellee's submission, para. 126.

<sup>141</sup>Indonesia's appellee's submission, para. 130.

<sup>142</sup>Indonesia's appellee's submission, para. 139 (referring to Panel Report, para. 7.277).

<sup>143</sup>Indonesia's appellee's submission, paras. 140 and 141; see also para. 142 (quoting Appellate Body Report, *Chile – Price Band System*, para. 173).

argument as speculative and emphasizes that the Panel referred to its terms of reference in the context of its like products analysis.<sup>144</sup> The Panel never contemplated that flavoured cigarettes other than clove and menthol cigarettes could be included in the like products analysis, which would be consistent with its terms of reference. Moreover, Indonesia's panel request and its subsequent submissions demonstrate that Indonesia raised no claims and made no arguments with respect to cigarettes with characterizing flavours other than clove or menthol.<sup>145</sup> Accordingly, the question of whether the Panel's terms of reference "could have allowed a finding of likeness" between clove cigarettes and other flavoured cigarettes "is moot".<sup>146</sup> Indonesia considers that, "absent a finding of likeness between clove and cigarettes with other characterizing flavors", the Panel could not have included these other flavoured cigarettes in its less favourable treatment analysis.<sup>147</sup>

52. Second, Indonesia argues that the Panel did not exceed its discretion when considering the effect of Section 907(a)(1)(A) on those products that existed at the time the measure went into effect. Indonesia characterizes the United States' argument in this respect as "irrelevant"<sup>148</sup>, and adds that the Panel acted within the limits of its discretion in determining the time period for which a comparison was to be made. While Indonesia agrees that there is "no rigid temporal limitation"<sup>149</sup> on the timeframe for analyzing less favourable treatment, neither is there a mandate to consider any specific timeframe for this analysis.<sup>150</sup> Moreover, Indonesia submits that the United States is arguing that the Panel should have assessed the treatment of the imported product—clove cigarettes—and a domestic product that had not been found to be like—other flavoured cigarettes. However, the "relevant comparison" had to be whether the measure at issue modified the conditions of competition "to the detriment of imported clove cigarettes as compared to menthol cigarettes, which were not banned".<sup>151</sup>

53. Third, Indonesia disagrees with the United States' claim that the Panel acted inconsistently with Article 11 of the DSU by failing to consider evidence demonstrating that cigarettes with characterizing flavours other than clove or menthol were being sold in the United States at the time the measure went into effect. According to Indonesia, because the appropriate products for comparison in the less favourable treatment analysis were clove and menthol cigarettes, the existence of other flavoured cigarettes at the time the ban was imposed is immaterial. Furthermore, Indonesia

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<sup>144</sup>Indonesia's appellee's submission, paras. 147 and 148 (referring to United States' appellant's submission, para. 86; and Panel Report, paras. 7.124-7.127).

<sup>145</sup>Indonesia's appellee's submission, paras. 149 and 150 (referring to Indonesia's panel request, pp. 1-2; and Indonesia's responses to Panel Questions 27 and 85).

<sup>146</sup>Indonesia's appellee's submission, para. 150.

<sup>147</sup>Indonesia's appellee's submission, para. 150.

<sup>148</sup>Indonesia's appellee's submission, para. 151.

<sup>149</sup>Indonesia's appellee's submission, para. 152 (quoting United States' appellant's submission, para. 89).

<sup>150</sup>Indonesia's appellee's submission, para. 152; see also para. 154 (quoting Panel Report, *US – Tuna II (Mexico)*, paras. 7.299 and 7.300).

<sup>151</sup>Indonesia's appellee's submission, para. 157.

submits that the Panel did consider and weigh the evidence submitted by the United States regarding the availability of other flavoured cigarettes, but eventually did not find it compelling.<sup>152</sup> Indonesia also points out that evidence on the record showed that the domestically produced brand of clove cigarettes "accounted for a negligible share of all clove cigarettes sold in the United States".<sup>153</sup> In Indonesia's view, the fact that the Panel did not place the same weight on such evidence as did the United States does not amount to a violation of Article 11 of the DSU.

54. Fourth, Indonesia takes issue with the United States' claim that the Panel applied the incorrect legal framework in determining whether the less favourable treatment accorded to clove cigarettes could be explained by factors unrelated to their foreign origin. Indonesia observes that the Appellate Body jurisprudence regarding Article III:4 of the GATT 1994 provides useful guidance in the present dispute<sup>154</sup> and that, under that provision, a less favourable treatment analysis only involves determining whether a measure has the effect of modifying the conditions of competition to the detriment of imported products.<sup>155</sup> According to Indonesia, the United States' claim that no less favourable treatment exists when the detrimental effect on an imported product is not attributable to its foreign origin, but to some other factor, is based on a "misreading" of the Appellate Body report in *Dominican Republic – Import and Sale of Cigarettes*.<sup>156</sup> On this basis, Indonesia posits, the United States is "attempt[ing] to create a new criterion" when it suggests that a finding of less favourable treatment under Article 2.1 of the *TBT Agreement* would be possible only if a measure's detrimental effects are tied to the foreign origin of the imported product at issue.<sup>157</sup> In fact, no panel or Appellate Body report has ever required under Article III:4 of the GATT 1994 "both 'a less favourable treatment' test and a second test 'based on national origin'".<sup>158</sup> In other words, Indonesia contends that the Panel's conclusion that imported clove cigarettes are treated less favourably than domestic menthol cigarettes—because the former are banned from the US market, whereas the latter

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<sup>152</sup>Indonesia's appellee's submission, paras. 158 and 162 (referring to Panel Report, footnote 524 to para. 7.289).

<sup>153</sup>Indonesia's appellee's submission, para. 164 (referring to Panel Report, paras. 2.26 and 2.27; and letter dated 25 March 2008 from the President of the Tobacco Merchants Association, Inc. (Panel Exhibit IND-12)).

<sup>154</sup>Indonesia's appellee's submission, para. 169 (referring to Panel Report, para. 7.269, in turn referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 137; and Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96).

<sup>155</sup>Indonesia's appellee's submission, para. 172 (referring to Indonesia's opening statement at the first Panel meeting, paras. 26 and 58; Indonesia's response to Panel Question 52; and Indonesia's second written submission to the Panel, para. 99).

<sup>156</sup>Indonesia's appellee's submission, para. 173 (referring to Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96).

<sup>157</sup>Indonesia's appellee's submission, para. 174 (referring to Brazil's oral statement at the Panel meeting with the third parties, para. 11; and Indonesia's second written submission to the Panel, para. 98).

<sup>158</sup>Indonesia's appellee's submission, paras. 179-181 (quoting Appellate Body Report, *Korea – Various Measures on Beef*, para. 135; and Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 128 and 134; and referring to Panel Report, *Mexico – Taxes on Soft Drinks*, paras. 8.114-8.122).

are not—is *per se* sufficient to make a finding that the United States acted inconsistently with Article 2.1 of the *TBT Agreement*.<sup>159</sup>

55. In addition, Indonesia disagrees with the United States' claim that the Panel failed to make an objective assessment of the facts as required by Article 11 of the DSU when it found that Section 907(a)(1)(A) did not impose any costs on any US entity without an adequate evidentiary basis. Indonesia contends that there was evidence on the record demonstrating that: (i) the exception for menthol cigarettes under the measure at issue was the result of a political compromise with the US tobacco industry and an effort to protect domestic jobs<sup>160</sup>; and (ii) that the sole reason for excluding menthol cigarettes from the ban was to spare the United States from the costs it might otherwise incur.<sup>161</sup> In evaluating and weighing such evidence, the Panel assessed the facts within the limits of its discretion, and thus did not act inconsistently with Article 11 of the DSU.

3. Article 2.12 of the *TBT Agreement* – "Reasonable Interval"

56. Indonesia submits that the Panel assigned the correct interpretative value to paragraph 5.2 of the Doha Ministerial Decision, and properly found that Indonesia established a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement*, which the United States failed to rebut.<sup>162</sup>

57. First, Indonesia contends that the United States incorrectly claims that the Panel declined to formally determine whether paragraph 5.2 of the Doha Ministerial Decision is an "authoritative interpretation" adopted by the Ministerial Conference pursuant to Article IX:2 of the *WTO Agreement*. According to Indonesia, the Panel "clearly concluded" that paragraph 5.2 of the Doha Ministerial Decision is "a binding interpretation".<sup>163</sup> Moreover, Indonesia disagrees with the United States that the Ministerial Conference, in adopting paragraph 5.2, did not act upon the recommendation of the Council for Trade in Goods, as Article IX:2 of the *WTO Agreement* requires. According to Indonesia, the preamble of the Doha Ministerial Decision indicates that the Decision and the interpretations contained therein were adopted on the basis of discussions carried out within the General Council and the WTO subsidiary bodies.

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<sup>159</sup>Indonesia's appellee's submission, para. 172.

<sup>160</sup>Indonesia's appellee's submission, para. 187 (referring to Indonesia's second written submission to the Panel, para. 118; S. Saul, "Cigarette Bill Treats Menthol with Leniency", *New York Times*, 13 May 2008 (Panel Exhibit IND-87); and S. Saul, "Bill to Regulate Tobacco Moves Forward", *New York Times*, 3 April 2008 (Panel Exhibit IND-88)).

<sup>161</sup>Indonesia's appellee's submission, para. 189 (referring to Panel Report, para. 7.289, in turn quoting United States' first written submission to the Panel, paras. 23-25; and United States' response to Panel Questions 40, 89, and 109).

<sup>162</sup>Indonesia's appellee's submission, para. 195.

<sup>163</sup>Indonesia's appellee's submission, para. 196 (referring to Panel Report, para. 7.575).

58. In response to the United States' argument that the Doha Ministerial Decision is "at most"<sup>164</sup> a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention*, Indonesia submits that the Panel properly determined that paragraph 5.2 of the Doha Ministerial Decision is a "subsequent agreement between the parties" within the meaning of Article 31(3)(a) of the *Vienna Convention*.<sup>165</sup> Moreover, Indonesia argues that the Panel did not err in its interpretation of the term "normally" in paragraph 5.2 of the Doha Ministerial Decision. According to Indonesia, the Panel correctly concluded that the term "normally" must be interpreted as meaning "under normal or usual conditions; as a rule".<sup>166</sup>

59. Second, Indonesia submits that the Panel did not err in finding that Indonesia had established a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement*. According to Indonesia, the United States incorrectly argues that the Panel based its finding that Indonesia had established a *prima facie* case "exclusively" on the basis of the text of paragraph 5.2 of the Doha Ministerial Decision.<sup>167</sup> Indonesia contends that the Panel Report clearly shows that the Panel considered both Article 2.12 of the *TBT Agreement* and paragraph 5.2 of the Doha Ministerial Decision.<sup>168</sup> Indonesia contends that this is "categorically stated" by the Panel when it noted that "Indonesia ha[d] persuaded the Panel that, in the light of Article 2.12 of the TBT Agreement and paragraph 5.2 of the Doha Ministerial Decision, an interval of less than six months was not reasonable in the circumstances of this case".<sup>169</sup>

60. In response to the United States' argument that Indonesia provided no evidence or argumentation that the three-month interval period prejudiced the ability of Indonesian producers to adapt to the requirements of Section 907(a)(1)(A) of the FFDCAs, Indonesia contends that it adduced sufficient argument and evidence to establish a presumption that the United States had acted inconsistently with its obligation under Article 2.12.<sup>170</sup> According to Indonesia, it did "establish[] a *prima facie* case that the 90-day interval provided by the United States was significantly shorter than the 6 months" normally required.<sup>171</sup> Indonesia submits that, following the elements stipulated in Article 2.12 of the *TBT Agreement*, as well as in the binding interpretation of the term "reasonable interval" in paragraph 5.2 of the Doha Ministerial Decision, Indonesia set forth in its written and oral submissions, as well as in its Panel exhibits, legal arguments and evidence to raise the presumption

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<sup>164</sup>Indonesia's appellee's submission, para. 205 (quoting United States' appellant's submission, para. 126).

<sup>165</sup>Indonesia's appellee's submission, para. 206.

<sup>166</sup>Indonesia's appellee's submission, paras. 220 and 221.

<sup>167</sup>Indonesia's appellee's submission, para. 223 (referring to United States' appellant's submission, para. 128).

<sup>168</sup>Indonesia's appellee's submission, para. 227.

<sup>169</sup>Indonesia's appellee's submission, para. 230 (quoting Panel Report, para. 7.594).

<sup>170</sup>Indonesia's appellee's submission, para. 233.

<sup>171</sup>Indonesia's appellee's submission, para. 237.

that its claim against the United States under Article 2.12 was true.<sup>172</sup> Accordingly, Indonesia submits that the Panel did not commit a legal error in finding that Indonesia had established a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement*.

61. Third, with regard to the United States' claim that, even assuming that the Panel correctly found that Indonesia had established a *prima facie* case, the Panel committed legal error in finding that the United States had not rebutted Indonesia's *prima facie* case, Indonesia responds that, since it had made out a *prima facie* case, the onus shifted to the United States "to bring forward evidence and arguments to disprove the claim".<sup>173</sup> Since the 90-day interval provided by the United States was significantly shorter than the six months normally required, the burden shifted to the United States to refute the claimed inconsistency. According to Indonesia, the Panel correctly stressed that the United States had failed to explain why it deemed that allowing a longer interval period between the publication and the entry into force of Section 907(a)(1)(A) would not have been effective in fulfilling the objective pursued by the measure, while a three-month interval was.<sup>174</sup> Indonesia also posits that the United States did not explain why six months would have been ineffective, especially taking into account that it did not notify Section 907(a)(1)(A) as an urgent measure pursuant to Article 2.10 of the *TBT Agreement*.<sup>175</sup>

62. According to Indonesia, the Panel weighed and balanced the evidence and arguments on the record and, while it was "convinced of the validity of the claim advanced by Indonesia", it "was not convinced by the rebuttal arguments" presented by the United States.<sup>176</sup> In Indonesia's view, therefore, the Panel acted consistently with its duties since, "in the absence of effective refutation by the defending party, a panel, as a matter of law, is required to rule in favor of the complaining party presenting the *prima facie* case".<sup>177</sup>

### C. Arguments of the Third Participants

#### 1. Brazil

63. Brazil generally agrees with the views expressed by the Panel concerning the legal standard for the assessment of likeness under Article 2.1 of the *TBT Agreement*. For Brazil, the absence of a provision similar to Article III:1 of the GATT 1994, combined with the sixth recital of the preamble

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<sup>172</sup>Indonesia's appellee's submission, para. 234.

<sup>173</sup>Indonesia's appellee's submission, para. 240 (quoting Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 16-17, DSR 1997:I, 323, at 338).

<sup>174</sup>Indonesia's appellee's submission, para. 240 (referring to Panel Report, para. 7.593).

<sup>175</sup>Indonesia's appellee's submission, para. 241 (referring to Panel Report, para. 7.593).

<sup>176</sup>Indonesia's appellee's submission, para. 242. (underlining omitted)

<sup>177</sup>Indonesia's appellee's submission, para. 243 (referring to Panel Report, para. 7.591, in turn referring to Appellate Body Report, *EC – Hormones*, para. 104; Appellate Body Report, *Japan – Agricultural Products II*, paras. 98 and 136; and Appellate Body Report, *Japan – Apples*, para. 159).



of the *TBT Agreement*, seems to indicate that the objectives of a technical regulation should play an important role in ascertaining the characteristics of products alleged to be like.<sup>178</sup> Despite there being no direct reference in Article 2.1 of the *TBT Agreement* to the legitimate objectives of the technical regulation, Brazil notes that the use of an overarching analytical concept to inform all paragraphs of a provision is an issue that has already been accepted in WTO jurisprudence.<sup>179</sup> In Brazil's view, the objective pursued by a Member adopting a technical regulation is a central element of the likeness analysis under Article 2.1, given its context and object and purpose.<sup>180</sup> However, Brazil posits, it does not seem reasonable to require a panel to examine the intentions of the regulator and its implications that go beyond the explicit legitimate objective of a measure. The objectives pursued through technical regulations must be assessed as objectively as possible<sup>181</sup>, looking at the measure's structure, architecture, and design.<sup>182</sup> Once the legitimate objectives pursued by a Member are properly revealed, Brazil is of the view that they should inform the likeness analysis under Article 2.1 of the *TBT Agreement*.

64. Brazil further notes that the United States pursues an interpretation of the term "treatment no less favourable" that would require evidence of origin-based detrimental effects to the imported product as a prerequisite for showing *de facto* discrimination.<sup>183</sup> Accordingly, Brazil explains, the United States considers that if any factor, other than the foreign origin of the product, were found to be the basis for the discrimination, there would be no violation of Article 2.1 of the *TBT Agreement*. In Brazil's view, both under Article III:4 of the GATT 1994 and under Article 2.1 of the *TBT Agreement*, a key question is to what extent the application of a measure results in less favourable treatment to the like imported product, regardless of the measure's stated objective.<sup>184</sup> The difference between these two provisions is that, while under Article 2.1 of the *TBT Agreement* the measure's objectives are relevant in defining whether the products at issue are like, under Article III:4 of the GATT 1994, likeness is assessed from a competition perspective.<sup>185</sup> Under both provisions, Brazil contends, once the imported and domestic products are found to be like, the manner in which the measure is applied and the prevailing circumstances of the relevant market for the affected products are more important in a less favourable treatment determination than the measure's

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<sup>178</sup>Brazil's third participant's submission, para. 8.

<sup>179</sup>Brazil's third participant's submission, para. 11 (referring to Appellate Body Report, *EC – Asbestos*, para. 98; and Appellate Body Reports, *Philippines – Distilled Spirits*, para. 119).

<sup>180</sup>Brazil's third participant's submission, para. 14.

<sup>181</sup>Brazil's third participant's submission, para. 17.

<sup>182</sup>Brazil's third participant's submission, para. 20 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29, DSR 1996:I, 97, at 120; Appellate Body Report, *Chile – Alcoholic Beverages*, paras. 61 and 62; and Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 112).

<sup>183</sup>Brazil's third participant's submission, para. 23 (referring to United States' appellant's submission, paras. 101-106).

<sup>184</sup>Brazil's third participant's submission, para. 28 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 28, DSR 1996:I, 97, at 119).

<sup>185</sup>Brazil's third participant's submission, para. 29.

objectives. According to Brazil, this conclusion is even more relevant in the context of an analysis of a *de facto* discrimination.<sup>186</sup>

## 2. Colombia

65. Colombia submits that the Panel erred in its legal interpretation of paragraph 5.2 of the Doha Ministerial Decision. In its view, the Panel decided to give the Doha Ministerial Decision the status of an authoritative interpretation because it was agreed by all WTO Members meeting in the form of the Ministerial Conference, the highest ranking body of the WTO.<sup>187</sup> According to Colombia, however, this legal conclusion is incorrect. Colombia notes that the Ministerial Conference did not act on the basis of a recommendation by the Council overseeing the functioning of the *TBT Agreement* as mandated by Article IX:2 of the *WTO Agreement*, and, consequently, the first condition of Article IX:2 was not present in this case.<sup>188</sup> Furthermore, the Panel dismissed this condition on the basis that it was only a formal requirement. Colombia considers such reasoning to be in error: first, because the procedural nature of a condition does not mean that it can be overlooked<sup>189</sup>; and, second, because the fact that all Members agreed on a certain interpretation is not sufficient to conclude that such interpretation was adopted pursuant to Article IX:2 of the *WTO Agreement*. With respect to the latter point, Colombia submits that neither the Ministerial Conference nor the General Council have the authority to disregard the previously given consent by all WTO Members embodied in the covered agreements.<sup>190</sup> Colombia further is of the view that the Appellate Body should clarify whether the Doha Ministerial Decision could be considered to constitute, pursuant to Article 31(3)(a) of the *Vienna Convention*, a "subsequent agreement between the parties" on the interpretation of Article 2.12 of the *TBT Agreement*.<sup>191</sup>

## 3. European Union

66. The European Union first submits that the term "like product" appears to be used by the parties and the Panel in two different ways. The first use relates to the "comparison between the import and domestic sides" (the "horizontal line")<sup>192</sup>, while the second use concerns the "relationship among the things that are to be considered together" as a product on both the import and domestic sides (the "vertical line").<sup>193</sup> In the European Union's view, the "horizontal line" comparison requires the import and domestic categories to be described in terms that are identical in all respects, otherwise

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<sup>186</sup>Brazil's third participant's submission, para. 30.

<sup>187</sup>Colombia's third participant's submission, para. 6 (quoting Panel Report, para. 7.576).

<sup>188</sup>Colombia's third participant's submission, para. 10.

<sup>189</sup>Colombia's third participant's submission, para. 14.

<sup>190</sup>Colombia's third participant's submission, para. 15.

<sup>191</sup>Colombia's third participant's submission, para. 19.

<sup>192</sup>European Union's third participant's submission, para. 17. (original underlining)

<sup>193</sup>European Union's third participant's submission, para. 18. (original underlining)

one cannot meaningfully test for *de facto* discrimination.<sup>194</sup> The "vertical line" comparison, on the other hand, does not require that all things within the set of a "product" be identical in all respects because the comparison is made on the basis of a market definition (that is, by reference to cross-elasticity of supply and demand), hence quite heterogeneous things can be taken together as a single product.<sup>195</sup> The European Union is of the view that, to determine whether there is *de facto* discrimination, it is necessary to consider whether the regulatory distinction is related to the foreign origin of the product.<sup>196</sup> For this reason, the European Union contends that even if clove and menthol cigarettes would be reasonably grouped together as part of a "product", this does not mean that the situation in respect of menthol cigarettes and youth smoking, and clove cigarettes and youth smoking, is necessarily the same or similar.<sup>197</sup>

67. With respect to the less favourable treatment analysis under Article 2.1 of the *TBT Agreement*, the European Union stresses that the relationship between trade and regulation is complex.<sup>198</sup> In its view, the problem is to distinguish between the exercise of regulatory autonomy that is acceptable, and that which is not.<sup>199</sup> This necessarily entails looking at whether the design of the measure is, expressly or by proxy, related to the foreign origin of the regulated products. The European Union also considers that any "countervailing explanations" should be considered together with the inquiry into whether there is some relation with foreign origin, because such an approach provides for the most flexibility when considering a wide range of potential factual situations.<sup>200</sup> In addition, the European Union raises concerns regarding the Panel's approach in allocating the burden of proof under Article 2.1 of the *TBT Agreement*.<sup>201</sup> In particular, according to the European Union, the Panel seems to reason that, because both menthol and clove cigarettes appeal to youth, the only plausible explanation for the failure to extend the ban to menthol cigarettes is *de facto* discrimination.<sup>202</sup> However, this reasoning overlooks the possibility advocated by the United States that the attractiveness of clove cigarettes to youth is more pronounced than in the case of menthol cigarettes.<sup>203</sup> The European Union contends that the Panel did not explain how Indonesia had discharged its burden of proving that the situation with respect to menthol cigarettes and youth smoking was the same as or similar to the situation with respect to clove cigarettes.<sup>204</sup> If Indonesia

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<sup>194</sup>European Union's third participant's submission, para. 19.

<sup>195</sup>European Union's third participant's submission, para. 20.

<sup>196</sup>European Union's third participant's submission, para. 21.

<sup>197</sup>European Union's third participant's submission, para. 23.

<sup>198</sup>European Union's third participant's submission, para. 32.

<sup>199</sup>European Union's third participant's submission, para. 33.

<sup>200</sup>European Union's third participant's submission, para. 44.

<sup>201</sup>European Union's third participant's submission, para. 51.

<sup>202</sup>European Union's third participant's submission, para. 54.

<sup>203</sup>European Union's third participant's submission, para. 54 (referring to United States' appellant's submission, paras. 32-36, 54, 55, and 61-63).

<sup>204</sup>European Union's third participant's submission, para. 56.

failed to provide evidence in that respect, the European Union wonders how Indonesia may be considered to have discharged its burden of proof with respect to an alleged "in fact" breach of Article 2.1 of the *TBT Agreement*.<sup>205</sup>

68. Lastly, with respect to Article 2.12 of the *TBT Agreement*, the European Union considers that paragraph 5.2 of the Doha Ministerial Decision is relevant either pursuant to Article 31(3)(a) of the *Vienna Convention*, or as a fact.<sup>206</sup> It further contends that Indonesia had the burden of proving, under Article 2.12 of the *TBT Agreement*, that the time actually allowed by the measure was not reasonable.<sup>207</sup> With respect to the question of whether or not six months would be ineffective in fulfilling the legitimate objective pursued, the European Union finds nothing in the Doha Ministerial Decision that expressly reverses the burden of proof.<sup>208</sup> It recalls, in that regard, that the Appellate Body in *EC – Sardines* placed the burden of proof on the complainant under Article 2.4 of the *TBT Agreement*.<sup>209</sup>

#### 4. Mexico

69. Mexico submits that it is difficult to incorporate the objective of a technical regulation into the like products analysis. In its view, when the purpose of a technical regulation is to protect the highest values, such as human life or health, the analysis of the four criteria will itself be sufficient to reach a correct interpretation of likeness because "the product differences themselves will have inspired the objective of the technical regulation, and not the opposite".<sup>210</sup> Mexico contends, in particular, that the consumer tastes and habits criterion needs to be approached very carefully because regulatory intervention by a Member can "shape consumer perceptions".<sup>211</sup> Moreover, Mexico submits that the creation of sub-categories of like products on the basis of different end-uses, as suggested by the United States, could lead to circumvention of the disciplines in Article 2.1 of the *TBT Agreement*.<sup>212</sup> Mexico further stresses that, if regulatory distinctions could be used to determine like products, this could "render the concept of *de facto* discrimination meaningless".<sup>213</sup>

70. With respect to the Panel's less favourable treatment analysis, Mexico disagrees with the United States that the group of like imported products should include like imported products from all WTO Members and not just from the complaining Member. According to Mexico, the term "any

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<sup>205</sup>European Union's third participant's submission, para. 57.

<sup>206</sup>European Union's third participant's submission, para. 62.

<sup>207</sup>European Union's third participant's submission, para. 63.

<sup>208</sup>European Union's third participant's submission, para. 66.

<sup>209</sup>European Union's third participant's submission, para. 67 (referring to Appellate Body Report, *EC – Sardines*, paras. 259-282).

<sup>210</sup>Mexico's third participant's submission, para. 15.

<sup>211</sup>Mexico's third participant's submission, para. 16.

<sup>212</sup>Mexico's third participant's submission, paras. 17-19.

<sup>213</sup>Mexico's third participant's submission, para. 21.

[Member]" under Article 2.1 of the *TBT Agreement* provides "considerable flexibility" when assessing conformity with this provision, and hence the focus can be on like products from "one Member, some Members or all Members".<sup>214</sup> In Mexico's view, the Panel correctly focused on the treatment accorded to like products from Indonesia. In addition, contrary to the United States' argument that the Panel should have compared the treatment accorded to imported and like domestic products as a group, Mexico submits that the Panel's "efficient approach" to applying the "group" comparison when determining less favourable treatment was "not a legal error".<sup>215</sup> On the contrary, the Panel properly found that the "vast majority" of imports of Indonesian cigarettes with characterizing flavours were banned while "all or almost all" of the US cigarettes with characterizing flavours were excluded from the ban.<sup>216</sup>

71. Mexico lastly addresses three additional issues concerning the less favourable treatment analysis. First, it agrees with the Panel's reasoning that a measure is discriminatory when it minimizes the costs for the domestic producers while triggering costs to the foreign producers. In Mexico's view, the Panel's approach is also applicable to any case where the technical regulation is designed in such a way that, either *de facto* or *de jure*, avoids or minimizes costs for the domestic producers and triggers costs to the foreign producers.<sup>217</sup> Second, with respect to the United States' argument that there is no temporal limitation on the analysis of *de facto* less favourable treatment<sup>218</sup>, Mexico posits that the date of a panel's establishment is "the key date" when assessing whether *de facto* discrimination exists.<sup>219</sup> Mexico considers that, although past and possibly future events may inform an assessment of *de facto* discrimination at the time of the establishment of the panel, "great care must be taken when incorporating such facts into the assessment".<sup>220</sup> Third, Mexico is concerned with the interpretation that the non-discrimination obligations in Article 2.1 of the *TBT Agreement* are not violated if the adverse impact is primarily the result of factors "unrelated to the foreign origin of the product".<sup>221</sup> According to Mexico, *de facto* discrimination precisely occurs, by its very nature, when the challenged measure does not, on its face, discriminate on the basis of origin.

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<sup>214</sup>Mexico's third participant's submission, para. 40. (original emphasis)

<sup>215</sup>Mexico's third participant's submission, para. 43.

<sup>216</sup>Mexico's third participant's submission, para. 48 (referring to Panel Report, paras. 7.276-7.279).

<sup>217</sup>Mexico's third participant's submission, paras. 53 and 54.

<sup>218</sup>Mexico's third participant's submission, para. 56 (referring to United States' appellant's submission, paras. 91-94).

<sup>219</sup>Mexico's third participant's submission, para. 57.

<sup>220</sup>Mexico's third participant's submission, para. 59.

<sup>221</sup>Mexico's third participant's submission, para. 65 (quoting United States' appellant's submission, para. 101; and referring to Panel Report, para. 7.259, in turn referring to Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96).

5. Norway

72. Norway agrees with the United States that a panel's terms of reference are not limited by the products listed in a panel request.<sup>222</sup> In this regard, Norway is not convinced by the Panel's reasoning that "the identification of the specific products at issue in a panel request pertains to the claim at issue".<sup>223</sup> In Norway's view, since the product scope of the likeness analysis may influence the outcome of a discrimination claim, a panel should be entitled to define "the product scope of its own analysis" to determine the existence of discrimination, "without being subject to limitations chosen by the complainant, for whatever reason, in its panel request".<sup>224</sup>

73. With respect to the analysis of less favourable treatment, Norway first notes that the Panel compared "one like product (i.e. clove cigarettes), from one source (i.e. Indonesia), to one like domestic product in the United States (i.e. menthol cigarettes)".<sup>225</sup> In its view, however, the Panel should have compared the impact of the measure at issue on "all like imported products, from all WTO Members" vis-à-vis its impact "on all like domestic products".<sup>226</sup> According to Norway, the correct starting point for the analysis should be "the entire group of products identified as like products".<sup>227</sup> Second, Norway disagrees with the United States' assertion that, because its measure distinguishes between cigarettes "on the basis of an origin-neutral criterion *derived from a legitimate regulatory purpose*", it is WTO-consistent.<sup>228</sup> In Norway's view, the United States appears to "stretch the Appellate Body's statement in *Dominican Republic – [Import and Sale of] Cigarettes* too far"<sup>229</sup>, to circumstances that differ from those prevailing in that dispute. A proper assessment of *de facto* discrimination turns on whether the like imported products are predominantly subject to less favourable treatment, while like domestic products are predominantly subject to more favourable treatment. If there is such *de facto* discrimination, whether a measure's policy objective justifies that discrimination belongs more properly to the analysis under an applicable exception.<sup>230</sup>

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<sup>222</sup>Norway's third participant's submission, para. 5.

<sup>223</sup>Norway's third participant's submission, para. 6 (quoting Panel Report, para. 7.139).

<sup>224</sup>Norway's third participant's submission, para. 7.

<sup>225</sup>Norway's third participant's submission, para. 12 (referring to Panel Report, paras. 7.274 and 7.275). (original emphasis)

<sup>226</sup>Norway's third participant's submission, para. 12. (original emphasis)

<sup>227</sup>Norway's third participant's submission, para. 13 (referring to Panel Report, *US – Tuna (II) (Mexico)*, para. 7.295, in turn referring to Appellate Body Report, *EC – Asbestos*, para. 100). (original underlining)

<sup>228</sup>Norway's third participant's submission, para. 15. (original emphasis)

<sup>229</sup>Norway's third participant's submission, para. 20 (referring to Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96).

<sup>230</sup>Norway's third participant's submission, para. 21.

6. Turkey

74. Turkey considers that the Panel did not commit a legal error in its general interpretation of the term "like products" in Article 2.1 of the *TBT Agreement*. In its view, the Panel properly considered the *TBT Agreement* as immediate context while also taking into account the jurisprudence on Article III:4 of the GATT 1994.<sup>231</sup> Turkey thus contends that the Panel correctly found that the declared legitimate public health objective of the measure, namely, reducing youth smoking, "must permeate and inform [its] likeness analysis".<sup>232</sup> Regarding the general assessment of the criteria for determining likeness, Turkey notes that the Appellate Body has rejected a "one-fits-all" approach and has advocated a case-by-case analysis.<sup>233</sup> As for the end-use criterion, Turkey believes that a competition-based approach to determine likeness should not be as influential under the *TBT Agreement* as under Article III of the GATT 1994. Instead, the public health aspect of the measure "creates the immediate context".<sup>234</sup> With respect to consumer tastes and habits, Turkey considers the Panel's focus on the relevant group of consumers—young smokers—not to be erroneous. In its view, it is not necessary to show that consumers are "actually substituting one product for the other"; rather, it is sufficient to show that consumers "can potentially substitute" them.<sup>235</sup>

75. Turkey further submits that the Panel did not commit legal error in limiting its analysis to a comparison between treatment of menthol cigarettes and clove cigarettes under Section 907(a)(1)(A) of the FFDCA. In its view, the Panel was under an obligation to make a comparison between the products specified in its terms of reference because, "at least in this case", the product specification was part of Indonesia's claim itself.<sup>236</sup> In addition, Turkey notes that, in a less favourable treatment analysis, detrimental effects stemming from factors other than the origin of a product are "an essential issue".<sup>237</sup> In assessing this key issue, Turkey contends, the critical benchmark is whether imported and domestic products are treated equally, taking account of all economic and social factors. Turkey therefore considers that the Panel was correct in concluding that the purpose of the *TBT Agreement* would be defeated if Members were "allowed to remove their domestic products" from the application of technical regulations "to avoid potential costs that it might otherwise incur".<sup>238</sup>

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<sup>231</sup>Turkey's third participant's submission, para. 4 (referring to Panel Report, para. 7.117).

<sup>232</sup>Turkey's third participant's submission, para. 5 (quoting Panel Report, para. 7.116).

<sup>233</sup>Turkey's third participant's submission, para. 7 (quoting Appellate Body Report, *EC – Asbestos*, para. 101).

<sup>234</sup>Turkey's third participant's submission, para. 11.

<sup>235</sup>Turkey's third participant's submission, para. 15.

<sup>236</sup>Turkey's third participant's submission, paras. 18 and 19.

<sup>237</sup>Turkey's third participant's submission, para. 21.

<sup>238</sup>Turkey's third participant's submission, para. 22 (quoting Panel Report, para. 7.291).

### III. Issues Raised in This Appeal

76. The following issues are raised in this appeal:

- (a) Whether the Panel erred in finding that Section 907(a)(1)(A) of the FFDCA is inconsistent with Article 2.1 of the *TBT Agreement*, and in particular:
- (i) Whether the Panel erred in finding that clove cigarettes and menthol cigarettes are like products within the meaning of Article 2.1 of the *TBT Agreement*, and in particular:
- whether the Panel performed an incomplete analysis of the different end-uses of the products at issue;
  - whether the Panel erred in its analysis of consumer tastes and habits; and
  - whether the Panel acted inconsistently with Article 11 of the DSU in its assessment of consumer tastes and habits;
- (ii) Whether the Panel erred in finding that Section 907(a)(1)(A) accords to imported clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes within the meaning of Article 2.1 of the *TBT Agreement*, and in particular:
- whether the Panel improperly narrowed the product scope of its analysis by comparing treatment accorded to imported clove cigarettes and to domestic menthol cigarettes;
  - whether the Panel erred in assessing less favourable treatment at the time the ban on flavoured cigarettes came into effect;
  - whether the Panel erred in finding that the detrimental impact on competitive opportunities of imported clove cigarettes could not be explained by reasons unrelated to the foreign origin of those products; and
  - whether the Panel acted inconsistently with Article 11 of the DSU in finding that Section 907(a)(1)(A) accords to imported clove



cigarettes less favourable treatment than that accorded to domestic menthol cigarettes; and

- (b) Whether the Panel erred in finding that, by failing to allow an interval of not less than six months between the publication and the entry into force of Section 907(a)(1)(A) of the FFDCA, the United States acted inconsistently with Article 2.12 of the *TBT Agreement*, and in particular:
- (i) whether the Panel attributed an incorrect "interpretative value" to paragraph 5.2 of the Doha Ministerial Decision in interpreting the term "reasonable interval" in Article 2.12 of the *TBT Agreement*; and
  - (ii) whether the Panel incorrectly found that Indonesia had established a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement* that the United States failed to rebut.

#### IV. Background

77. Before commencing our analysis of the issues of law and legal interpretations raised in this appeal, we briefly outline certain pertinent facts and background information. This dispute concerns Section 907(a)(1)(A) of the United States Federal Food, Drug and Cosmetic Act<sup>239</sup> (the "FFDCA"). Section 907(a)(1)(A) was added to the FFDCA by Section 101(b) of the Family Smoking Prevention and Tobacco Control Act<sup>240</sup> (the "FSPTCA")<sup>241</sup>, and became law on 22 June 2009.<sup>242</sup>

78. Under Section 907(a)(1)(A), beginning three months after the enactment of the FSPTCA—that is, as from 22 September 2009:

... a cigarette or any of its components (including the tobacco, filter, or paper) shall not contain, as a constituent ... or additive, an artificial or natural flavour (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, liquorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavour of the tobacco product or tobacco smoke.

79. The specific objective of Section 907(a)(1)(A) is not set forth in the FSPTCA itself. However, a report prepared by the House Energy and Commerce Committee<sup>243</sup> (the "House Report")

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<sup>239</sup>*Supra*, footnote 2.

<sup>240</sup>*Supra*, footnote 3.

<sup>241</sup>Panel Report, para. 2.4.

<sup>242</sup>Panel Report, para. 2.5 (referring to Indonesia's first written submission to the Panel, footnote 1 to para. 1).

<sup>243</sup>H.R. Rep. No. 111-58, Pt. 1 (2009) (Panel Exhibits IND-2 and US-67).

articulates both the objectives of the FSPTCA overall, and of Section 907(a)(1)(A) in particular. According to the House Report, "[t]he objectives of [the FSPTCA] are to provide the Secretary with the proper authority over tobacco products in order to protect the public health and to reduce the number of individuals under 18 years of age who use tobacco products."<sup>244</sup> The House Report also explains the purpose of Section 907(a)(1)(A) as follows:

Consistent with the overall intent of the bill to protect the public health, including by reducing the number of children and adolescents who smoke cigarettes, Section 907(a)(1)(A) is intended to prohibit the manufacture and sale of cigarettes with certain 'characterizing flavors' that appeal to youth.<sup>245</sup>

80. According to the Guidance for Industry and FDA Staff<sup>246</sup> ("FDA Guidance"), Section 907(a)(1)(A) applies to all flavoured tobacco products<sup>247</sup> that meet the definition of a "cigarette" in Section 3(1) of the Federal Cigarette Labeling and Advertising Act<sup>248</sup>, that is: "(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco"; or "(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described [under] (A)."<sup>249</sup> The ban contained in Section 907(a)(1)(A) also extends to flavoured loose tobacco and rolling papers, and filters intended to be used in "roll-your-own" cigarettes.<sup>250</sup>

81. The Panel identified the products at issue in this dispute as being clove cigarettes and menthol cigarettes.<sup>251</sup> Clove cigarettes are composed of tobacco combined with flavouring additives, which is presented to the consumer in a paper wrapped with a filter.<sup>252</sup> More specifically, clove cigarettes are generally manufactured with 60 to 80 per cent tobacco content, usually resulting from a blend of

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<sup>244</sup>House Report, p. 14.

<sup>245</sup>House Report, p. 37.

<sup>246</sup>"General Questions and Answers on the Ban of Cigarettes that Contain Characterizing Flavors (Edition 2)", 23 December 2009 (Panel Exhibit IND-41).

<sup>247</sup>The Panel noted that, in referring to cigarettes *not containing any characterizing flavours*, the parties often used the terms "regular" and "tobacco-flavoured" cigarettes interchangeably, and found this ambiguity to be "susceptible of causing confusion". The Panel observed that referring to tobacco-flavoured cigarettes may confuse the reader into believing that cigarettes such as clove-flavoured or menthol-flavoured cigarettes do not contain tobacco. In fact, *all* cigarettes contain tobacco, but "flavoured" cigarettes such as menthol, kreteks, bidis, and so on, contain, as well, an additive that imparts a characterizing flavour to cigarettes. Therefore, the Panel decided to use the term "regular" cigarettes, and not "tobacco-flavoured" cigarettes, as it better describes the fact that they do not include *additional* characterizing flavours. (Panel Report, para. 7.131)

<sup>248</sup>*United States Code*, Title 15, Chapter 36.

<sup>249</sup>FDA Guidance, answer to Question 2.

<sup>250</sup>FDA Guidance, answers to Questions 3 and 4.

<sup>251</sup>Panel Report, para. 7.147.

<sup>252</sup>Panel Report, para. 7.157 (referring to Indonesia's first written submission to the Panel, para. 54; and Indonesia's second written submission to the Panel, para. 67).

different varieties of tobacco.<sup>253</sup> As for the additives, clove cigarettes contain approximately 20 to 40 per cent cloves, either in the form of clove buds or ground/minced cloves.<sup>254</sup> They also generally include a "sauce" as part of the flavouring ingredients chosen by each manufacturer<sup>255</sup>, as well as other components inherent to cloves, such as benzyl acetate, methyl salicylate, trans-anethole, and methyl eugenol.<sup>256</sup> Before the Panel, the parties did not dispute that clove cigarettes contain eugenol<sup>257</sup>—a substance that the United States defined as "a common topical anesthetic used in dental procedures"<sup>258</sup>—and they also agreed that the Polzin paper, a study on certain ingredients of Indonesian clove cigarettes, shows that 19 of 33 clove cigarette brands analyzed contained coumarin, a flavouring additive.<sup>259</sup>

82. Menthol cigarettes, in contrast, have approximately 90 per cent tobacco content by weight and are composed of a blend of Virginia, Maryland burley, Oriental, and reconstituted tobacco.<sup>260</sup> The Panel noted that the March 2011 report by the Tobacco Products Scientific Advisory Committee to the FDA<sup>261</sup> (the "March 2011 TPSAC Report") specifies that "[m]enthol cigarettes are typically blended using more flue-cured and less burley tobacco ... because some of the chemicals in burley tobaccos create an incompatible taste character with menthol."<sup>262</sup> The main additive in menthol cigarettes is menthol oil, a chemical compound extracted from the peppermint plant (*Mentha piperita*), the corn mint plant (*Mentha arvensis*), or produced by synthetic or semi-synthetic means. Menthol is added to cigarettes in several different ways<sup>263</sup> and diffuses throughout the cigarette, irrespective of the means of application.<sup>264</sup> According to the March 2011 TPSAC Report, menthol is added to cigarettes both as a characterizing flavour and for other taste reasons, which include brightening the flavour of tobacco blends and/or smoothing the taste of the blend. Menthol amounts

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<sup>253</sup>Panel Report, para. 7.158 (referring to S. Farrer, "Alternative Cigarettes May Deliver More Nicotine Than Conventional Cigarettes" (August 2003) 18(2) *National Institute on Drug Abuse (NIDA) Notes* (Panel Exhibit IND-29); United States' first written submission to the Panel, para. 163; and Indonesia's and United States' responses to Panel Question 33).

<sup>254</sup>Panel Report, para. 7.159.

<sup>255</sup>Panel Report, para. 7.160 (referring to United States' first written submission to the Panel, para. 165).

<sup>256</sup>Panel Report, para. 7.164 (referring to Indonesia's response to Panel Question 30).

<sup>257</sup>Panel Report, para. 7.162.

<sup>258</sup>Panel Report, para. 7.161 (quoting United States' first written submission to the Panel, para. 38).

<sup>259</sup>Panel Report, para. 7.163 (referring to Polzin et al., "Determination of eugenol, anethole, and coumarin in the mainstream cigarette smoke of Indonesian clove cigarettes" (October 2007) 45(10) *Food & Chemical Toxicology* (Panel Exhibit US-45); and Indonesia's and United States' responses to Panel Question 34).

<sup>260</sup>Panel Report, para. 7.166 (referring to United States' response to Panel Question 31). The Panel noted that Indonesia did not provide any specific information in that respect. (*Ibid.*, footnote 357 to para. 7.166)

<sup>261</sup>Available at <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM247689.pdf>.

<sup>262</sup>Panel Report, para. 7.166.

<sup>263</sup>The different ways in which menthol is added to cigarettes are the following: (a) by spraying the cut tobacco during blending; (b) by applying it to the pack foil; (c) by injecting it into the tobacco stream; (d) by injecting it into the filter; (e) by inserting a crushable capsule in the filter; (f) by placing a menthol thread in the filter; or (g) any combination of the above. (Panel Report, para. 7.167)

<sup>264</sup>Panel Report, para. 7.167.

to roughly 1 per cent of the content of the cigarette, although the specific amount varies from brand to brand.<sup>265</sup> Moreover, menthol may have cooling, analgesic, or irritating properties, and is reported to reduce sensitivity to noxious chemicals, including nicotine.<sup>266</sup>

83. In this Report, we first consider the United States' claim that the Panel erred in finding that clove and menthol cigarettes are like products within the meaning of Article 2.1 of the *TBT Agreement*. We then address the United States' claim that the Panel erred in finding that the United States acted inconsistently with Article 2.1 of the *TBT Agreement* by according to imported clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes. Lastly, we consider the United States' claim that the Panel erred in finding that, by not allowing a period of not 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*.

## V. Article 2.1 of the *TBT Agreement*

### A. Introduction

84. The Panel found that Section 907(a)(1)(A) of the FFDCA is a "technical regulation" within the meaning of Annex 1.1 of the *TBT Agreement*, and that it is inconsistent with Article 2.1 of the *TBT Agreement* because it accords to imported clove cigarettes less favourable treatment than that accorded to like menthol cigarettes of national origin.<sup>267</sup> In particular, the Panel found that "clove cigarettes and menthol cigarettes are 'like products' for the purpose of Article 2.1 of the *TBT Agreement*"<sup>268</sup>, and that, "by banning clove cigarettes while exempting menthol cigarettes from the ban, Section 907(a)(1)(A) does accord imported clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes, for the purpose of Article 2.1 of the *TBT Agreement*".<sup>269</sup>

85. The United States appeals the Panel's finding that Section 907(a)(1)(A) is inconsistent with Article 2.1 of the *TBT Agreement*, and argues that the Panel erred in finding that clove and menthol cigarettes are like products and that Section 907(a)(1)(A) accords to imported clove cigarettes less favourable treatment than that accorded to like products of national origin within the meaning of Article 2.1 of the *TBT Agreement*. We address separately in this Report the United States' claims in respect of the Panel's findings on like products and on less favourable treatment under Article 2.1 of

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<sup>265</sup>According to Indonesia, the menthol content can range up to 3 per cent. (Panel Report, para. 7.169 (referring to Indonesia's response to Panel Question 32))

<sup>266</sup>Panel Report, para. 7.168 (referring to March 2011 TPSAC Report, pp. 18-20 and 22).

<sup>267</sup>Panel Report, paras. 7.293, 8.1(a), and 8.1(b).

<sup>268</sup>Panel Report, para. 7.248.

<sup>269</sup>Panel Report, para. 7.292.

the *TBT Agreement*. Before doing so, however, we consider Article 2.1 as a whole in its context and in the light of the object and purpose of the *TBT Agreement*.

86. Article 2.1 of the *TBT Agreement* provides that, with respect to their central government bodies:

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

87. Article 2.1 of the *TBT Agreement* contains a national treatment and a most-favoured nation treatment obligation. In this dispute, we are called upon to clarify the meaning of the national treatment obligation. For a violation of the national treatment obligation in Article 2.1 to be established, three elements must be satisfied: (i) the measure at issue must be a technical regulation; (ii) the imported and domestic products at issue must be like products; and (iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products. The United States' appeal concerns only the second and the third elements of this test of inconsistency, namely, whether the products at issue are like and whether the treatment accorded to clove cigarettes imported from Indonesia is less favourable than that accorded to like domestic products in the United States.<sup>270</sup>

88. In sections V.B and V.C of this Report, we interpret Article 2.1 of *TBT Agreement* and, in particular, the terms "like products" and "treatment no less favourable". However, before engaging in this interpretative effort, we wish to make some observations of general import on: the preamble of the *TBT Agreement*; the definition of "technical regulation"; the relevance of Article III:4 of the GATT 1994 in interpreting Article 2.1 of the *TBT Agreement*; and the absence among the provisions of the *TBT Agreement* of a general exception provision similar to Article XX of the GATT 1994.

89. The preamble of the *TBT Agreement* is part of the context of Article 2.1 and also sheds light on the object and purpose of the Agreement. We find guidance for the interpretation of Article 2.1, in particular, in the second, fifth, and sixth recitals of the preamble of the *TBT Agreement*.

90. The second recital links the *TBT Agreement* to the GATT 1994. It states:

*Desiring* to further the objectives of GATT 1994;

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<sup>270</sup>We recall that it was not disputed before the Panel that Section 907(a)(1)(A) is a technical regulation and that the United States has not appealed the Panel's finding that Section 907(a)(1)(A) is a technical regulation within the meaning of Annex 1.1 to the *TBT Agreement* (Panel Report, paras. 7.21 and 7.41).

91. While this recital may be read as suggesting that the *TBT Agreement* is a "development" or a "step forward" from the disciplines of the GATT 1994<sup>271</sup>, in our view, it also suggests that the two agreements overlap in scope and have similar objectives. If this were not true, the *TBT Agreement* could not serve to "further the objectives" of the GATT 1994. The second recital indicates that the *TBT Agreement* expands on pre-existing GATT disciplines and emphasizes that the two Agreements should be interpreted in a coherent and consistent manner.

92. The fifth recital reflects the trade-liberalization objective of the *TBT Agreement* by expressing the "desire" that technical regulations, technical standards, and conformity assessment procedures do not create unnecessary obstacles to international trade. It states:

*Desiring* however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;

93. We see the fifth recital reflected in those TBT provisions that aim at reducing obstacles to international trade and that limit Members' right to regulate, for instance, by prohibiting discrimination against imported products (Article 2.1) or requiring that technical regulations be no more trade restrictive than necessary to fulfil a legitimate objective (Article 2.2).

94. The objective of avoiding the creation of unnecessary obstacles to international trade through technical regulations, standards, and conformity assessment procedures is, however, qualified in the sixth recital by the explicit recognition of Members' right to regulate in order to pursue certain legitimate objectives. The sixth recital states:

*Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;

95. We read the sixth recital as counterbalancing the trade-liberalization objective expressed in the fifth recital. The sixth recital "recognizes" Members' right to regulate versus the "desire" to avoid creating unnecessary obstacles to international trade, expressed in the fifth recital. While the fifth recital clearly suggests that Members' right to regulate is not unbounded, the sixth recital affirms

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<sup>271</sup>Panel Report, para. 7.112.

that such a right exists while ensuring that trade-distortive effects of regulation are minimized. The sixth recital suggests that Members' right to regulate should not be constrained if the measures taken are necessary to fulfil certain legitimate policy objectives, and provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the Agreement. We thus understand the sixth recital to suggest that Members have a right to use technical regulations in pursuit of their legitimate objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the *TBT Agreement*.

96. The balance set out in the preamble of the *TBT Agreement* between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.

97. We observe that Article 2.1 of the *TBT Agreement* applies only in respect of technical regulations, which are defined in Annex 1.1 as "[d]ocument[s] which lay[] down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory".<sup>272</sup> Product characteristics laid down in a technical regulation may themselves be relevant to the determination of whether products are like within the meaning of Article 2.1. Thus, we consider that, in the case of technical regulations, the measure itself *may* provide elements that are relevant to the determination of whether products are like and whether less favourable treatment has been accorded to imported products.

98. The definition of technical regulations as documents laying down product characteristics gives an indication that, under the *TBT Agreement*, measures making distinctions based on product characteristics are in principle permitted. However, the fact that a technical regulation defines a product's characteristics with a view to fulfilling a legitimate policy objective does not mean that it may do so by treating imported products less favourably than like domestic products.

99. We note that the language of the national treatment obligation of Article 2.1 of the *TBT Agreement* closely resembles the language of Article III:4 of the GATT 1994. Article III:4 of the GATT 1994 reads, in relevant part:

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<sup>272</sup>The second sentence of Annex 1.1 reads as follows: "It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method".

The products of the territory of any Member imported into the territory of any other Member 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.

100. The national treatment obligations of Article 2.1 and Article III:4 are built around the same core terms, namely, "like products" and "treatment no less favourable". We further note that technical regulations are in principle subject not only to Article 2.1 of the *TBT Agreement*, but also to the national treatment obligation of Article III:4 of the GATT 1994, as "laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use" of products. The very similar formulation of the provisions, and the overlap in their scope of application in respect of technical regulations, confirm that Article III:4 of the GATT 1994 is relevant context for the interpretation of the national treatment obligation of Article 2.1 of the *TBT Agreement*.<sup>273</sup> We consider that, in interpreting Article 2.1 of the *TBT Agreement*, a panel should focus on the text of Article 2.1, read in the context of the *TBT Agreement*, including its preamble, and also consider other contextual elements, such as Article III:4 of the GATT 1994.<sup>274</sup>

101. Finally, we observe that the *TBT Agreement* does not contain among its provisions a general exceptions clause. This may be contrasted with the GATT 1994, which contains a general exceptions clause in Article XX.

102. With these observations of general import in mind, we turn to the United States' appeal of the Panel's findings that clove and menthol cigarettes are like products, and that Section 907(a)(1)(A) accords imported clove cigarettes from Indonesia less favourable treatment than that accorded to like domestic menthol cigarettes, within the meaning of Article 2.1 of the *TBT Agreement*.

B. *The Panel's Finding that Clove Cigarettes and Menthol Cigarettes are "Like Products" within the Meaning of Article 2.1 of the TBT Agreement*

103. We begin our analysis by addressing the Panel's interpretation of the concept of "like products" under Article 2.1 of the *TBT Agreement*. We then turn to the United States' claims that the

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<sup>273</sup>We recall that, in *EC – Asbestos*, the Appellate Body found that the terms used in one provision "must be interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears" and that the meaning attributed to the same terms in other provisions of the same agreement or in other covered agreements, may also be relevant context. (Appellate Body Report, *EC – Asbestos*, paras. 88-89)

<sup>274</sup>In setting out its interpretative approach to Article 2.1 of the *TBT Agreement*, the Panel considered that, "[e]ven if the GATT 1994 were considered to serve as context for Article 2.1 of the *TBT Agreement*, it would not be the immediate context of that provision" and that "an interpreter should first assess the immediate context of the provision subject to interpretation before reaching for an interpretative aid that is further removed." (Panel Report, para. 7.103)



Panel erred in its interpretation and application of the "likeness" criteria of end-use and consumer tastes and habits, as well as to its claim that the Panel acted inconsistently with Article 11 of the DSU in its assessment of consumer tastes and habits. The United States does not appeal the Panel's findings concerning the products' physical characteristics and tariff classification.

1. "Like Products" under Article 2.1 of the *TBT Agreement*

104. The Panel found that clove cigarettes and menthol cigarettes are like products within the meaning of Article 2.1 of the *TBT Agreement*.<sup>275</sup> The Panel reached this conclusion after having evaluated the traditional "likeness" criteria (physical characteristics, end-uses, consumer tastes and habits, and tariff classification), "bearing in mind that the measure at issue is a technical regulation, with the immediate purpose of regulating cigarettes having a characterizing flavour, with a view to attaining the legitimate objective of reducing youth smoking".<sup>276</sup> Before addressing the United States' appeal of the Panel's specific findings in respect of the "likeness" criteria of end-uses and consumer tastes and habits, we first consider the Panel's approach to interpreting "like products" in the context of Article 2.1 of the *TBT Agreement*.

105. The Panel considered that "it is far from clear that it is always appropriate to transpose automatically the competition-oriented approach to likeness under Article III:4 of the GATT 1994 to Article 2.1 of the *TBT Agreement*" in the absence of a general principle such as that expressed in Article III:1 of the GATT 1994.<sup>277</sup> The Panel also noted that, despite the similarity in wording, Article 2.1 of the *TBT Agreement* and Article III:4 of the GATT 1994 differ in that the former only applies to technical regulations whereas the latter applies to a much broader range of measures.<sup>278</sup> The Panel stated that Article III:4 of the GATT 1994 could not be regarded as immediate context to Article 2.1 of the *TBT Agreement* and noted that the Appellate Body's reference to an "accordion" of "likeness" allows, and potentially mandates, different interpretations of the term "like products" under Article III:4 of the GATT 1994 and Article 2.1 of the *TBT Agreement*.<sup>279</sup>

106. The Panel turned to what it considered the immediate context of the term "like products" in Article 2.1 of the *TBT Agreement*, namely, Article 2.1 itself and the *TBT Agreement* as a whole, and to that Agreement's object and purpose as set out in its preamble. The Panel considered that the fact that Section 907(a)(1)(A) of the FFDCA is a technical regulation within the meaning of Annex 1.1 of the *TBT Agreement*, which has the immediate purpose of regulating cigarettes with characterizing flavours with the view to attaining the legitimate objective of reducing youth smoking, should have

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<sup>275</sup>Panel Report, para. 7.248.

<sup>276</sup>Panel Report, para. 7.244.

<sup>277</sup>Panel Report, para. 7.99.

<sup>278</sup>Panel Report, para. 7.106.

<sup>279</sup>Panel Report, para. 7.105.

"some weight and potentially considerable weight" in the determination of whether the products at issue are like.<sup>280</sup> The Panel also noted that the sixth recital of the preamble of the *TBT Agreement*, which recognizes Members' right to take measures for legitimate objectives, and Article 2.2 could justify a different interpretation of "likeness" under Article 2.1 of the *TBT Agreement* from that developed under Article III:4 of the GATT 1994.<sup>281</sup>

107. The Panel thus found that, in the circumstances of this case, the interpretation of Article 2.1 of the *TBT Agreement* should not be approached primarily from a competition-oriented perspective, but that the weighing of the evidence relating to the "likeness" criteria should be influenced by the fact that Section 907(a)(1)(A) is a technical regulation having the immediate purpose of regulating cigarettes with a characterizing flavour for public health reasons.<sup>282</sup> Having developed this interpretative approach, the Panel turned to the analysis of the traditional "likeness" criteria, namely, the physical characteristics of the products, end-uses, consumer tastes and habits, and tariff classification. The Panel gave particular weight to the health objective of Section 907(a)(1)(A) in its assessment of the products' physical characteristics and of consumer tastes and habits.<sup>283</sup>

108. We agree with the Panel that the interpretation of the term "like products" in Article 2.1 of the *TBT Agreement* should start with the text of that provision in the light of the context provided by Article 2.1 itself, by other provisions of the *TBT Agreement*, and by the *TBT Agreement* as a whole. We also agree that the relevant context includes the fact that Article 2.1 applies to technical regulations, which are documents laying down the characteristics of products. We further note that the preamble of the *TBT Agreement* recognizes Members' right to regulate through technical regulations. As explained below, however, we are not persuaded that these contextual elements and the object and purpose of the *TBT Agreement* suggest that the interpretation of the concept of "like products" in Article 2.1 of the *TBT Agreement* cannot be approached from a competition-oriented perspective.

109. As we have observed above, the balance that the preamble of the *TBT Agreement* strikes between, on the one hand, the pursuit of trade liberalization and, on the other hand, Members' right to regulate, is not, in principle, different from the balance that exists between the national treatment obligation of Article III and the general exceptions provided under Article XX of the GATT 1994. The second recital of the preamble links the two Agreements by expressing the "desire" "to further the objectives of the GATT 1994", while the "recognition" of a Member's right to regulate in the sixth recital is balanced by the "desire" expressed in the fifth recital to ensure that technical

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<sup>280</sup>Panel Report, para. 7.109.

<sup>281</sup>Panel Report, para. 7.114.

<sup>282</sup>Panel Report, para. 7.119.

<sup>283</sup>Panel Report, para. 7.119.

regulations, standards, and conformity assessment procedures do not create unnecessary obstacles to international trade. We note, however, that in the GATT 1994 this balance is expressed by the national treatment rule in Article III:4 as qualified by the exceptions in Article XX, while, in the *TBT Agreement*, this balance is to be found in Article 2.1 itself, read in the light of its context and of its object and purpose.

110. The Panel was also of the view that the absence of a provision like Article III:1 of the GATT 1994 in the *TBT Agreement* would prevent the transposition of the GATT competition-oriented approach to likeness to Article 2.1 of the *TBT Agreement*.<sup>284</sup> Article III:1 provides that internal fiscal and regulatory measures "should not be applied to imported or domestic products so as to afford protection to domestic production". We observe, in this respect, that, in *EC – Asbestos*, the Appellate Body considered that the "general principle" articulated in Article III:1 of the GATT 1994 "seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, *between the domestic and imported products involved*, 'so as to afford protection to domestic production'".<sup>285</sup> However, the Appellate Body did not base its conclusion that "likeness" in Article III:4 is about the "nature and extent of a competitive relationship between and among products"<sup>286</sup> exclusively on the "general principle" expressed in Article III:1. Rather, the Appellate Body further clarified that "the word 'like' in Article III:4 is to be interpreted to apply to products that are in ... a competitive relationship", because it is "products that are in a competitive relationship in the marketplace [that] could be affected through treatment of *imports* 'less favourable' than the treatment accorded to *domestic* products".<sup>287</sup>

111. We agree that the very concept of "treatment no less favourable", which is expressed in the same words in Article III:4 of the GATT 1994 and in Article 2.1 of the *TBT Agreement*, informs the determination of likeness, suggesting that likeness is about the "nature and extent of a competitive relationship between and among products". Indeed, the concept of "treatment no less favourable" links the products to the marketplace, because it is only in the marketplace that it can be determined how the measure treats like imported and domestic products. We note, however, that, in determining likeness based on the competitive relationship between and among the products, a panel should discount any distortive effects that the measure at issue may itself have on the competitive relationship, and reserve the consideration of such effects for the analysis of less favourable treatment. In such cases, a panel should determine the nature and the extent of the competitive relationship for

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<sup>284</sup> Panel Report, para. 7.99.

<sup>285</sup> Appellate Body Report, *EC – Asbestos*, para. 98. (original emphasis)

<sup>286</sup> Appellate Body Report, *EC – Asbestos*, para. 99.

<sup>287</sup> Appellate Body Report, *EC – Asbestos*, para. 99. (original emphasis)

the purpose of determining likeness in isolation from the measure at issue, to the extent that the latter informs the physical characteristics of the products and/or consumers' preferences.

112. In the light of the above, we disagree with the Panel that the text and context of the *TBT Agreement* support an interpretation of the concept of "likeness" in Article 2.1 of the *TBT Agreement* that focuses on the legitimate objectives and purposes of the technical regulation, rather than on the competitive relationship between and among the products.

113. We further observe that measures often pursue a multiplicity of objectives, which are not always easily discernible from the text or even from the design, architecture, and structure of the measure. Determining likeness on the basis of the regulatory objectives of the measure, rather than on the products' competitive relationship, would require the identification of all the relevant objectives of a measure, as well as an assessment of which objectives among others are relevant or should prevail in determining whether the products are like. It seems to us that it would not always be possible for a complainant or a panel to identify all the objectives of a measure and/or be in a position to determine which among multiple objectives are relevant to the determination of whether two products are like, or not.<sup>288</sup>

114. The appeal by the United States of the Panel's determination of consumer tastes and habits, which we address further below, highlights the difficulties that arise when attempting to determine likeness based on the regulatory purposes of the measure rather than on the competitive relationship between and among products. The Panel relied on the objective of the measure at issue, which it identified as reducing youth smoking, to determine the likeness of the products.<sup>289</sup> The United States questions the basis for the Panel's narrow focus on the immediate objective of the measure<sup>290</sup> and cites to other regulatory objectives related to health considerations associated with heavily used cigarettes to draw further distinctions between menthol and clove cigarettes.<sup>291</sup>

115. Measures, such as technical regulations, may have more than one objective. However, a panel that is tasked with determining whether two products are like may not be able to reach a coherent result if, in determining likeness, it has to rely on various possible regulatory objectives of the measure. If a panel were to focus on one of the objectives of a measure to the exclusion of all others that are equally important, it may reach a somewhat arbitrary result in the determination of what are the like products at issue which, in turn, has implications for the determination of whether

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<sup>288</sup>See Panel Report, *Japan – Alcoholic Beverages II*, para. 6.16.

<sup>289</sup>Panel Report, para. 7.119.

<sup>290</sup>United States' appellant's submission, para. 60.

<sup>291</sup>The United States cites to "possible countervailing public health factors" associated with banning heavily used cigarettes, such as "possible increases in unregulated black market cigarettes or strain to the healthcare system". (United States' appellant's submission, para. 61)

less favourable treatment has been accorded. Moreover, we note that a purpose-based approach to the determination of likeness does not, necessarily, leave more regulatory autonomy for Members, because it almost invariably puts panels into the position of having to determine which of the various objectives purportedly pursued by Members are more important, or which of these objectives should prevail in determining likeness or less favourable treatment in the event of conflicting objectives.

116. More importantly, however, we do not consider that the concept of "like products" in Article 2.1 of the *TBT Agreement* lends itself to distinctions between products that are based on the regulatory objectives of a measure. As we see it, the concept of "like products" serves to define the scope of products that should be compared to establish whether less favourable treatment is being accorded to imported products. If products that are in a sufficiently strong competitive relationship to be considered like are excluded from the group of like products on the basis of a measure's regulatory purposes, such products would not be compared in order to ascertain whether less favourable treatment has been accorded to imported products. This would inevitably distort the less favourable treatment comparison, as it would refer to a "marketplace" that would include some like products, but not others. As we consider further below in respect of the United States' appeal of the Panel's less favourable treatment finding, distinctions among products that have been found to be like are better drawn when considering, subsequently, whether less favourable treatment has been accorded, rather than in determining likeness, because the latter approach would alter the scope and result of the less favourable treatment comparison.

117. Nevertheless, in concluding that the determination of likeness should not be based on the regulatory purposes of technical regulations, we are not suggesting that the regulatory concerns underlying technical regulations may not play a role in the determination of whether or not products are like. In this respect, we recall that, in *EC – Asbestos*, the Appellate Body found that regulatory concerns and considerations may play a role in applying certain of the "likeness" criteria (that is, physical characteristics and consumer preferences) and, thus, in the determination of likeness under Article III:4 of the GATT 1994.

118. In *EC – Asbestos*, the Appellate Body found that, in examining whether products are like, panels must evaluate all relevant evidence, including evidence relating to the health risks associated with a product, which was the underlying concern of the challenged measure in that dispute. The Appellate Body found that such evidence would not be examined as a separate criterion but, rather, under the traditional "likeness" criteria. In particular, the Appellate Body stated that a product's health risks are relevant to the determination of the competitive relationship between products, and addressed health risks as part of the products' physical characteristics and of the tastes and habits of

consumers.<sup>292</sup> In respect of physical characteristics, the Appellate Body considered that a panel should examine fully the physical properties of products, in particular, those physical properties that are likely to influence the competitive relationship between products in the marketplace. These include those physical properties that make a product toxic or otherwise dangerous to health.<sup>293</sup> In respect of consumer tastes and habits, the Appellate Body found that the health risks associated with a product could influence the preference of consumers.<sup>294</sup>

119. Similarly, we consider that the regulatory concerns underlying a measure, such as the health risks associated with a given product, may be relevant to an analysis of the "likeness" criteria under Article III:4 of the GATT 1994, as well as under Article 2.1 of the *TBT Agreement*, to the extent they have an impact on the competitive relationship between and among the products concerned.

120. The interpretation of the concept of "likeness" in Article 2.1 has to be based on the text of that provision as read in the context of the *TBT Agreement* and of Article III:4 of the GATT 1994, which also contains a similarly worded national treatment obligation that applies to laws, regulations, and requirements including technical regulations. In the light of this context and of the object and purpose of the *TBT Agreement*, as expressed in its preamble, we consider that the determination of likeness under Article 2.1 of the *TBT Agreement*, as well as under Article III:4 of the GATT 1994, is a determination about the nature and extent of a competitive relationship between and among the products at issue. To the extent that they are relevant to the examination of certain "likeness" criteria and are reflected in the products' competitive relationship, regulatory concerns underlying technical regulations may play a role in the determination of likeness.

121. With this interpretative approach in mind, we now turn to the claims by the United States that the Panel committed errors in its assessments of the end-uses of clove and menthol cigarettes and of the tastes and habits of consumers of clove and menthol cigarettes, as well as to the United States' claim that the Panel acted inconsistently with Article 11 of the DSU in its assessment of consumer tastes and habits. We begin by examining the Panel's finding that clove and menthol cigarettes have the same end-use.

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<sup>292</sup>Appellate Body Report, *EC – Asbestos*, para. 113.

<sup>293</sup>The Appellate Body noted that a characteristic of chrysotile asbestos fibres was that the microscopic particles and filaments of these fibres were carcinogenic for humans when inhaled. Thus, the Appellate Body concluded that the carcinogenicity, or toxicity, constituted a defining aspect of the physical properties of chrysotile asbestos fibres as opposed to polyvinyl alcohol, cellulose, and glass (PCG) fibres, which did not present the same health risk. (Appellate Body Report, *EC – Asbestos*, para. 114)

<sup>294</sup>The Appellate Body found that the health risks associated with chrysotile asbestos fibres influenced the behaviour of both manufacturers (who incorporate fibres into another product) and ultimate consumers. The Appellate Body noted that a manufacturer cannot ignore the preferences of the ultimate consumers of a product and, if the risks posed by a particular product are sufficiently great, the ultimate consumers may simply cease to buy that product. (Appellate Body Report, *EC – Asbestos*, para. 122)

2. End-Uses

122. In examining the end-uses of clove and menthol cigarettes, the Panel found that both clove and menthol cigarettes have the same end-use, that is, "to be smoked"<sup>295</sup>, and disagreed with the United States that the end-uses of a cigarette include "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". The Panel considered that the end-uses presented by the United States relate to the reasons why people smoke, but that does not mean that cigarettes have several end-uses.<sup>296</sup> In particular, the Panel considered that the United States' comments on the appeal of flavours to certain smokers relate more properly to consumer tastes and habits than to end-use.<sup>297</sup>

123. The United States claims that a panel, when conducting an end-use analysis, must consider the different uses of the products and not just the use that is a "common denominator" of the products in question.<sup>298</sup> According to the United States, it is undisputed that both clove and menthol cigarettes are used for smoking, but the Panel improperly limited its analysis to considering only this common use between the products while ignoring other relevant end-uses. Menthol cigarettes, the United States posits, are used to "satisfy the nicotine addictions of millions of smokers in the United States", whereas clove cigarettes are primarily used "for experimentation and special social settings" and generally are not smoked to satisfy nicotine addiction in the US market.<sup>299</sup>

124. Indonesia responds that the Panel did not err in finding that the end-use of clove and menthol cigarettes is "to be smoked". In Indonesia's view, moreover, even assuming *arguendo* that the end-uses put forward by the United States were pertinent ones, the United States presented no evidence showing that clove and menthol cigarettes were not both *capable* of performing the end-uses of satisfying a nicotine addiction and creating a pleasurable experience.<sup>300</sup>

125. We observe that end-uses describe the possible functions of a product, while consumer tastes and habits reflect the consumers' appreciation of these functions. In *EC – Asbestos*, the Appellate Body described end-uses as "the extent to which products are *capable* of performing the same, or similar, functions" and consumer tastes and habits as "the extent to which consumers are willing to

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<sup>295</sup>Panel Report, para. 7.199.

<sup>296</sup>Panel Report, para. 7.198.

<sup>297</sup>Panel Report, para. 7.197.

<sup>298</sup>United States' appellant's submission, para. 45.

<sup>299</sup>United States' appellant's submission, para. 46.

<sup>300</sup>Indonesia's appellee's submission, para. 73.

use the products to perform these functions".<sup>301</sup> That a product is not principally used to perform a certain function does not exclude that it may nevertheless be *capable* of performing that function.

126. The Appellate Body has also considered that, while each criterion addresses, in principle, a different aspect of the products involved, which should be examined separately, the different criteria are "interrelated"<sup>302</sup> and "not mutually exclusive", so that certain evidence may well fall under more than one criterion.<sup>303</sup> Thus, in our view, that consumers smoke to satisfy an addiction or that they smoke for pleasure are relevant to the examination of both end-uses and consumer tastes and habits, although different aspects are addressed in the analysis of these two separate "likeness" criteria.

127. We do not consider that it is correct to characterize "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke" as consumer tastes and habits and not end-uses. To the extent that they describe possible functions of the products, rather than the consumers' appreciation of these functions, they represent, in fact, different end-uses of the products at issue, rather than consumer tastes and habits. Consumer tastes and habits should indicate to what extent consumers are willing to substitute clove cigarettes and menthol cigarettes to "satisfy an addiction to nicotine" and/or to "create a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke".

128. We also recall that, in *EC – Asbestos*, the Appellate Body found that the panel had not provided a complete picture of the various end-uses of the different fibres at issue, because its analysis was based on a "small number of applications" for which the products were substitutable, and because it had failed to examine other, different end-uses for the products. The Appellate Body noted that it is only by forming a complete picture of the various end-uses of a product that a panel can assess the significance of the fact that products share a limited number of end-uses.<sup>304</sup>

129. An analysis of end-use should be comprehensive and specific enough to provide meaningful guidance as to whether the products in question are like products. It is not disputed that both clove and menthol cigarettes are "to be smoked". Nevertheless, "to be smoked" does not exhaustively describe the functions of cigarettes. As a consequence, to find, as the Panel did, that the end-use of both clove and menthol cigarettes is "to be smoked" does not, in our view, provide sufficient guidance as to whether such products are like products within the meaning of Article 2.1 of the *TBT Agreement*.

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<sup>301</sup>Appellate Body Report, *EC – Asbestos*, para. 117. (emphasis added)

<sup>302</sup>Appellate Body Report, *EC – Asbestos*, para. 102.

<sup>303</sup>Appellate Body Reports, *Philippines – Distilled Spirits*, para. 131. In that dispute, the Appellate Body considered that factors such as the perceptibility of differences among the products and the products' presentation and labelling concern both physical characteristics and consumer tastes and habits. (*Ibid.*, paras. 128 and 132)

<sup>304</sup>Appellate Body Report, *EC – Asbestos*, para. 119.



Also cigars, loose tobacco, and herbs share the same end-use of being "smoked", although this does not say much as to whether all these products are like.<sup>305</sup>

130. In our view, the Panel did not perform an analysis of the end-uses of clove and menthol cigarettes that was sufficiently comprehensive and specific to provide significant indications as to the likeness of these products. We agree with the United States that there are more specific permutations and functions of "smoking", which are relevant to the end-uses of cigarettes, such as "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". The Panel should have considered these permutations and functions in its evaluation of whether the products at issue are like. We also note, however, the argument by Indonesia that, even assuming that the end-uses put forward by the United States were "legitimate end-uses", the United States did not show that clove and menthol cigarettes were not both *capable* of performing the functions of "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke".<sup>306</sup>

131. The United States argues on appeal that menthol cigarettes are used to satisfy the nicotine addictions of millions of smokers in the United States, while clove cigarettes are primarily used for experimentation and special social settings and generally are not used to satisfy addiction. The Panel, however, found that "both menthol and clove cigarettes appeal to youth because of the presence of an additive that gives them a characterizing flavour having the effect of masking the harshness of tobacco".<sup>307</sup> Both types of cigarettes are capable of performing a social/experimentation function and, thus, share the end-use of "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". At the same time, both clove and menthol cigarettes are capable of performing the function of "satisfying an addiction to nicotine", considering that both types of cigarettes contain nicotine, whose addictiveness is scientifically proven.<sup>308</sup> The fact that more "addicts" smoke menthol than clove cigarettes does not mean that clove cigarettes cannot be smoked to "satisfy an addiction to nicotine". As we have observed above, what matters in determining a product's end-use is that a product is *capable* of performing it, not that such end-use represents the principal or the most common end-use of that product.

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<sup>305</sup>Similarly, to state that the end-use of alcoholic beverages is "to be drunk" would not distinguish alcoholic beverages from water, milk, or orange juice that are also consumed by drinking. In contrast, in *Philippines – Distilled Spirits*, the specific end-use of alcoholic beverages was described as "thirst quenching, socialization, relaxation, pleasant intoxication". (Appellate Body Reports, *Philippines – Distilled Spirits*, para. 171 (quoting Panel Reports, *Philippines – Distilled Spirits*, para. 7.81))

<sup>306</sup>Indonesia's appellee's submission, para. 73.

<sup>307</sup>Panel Report, para. 7.231.

<sup>308</sup>In its response to Panel Question 37, the United States notes that, "[w]ith respect to the addictive effects of regular, menthol and clove cigarettes, all of these products contain nicotine and are thus addictive." (United States' response to Panel Question 37, para. 85)

132. In the light of the above, we disagree with the Panel that the end-use of cigarettes is simply "to be smoked" and agree with the United States that there are more specific end-uses of cigarettes such as "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". We consider, however, that, based on the Panel's findings referred to above, it can be concluded that both clove and menthol cigarettes share the end-uses of "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". Accordingly, we consider that the more specific products' end-uses put forward by the United States also support the Panel's overall finding that clove and menthol cigarettes are like products.

### 3. Consumer Tastes and Habits

133. In addressing consumer tastes and habits in respect of clove and menthol cigarettes, the Panel stated that the legitimate objective of Section 907(a)(1)(A) of the FFDCA, namely, reducing youth smoking, delimited the scope of the consumers whose tastes and habits should be examined under this criterion.<sup>309</sup> Accordingly, the Panel considered it appropriate to examine the substitutability of clove and menthol cigarettes from the perspective of the relevant group of consumers, which included young smokers and those ready to become smokers (potential consumers).<sup>310</sup> The Panel found that the evidence submitted by the parties showed that both clove and menthol cigarettes, because of their characterizing flavours, which help to mask the harshness of tobacco, appeal to youth and are better vehicles for youth to start smoking than regular cigarettes.<sup>311</sup> Therefore, the Panel concluded that, from the point of view of the consumers at issue in this case, menthol-flavoured and clove-flavoured cigarettes are "similar for the purpose of starting to smoke".<sup>312</sup>

134. The United States claims that the Panel erred in considering the tastes and habits of only young smokers and potential young smokers, and not of current adult smokers. The United States notes that Section 907(a)(1)(A) makes regulatory distinctions among cigarettes based not only on their appeal to young and potential smokers, but also on their use by current adult smokers.<sup>313</sup> The United States argues that nothing in the text of Article 2.1 of the *TBT Agreement* provides a basis for the Panel to have limited its consideration of the public health distinctions drawn under the measure according to what the Panel construed to be the immediate objective of the measure.<sup>314</sup>

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<sup>309</sup>Panel Report, para. 7.206.

<sup>310</sup>Panel Report, para. 7.214.

<sup>311</sup>Panel Report, para. 7.217.

<sup>312</sup>Panel Report, para. 7.232.

<sup>313</sup>United States' appellant's submission, para. 54.

<sup>314</sup>United States' appellant's submission, para. 60.

135. The United States contends that a like product analysis under Article 2.1 must take account of the regulatory distinctions drawn under the measure at issue, which are not limited to the immediate or primary objective of a measure, but that often reflect a balancing of other considerations relevant to the public welfare. In particular, the United States argues that, even though the primary or immediate purpose of Section 907(a)(1)(A) is to reduce youth smoking, the measure was developed based on a consideration of the health benefits, risks, and consequences to the population as a whole, including the possible negative consequences of banning a type of cigarette, such as menthol cigarettes, to which millions of adults are chemically and psychologically addicted.<sup>315</sup>

136. We have disagreed with the Panel's approach to interpreting the concept of "likeness" in Article 2.1 of the *TBT Agreement* in the light of the regulatory objectives of the measure, rather than based on the competitive relationship between and among the products.<sup>316</sup> In particular, we have observed that the context of the *TBT Agreement* and its object and purpose do not suggest that the regulatory objectives of a technical regulation should play a role that is separate from the determination of a competitive relationship between and among products. We have also noted that determining likeness primarily in the light of the regulatory objectives of the measure is further complicated by the fact that measures, including technical regulations, often have multiple objectives. In contrast, we have considered that the determination of likeness under Article 2.1 of the *TBT Agreement* is a determination about the nature and the extent of a competitive relationship between and among products, and that the regulatory concerns that underlie a measure may be considered to the extent that they have an impact on the competitive relationship.<sup>317</sup>

137. In the light of the above, we also consider that the Panel was wrong in confining its analysis of consumer tastes and habits to those consumers (young and potential young smokers) that are the concern of the objective of the regulation (to reduce youth smoking). In an analysis of likeness based on products' competitive relationship, it is the market that defines the scope of consumers whose preferences are relevant. The proportion of youth and adults smoking different types of cigarettes may vary, but clove, menthol, and regular cigarettes are smoked by both young and adult smokers. To evaluate the degree of substitutability among these products, the Panel should have assessed the tastes and habits of all relevant consumers of the products at issue, not only of the main consumers of clove and menthol cigarettes, particularly where it is clear that an important proportion of menthol cigarette smokers are adult consumers.

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<sup>315</sup>United States' appellant's submission, para. 62. The United States cites in particular to "possible increases in unregulated black market cigarettes or strain to the healthcare system". (United States' appellant's submission, para. 61)

<sup>316</sup>Section V.B.1 of this Report.

<sup>317</sup>See *supra*, para. 119.

138. Moreover, without at this stage entering into the merits of the other objectives of the regulation advocated by the United States, the Panel's approach discounts the fact that the technical regulation at issue may also have other objectives that concern other actual and potential consumers of the products at issue. Therefore, we disagree with the Panel that the legitimate objective of Section 907(a)(1)(A), that is, reducing youth smoking, delimits the scope of the consumers whose tastes and habits should be examined to young smokers and potential young smokers.<sup>318</sup>

139. Having determined that the Panel was wrong in confining its analysis of consumer tastes and habits to young and potential young smokers, we now consider whether the Panel's failure to evaluate the tastes and habits of current adult consumers of menthol cigarettes undermines the proposition that there is a sufficient degree of substitutability between clove and menthol cigarettes to support an overall finding of likeness under Article 2.1 of the *TBT Agreement*.

140. The United States claims that "[e]vidence comparing the tastes and habits of younger, potential smokers and the tastes and habits of older, established smokers is directly relevant to the issue of consumer tastes and habits", because clove cigarettes are smoked disproportionately by youth, while menthol cigarettes are smoked more evenly among young and adult smokers. Accordingly, the United States argues, clove cigarettes present a unique risk to young, uninitiated smokers and have little to no impact on adults, while menthol cigarettes are a risk to young, uninitiated smokers, but also have a significant impact on adults.<sup>319</sup>

141. Indonesia submits that the United States failed to present evidence showing that consumers, whether adult or youth, would be unwilling to substitute clove and menthol cigarettes for the end-use of smoking. Indonesia argues that the United States is wrong in presuming that consumer tastes and habits must be identical to be like, considering that the Appellate Body found that products that are close to being perfectly substitutable can be like products. Indonesia contends that there is sufficient evidence on record supporting the fact that young smokers and pre-smoking youth view clove and menthol cigarettes "as at least close to substitutable".<sup>320</sup>

142. We consider that, in order to determine whether products are like under Article 2.1 of the *TBT Agreement*, it is not necessary to demonstrate that the products are substitutable for all consumers or that they actually compete in the entire market. Rather, if the products are highly substitutable for some consumers but not for others, this may also support a finding that the products are like. In *Philippines – Distilled Spirits*, the Appellate Body considered that the standard of "directly

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<sup>318</sup>Panel Report, paras. 7.206.

<sup>319</sup>United States' appellant's submission, para. 55.

<sup>320</sup>Indonesia's appellee's submission, para. 82 (referring to Appellate Body Reports, *Philippines – Distilled Spirits*, para. 149).

competitive or substitutable" relating to Article III:2, second sentence, of the GATT 1994 is satisfied even if competition does not take place in the whole market but is limited to a segment of the market. The Appellate Body found that "it was reasonable for the [p]anel to draw, from the Philippines' argument that imported distilled spirits are only available to a 'narrow segment' of its population, the inference that there is actual competition between imported and domestic distilled spirits at least in the segment of the market that the Philippines admitted has access to both imported and domestic distilled spirits".<sup>321</sup> In that same dispute, the Appellate Body found that Article III:2, second sentence, does not require that competition be assessed in relation to the market segment that is most representative of the "market as a whole", and that Article III of the GATT 1994 "does not protect just *some* instances or *most* instances, but rather, it protects *all* instances of direct competition".<sup>322</sup>

143. Although the Appellate Body's finding in *Philippines – Distilled Spirits* concerned the second sentence of Article III:2 of the GATT 1994, we consider this interpretation of "directly competitive or substitutable products" to be relevant to the concept of "likeness" in Article III:4 of the GATT 1994 and 2.1 of the *TBT Agreement*, since likeness under these provisions is determined on the basis of the competitive relationship between and among the products.<sup>323</sup> In our view, the notion that actual competition does not need to take place in the whole market, but may be limited to a segment of the market, is separate from the question of the degree of competition that is required to satisfy the standards of "directly competitive or substitutable products" and "like products".

144. The Panel's consideration of consumer tastes and habits was too limited. At the same time, the mere fact that clove cigarettes are smoked disproportionately by youth, while menthol cigarettes are smoked more evenly by young and adult smokers does not necessarily affect the degree of substitutability between clove and menthol cigarettes. The Panel found that, from the perspective of young and potential young smokers, clove-flavoured cigarettes and menthol-flavoured cigarettes are similar for purposes of starting to smoke.<sup>324</sup> We understand this as a finding that young and potential young smokers perceive clove and menthol cigarettes as sufficiently substitutable. This, in turn, is sufficient to support the Panel's finding that those products are like within the meaning of Article 2.1 of the *TBT Agreement*, even if the degree of substitutability is not the same for all adult smokers.

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<sup>321</sup> Appellate Body Reports, *Philippines – Distilled Spirits*, para. 220.

<sup>322</sup> Appellate Body Reports, *Philippines – Distilled Spirits*, para. 221 (referring to Panel Report, *Chile – Alcoholic Beverages*, para. 7.43). (original emphasis)

<sup>323</sup> In *EC – Asbestos*, the Appellate Body, while not defining the precise scope of the concept of "like products" in Article III:4, found that Article III:4 applies to products that are in a competitive relationship and that "the scope of 'like' in Article III:4 is broader than the scope of 'like' in Article III:2, first sentence". (Appellate Body Report, *EC – Asbestos*, para. 99)

<sup>324</sup> Panel Report, para. 7.232.

145. In the light of the above, we are of the view that, while the Panel should not have limited its analysis of consumer tastes and habits to young and potential young smokers to the exclusion of current adult smokers, this does not undermine the Panel's finding regarding consumer tastes and habits and its ultimate finding of likeness. This is so because the degree of competition and substitutability that the Panel found for young and potential young smokers is sufficiently high to support a finding of likeness under Article 2.1 of the *TBT Agreement*.

146. Finally, we turn to the claim by the United States that the Panel acted inconsistently with Article 11 of the DSU when it reached the conclusion that clove cigarettes and menthol cigarettes are perceived similarly by the consumers at issue in this case, and that it disregarded critical evidence on how consumers actually use and perceive the products at issue in the relevant market.<sup>325</sup>

147. The United States emphasizes that clove cigarettes are smoked disproportionately by young, novice smokers while menthol cigarettes are smoked more evenly by young people and adults. It recalls that both parties presented evidence—in particular a set of surveys—aimed at shedding light on the tastes and habits of consumers in the United States in respect of clove and menthol cigarettes. However, the United States argues, the Panel disregarded this evidence after having erroneously concluded that it could not "rely on the information provide[d]" in the surveys on the basis that this information was "not directly comparable".<sup>326</sup> The United States submits that the survey data before the Panel were "directly relevant to the question" before it because the data provided evidence on how consumers and potential consumers "used and perceived different cigarettes *in the United States*"<sup>327</sup>, that is, the relevant market. The United States further argues that, after disregarding this evidence, the Panel proceeded to base its conclusions "entirely on speculation and conjecture", without any evidentiary support as to how consumers in the relevant market actually use the cigarettes at issue.<sup>328</sup>

148. Indonesia responds that, given that the research parameters varied from survey to survey, the Panel properly concluded that the survey data did not provide clear guidance on "consumer tastes and habits". In its view, the Panel's approach to that evidence "hardly amounts to excluding it *a priori*".<sup>329</sup> Instead, the Panel "clearly articulated the difficulties it encountered in comparing the survey data"<sup>330</sup> and simply did not place the same weight on the evidence as did the United States. Indonesia further argues that the Panel identified and relied on evidence showing that both clove and menthol cigarettes

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<sup>325</sup>United States' appellant's submission, para. 64.

<sup>326</sup>United States' appellant's submission, para. 66 (quoting Panel Report, para. 7.210).

<sup>327</sup>United States' appellant's submission, para. 67. (original emphasis)

<sup>328</sup>United States' appellant's submission, para. 68.

<sup>329</sup>Indonesia's appellee's submission, para. 106.

<sup>330</sup>Indonesia's appellee's submission, para. 115.

are "trainer" or "starter" cigarettes that appeal to youth.<sup>331</sup> Based on this evidence on record, the Panel properly found that "all these flavoured cigarettes are perceived as vehicles to start smoking".<sup>332</sup>

149. We observe that Article 11 of the DSU requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts of the case. Thus, Article 11 requires a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."<sup>333</sup> In addition, panels "are not required to accord to factual evidence of the parties the same meaning and weight as do the parties."<sup>334</sup> In this respect, the Appellate Body will not "interfere lightly" with a panel's fact-finding authority, and will not "base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding".<sup>335</sup> Instead, for a claim under Article 11 to succeed, the Appellate Body must be satisfied that the panel has exceeded its authority as the initial trier of facts. As the initial trier of facts, a panel must provide "reasoned and adequate explanations and coherent reasoning"<sup>336</sup>, must base its finding on a sufficient evidentiary basis<sup>337</sup>, and must treat evidence with "even-handedness".<sup>338</sup> Moreover, a participant claiming that a panel disregarded certain evidence must explain why the evidence is so material to its case that the panel's failure to address such evidence has a bearing on the objectivity of the panel's factual assessment.<sup>339</sup>

150. Both the United States and Indonesia relied on a series of surveys addressing smoking patterns in the United States in order to support their respective arguments.<sup>340</sup> The Panel observed,

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<sup>331</sup>Indonesia's appellee's submission, para. 111.

<sup>332</sup>Indonesia's appellee's submission, para. 113 (quoting Panel Report, para. 7.231).

<sup>333</sup>Appellate Body Reports, *Philippines – Distilled Spirits*, para. 135 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185, in turn referring to Appellate Body Report, *EC – Hormones*, paras. 132 and 133).

<sup>334</sup>Appellate Body Report, *Australia – Salmon*, para. 267.

<sup>335</sup>Appellate Body Reports, *Philippines – Distilled Spirits*, para. 136 (quoting Appellate Body Report, *US – Wheat Gluten*, para. 151).

<sup>336</sup>Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, footnote 618 to para. 293.

<sup>337</sup>See Appellate Body Report, *US – Carbon Steel*, para. 148.

<sup>338</sup>Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 292.

<sup>339</sup>See Appellate Body Report, *EC – Fasteners (China)*, para. 442.

<sup>340</sup>Indonesia relied on the following four surveys: (i) the 2006-2008 National Survey on Drug Use and Health; (ii) the 2009 Western Watts Survey; (iii) the 2009 Monitoring the Future Survey; and (iv) a 2010 telephone survey conducted by Opinion Research Corporation. (Panel Report, footnote 426 to para. 7.210 (referring to National Survey on Drug Use and Health 2006-2008, "Essential Facts About Clove Cigarettes" (Panel Exhibit IND-3); Western Watts Data Collection, "Clove Cigarettes Attitude, Awareness and Usage Survey", 16-19 February 2009 (Panel Exhibit IND-26); L.D. Johnston et al., "Smoking continues gradual decline among U.S. teens, smokeless tobacco threatens a comeback," *University of Michigan News Service*, 14 December 2009 (Panel Exhibit IND-33); and Opinion Research Corporation, Teen CARAVAN Study No. 719381, 23-26 September 2010 (Panel Exhibit IND-34))) The United States based its arguments on two surveys: (i) the 2002-2003 National Survey on Drug Use and Health; and (ii) the National Youth Tobacco Survey. (Panel Report, footnote 426 to para. 7.210 (referring to FDA Survey Assessment, "Patterns of Use Among Menthol, Clove, and Other Flavored Cigarettes (Panel Exhibit US-53)))

however, that these surveys "do not share the same research parameters"<sup>341</sup>; instead, they "examine[d] different age groups", "pose[d] different questions", and were "based on different methodological approaches".<sup>342</sup> Consequently, in the Panel's view, the information contained in the different surveys was "not directly comparable". On this basis, the Panel reached the conclusion that it could not "rely on the information [that the surveys] provide on market shares for the purposes of analyzing the consumers' tastes and habits criterion"<sup>343</sup>, and that "the evidence on consumer preferences submitted by the parties may not provide clear guidance" as to whether clove and menthol cigarettes are substitutable from the perspective of young smokers and potential young smokers.<sup>344</sup>

151. We acknowledge that extracting meaningful information from surveys that differ considerably in terms of research parameters might not be an easy task. Likewise, we do not suggest that panels must always be capable of engaging in sophisticated statistical exercises to solve data discrepancies that ultimately cannot be resolved. However, the fact that evidence relied on by the parties may be difficult to compare cannot excuse the panel from examining it. A panel has the obligation to "consider *all* the evidence presented to it"<sup>345</sup>, and it should at least attempt to extract potentially relevant information contained therein. It is only after such an examination that a panel might be able to provide "reasoned and adequate explanations"<sup>346</sup> as to why it cannot or chooses not to rely on specific evidence submitted by the parties. In our view, a panel cannot determine *a priori* that some pieces of evidence are not reliable for the purposes of its analysis solely on the basis of a difference in the parameters and methodology used.

152. We recall, however, that not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU. A participant claiming that a panel ignored certain evidence must explain why that evidence is so material to its case that the panel's failure to address such evidence has a bearing on the objectivity of the panel's factual assessment.<sup>347</sup> In that respect, the United States submits that, because the Panel did not examine the evidence related to consumers' tastes and habits, the Panel's finding with respect to this criterion "was fatally flawed".<sup>348</sup> In the United States' view, the survey data presented by the parties "show that consumers and potential consumers use and perceive

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<sup>341</sup>Panel Report, para. 7.210.

<sup>342</sup>Panel Report, para. 7.210.

<sup>343</sup>Panel Report, para. 7.210.

<sup>344</sup>Panel Report, para. 7.209.

<sup>345</sup>Appellate Body Reports, *Philippines – Distilled Spirits*, para. 135 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185, in turn referring to Appellate Body Report, *EC – Hormones*, paras. 132 and 133).

<sup>346</sup>Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, footnote 618 to para. 293.

<sup>347</sup>Appellate Body Report, *EC – Fasteners (China)*, para. 442.

<sup>348</sup>United States' appellant's submission, para. 68.



clove and menthol cigarettes differently—even though they are both cigarettes with characterizing flavors that appeal to youth".<sup>349</sup>

153. We have considered above, in respect of the claim by the United States that the Panel erred in the application of the consumer tastes and habits criterion, that, although the Panel should not have limited its analysis to young and potential young consumers, to the exclusion of current adult consumers, this did not affect its finding that there is sufficient substitutability between clove and menthol cigarettes to support its overall finding that the products are like. The Panel's findings show that, while clove and menthol cigarettes do not compete in the whole market, these products are substitutable for young and potential young consumers.

154. Therefore, in our view, the fact that the Panel did not rely on evidence demonstrating that clove cigarettes are disproportionately smoked by youth while menthol cigarettes are smoked by both youth and adults, does not have material consequences for the Panel's finding on consumer tastes and habits. This is so because the Panel found that there is a sufficient degree of substitutability, at least in some segments of the market, between clove and menthol cigarettes, to support a finding of likeness under Article 2.1 of the *TBT Agreement*.

155. In sum, we are not persuaded that the reasons advanced by the Panel for not relying on the surveys submitted by the parties justify the cursory treatment given by the Panel to these surveys. Even if this evidence was not directly comparable or based on different methodological approaches, the Panel was required to consider this evidence and extract relevant information that it contained. The Panel did not provide an adequate explanation as to why this was not possible. Nevertheless, in our view, the Panel's error does not amount to a violation of Article 11 of the DSU, considering that the evidence that the Panel did not engage with does not have material consequences for the Panel's finding that consumer tastes and habits indicate that clove and menthol cigarettes are sufficiently substitutable in certain segments of the market, and does not, therefore, undermine the Panel's finding that clove and menthol cigarettes are like products under Article 2.1 of the *TBT Agreement*.

#### 4. Conclusion on "Like Products"

156. We have disagreed with the Panel's interpretation of the concept of "like products" in Article 2.1 of the *TBT Agreement*, which focuses on the purposes of the technical regulation at issue, as separate from the competitive relationship between and among the products. In contrast, we have concluded that the context provided by Article 2.1 itself, by other provisions of the *TBT Agreement*, by the *TBT Agreement* as a whole, and by Article III:4 of the GATT 1994, as well as the object and

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<sup>349</sup>United States' appellant's submission, para. 69.

purpose of the *TBT Agreement*, support an interpretation of the concept of "likeness" in Article 2.1 that is based on the competitive relationship between and among the products and that takes into account the regulatory concerns underlying a technical regulation, to the extent that they are relevant to the examination of certain likeness criteria and are reflected in the products' competitive relationship.

157. As a consequence of our interpretative approach to the concept of "like products" in Article 2.1 of the *TBT Agreement*, we have also disagreed with the Panel's decision to examine the extent of substitutability of clove and menthol cigarettes from the perspective of a limited group of consumers, that is, young smokers and potential young smokers. We have, nevertheless, considered that the Panel's error does not vitiate the conclusion that there is a sufficient degree of substitutability between clove and menthol cigarettes to support an overall finding of likeness under Article 2.1 of the *TBT Agreement*. We have also determined that the Panel's decision that it could not rely on certain evidence submitted by the parties did not amount to an error under Article 11 of the DSU.

158. In respect of end-use, we have disagreed with the Panel's conclusion that the end-use of clove and menthol cigarettes is simply "to be smoked". Nevertheless, we have considered, based on the Panel's findings, that both clove and menthol cigarettes are *capable* of performing the more specific end-uses put forward by the United States, that is, "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke".<sup>350</sup> We have thus concluded that the different end-uses of clove and menthol cigarettes support the Panel's overall finding of likeness.

159. Finally, we observe that the United States has not appealed the Panel's findings regarding the physical characteristics and the tariff classification of clove and menthol cigarettes. The Panel found that clove and menthol cigarettes are physically similar as "they share their main traits as cigarettes, that is, having tobacco as a main ingredient, and an additive which imparts a characterizing flavour, taste and aroma, and reduces the harshness of tobacco"<sup>351</sup>; and that they are both classified under subheading 2402.20 of the Harmonized Commodity Description and Coding System.<sup>352</sup>

160. In the light of all of the above, while we disagree with certain aspects of the Panel's analysis, we agree with the Panel that the "likeness" criteria it examined support its overall conclusion that clove and menthol cigarettes are like products within the meaning of Article 2.1 of the *TBT Agreement*. Therefore, we *uphold*, albeit for different reasons, the Panel's finding, in

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<sup>350</sup>Panel Report, para. 7.231; United States' response to Panel Question 37, para. 85.

<sup>351</sup>Panel Report, para. 7.187.

<sup>352</sup>Panel Report, para. 7.239.

paragraph 7.248 of the Panel Report, that clove cigarettes and menthol cigarettes are like products within the meaning of Article 2.1 of the *TBT Agreement*.

C. *The Panel's Finding that Section 907(a)(1)(A) of the FFDCA Accords Imported Clove Cigarettes Less Favourable Treatment than That Accorded to Domestic Menthol Cigarettes, within the Meaning of Article 2.1 of the TBT Agreement*

1. Introduction

161. In this section, we address the United States' appeal of the Panel's finding that the United States acted inconsistently with Article 2.1 of the *TBT Agreement* by according to clove cigarettes imported from Indonesia less favourable treatment than that accorded to domestic like products.

162. Having concluded that clove and menthol cigarettes are like products within the meaning of Article 2.1 of the *TBT Agreement*, the Panel undertook a four-step analysis to determine whether Section 907(a)(1)(A) of the FFDCA accords to clove cigarettes imported from Indonesia less favourable treatment than that accorded to like domestic products. First, the Panel sought to determine the products to be compared in its analysis.<sup>353</sup> The Panel found that Article 2.1 called for a comparison between treatment accorded to, on the one hand, clove cigarettes imported from Indonesia, and, on the other hand, domestic menthol cigarettes.<sup>354</sup> Second, the Panel determined that under Section 907(a)(1)(A) clove and menthol cigarettes are treated differently, in that clove cigarettes are banned while menthol cigarettes are excluded from the ban.<sup>355</sup> Third, the Panel found that such difference in treatment modifies the conditions of competition to the detriment of the imported products, insofar as imported clove cigarettes are banned while domestic menthol cigarettes are allowed to remain in the market.<sup>356</sup> Fourth and finally, the Panel rejected the United States' argument that such detrimental impact could be "explained by factors or circumstances unrelated to the foreign origin of the products"<sup>357</sup>, because Section 907(a)(1)(A) imposes costs on foreign producers, notably producers in Indonesia, while at the same time imposing no costs on any US entity.<sup>358</sup>

163. On appeal, the United States claims that the Panel improperly narrowed the *product scope* of its analysis by focusing exclusively on treatment accorded to imported clove cigarettes and to

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<sup>353</sup>Panel Report, para. 7.270.

<sup>354</sup>Panel Report, paras. 7.275-7.277.

<sup>355</sup>Panel Report, paras. 7.279 and 7.280.

<sup>356</sup>Panel Report, para. 7.281.

<sup>357</sup>Panel Report, para. 7.283 (referring to United States' second written submission to the Panel, para. 127, in turn referring to Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96).

<sup>358</sup>Panel Report, para. 7.289.

domestic menthol cigarettes. The United States posits that the Panel should have compared the treatment accorded to the group of imported and to the group of domestic like products. The United States also claims that the Panel improperly narrowed the *temporal scope* of its analysis by focusing exclusively on the effects of Section 907(a)(1)(A) on domestic like products at the time the ban on flavoured cigarettes came into effect. The United States claims further that the Panel erred in finding that the less favourable treatment accorded to imported clove cigarettes was related to the origin of the products, because Section 907(a)(1)(A) imposes costs on foreign producers while at the same time imposing no costs on any US entity. Finally, the United States claims that the Panel acted inconsistently with Article 11 of the DSU in reaching these findings.

164. Indonesia responds that the Panel properly identified the products to be compared in its less favourable treatment analysis, and did not err in establishing the appropriate timeframe for its comparison. Indonesia also asserts that the Panel correctly found that the less favourable treatment accorded to clove cigarettes could not be explained by factors unrelated to the foreign origin of the imported products. Finally, Indonesia claims that the Panel acted in accordance with Article 11 of the DSU in performing its analysis.

165. Before turning to the specific issues raised by the United States on appeal, we find it useful to interpret the "treatment no less favourable" requirement of Article 2.1 of the *TBT Agreement* in the light of the conflicting interpretations of this phrase offered by the participants on appeal.

2. "Treatment No Less Favourable" under Article 2.1 of the *TBT Agreement*

166. Referring to the Appellate Body's interpretation of Article III:4 of the GATT 1994<sup>359</sup>, the United States and Indonesia agree that the "treatment no less favourable" standard of Article 2.1 of the *TBT Agreement* requires a panel to determine whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the imported products. However, Indonesia considers that the existence of any detrimental effect on competitive opportunities for imported products is sufficient to establish less favourable treatment under Article 2.1.<sup>360</sup> In contrast, the United States argues that the existence of a detrimental effect on competitive opportunities for imports is necessary, but not sufficient, to establish a violation of Article 2.1. Referring to the Appellate Body report in *Dominican Republic – Import and Sale of Cigarettes*, the United States

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<sup>359</sup>See Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

<sup>360</sup>Indonesia's appellee's submission, para. 172.

argues that Article 2.1 requires further inquiry into whether "the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product".<sup>361</sup>

167. Article 2.1 of the *TBT Agreement* provides that, with respect to their central government bodies:

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

168. As already set out above, for a violation of the national treatment obligation in Article 2.1 to be established, three elements must be satisfied: (i) the measure at issue must be a "technical regulation"; (ii) the imported and domestic products at issue must be like products; and (iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products. In this part of its appeal, the United States challenges only the Panel's finding that Section 907(a)(1)(A) of the FFDCFA violates the national treatment obligation provided in Article 2.1 of the *TBT Agreement*, insofar as it accords to imported clove cigarettes less favourable treatment than that accorded to like domestic products.

169. The "treatment no less favourable" requirement of Article 2.1 of the *TBT Agreement* applies "in respect of technical regulations". A technical regulation is defined in Annex 1.1 thereto as a "[d]ocument which lays down product characteristics or their related processes and production methods ... with which compliance is mandatory". As such, technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics or their related processes and production methods. This suggests, in our view, that Article 2.1 should not be read to mean that *any* distinction, in particular those that are based *exclusively* on particular product characteristics or their related processes and production methods, would *per se* accord less favourable treatment within the meaning of Article 2.1.

170. We next observe that Article 2.2 of the *TBT Agreement* provides, in relevant part, that:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.

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<sup>361</sup>United States' appellant's submission, para. 101 (referring to Panel Report, para. 7.269; and Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96).

171. The context provided by Article 2.2 suggests that "obstacles to international trade" may be permitted insofar as they are not found to be "unnecessary", that is, "more trade-restrictive than necessary to fulfil a legitimate objective". To us, this supports a reading that Article 2.1 does not operate to prohibit *a priori* any obstacle to international trade. Indeed, if *any* obstacle to international trade would be sufficient to establish a violation of Article 2.1, Article 2.2 would be deprived of its *effet utile*.

172. This interpretation of Article 2.1 is buttressed by the sixth recital of the preamble of the *TBT Agreement*, in which WTO Members recognize that:

... no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal, or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.

173. The language of the sixth recital expressly acknowledges that Members may take measures necessary for, *inter alia*, the protection of human life or health, provided that such measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade" and are "otherwise in accordance with the provisions of this Agreement". We consider that the sixth recital of the preamble of the *TBT Agreement* provides relevant context regarding the ambit of the "treatment no less favourable" requirement in Article 2.1, by making clear that technical regulations may pursue the objectives listed therein, provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the *TBT Agreement*.

174. Finally, as noted earlier<sup>362</sup>, the object and purpose of the *TBT Agreement* is to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members' right to regulate. This object and purpose therefore suggests that Article 2.1 should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions.

175. Accordingly, the context and object and purpose of the *TBT Agreement* weigh in favour of reading the "treatment no less favourable" requirement of Article 2.1 as prohibiting both *de jure* and

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<sup>362</sup>*Supra*, paras. 94 and 95.

*de facto* discrimination against imported products, while at the same time permitting detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions.

176. Like the participants, we also find it useful to consider the context provided by the other covered agreements. In particular, we note that the non-discrimination obligation of Article 2.1 of the *TBT Agreement* is expressed in the same terms as that of Article III:4 of the GATT 1994.<sup>363</sup> In the context of Article III:4, the "treatment no less favourable" requirement has been widely interpreted by previous GATT and WTO panels and by the Appellate Body. Beginning with the GATT panel in *US – Section 337 Tariff Act*, the term "treatment no less favourable" in Article III:4 was interpreted as requiring "effective equality of opportunities for imported products".<sup>364</sup> Subsequent GATT and WTO panels followed a similar approach, and found violations of Article III:4 in cases where regulatory distinctions in enforcement procedures<sup>365</sup>, distribution channels<sup>366</sup>, statutory content requirements<sup>367</sup>, and allocation of import licenses<sup>368</sup> resulted in alteration of the competitive opportunities in the market of the regulating Member to the detriment of imported products vis-à-vis domestic like products.

177. In *Korea – Various Measures on Beef*, the Appellate Body agreed that the analysis of less favourable treatment under Article III:4 focuses on the "conditions of competition" between imported and domestic like products.<sup>369</sup> The Appellate Body further clarified that a formal difference in treatment between imported and like domestic products is:

... neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated "less favourably" than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.<sup>370</sup> (original emphasis)

178. Subsequently, in *EC – Asbestos*, the Appellate Body explained that imports will be treated less favourably than domestic like products when regulatory distinctions disadvantage the group of

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<sup>363</sup> Article III:4 of the GATT 1994 reads:

The products of the territory of any Member imported into the territory of any other Member 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.

<sup>364</sup> GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.10.

<sup>365</sup> GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.20.

<sup>366</sup> GATT Panel Report, *Canada – Provincial Liquor Boards (US)*, paras. 5.12-5.16.

<sup>367</sup> Panel Report, *US – Gasoline*, para. 6.10.

<sup>368</sup> Panel Reports, *EC – Bananas III*, paras. 7.179-7.180.

<sup>369</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 136.

<sup>370</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

imported products vis-à-vis the group of domestic like products. The Appellate Body reasoned that the "treatment no less favourable" clause of Article III:4:

... expresses the general principle, in Article III:1, that internal regulations "should not be applied ... so as to afford protection to domestic production." If there is "less favourable treatment" of the group of "like" imported products, there is, conversely, "protection" of the group of "like" domestic products. However, a Member may draw distinctions between products which have been found to be "like", without, for this reason alone, according to the group of "like" imported products "less favourable treatment" than that accorded to the group of "like" domestic products.<sup>371</sup> (original emphasis)

179. Thus, the "treatment no less favourable" standard of Article III:4 of the GATT 1994 prohibits WTO Members from modifying the conditions of competition in the marketplace to the detriment of the group of imported products vis-à-vis the group of domestic like products.<sup>372</sup>

180. Although we are mindful that the meaning of the term "treatment no less favourable" in Article 2.1 of the *TBT Agreement* is to be interpreted in the light of the specific context provided by the *TBT Agreement*, we nonetheless consider these previous findings by the Appellate Body in the context of Article III:4 of the GATT 1994 to be instructive in assessing the meaning of "treatment no less favourable", provided that the specific context in which the term appears in Article 2.1 of the *TBT Agreement* is taken into account. Similarly to Article III:4 of the GATT 1994, Article 2.1 of the *TBT Agreement* requires WTO Members to accord to the group of imported products treatment no less favourable than that accorded to the group of like domestic products. Article 2.1 prescribes such

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<sup>371</sup> Appellate Body Report, *EC – Asbestos*, para. 100.

<sup>372</sup> We disagree with the United States to the extent that it suggests that *Dominican Republic – Import and Sale of Cigarettes* stands for the proposition that, under Article III:4, panels should inquire further whether "the detrimental effect is unrelated to the foreign origin of the product". (United States' appellant's submission, para. 101 (referring to Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96)) Although the statement referred to by the United States, when read in isolation, could be viewed as suggesting that further inquiry into the rationale for the detrimental impact is necessary, in that dispute the Appellate Body rejected Honduras' claim under Article III:4 because:

... the difference between the per-unit costs of the bond requirement alleged by Honduras is explained by the fact that the importer of Honduran cigarettes has a smaller market share than two domestic producers (the per-unit cost of the bond requirement being the result of dividing the cost of the bond by the number of cigarettes sold on the Dominican Republic market).

(Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96)

Thus, in that dispute, the Appellate Body merely held that the higher *per unit* costs of the bond requirement for imported cigarettes did not conclusively demonstrate less favourable treatment, because it was not attributable to the specific measure at issue but, rather, was a function of sales volumes. In *Thailand – Cigarettes (Philippines)*, the Appellate Body further clarified that for a finding of less favourable treatment under Article III:4 "there must be in every case a genuine relationship between the measure at issue and its adverse impact on competitive opportunities for imported versus like domestic products to support a finding that imported products are treated less favourably". (Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134) The Appellate Body eschewed an additional inquiry as to whether such detrimental impact was related to the foreign origin of the products or explained by other factors or circumstances.



treatment specifically in respect of technical regulations. For this reason, a panel examining a claim of violation under Article 2.1 should seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products vis-à-vis the group of like domestic products.

181. However, as noted earlier, the context and object and purpose of the *TBT Agreement* weigh in favour of interpreting the "treatment no less favourable" requirement of Article 2.1 as not prohibiting detrimental impact on imports that stems exclusively from a legitimate regulatory distinction. Rather, for the aforementioned reasons<sup>373</sup>, the "treatment no less favourable" requirement of Article 2.1 only prohibits *de jure* and *de facto* discrimination against the group of imported products.

182. Accordingly, where the technical regulation at issue does not *de jure* discriminate against imports, the existence of a detrimental impact on competitive opportunities for the group of imported vis-à-vis the group of domestic like products is not dispositive of less favourable treatment under Article 2.1. Instead, a panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. In making this determination, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products.

### 3. Product Scope of the "Treatment No Less Favourable" Comparison

183. We now turn to the specific issues raised by the United States on appeal. We begin with the United States' appeal of the scope of products considered by the Panel to determine whether imported clove cigarettes are treated less favourably than US domestic like products within the meaning of Article 2.1 of the *TBT Agreement*.

184. Before the Panel, Indonesia argued that the "treatment no less favourable" requirement of Article 2.1 calls for a comparison between, on the one hand, treatment accorded to imported clove cigarettes and, on the other hand, treatment accorded to any like domestic cigarettes that are not banned by Section 907(a)(1)(A) of the FFDC (that is, menthol or regular cigarettes, but not other flavoured cigarettes, which are prohibited under Section 907(a)(1)(A)).<sup>374</sup> The United States responded that the Panel should compare treatment accorded under Section 907(a)(1)(A) to all

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<sup>373</sup>See *supra*, paras. 97-101.

<sup>374</sup>Panel Report, para. 7.271.

imported cigarettes (to the extent they are like) and not just clove cigarettes, with the treatment accorded to all domestically produced like cigarettes.<sup>375</sup>

185. The Panel determined that the comparison should be between the treatment accorded to imported clove cigarettes and that accorded to the domestically produced cigarettes that it had earlier found to be like products, that is, menthol cigarettes. It reasoned that:

Article 2.1 of the *TBT Agreement* calls for a comparison of "products imported from the territory of any Member" with "like products of national origin". These provisions refer to the products imported from the territory of "*any other Member*", and not "Members" or "other Members" more generally. The imported products in this case are the products imported from the territory of *Indonesia*. And it appears to be common ground between the parties that the vast majority of cigarettes that were imported from Indonesia into the United States were *clove* cigarettes.<sup>376</sup> (original emphasis; footnote omitted)

On the domestic side, we recall that we have found that menthol cigarettes are "like" clove cigarettes for the purpose of Article 2.1 of the *TBT Agreement* because, *inter alia*, they both contain an additive that provides them with a characterizing flavour which makes them appealing to youth. We have not entered into an analysis of whether domestic regular cigarettes are "like" imported clove cigarettes as we consider that we would be exceeding our terms of reference.<sup>377</sup>

186. On appeal, the United States claims that the Panel erred in *a priori* limiting its less favourable treatment comparison to one imported product (Indonesian clove cigarettes) and one domestic like product (menthol cigarettes). Referring to the Appellate Body report in *EC – Asbestos* and the panel report in *US – Tuna II (Mexico)*, the United States argues that Article 2.1 required the Panel to compare the treatment accorded to all imported and domestic like products as a group.<sup>378</sup> For the United States, a proper comparison would have demonstrated that Section 907(a)(1)(A) does not alter the conditions of competition between imported and domestic like products as a group.<sup>379</sup>

187. With respect to the imported products, the United States argues that the Panel erred in failing to consider the treatment accorded to menthol cigarettes imported from other countries.<sup>380</sup> According to the United States, the reference to imported products of "*any other Member*" in Article 2.1 does not justify the Panel's focus on Indonesian clove cigarettes, because Article 2.1 aims at discerning

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<sup>375</sup>Panel Report, para. 7.272.

<sup>376</sup>Panel Report, para. 7.275.

<sup>377</sup>Panel Report, para. 7.277.

<sup>378</sup>United States' appellant's submission, paras. 75-77 (referring to Appellate Body Report, *EC – Asbestos*, para. 100; and quoting Panel Report, *US – Tuna II (Mexico)*, para. 7.295).

<sup>379</sup>United States' appellant's submission, para. 81.

<sup>380</sup>United States' appellant's submission, para. 79.

legitimate regulatory distinctions from those that serve as a proxy for singling out the like products of the complaining Member<sup>381</sup> for less favourable treatment.

188. With respect to like domestic products, the United States argues that the Panel erred in failing to consider the treatment accorded to domestic flavoured cigarettes.<sup>382</sup> To the extent that the Panel limited its analysis to domestic menthol cigarettes by virtue of the product scope of Indonesia's panel request, the United States maintains that a panel's terms of reference do not limit the scope of the products to be considered in a discrimination claim.<sup>383</sup>

189. For its part, Indonesia responds that the Panel did not err in comparing the treatment accorded to imported clove cigarettes with the treatment accorded to domestic menthol cigarettes. Indonesia argues that the Panel correctly limited its less favourable treatment comparison to those imported and domestic products that it reviewed in its likeness analysis.<sup>384</sup> Whereas the Appellate Body in *EC – Asbestos* and the panel in *US – Tuna II (Mexico)* engaged in a likeness analysis on the basis of groups of products, the Panel in this case correctly limited its analysis to the specific products at issue, namely, imported clove cigarettes and domestic menthol cigarettes.<sup>385</sup> Indonesia further maintains that the Panel did not rely on its terms of reference to limit the product scope of its less favourable treatment comparison, but rather on its determination of the scope of its likeness analysis.<sup>386</sup>

190. Article 2.1 provides that "products imported from the territory of *any* Member"<sup>387</sup> shall be accorded treatment no less favourable than that accorded to "like products of national origin and like products originating in any other country". The text of Article 2.1 thus calls for a comparison of treatment accorded to, on the one hand, products imported from any Member alleging a violation of Article 2.1, and treatment accorded to, on the other hand, like products of domestic and any other origin. Therefore, for the purposes of the less favourable treatment analysis, treatment accorded to products imported from the complaining Member is to be compared with that accorded to like domestic products and like products of any other origin.

191. In determining what are the "like products of national origin and like products originating in any other country", a panel must seek to establish, based on the nature and extent of the competitive relationship between the products in the market of the regulating Member, the products of domestic (and other) origin(s) that are like the products imported from the complaining Member. In

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<sup>381</sup>United States' appellant's submission, para. 84.

<sup>382</sup>United States' appellant's submission, para. 79.

<sup>383</sup>United States' appellant's submission, para. 87.

<sup>384</sup>Indonesia's appellee's submission, paras. 138 and 139.

<sup>385</sup>Indonesia's appellee's submission, paras. 123-130.

<sup>386</sup>Indonesia's appellee's submission, paras. 147 and 148.

<sup>387</sup>Emphasis added.

determining what the like products at issue are, a panel is not bound by its terms of reference to limit its analysis to those products identified by the complaining Member in its panel request. Rather, Article 2.1 requires the panel to identify the domestic products that stand in a sufficiently close competitive relationship with the products imported from the complaining Member to be considered like products within the meaning of that provision.

192. To be clear, a panel's duty under Article 2.1 to identify the products of domestic and other origins that are like the products imported from the complaining Member does not absolve the complainant from making a *prima facie* case of violation of Article 2.1. Ordinarily, in discharging that burden, the complaining Member will identify the imported and domestic products that are allegedly like and whose treatment needs to be compared for purposes of establishing a violation of Article 2.1. The products identified by the complaining Member are the starting point in a panel's likeness analysis. However, Article 2.1 requires panels to assess objectively, on the basis of the nature and extent of the competitive relationship between the products in the market of the regulating Member, the universe of domestic products that are like the products imported from the complaining Member.<sup>388</sup>

193. Once the imported and domestic like products have been properly identified, Article 2.1 requires a panel dealing with a national treatment claim to compare, on the one hand, the treatment accorded under the technical regulation at issue to all like products imported from the complaining Member with, on the other hand, that accorded to all like domestic products. However, the national treatment obligation of Article 2.1 does not require Members to accord no less favourable treatment to each and every imported product as compared to each and every domestic like product. Article 2.1 does not preclude any regulatory distinctions between products that are found to be like, as long as treatment accorded to the *group* of imported products is no less favourable than that accorded to the *group* of like domestic products. As noted by the Appellate Body in the context of Article III:4 of the GATT 1994:

[A] Member may draw distinctions between products which have been found to be "like", without, for this reason alone, according to the group of "like" *imported* products "less favourable treatment" than that accorded to the group of "like" *domestic* products.<sup>389</sup>  
(original emphasis)

194. In sum, the national treatment obligation of Article 2.1 calls for a comparison of treatment accorded to, on the one hand, the group of products imported from the complaining Member and, on the other hand, the treatment accorded to the group of like domestic products. In determining what

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<sup>388</sup>See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1131.

<sup>389</sup>Appellate Body Report, *EC – Asbestos*, para. 100.

the scope of like imported and domestic products is, a panel is not limited to those products specifically identified by the complaining Member. Rather, a panel must objectively assess, based on the nature and extent of their competitive relationship, what are the domestic products that are like the products imported from the complaining Member. Once the universe of imported and domestic like products has been identified, the treatment accorded to all like products imported from the complaining Member must be compared to that accorded to all like domestic products. The "treatment no less favourable" standard of Article 2.1 does not prohibit regulatory distinctions between products found to be like, provided that the group of like products imported from the complaining Member is treated no less favourably than the group of domestic like products.

195. Against this analytical framework, we turn to the United States' specific allegations of error. The United States essentially claims that the Panel impermissibly narrowed the scope of products to be compared for the purpose of assessing Indonesia's claim that Section 907(a)(1)(A) violates the national treatment obligation of Article 2.1.

196. With respect to the group of imported products, the United States claims that the Panel erred in failing to include in its analysis treatment accorded to menthol cigarettes imported into the United States from all Members. We cannot agree. As noted earlier, the national treatment obligation of Article 2.1 calls for a comparison of treatment accorded to the group of like products imported from the Member alleging a violation of Article 2.1, and treatment accorded to the group of like domestic products. It follows that the Panel did not err in finding that a determination of Indonesia's claims under Article 2.1 required an examination of whether Section 907(a)(1)(A) accords to the group of products imported *from Indonesia* less favourable treatment than that accorded to the group of like products of US origin.<sup>390</sup>

197. In determining the group of products imported from Indonesia whose treatment needed to be compared with the treatment accorded to like domestic products, the Panel found that it was uncontested that the "vast majority" of cigarettes that were imported from Indonesia into the United States were clove cigarettes.<sup>391</sup> The Panel also observed that only "a small percentage of non-clove cigarettes" was imported from Indonesia into the United States.<sup>392</sup> Accordingly, the Panel did not err in finding that the group of products imported from Indonesia essentially consisted of clove cigarettes.

198. With respect to the group of like domestic products, the United States' challenge focuses on the Panel's exclusion of domestically produced flavoured cigarettes from its less favourable treatment

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<sup>390</sup>Panel Report, paras. 7.275-7.276.

<sup>391</sup>Panel Report, para. 7.275.

<sup>392</sup>Panel Report, footnote 503 to para. 7.275 (referring to United States' response to Panel Question 81, in turn referring to World Trade Atlas, Indonesia Cigarette Exports to the United States, 1998-2009 (Panel Exhibit US-134)).

analysis. The Panel felt bound by its terms of reference to limit its likeness analysis to two categories of products regulated under Section 907(a)(1)(A)—imported clove cigarettes and domestic menthol cigarettes<sup>393</sup>—and accordingly limited its less favourable treatment analysis to a comparison of the treatment accorded to those two product groups.<sup>394</sup> The Panel did not address domestic flavoured cigarettes at either the likeness or the less favourable treatment stage of its analysis.

199. We note, however, that the United States does not challenge on appeal the Panel's exclusion of domestically produced flavoured cigarettes from the likeness stage of its analysis. Rather, the United States' challenge focuses exclusively on the Panel's exclusion of domestically produced flavoured cigarettes from the less favourable treatment stage of the Panel's analysis. Because Article 2.1 expressly limits the scope of the less favourable treatment comparison to imported and domestic like products, in the absence of specific findings by the Panel that domestically produced flavoured cigarettes other than menthol are like clove cigarettes, we cannot determine whether the Panel erred in failing to include domestically produced flavoured cigarettes in its less favourable treatment comparison.

200. Even assuming, for the sake of argument, that the Panel had found that domestic flavoured cigarettes are like clove cigarettes imported from Indonesia, we are not persuaded that this would have changed the Panel's ultimate conclusion that Section 907(a)(1)(A) modifies the conditions of competition to the detriment of the group of imported products vis-à-vis like domestic products. Aside from the Panel's finding that, "at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol cigarettes"<sup>395</sup> in the US market—which is challenged by the United States and addressed below—the Panel did not have evidence on the record that flavoured cigarettes other than menthol cigarettes had "any sizeable market share in the United States prior to the implementation of the ban in 2009".<sup>396</sup> To the contrary, in response to a Panel question, the United States confirmed that the non-clove-flavoured cigarettes banned under Section 907(a)(1)(A) "were on the market for a relatively short period of time and represented a relatively small market share".<sup>397</sup> Therefore, we consider it safe to assume that, given their relatively low share in the US market, the inclusion of domestically produced flavoured cigarettes in the comparison would not have altered the Panel's ultimate conclusion that the group of like domestic products essentially consisted of domestic menthol cigarettes.

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<sup>393</sup>Panel Report, para. 7.147.

<sup>394</sup>Panel Report, para. 7.277.

<sup>395</sup>Panel Report, para. 7.289.

<sup>396</sup>Panel Report, para. 2.28.

<sup>397</sup>United States' response to Panel Question 17, para. 43.

4. Temporal Scope of the "Treatment No Less Favourable" Comparison

201. To the extent that the Panel's exclusion of domestic flavoured cigarettes other than menthol cigarettes from its analysis stemmed from its finding that those products were not on the market at the time when the ban came into effect, the United States submits that this constitutes legal error. In particular, the United States claims that the Panel erred in *a priori* excluding from its analysis evidence concerning the effects of Section 907(a)(1)(A) of the FFDCA on domestic like products prior to the entry into force of the ban on flavoured cigarettes. Moreover, the United States claims that the Panel acted inconsistently with Article 11 of the DSU in ignoring evidence demonstrating that there were domestic flavoured cigarettes other than menthol cigarettes on the US market at the time of the ban.<sup>398</sup>

(a) Application of Article 2.1 of the *TBT Agreement*

202. The United States argues that Article 2.1 of the *TBT Agreement* does not establish a rigid temporal limitation in relation to the evidence that a panel may consider in performing a less favourable treatment analysis. For this reason, the United States argues that the Panel should have taken into account evidence demonstrating that there were domestically produced flavoured cigarettes on the market "in the years closely preceding the effective date of the ban".<sup>399</sup> Section 907(a)(1)(A) was enacted specifically to respond to an "emerging trend of products", and closed off a "potential market" that US producers were actively exploring as recently as 2008.<sup>400</sup> Therefore, the fact that the ban on flavoured cigarettes went into effect before US producers were able to "saturate" the market with those products should not be construed as evidence that US producers were not affected by the ban.<sup>401</sup>

203. Indonesia responds that the United States' appeal of the relevant timeframe for the Panel's analysis is irrelevant, because the Panel properly compared only the treatment accorded to the products found to be like in this dispute—imported clove and domestic menthol cigarettes—both of which were on the market before the ban went into effect.<sup>402</sup> Indonesia agrees with the United States that Article 2.1 establishes "no rigid temporal limitation" on the timeframe of the analysis, and affords panels discretion in selecting the appropriate period.<sup>403</sup>

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<sup>398</sup>United States' appellant's submission, paras. 97 and 98.

<sup>399</sup>United States' appellant's submission, para. 92.

<sup>400</sup>United States' appellant's submission, para. 93.

<sup>401</sup>United States' appellant's submission, para. 94.

<sup>402</sup>Indonesia's appellee's submission, para. 151.

<sup>403</sup>Indonesia's appellee's submission, para. 152 (quoting United States' appellant's submission, para. 92).

204. The United States' challenge is directed at the Panel's statement that:

... *at the time of the ban*, there were no domestic cigarettes with characterizing flavours other than menthol cigarettes which accounted for approximately 25 per cent of the market and for a very significant proportion of the cigarettes smoked by youth in the United States. (emphasis added; footnote omitted)

205. In the present dispute, the Panel's mandate was established by its terms of reference, as defined in Indonesia's panel request. These terms of reference required the Panel to determine whether Section 907(a)(1)(A) was consistent with various provisions of the *TBT Agreement* and of the GATT 1994 at the date of the Panel's establishment. Accordingly, the Panel was required to assess whether there existed a violation of those Agreements at that time and, if so, to make a recommendation that the United States bring its measure into compliance. It follows that, in relation to Indonesia's claim under Article 2.1 of the *TBT Agreement*, the Panel was required to assess, as of the date of its establishment, whether Section 907(a)(1)(A) is a technical regulation that accords to products imported from Indonesia less favourable treatment than that accorded to like domestic products.

206. We agree with the participants that Article 2.1 does not establish a rigid temporal limitation on the evidence that the Panel could review in assessing Indonesia's claim under Article 2.1. Nothing in Article 2.1 enjoins panels from taking into account evidence pre-dating the establishment of a panel to the extent that such evidence informs the panel's assessment of the consistency of the measure at that point in time. This is particularly so in the case of a *de facto* discrimination claim, where a panel must base its determination on the totality of facts and circumstances before it, including the design, architecture, revealing structure, operation, and application of the technical regulation at issue. Therefore, evidence that Section 907(a)(1)(A) had "chilling" regulatory effects on domestic producers of flavoured cigarettes prior to the entry into force of the ban on those cigarettes could be relevant in the Panel's assessment of Indonesia's claim under Article 2.1.

207. In the present dispute, it is not clear that the Panel considered Article 2.1 to prohibit review of evidence pre-dating the entry into force of Section 907(a)(1)(A). As noted earlier, the Panel did not explain why it did not include domestic flavoured cigarettes other than menthol cigarettes in the group of like domestic products. In any event, the Panel's statement that, "at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol" on the US market, was not the basis for the Panel's exclusion of domestic flavoured cigarettes from the less favourable treatment analysis. Rather, it was the basis for its finding that Section 907(a)(1)(A) imposes "costs on producers in other Members, notably producers in Indonesia, while at the same time imposing no costs on any



US entity."<sup>404</sup> This finding by the Panel is challenged by the United States on appeal, and addressed in subsection V.C.5 of this Report.

(b) Article 11 of the DSU

208. The United States claims that the Panel acted inconsistently with Article 11 of the DSU in disregarding evidence demonstrating that, *at the time of the ban*, domestic flavoured cigarettes other than menthol cigarettes were marketed in the United States.<sup>405</sup>

209. Indonesia responds that the Panel did consider the evidence submitted by the United States in this regard but was ultimately not persuaded by it.<sup>406</sup> According to Indonesia, in weighing the evidence before it, the Panel did not act inconsistently with Article 11 of the DSU.

210. We recall that Article 11 of the DSU requires a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence".<sup>407</sup> Within these parameters, "it is generally within the discretion of the [p]anel to decide which evidence it chooses to utilize in making findings"<sup>408</sup>, and panels "are not required to accord to factual evidence of the parties the same meaning and weight as do the parties".<sup>409</sup>

211. We observe that, in finding that "at the time of the ban there were no domestic cigarettes with characterizing flavours other than menthol cigarettes which accounted for 25 per cent of the market"<sup>410</sup>, the Panel noted:

The United States argues that there is evidence showing that U.S.-produced cigarettes with characterizing flavours were on the market in 2008 and 2009 (United States' second written submission, para. 132). In this regard, the United States points to exhibits US-52 and US-62. In our view, none of the exhibits submitted demonstrate that U.S.-produced flavour cigarettes were being sold on the market as of the entry into force of Section 907(a)(1)(A). Exhibit US-52 only contains the "known and possible 'flavored' cigarette brands sold in the United States" as of 2008. Thus, it does not shed light upon the brands of cigarettes present in the U.S. market at the time Section 907(a)(1)(A) entered into force. Exhibit US-62 lists the flavoured cigarette brands that were certified as "fire-safe" brands in the States of New York and Maine as of 2009. Although this exhibit

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<sup>404</sup>Panel Report, para. 7.289.

<sup>405</sup>United States' appellant's submission, paras. 97 and 98.

<sup>406</sup>Indonesia's appellee's submission, paras. 158 and 162.

<sup>407</sup>Appellate Body Reports, *Philippines – Distilled Spirits*, para. 135 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185, in turn referring to Appellate Body Report, *EC – Hormones*, paras. 132 and 133).

<sup>408</sup>Appellate Body Report, *EC – Hormones*, para. 135.

<sup>409</sup>Appellate Body Report, *Australia – Salmon*, para. 267.

<sup>410</sup>Panel Report, para. 7.289.

extends until the entry into force of Section 907(a)(1)(A), it does not demonstrate which brands and types of cigarettes were actually being sold on the U.S. market on that date. Rather, it merely lists the brands cigarettes certified as "fire-safe". We therefore stand by our conclusion.<sup>411</sup>

212. Thus, it appears that the Panel did not disregard the evidence that, according to the United States, demonstrated the presence of domestically produced flavoured cigarettes other than menthol cigarettes on the US market at the time of the ban. Rather, the Panel reviewed that evidence but was ultimately not persuaded by it. In determining the weight to be attributed to the evidence before it, the Panel did not act inconsistently with Article 11 of the DSU. In particular, the Panel did not exceed its authority under Article 11 of DSU merely by attributing to the evidence a weight and significance different from that attributed to it by the United States.

#### 5. Detrimental Impact on Imported Products

213. Finally, the United States claims that, even if the Appellate Body were to agree with the comparison undertaken by the Panel in its less favourable treatment analysis, the Panel nonetheless erred in finding that the detrimental effect on competitive opportunities for imported clove cigarettes was not "explained by factors unrelated to the foreign origin of those products".<sup>412</sup>

214. The United States does not challenge on appeal the Panel's findings that Section 907(a)(1)(A) of the FFDCCA accords different treatment to imported clove cigarettes and to domestic menthol cigarettes, and that such differential treatment is to the detriment of the imported product, insofar as clove cigarettes are banned while menthol cigarettes are permitted.<sup>413</sup> Accordingly, the Panel's conclusion that Section 907(a)(1)(A) modifies the conditions of competition in the US market to the detriment of imported clove cigarettes stands.

215. However, as noted earlier<sup>414</sup>, the existence of a detrimental impact on competitive opportunities in the relevant market for the group of imported products vis-à-vis the group of domestic like products is not sufficient to establish a violation of the national treatment obligation contained in Article 2.1 of the *TBT Agreement*. Where the technical regulation at issue does not *de jure* discriminate against imports, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in

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<sup>411</sup>Panel Report, footnote 524 to para. 7.289.

<sup>412</sup>United States' appellant's submission, para. 99 (referring to Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96).

<sup>413</sup>Panel Report, paras. 7.279-7.281.

<sup>414</sup>See *supra*, paras. 174 and 175.

order to determine whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflects discrimination against the group of imported products.

216. Before the Panel, the United States argued that the exemption of menthol cigarettes from the ban on flavoured cigarettes is unrelated to the origin of the products, because it addresses two distinct objectives: one relates to the potential impact on the US health care system associated with the need to treat "millions" of menthol cigarette addicts with withdrawal symptoms; and the other relates to the risk of development of a black market and smuggling to supply the needs of menthol cigarette smokers.<sup>415</sup>

217. The Panel considered that "the potential impact on the health care system and the potential development of a black market and smuggling of menthol cigarettes"<sup>416</sup> did not constitute legitimate objectives, because:

These reasons which the United States has presented as constituting a legitimate objective by themselves, appear to us as relating in one way or another to the costs that might be incurred by the United States were it to ban menthol cigarettes. Indeed, the United States is not banning menthol cigarettes because it is not a type of cigarette with a characterizing flavour that appeals to youth, but rather because of the costs that might be incurred as a result of such a ban. We recall that at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol cigarettes which accounted for approximately 25 per cent of the market and for a very significant proportion of the cigarettes smoked by youth in the United States. It seems to us that the effect of banning cigarettes with characterizing flavours other than menthol is to impose costs on producers in other Members, notably producers in Indonesia, while at the same time imposing no costs on any U.S. entity.<sup>417</sup> (footnotes omitted)

218. On appeal, the United States claims that the Panel erred in concluding that any detriment to the competitive opportunities for imported clove cigarettes could not be explained by factors unrelated to the foreign origin of the products.<sup>418</sup> In addition, the United States claims that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU in finding that there were no costs imposed on any US entity.<sup>419</sup>

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<sup>415</sup>Panel Report, para. 7.289 and footnote 522 thereto.

<sup>416</sup>Panel Report, para. 7.289.

<sup>417</sup>Panel Report, para. 7.289.

<sup>418</sup>United States' appellant's submission, para. 99.

<sup>419</sup>United States' appellant's submission, para. 109.

(a) Application of Article 2.1

219. We begin with the United States' claim that the Panel erred in concluding that any detriment to the competitive opportunities for imported clove cigarettes could not be explained by factors unrelated to the foreign origin of the products.<sup>420</sup> The United States argues that, "even where a technical regulation adversely affects the competitive situation of imported products compared to like domestic products, this does not constitute less favourable treatment when the detrimental effect is unrelated to the foreign origin of the product."<sup>421</sup> According to the United States, many factors affect the costs associated with a technical regulation, such as transportation costs, production methods, the age of the producer's facility, size, efficiency, productivity, and marketing strategy. As a result, Article 2.1 does not prohibit the imposition of costs on imported products as compared to domestic products, where those costs are not related to the origin of the product.<sup>422</sup> The Panel did not examine the "architecture, structure and design" of Section 907(a)(1)(A), including the fact that it allows Indonesia to import and sell regular and menthol cigarettes in the United States.<sup>423</sup> For the United States, reference to unspecified "costs" on foreign producers does not establish that the effects of Section 907(a)(1)(A) on competitive opportunities for imported products are related to their origin.<sup>424</sup> The United States underscores that the costs that Section 907(a)(1)(A) allegedly avoids would be incurred by the US regulatory enforcement and health care systems (and not by domestic menthol cigarette producers), even if all menthol cigarettes were imported.<sup>425</sup>

220. For Indonesia, the Panel's finding that Section 907(a)(1)(A) modifies the conditions of competition in the United States to the detriment of imported clove cigarettes vis-à-vis domestic menthol cigarettes was sufficient to establish a violation of Article 2.1.<sup>426</sup> Although Indonesia maintains that an additional "national origin" test was not required, Indonesia argues that, nevertheless, the Panel was correct in concluding that Section 907(a)(1)(A) had a "discriminatory intent", because menthol cigarettes accounted for 25 per cent of the market, and for a significant proportion of the cigarettes smoked by youth in the United States.<sup>427</sup> The Panel correctly rejected the potential costs on the US health care and enforcement systems as "legitimate reasons" for exempting menthol cigarettes from the ban on flavoured cigarettes. The Panel also appropriately found that the

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<sup>420</sup>United States' appellant's submission, para. 99.

<sup>421</sup>United States' appellant's submission, para. 101.

<sup>422</sup>United States' appellant's submission, para. 101.

<sup>423</sup>United States' appellant's submission, para. 103.

<sup>424</sup>United States' appellant's submission, para. 106.

<sup>425</sup>United States' appellant's submission, para. 107.

<sup>426</sup>Indonesia's appellee's submission, para. 172.

<sup>427</sup>Indonesia's appellee's submission, para. 183.

disproportionate allocation of costs between Indonesian and US entities evidenced *de facto* discrimination against imports.<sup>428</sup>

221. At the outset, we agree with the United States that the Panel did not clearly articulate its reasons for concluding that "the effect of banning cigarettes with characterizing flavours other than menthol is to impose costs on producers in other Members, notably producers in Indonesia, while at the same time imposing no costs on any US entity."<sup>429</sup> To the extent that actual or potential costs are relevant to the analysis of less favourable treatment under Article 2.1, the Panel did not elaborate on why, in its view, Section 907(a)(1)(A) does not impose costs "on any US entity" beyond observing that, "at the time of the ban, there were no domestic cigarettes with characterizing flavours other than menthol cigarettes"<sup>430</sup> on the US market.<sup>431</sup>

222. Nonetheless, we are not persuaded that the Panel erred in ultimately finding that Section 907(a)(1)(A) is inconsistent with Article 2.1. By design, Section 907(a)(1)(A) prohibits all cigarettes with characterizing flavours other than tobacco or menthol. In relation to the cigarettes that are banned under Section 907(a)(1)(A), the Panel made a factual finding that "virtually all clove cigarettes" that were imported into the United States in the three years prior to the ban came from Indonesia.<sup>432</sup> The Panel also noted that the "vast majority" of clove cigarettes consumed in the United States came from Indonesia.<sup>433</sup> Although the United States stated that it was "unable to attain market share data for all non-clove products banned under Section 907(a)(1)(A)"<sup>434</sup>, the Panel did not find evidence that these products had "any sizeable market share in the United States prior to the implementation of the ban in 2009".<sup>435</sup> In response to a Panel question, the United States confirmed that non-clove-flavoured cigarettes banned under Section 907(a)(1)(A) "were on the market for a relatively short period of time and represented a relatively small market share".<sup>436</sup>

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<sup>428</sup>Indonesia's appellee's submission, paras. 184-185.

<sup>429</sup>Panel Report, para. 7.289.

<sup>430</sup>Panel Report, para. 7.289.

<sup>431</sup>Moreover, to the extent that the Panel's finding could be read as suggesting that reducing potential costs of regulation *per se* constitutes an illegitimate regulatory objective, we disagree. Nothing in Article 2.1 prevents a Member from seeking to minimize the potential costs arising from technical regulations, provided that the technical regulation at issue does not overtly or covertly discriminate against imports.

<sup>432</sup>Panel Report, para. 2.26 (referring to Indonesia's first written submission to the Panel, para. 18; United States' first written submission to the Panel, para. 35; World Trade Atlas, United States – Imports, Clove Cigarette Market Share Data (Panel Exhibit US-100); and World Trade Atlas, Indonesia Cigarette Exports to the United States, 1998-2009 (Panel Exhibit US-134)).

<sup>433</sup>Panel Report, para. 2.27. The Panel nonetheless was able to identify at least one US company that manufactured clove cigarettes prior to the entry into force of the FSPTCA. (*Ibid.* (referring to United States' first written submission to the Panel, para. 35))

<sup>434</sup>Panel Report, footnote 58 to para. 2.28.

<sup>435</sup>Panel Report, para. 2.28.

<sup>436</sup>United States' response to Panel Question 17, para. 43.

223. With respect to the cigarettes that are *not* banned under Section 907(a)(1)(A), the record demonstrates that, in the years 2000 to 2009, between 94.3 and 97.4 per cent of all cigarettes sold in the United States were domestically produced<sup>437</sup>, and that menthol cigarettes accounted for about 26 per cent of the total US cigarette market.<sup>438</sup> Information on the record also shows that three domestic brands dominate the US market for menthol cigarettes: Kool, Salem (Reynolds American), and Newport (Lorillard), with Marlboro having a smaller market share.<sup>439</sup>

224. Given the above, the design, architecture, revealing structure, operation, and application of Section 907(a)(1)(A) strongly suggest that the detrimental impact on competitive opportunities for clove cigarettes reflects discrimination against the group of like products imported from Indonesia. The products that are prohibited under Section 907(a)(1)(A) consist primarily of clove cigarettes imported from Indonesia, while the like products that are actually permitted under this measure consist primarily of domestically produced menthol cigarettes.

225. Moreover, we are not persuaded that the detrimental impact of Section 907(a)(1)(A) on competitive opportunities for imported clove cigarettes does stem from a legitimate regulatory distinction. We recall that the stated objective of Section 907(a)(1)(A) is to reduce youth smoking. One of the particular characteristics of flavoured cigarettes that makes them appealing to young people is the flavouring that masks the harshness of the tobacco, thus making them more pleasant to start smoking than regular cigarettes.<sup>440</sup> To the extent that this particular characteristic is present in both clove and menthol cigarettes<sup>441</sup>, menthol cigarettes have the same product characteristic that, from the perspective of the stated objective of Section 907(a)(1)(A), justified the prohibition of clove cigarettes. Furthermore, the reasons presented by the United States for the exemption of menthol cigarettes from the ban on flavoured cigarettes do not, in our view, demonstrate that the detrimental impact on competitive opportunities for imported clove cigarettes does stem from a legitimate regulatory distinction. The United States argues that the exemption of menthol cigarettes from the ban on flavoured cigarettes aims at minimizing: (i) the impact on the US health care system associated with treating "millions" of menthol cigarette smokers affected by withdrawal symptoms;

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<sup>437</sup>Cigarettes: Domestic and Imported, 2000-2009 (Panel Exhibit US-31).

<sup>438</sup>United States' first written submission to the Panel, para. 27 (referring to US Federal Trade Commission, *Cigarette Report for 2006*, Table 1A (2009) (Panel Exhibit US-29); and P.S. Gardiner, "The African Americanization of menthol cigarette use in the United States" (February 2004) 6(1) *Nicotine & Tobacco Research* S55 (Panel Exhibit US-30)).

<sup>439</sup>See United States' first written submission to the Panel, para. 29 and P.S. Gardiner, "The African Americanization of menthol cigarette use in the United States" (February 2004) 6(1) *Nicotine & Tobacco Research* S55 (Panel Exhibit US-30), p. 58.

<sup>440</sup>Panel Report, paras. 7.216-7.221.

<sup>441</sup>Panel Report, para. 7.221 (referring to "Use of Menthol Cigarettes", The National Survey on Drug Use and Health Report, 19 November 2009 (Panel Exhibit IND-66); and American Lung Association, Tobacco Policy Trend Alert, *From Joe Camel to Kauai Kolada – the Marketing of Candy-Flavored Cigarettes* (2006) (Panel Exhibit US-35), p. 1, available at <<http://slati.lungusa.org/reports/CandyFlavoredUpdatedAlert.pdf>>).

and (ii) the risk of development of a black market and smuggling of menthol cigarettes to supply the needs of menthol cigarette smokers. Thus, according to the United States, the exemption of menthol cigarettes from the ban on flavoured cigarettes is justified in order to avoid risks arising from withdrawal symptoms that would afflict menthol cigarette smokers in case those cigarettes were banned. We note, however, that the addictive ingredient in menthol cigarettes is nicotine, not peppermint or any other ingredient that is exclusively present in menthol cigarettes, and that this ingredient is also present in a group of products that is likewise permitted under Section 907(a)(1)(A), namely, regular cigarettes. Therefore, it is not clear that the risks that the United States claims to minimize by allowing menthol cigarettes to remain in the market would materialize if menthol cigarettes were to be banned, insofar as regular cigarettes would remain in the market.

226. Therefore, even though Section 907(a)(1)(A) does not expressly distinguish between treatment accorded to the imported and domestic like products, it operates in a manner that reflects discrimination against the group of like products imported from Indonesia. Accordingly, despite our reservations on the brevity of the Panel's analysis, we agree with the Panel that, by exempting menthol cigarettes from the ban on flavoured cigarettes, Section 907(a)(1)(A) accords to clove cigarettes imported from Indonesia less favourable treatment than that accorded to domestic like products, within the meaning of Article 2.1 of the *TBT Agreement*.

(b) Article 11 of the DSU

227. Finally, the United States argues that the Panel acted inconsistently with Article 11 of the DSU because it found that Section 907(a)(1)(A) avoids costs on any US entity, in the absence of any basis in the Panel record that would have allowed it to reach such conclusion.<sup>442</sup> The United States argues that the measure imposed enforcement costs on the United States Food and Drug Administration (the "FDA"), and on domestic producers of cigarettes with characterizing flavours whose potential market was closed off. By reducing youth smoking, Section 907(a)(1)(A) also reduces subsequent demand for cigarettes. Therefore, it also shrinks the "adult" cigarette market, which is comprised almost entirely of domestic producers.<sup>443</sup>

228. Indonesia responds that the Panel did not act inconsistently with Article 11 of the DSU in reaching its finding, which is supported by evidence showing that the exemption of menthol cigarettes from the ban was the result of a political compromise with the US tobacco industry.<sup>444</sup>

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<sup>442</sup>United States' appellant's submission, para. 110.

<sup>443</sup>United States' appellant's submission, para. 111.

<sup>444</sup>Indonesia's appellee's submission, para. 189.

229. We recall that, in *EC – Fasteners (China)*, the Appellate Body considered that "[i]t is ... unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim" and that "a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements."<sup>445</sup> With these considerations in mind, we turn to review the United States' appeal that the Panel acted inconsistently with Article 11 of the DSU in finding that Section 907(a)(1)(A) imposed no costs on any US entity.

230. As noted above, we believe that the Panel did not fully explain the basis for the statement that Section 907(a)(1)(A), while imposing "costs" on foreign producers, imposed "no costs on any US entity". However, the Panel's statement should be read in the light of the fact that, in paragraph 7.289 of its Report, the Panel considered the costs imposed on producers "at the time of the ban" and that it equated the concept of "entity" with that of "producer", thus comparing the costs imposed on producers in Indonesia with the costs imposed on US producers, to the exclusion of government entities such as the FDA.

231. It seems to us that the United States' claim is concerned with the Panel's less favourable treatment comparison, rather than with the alleged absence of evidence in the Panel record justifying the lack of costs on any US entity. We note that the United States argues that the Panel erred, under Article 2.1 of the *TBT Agreement*, in limiting the scope of its less favourable treatment analysis to the effects of Section 907(a)(1)(A) on all domestic cigarettes at the time the measure entered into force, to the exclusion of flavoured cigarettes that were produced in the United States before the ban came into force.<sup>446</sup> In our view, the United States' argument that the Panel erred in not considering the impact of Section 907(a)(1)(A) on US producers before the entry into force of the ban also implies that the Panel was wrong in stating that the measure imposed no costs on any US producers. We thus consider that the claim by the United States that the Panel violated Article 11 of the DSU because it found that Section 907(a)(1)(A) imposed "no costs on any US entity" is subsidiary to its claim that the Panel erred in concluding that Section 907(a)(1)(A) accords less favourable treatment to imported clove cigarettes than to like menthol cigarettes of national origin within the meaning of Article 2.1 of the *TBT Agreement*.

232. In the light of the above, we do not consider that the Panel acted inconsistently with Article 11 of the DSU in finding that Section 907(a)(1)(A) accords imported clove cigarettes less

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<sup>445</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442. See also Appellate Body Report, *US – Steel Safeguards*, para. 498; and Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238.

<sup>446</sup> United States' appellant's submission, para. 96.



favourable treatment than that accorded to domestic menthol cigarettes, within the meaning of Article 2.1 of the *TBT Agreement*.

6. Conclusion on "Treatment No Less Favourable"

233. Given the above, we *uphold*, albeit for different reasons, the Panel's finding, in paragraph 7.292 of the Panel Report, that, by banning clove cigarettes while exempting menthol cigarettes from the ban, Section 907(a)(1)(A) of the FFDCA accords imported clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes, within the meaning of Article 2.1 of the *TBT Agreement*.

D. *Conclusions under Article 2.1 of the TBT Agreement*

234. In the light of the foregoing considerations with regard to the Panel's findings on likeness and less favourable treatment, we therefore *uphold*, albeit for different reasons, the Panel's finding, in paragraphs 7.293 and 8.1(b) of the Panel Report, that Section 907(a)(1)(A) of the FFDCA is inconsistent with Article 2.1 of the *TBT Agreement* because it accords to imported clove cigarettes less favourable treatment than that accorded to like menthol cigarettes of national origin.

235. In reaching this conclusion, we wish to clarify the implications of our decision. We do not consider that the *TBT Agreement* or any of the covered agreements is to be interpreted as preventing Members from devising and implementing public health policies generally, and tobacco-control policies in particular, through the regulation of the content of tobacco products, including the prohibition or restriction on the use of ingredients that increase the attractiveness and palatability of cigarettes for young and potential smokers. Moreover, we recognize the importance of Members' efforts in the World Health Organization on tobacco control.

236. While we have upheld the Panel's finding that the specific measure at issue in this dispute is inconsistent with Article 2.1 of the *TBT Agreement*, we are not saying that a Member cannot adopt measures to pursue legitimate health objectives such as curbing and preventing youth smoking. In particular, we are not saying that the United States cannot ban clove cigarettes: however, if it chooses to do so, this has to be done consistently with the *TBT Agreement*. Although Section 907(a)(1)(A) pursues the legitimate objective of reducing youth smoking by banning cigarettes containing flavours and ingredients that increase the attractiveness of tobacco to youth, it does so in a manner that is inconsistent with the national treatment obligation in Article 2.1 of the *TBT Agreement* as a result of the exemption of menthol cigarettes, which similarly contain flavours and ingredients that increase the attractiveness of tobacco to youth, from the ban on flavoured cigarettes.

## VI. Article 2.12 of the *TBT Agreement*

### A. Introduction

237. We turn now to the United States' appeal of the Panel's finding that, by failing to allow a period of not less than six months between the publication and the entry into force of Section 907(a)(1)(A) of the FFDCA, the United States acted inconsistently with Article 2.12 of the *TBT Agreement*.

238. The FSPTCA was enacted on 22 June 2009. The measure at issue, Section 907(a)(1)(A), entered into force three months thereafter. Before the Panel, Indonesia argued that paragraph 5.2 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns<sup>447</sup> ("the Doha Ministerial Decision")—which defined the term "reasonable interval" in Article 2.12 of the *TBT Agreement* as at least six months—constitutes a legally binding interpretation pursuant to Article IX:2 of the *WTO Agreement*. Thus, according to Indonesia, by not allowing a reasonable interval of at least six months between the publication and the entry into force of Section 907(a)(1)(A), the United States acted inconsistently with its obligations under Article 2.12 of the *TBT Agreement*.<sup>448</sup> The Panel framed the question before it as whether the United States acted inconsistently with its obligations under Article 2.12 by allowing an interval of three months between the enactment of the FSPTCA and the entry into force of Section 907(a)(1)(A). In particular, the Panel considered whether, as Indonesia claimed, Article 2.12 "obliged the United States to allow *as a minimum* a period of *six months* between the publication and the entry into force of Section 907(a)(1)(A)".<sup>449</sup>

239. In its analysis of Indonesia's claim under Article 2.12 of the *TBT Agreement*, the Panel considered the interpretative value of paragraph 5.2 of the Doha Ministerial Decision. The Panel took the view that, although the United States and Indonesia disagreed on the categorization of paragraph 5.2 as an authoritative interpretation under Article IX:2 of the *WTO Agreement*, it would "be guided by [the Doha Ministerial Decision] in its interpretation of the phrase 'reasonable interval' as [the Doha Ministerial Decision] was agreed by all WTO Members meeting in the form of Ministerial Conference, the highest ranking body of the WTO". Moreover, the Panel stated that, in its view, "paragraph 5.2 of the Doha Ministerial Decision could be considered as a subsequent agreement

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<sup>447</sup>Decision of 14 November 2001, WT/MIN(01)/17, para. 5.2.

<sup>448</sup>Panel Report, para. 7.552.

<sup>449</sup>Panel Report, para. 7.561. (original emphasis)

of the parties", within the meaning of Article 31(3)(a) of the *Vienna Convention*, on the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*.<sup>450</sup>

240. The United States claims on appeal that: (i) the Panel attributed an incorrect "interpretative value" to paragraph 5.2 of the Doha Ministerial Decision in its interpretation of Article 2.12 of the *TBT Agreement*; and (ii) the Panel erred in finding that Indonesia had established a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement*, that the United States failed to rebut.

B. *The Interpretative Value of Paragraph 5.2 of the Doha Ministerial Decision*

241. We recall that, with regard to the interpretative value of paragraph 5.2 of the Doha Ministerial Decision, the Panel stated that it "must be guided by [paragraph 5.2] in its interpretation of the phrase 'reasonable interval', as [paragraph 5.2] was agreed by all WTO Members meeting in the form of Ministerial Conference, the highest ranking body of the WTO".<sup>451</sup>

242. According to the United States, the Panel "declined to formally determine" whether paragraph 5.2 constitutes an authoritative interpretation of Article 2.12, "only saying that it 'must be guided' by paragraph 5.2" because it was agreed by all WTO Members meeting in the form of Ministerial Conference, the highest ranking body of the WTO.<sup>452</sup> The United States submits that, despite not having found that paragraph 5.2 has the legal status of an authoritative interpretation adopted pursuant to Article IX:2 of the *WTO Agreement*, the Panel erred by applying paragraph 5.2 as a "rule" that amended the text of Article 2.12 of the *TBT Agreement*.<sup>453</sup> The United States claims that the legal value of paragraph 5.2 is at most a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention*.<sup>454</sup>

243. Indonesia responds that "the Panel *did* establish that paragraph 5.2 of the Doha Ministerial Decision is a binding interpretation as per Article IX:2 of the *WTO Agreement*", and that it may also be considered a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the *Vienna Convention*, on the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*.<sup>455</sup>

244. In paragraph 7.575 of its Report, the Panel stated that the wording of paragraph 5.2 of the Doha Ministerial Decision "*appears to suggest* that the intention of the Ministerial Conference, and thus the highest level organ of the WTO where all Members meet, was that paragraph 5.2 is

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<sup>450</sup>Panel Report, para. 7.576.

<sup>451</sup>Panel Report, para. 7.576.

<sup>452</sup>United States' appellant's submission, para. 124 (referring to Panel Report, para. 7.576).

<sup>453</sup>United States' appellant's submission, para. 129.

<sup>454</sup>United States' appellant's submission, para. 126.

<sup>455</sup>Indonesia's appellee's submission, para. 222. (original emphasis)

binding".<sup>456</sup> On appeal, Indonesia relies on this latter statement made by the Panel and argues that the Panel found that paragraph 5.2 of the Doha Ministerial Decision is a binding interpretation "as per" Article IX:2 of the *WTO Agreement*.<sup>457</sup>

245. In paragraph 7.576 of its Report, the Panel stated that, although the United States and Indonesia disagreed on the categorization of paragraph 5.2 of the Doha Ministerial Decision as an authoritative interpretation under Article IX:2 of the *WTO Agreement*, it would be "guided by [paragraph 5.2] in its interpretation of the phrase 'reasonable interval', as it was agreed by all WTO Members meeting in the form of Ministerial Conference, the highest ranking body of the WTO". On appeal, the United States relies on this statement of the Panel and argues that the Panel did not find that paragraph 5.2 constitutes an authoritative interpretation adopted by the Ministerial Conference pursuant to Article IX:2 of the *WTO Agreement*.<sup>458</sup>

246. As we see it, in paragraph 7.575 of its Report, the Panel identified certain features of the Doha Ministerial Decision that *suggest* that Members intended to adopt a "binding" interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*. The Panel's statement in paragraph 7.575 was, by its own terms, tentative. Moreover, the Panel's statement was not followed by any "finding" that paragraph 5.2 constitutes an interpretation adopted pursuant to Article IX:2 of the *WTO Agreement*. Thus, we do not agree with Indonesia that the Panel *found* that paragraph 5.2 of the Doha Ministerial Decision "is a binding interpretation as per Article IX:2 of the *WTO Agreement*".<sup>459</sup>

247. Despite our conclusion that the Panel did not formally determine whether paragraph 5.2 of the Doha Ministerial Decision constitutes a multilateral interpretation under Article IX:2 of the *WTO Agreement*, we will consider, nevertheless, whether paragraph 5.2, in fact, has that legal status. Before doing so, we set forth some general considerations on the role and function of multilateral interpretations adopted pursuant to Article IX:2 of the *WTO Agreement*.

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<sup>456</sup>Emphasis added.

<sup>457</sup>Indonesia's appellee's submission, para. 222.

<sup>458</sup>United States' appellant's submission, para. 124.

<sup>459</sup>Indonesia's appellee's submission, para. 222.

248. Article IX:2 of the *WTO Agreement* provides:

The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

249. In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body opined that multilateral interpretations adopted pursuant to Article IX:2 of the *WTO Agreement* are "meant to clarify the meaning of existing obligations, not to modify their content".<sup>460</sup> Article IX:2 establishes that a decision to adopt a multilateral interpretation can only be taken by Members sitting in the form of the Ministerial Conference or the General Council, and that such decisions must be taken by a three-fourths majority of Members. With regard to decisions adopting multilateral interpretations of a Multilateral Trade Agreement contained in Annex 1 to the *WTO Agreement*, Article IX:2 requires the Ministerial Conference or the General Council to exercise its authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. Thus, while Article IX:2 confers upon the Ministerial Conference and the General Council the exclusive authority to adopt multilateral interpretations of the *WTO Agreement*, the exercise of this authority is situated within defined parameters established by Article IX:2.

250. Multilateral interpretations adopted pursuant to Article IX:2 of the *WTO Agreement* have a pervasive legal effect. Such interpretations are binding on all Members. As we see it, the broad legal effect of these interpretations is precisely the reason why Article IX:2 subjects the adoption of such interpretations to clearly articulated and strict decision-making procedures.

251. Turning to the question of whether paragraph 5.2 of the Doha Ministerial Decision can be characterized as a multilateral interpretation of Article 2.12 of the *TBT Agreement*, we recall that Article IX:2 of the *WTO Agreement* establishes two specific requirements that apply to the adoption of multilateral interpretations of the Multilateral Trade Agreements contained in Annex 1 to the *WTO Agreement*: (i) a decision by the Ministerial Conference or the General Council to adopt such interpretations shall be taken by a three-fourths majority of Members; and (ii) such interpretations shall be taken on the basis of a recommendation by the Council overseeing the functioning of the

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<sup>460</sup>Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 383.

relevant Agreement. Thus, we will consider whether the decision to adopt paragraph 5.2 conforms with these specific decision-making procedures.

252. With regard to the first requirement, the Panel observed that the Ministerial Conference decided on the matters addressed in the Doha Ministerial Decision *by consensus*. The issue of whether the first requirement was met has not been raised in this appeal. With regard to the second requirement, the Panel noted that, "it *appears* that when adopting the Doha Ministerial Decision, the Ministerial Conference did not comply with the preliminary requirement under Article IX:2 of the *WTO Agreement*" to exercise its authority on the basis of a recommendation from the Council for Trade in Goods.<sup>461</sup> The Panel stated, further, that "it could be argued" that the absence of this "formal requirement" is insufficient to conclude that paragraph 5.2 of the Doha Ministerial Decision is not an authoritative interpretation under Article IX:2 of the *WTO Agreement*.<sup>462</sup> On appeal, the United States argues that "[a] panel is not authorized to waive the requirements of Article IX:2 or to impose on Members an interpretation that is not adopted in the manner required."<sup>463</sup>

253. We do not agree with the Panel to the extent that it suggested that the absence of a recommendation from the Council for Trade in Goods "is insufficient to conclude that paragraph 5.2 of the Doha Ministerial Decision is not an authoritative interpretation under Article IX:2 of the *WTO Agreement*".<sup>464</sup> While Article IX:2 of the *WTO Agreement* confers upon the Ministerial Conference and the General Council the exclusive authority to adopt multilateral interpretations of the *WTO Agreement*, this authority must be exercised within the defined parameters of Article IX:2. It seems to us that the view expressed by the Panel does not respect a specific decision-making procedure established by Article IX:2 of the *WTO Agreement*. In our view, to characterize the requirement to act on the basis of a recommendation by the Council overseeing the functioning of the relevant Agreement as a "formal requirement" neither permits a panel to read that requirement out of a treaty provision, nor to dilute its effectiveness.

254. Although the Panel's reasoning may be read as suggesting that the Ministerial Conference could dispense with a specific requirement established by Article IX:2 of the *WTO Agreement*, the terms of Article IX:2 do not suggest that compliance with this requirement is dispensable. In this connection, we recall that, pursuant to Article IX:2 of the *WTO Agreement*, the Ministerial Conference or the General Council "*shall*" exercise their authority to adopt an interpretation of a Multilateral Trade Agreement contained in Annex 1 to the *WTO Agreement* "on the basis of a

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<sup>461</sup>Panel Report, para. 7.574 (referring to United States' response to Panel Question 6, para. 5). (emphasis added)

<sup>462</sup>Panel Report, para. 7.575.

<sup>463</sup>United States' appellant's submission, para. 125.

<sup>464</sup>Panel Report, para. 7.575.

recommendation" by the Council overseeing the functioning of that Agreement. We consider that the recommendation from the relevant Council is an essential element of Article IX:2, which constitutes the legal basis upon which the Ministerial Conference or the General Council exercise their authority to adopt interpretations of the *WTO Agreement*. Thus, an interpretation of a Multilateral Trade Agreement contained in Annex 1 to the *WTO Agreement* must be adopted on the basis of a recommendation from the relevant Council overseeing the functioning of that Agreement.

255. We note that, before the Panel, Indonesia relied on paragraph 12 of the Doha Ministerial Declaration<sup>465</sup> and on the preamble of the Doha Ministerial Decision, and argued that the interpretation of Article 2.12 of the *TBT Agreement* was reached on the basis of discussions carried out within the General Council and the WTO subsidiary bodies.<sup>466</sup> Whereas the content of paragraph 5.2 of the Doha Ministerial Decision might very well have been based on discussions within the Committee on Technical Barriers to Trade, we are not persuaded that this is sufficient to establish that the Ministerial Conference exercised its authority to adopt an interpretation of the *TBT Agreement* on the basis of a *recommendation* from the Council for Trade in Goods. Accordingly, we find that, in the absence of evidence of the existence of a specific recommendation from the Council for Trade in Goods concerning the interpretation of Article 2.12 of the *TBT Agreement*, paragraph 5.2 of the Doha Ministerial Decision does not constitute a multilateral interpretation adopted pursuant to Article IX:2 of the *WTO Agreement*.<sup>467</sup>

256. In the light of our finding that paragraph 5.2 of the Doha Ministerial Decision does not qualify as a multilateral interpretation within the meaning of Article IX:2 of the *WTO Agreement*, we address whether, as the Panel found, paragraph 5.2 "could be considered as a subsequent agreement of the parties within the meaning of Article 31(3)(a) of the [*Vienna Convention*], on the interpretation of 'reasonable interval' [in] Article 2.12 of the *TBT Agreement*".<sup>468</sup>

257. We note that, in response to questioning at the oral hearing, the United States argued that a decision by the Ministerial Conference that does not conform with the specific decision-making procedures established by Article IX:2 of the *WTO Agreement* cannot constitute a "subsequent agreement between the parties" within the meaning of Article 31(3)(a) of the *Vienna Convention*. We observe that multilateral interpretations adopted pursuant to Article IX:2 of the *WTO Agreement*, on

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<sup>465</sup> Adopted on 14 November 2001, WT/MIN(01)/DEC/1.

<sup>466</sup> Panel Report, para. 7.574 (referring to Indonesia's response to Panel Question 6, para. 27).

<sup>467</sup> In reaching this finding, we are not saying that the Ministerial Conference failed to comply with a specific decision-making procedure established by Article IX:2 of the *WTO Agreement*. Rather, we are saying that the absence of a recommendation from the Council for Trade in Goods concerning the interpretation of Article 2.12 of the *TBT Agreement* supports a conclusion that paragraph 5.2 of the Doha Ministerial Decision does not constitute a multilateral interpretation adopted pursuant to Article IX:2 of the *WTO Agreement*.

<sup>468</sup> Panel Report, para. 7.576. (footnote omitted)

the one hand, and subsequent agreements on interpretation within the meaning of Article 31(3)(a) of the *Vienna Convention*, on the other hand, serve different functions and have different legal effects under WTO law. Multilateral interpretations under Article IX:2 of the *WTO Agreement* provide a means by which Members—acting through the highest organs of the WTO—may adopt binding interpretations that clarify WTO law for all Members. Such interpretations are binding on all Members, including in respect of all disputes in which these interpretations are relevant.

258. On the other hand, Article 31(3)(a) of the *Vienna Convention* is a rule of treaty interpretation, pursuant to which a treaty interpreter uses a subsequent agreement between the parties on the interpretation of a treaty provision as an interpretative tool to determine the meaning of that treaty provision. Pursuant to Article 3.2 of the DSU, panels and the Appellate Body are required to apply the customary rules of interpretation of public international law—including the rule embodied in Article 31(3)(a) of the *Vienna Convention*—to clarify the existing provisions of the covered agreements. Interpretations developed by panels and the Appellate Body in the course of dispute settlement proceedings are binding only on the parties to a particular dispute.<sup>469</sup> Article IX:2 of the *WTO Agreement* does not preclude panels and the Appellate Body from having recourse to a customary rule of interpretation of public international law that, pursuant to Article 3.2 of the DSU, they are required to apply.

259. We also recall that, in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body stated that "multilateral interpretations are meant to clarify the meaning of existing obligations"<sup>470</sup>, and that "multilateral interpretations" adopted pursuant to Article IX:2 of the *WTO Agreement* are *most akin* to subsequent agreements within the meaning of Article 31(3)(a) of the *Vienna Convention*".<sup>471</sup> Thus, given the specific function of multilateral interpretations adopted pursuant to Article IX:2, and the fact that these interpretations are adopted by

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<sup>469</sup>In *US – Stainless Steel (Mexico)*, the Appellate Body stated:

It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB.

...

Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.

(Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 158 and 160 (footnotes omitted))

<sup>470</sup>Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 383.

<sup>471</sup>Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 390. (emphasis added)



Members sitting in the form of the highest organs of the WTO, such interpretations are most akin to, but *not exhaustive of*, subsequent agreements on interpretation within the meaning of Article 31(3)(a) of the *Vienna Convention*.

260. We consider, therefore, that a decision adopted by Members, *other than* a decision adopted pursuant to Article IX:2 of the *WTO Agreement*, may constitute a "subsequent agreement" on the interpretation of a provision of a covered agreement under Article 31(3)(a) of the *Vienna Convention*. Accordingly, we turn to the issue of whether paragraph 5.2 of the Doha Ministerial Decision can be considered to be a subsequent agreement, within the meaning of Article 31(3)(a) of the *Vienna Convention*, on the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*.

261. Article 31(3)(a) of the *Vienna Convention* provides:

There shall be taken into account, together with the context:  
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions[.]

262. Based on the text of Article 31(3)(a) of the *Vienna Convention*, we consider that a decision adopted by Members may qualify as a "subsequent agreement between the parties" regarding the interpretation of a covered agreement or the application of its provisions if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an *agreement* between Members on the *interpretation* or *application* of a provision of WTO law.

263. With regard to the first element, we note that the Doha Ministerial Decision was adopted by consensus on 14 November 2001 on the occasion of the Fourth Ministerial Conference of the WTO. Thus, it is beyond dispute that paragraph 5.2 of the Doha Ministerial Decision was adopted subsequent to the relevant WTO agreement at issue, the *TBT Agreement*. With regard to the second element, the key question to be answered is whether paragraph 5.2 of the Doha Ministerial Decision expresses an *agreement* between Members on the *interpretation* or *application* of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*.

264. We recall that paragraph 5.2 of the Doha Ministerial Decision provides:

Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase "reasonable interval" shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.

265. In addressing the question of whether paragraph 5.2 of the Doha Ministerial Decision expresses an agreement between Members on the interpretation or application of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*, we find useful guidance in the Appellate Body reports in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*. The Appellate Body observed that the International Law Commission (the "ILC") describes a subsequent agreement within the meaning of Article 31(3)(a) of the *Vienna Convention* as "a further *authentic element of interpretation* to be taken into account together with the context". According to the Appellate Body, "by referring to 'authentic interpretation', the ILC reads Article 31(3)(a) as referring to *agreements bearing specifically upon the interpretation of the treaty*."<sup>472</sup> Thus, we will consider whether paragraph 5.2 bears specifically upon the interpretation of Article 2.12 of the *TBT Agreement*.

266. Paragraph 5.2 of the Doha Ministerial Decision refers explicitly to the term "reasonable interval" in Article 2.12 of the *TBT Agreement* and defines this interval as "normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued" by a technical regulation. In the light of the terms and content of paragraph 5.2, we are unable to discern a function of paragraph 5.2 *other than* to interpret the term "reasonable interval" in Article 2.12 of the *TBT Agreement*. We consider, therefore, that paragraph 5.2 *bears specifically* upon the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*. We turn now to consider whether paragraph 5.2 of the Doha Ministerial Decision reflects an "agreement" among Members—within the meaning of Article 31(3)(a) of the *Vienna Convention*—on the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*.

267. We note that the text of Article 31(3)(a) of the *Vienna Convention* does not establish a requirement as to the form which a "subsequent agreement between the parties" should take. We consider, therefore, that the term "agreement" in Article 31(3)(a) of the *Vienna Convention* refers, fundamentally, to substance rather than to form. Thus, in our view, paragraph 5.2 of the Doha Ministerial Decision can be characterized as a "subsequent agreement" within the meaning of Article 31(3)(a) of the *Vienna Convention* provided that it clearly expresses a common understanding, and an acceptance of that understanding among Members with regard to the meaning of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*. In determining whether this is so, we find the terms and content of paragraph 5.2 to be dispositive. In this connection, we note that the understanding among Members with regard to the meaning of the term "reasonable interval" in Article 2.12 of the *TBT Agreement* is expressed by terms—"shall be understood to mean"—that cannot be considered as merely hortatory.

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<sup>472</sup>Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 390. (emphasis added)

268. For the foregoing reasons, we *uphold* the Panel's finding, in paragraph 7.576 of the Panel Report, that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the *Vienna Convention*, on the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*.

269. In the light of our characterization of paragraph 5.2 of the Doha Ministerial Decision as a subsequent agreement between the parties within the meaning of Article 31(3)(a) of the *Vienna Convention*, we turn now to consider the meaning of Article 2.12 of the *TBT Agreement* in the light of the clarification of the term "reasonable interval" provided by paragraph 5.2. We observe that, in its commentaries on the *Draft articles on the Law of Treaties*, the ILC states that a subsequent agreement between the parties within the meaning of Article 31(3)(a) "must be read into the treaty for purposes of its interpretation".<sup>473</sup> As we see it, while the terms of paragraph 5.2 must be "read into" Article 2.12 for the purpose of interpreting that provision, this does not mean that the terms of paragraph 5.2 replace or override the terms contained in Article 2.12. Rather, the terms of paragraph 5.2 of the Doha Ministerial Decision constitute an interpretative clarification to be taken into account in the interpretation of Article 2.12 of the *TBT Agreement*.

270. Article 2.12 of the *TBT Agreement* provides:

Except in those urgent circumstances referred to in paragraph 10, Members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

271. Paragraph 5.2 of the Doha Ministerial Decision provides:

Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.

272. We note, as did the Panel, that Article 2.12 of the *TBT Agreement* explains that "the reason for allowing an interval between the publication and the entry into force of a technical regulation is to allow time for producers in exporting Members, and particularly in developing country Members, to

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<sup>473</sup>*Draft articles on the Law of Treaties with commentaries*. Text adopted by the ILC at its eighteenth session, in 1966, and submitted to the United Nations General Assembly as a part of the Commission's report covering the work of that session (at para. 38). The ILC report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 1966*, Vol. II, p. 221, para. 14.

adapt their products or methods of production" to the requirements of the importing Member's technical regulation.<sup>474</sup> In our view, the term "normally" in paragraph 5.2 relates to the rationale of the obligation articulated in Article 2.12 of the *TBT Agreement*. Seen in this light, the term "normally" provides the interpretative link between Article 2.12, on the one hand, and paragraph 5.2, on the other hand. Thus, we consider that, taking into account the interpretative clarification provided by paragraph 5.2 of the Doha Ministerial Decision, Article 2.12 of the *TBT Agreement* establishes a rule that "normally" producers in exporting Members require a period of "not less than 6 months" to adapt their products or production methods to the requirements of an importing Member's technical regulation.

273. On appeal, the United States argues that the use of the term "normally" in paragraph 5.2 of the Doha Ministerial Decision does not support the conclusion that paragraph 5.2 represents a rule.<sup>475</sup> We observe that the ordinary meaning of the term "normally" is defined as "under normal or ordinary conditions; as a rule".<sup>476</sup> In our view, the qualification of an obligation with the adverb "normally" does not, necessarily, alter the characterization of that obligation as constituting a "rule". Rather, we consider that the use of the term "normally" in paragraph 5.2 indicates that the rule establishing that foreign producers require a minimum of "not less than 6 months" to adapt to the requirements of a technical regulation admits of derogation under certain circumstances.

274. The obligation imposed on Members by Article 2.12 to provide a "reasonable interval" between the publication and the entry into force of their technical regulations carefully balances the interests of, on the one hand, the exporting Member whose producers might be affected by a technical regulation and, on the other hand, the importing Member that wishes to pursue a legitimate objective through a technical regulation. With regard to the former, Article 2.12 of the *TBT Agreement*, as clarified by paragraph 5.2 of the Doha Ministerial Decision, establishes a rule that, "normally", producers in exporting Members require a period of at least six months to adapt their products or production methods to the requirements of the importing Member's technical regulation. Thus, Article 2.12 presumes that foreign producers in exporting Members, and particularly in developing country Members, require a minimum of at least six months to adapt to the requirements of an importing Member's technical regulation.

275. With regard to the interests of the importing Member, we recall that paragraph 5.2 of the Doha Ministerial Decision tempers the obligation to provide a "reasonable interval" of not less than six months between the publication and the entry into force of a technical regulation by stipulating

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<sup>474</sup>Panel Report, para. 7.582.

<sup>475</sup>United States' appellant's submission, para. 127.

<sup>476</sup>*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1945.

that this obligation applies "except when this would be ineffective in fulfilling the legitimate objectives pursued" by the technical regulation. Thus, while Article 2.12 of the *TBT Agreement* imposes an obligation on importing Members to provide a "reasonable interval" of not less than six months between the publication and entry into force of a technical regulation, an importing Member may depart from this obligation if this interval "would be ineffective to fulfil the legitimate objectives pursued" by the technical regulation.

C. *The Panel's Finding that the United States Acted Inconsistently with Article 2.12 of the TBT Agreement*

276. We turn now to consider the United States' claim that the Panel erred in finding that Indonesia had established a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement* that the United States failed to rebut. The United States advances, essentially, two arguments in support of its claim that the Panel incorrectly found that Indonesia had established a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement*. First, the United States argues that the Panel erred in finding that Indonesia had established a *prima facie* case because Indonesia did not establish that the three-month interval between the publication and entry into force of Section 907(a)(1)(A) of the FFDCAs was unreasonable in the light of its impact on the ability of Indonesian producers to adapt to the requirements of that measure.<sup>477</sup> Second, the United States argues that, even assuming *arguendo* that the Panel was correct in deciding that the elements of a *prima facie* case may be drawn exclusively from paragraph 5.2 of the Doha Ministerial Decision, the Panel erred in finding that Indonesia had "succeeded in making such a case".<sup>478</sup>

277. According to the United States, in view of the elements contained in paragraph 5.2 of the Doha Ministerial Decision, Indonesia "would have to establish with evidence and argument" a *prima facie* case that: (i) "urgent circumstances" did not exist; (ii) the interval period was less than six months; (iii) "this is a 'normal' situation"; and (iv) allowing an interval of at least six months would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective.<sup>479</sup> Indonesia, in response, argues that it did establish "a *prima facie* case that the 90-day interval provided by the United States was significantly shorter than the 6 months" normally required.<sup>480</sup>

278. The United States and Indonesia do not agree on the elements of a *prima facie* case that a complaining Member is required to establish under Article 2.12 of the *TBT Agreement*. Moreover, it appears that the divergence stems from the fact that the United States and Indonesia attribute a different interpretative value to paragraph 5.2 of the Doha Ministerial Decision. In this connection,

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<sup>477</sup>United States' appellant's submission, paras. 132-134.

<sup>478</sup>United States' appellant's submission, para. 135.

<sup>479</sup>United States' appellant's submission, para. 136.

<sup>480</sup>Indonesia's appellee's submission, para. 237.

we note that the United States argues that the elements of a *prima facie* case of inconsistency with Article 2.12 are to be drawn from the text of Article 2.12, but that, "[e]ven assuming *arguendo* that the Panel" could draw the elements of a *prima facie* case from paragraph 5.2, the Panel erred in finding that Indonesia had made such a case.<sup>481</sup>

279. We do not consider that the elements of a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement* are to be drawn exclusively from either the terms of Article 2.12, on the one hand, or of paragraph 5.2 of the Doha Ministerial Decision, on the other hand. Article 2.12 imposes an obligation on importing Members to allow a "reasonable interval" between the publication and the entry into force of their technical regulations. We recall our finding above that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the *Vienna Convention*, on the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*. Thus, it seems to us that the elements of a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement* are to be drawn from a proper interpretation of Article 2.12, taking into account—pursuant to Article 31(3)(a) of the *Vienna Convention*—the interpretative clarification provided by the terms of paragraph 5.2 of the Doha Ministerial Decision.

280. We further recall our finding above that Article 2.12 of the *TBT Agreement*, properly interpreted in the light of paragraph 5.2 of the Doha Ministerial Decision, establishes a rule that, "normally", producers in exporting Members require a period of at least six months to adapt their products or production methods to the requirements of the importing Member's technical regulation. Based on our interpretation of Article 2.12 of the *TBT Agreement*, we consider that a *prima facie* case of inconsistency with Article 2.12 is established where it is shown that an importing Member has failed to allow an interval of not less than six months between the publication and the entry into force of the technical regulation at issue.

281. In accordance with the general rules on burden of proof reflected in *US – Wool Shirts and Blouses*, we consider that, under Article 2.12 of the *TBT Agreement*, it is for the complaining Member to establish that the responding Member has not allowed an interval of not less than six months

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<sup>481</sup>United States' appellant's submission, para. 135.

between the publication and the entry into force of the technical regulation at issue.<sup>482</sup> If the complaining Member establishes this *prima facie* case of inconsistency, it is for the responding Member to rebut the *prima facie* case of inconsistency with Article 2.12. We recall that, in *US – Wool Shirts and Blouses*, the Appellate Body stated that "precisely how much and precisely what kind of evidence" will be required to establish a *prima facie* case "will necessarily vary from measure to measure, provision to provision, and case to case".<sup>483</sup> We consider that, similarly, this reasoning applies with regard to the quantity and nature of evidence required to *rebut* a *prima facie* case of inconsistency.

282. The text of Article 2.12 of the *TBT Agreement* read in the light of paragraph 5.2 of the Doha Ministerial Decision provides an indication of the nature of evidence that is required to rebut a *prima facie* case of inconsistency with that provision. First, Article 2.12 of the *TBT Agreement* excludes from the obligation to provide a "reasonable interval" between the publication and the entry into force of technical regulations "those urgent circumstances" referred to in Article 2.10 of the *TBT Agreement*. Thus, where "urgent problems of safety, health, environmental protection or national security" arise for a Member that is implementing a technical regulation, a period of six months or more cannot be considered to be a "reasonable interval" within the meaning of Article 2.12. Second, Article 2.12 expressly states that the rationale for providing a "reasonable interval" between the publication and the entry into force of a technical regulation is "to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production" to the requirements of the importing Member's technical regulation. If these producers can adapt their products or production methods to the requirements of an importing Member's technical regulation in less than six months, a period of six months or more cannot be considered to be a "reasonable interval" within the meaning of Article 2.12. Third, paragraph 5.2 allows an importing Member to depart from the obligation to provide a "reasonable interval" of, "normally", not less than six months between the publication and entry into force of their technical regulation, if this interval would be "ineffective to fulfil the legitimate objectives pursued" by its technical regulation. Therefore, a period of "not less than six months" cannot be considered to be a "reasonable interval", within the meaning of Article 2.12, if this period would be ineffective to fulfil the legitimate objectives pursued by the technical regulation at issue.

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<sup>482</sup>In *US – Wool Shirts and Blouses*, the Appellate Body outlined the general rules on burden of proof by stating that:

... the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.

(Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335)

<sup>483</sup>Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335.

283. Thus, in the light of the above, we consider that, in order to rebut a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement*, a responding Member that has allowed an interval of less than six months between the publication and entry into force of its technical regulation must submit evidence and argument sufficient to establish *either*: (i) that the "urgent circumstances" referred to in Article 2.10 of the *TBT Agreement* surrounded the adoption of the technical regulation at issue; (ii) that producers of the complaining Member could have adapted to the requirements of the technical regulation at issue within the shorter interval that it allowed; *or* (iii) that a period of "not less than" six months would be ineffective to fulfil the legitimate objectives of its technical regulation.

284. The Panel found that Indonesia had made a *prima facie* case that "allowing at least six months between the date of publication of Section 907(a)(1)(A) and its entry into force would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective."<sup>484</sup> Thus, in the Panel's view, the burden was on Indonesia to establish a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement* that included establishing that a period of at least six months between the publication of Section 907(a)(1)(A) and its entry into force would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective. The United States argues that Indonesia failed to establish such a *prima facie* case. Relying on the Appellate Body's ruling on the burden of proof under Article 2.4 of the *TBT Agreement* in *EC – Sardines*, the United States argues on appeal that the burden rests with the complaining Member to adduce sufficient evidence and argument to establish that an interval of not less than six months would be effective in fulfilling the objectives of the technical regulation at issue.<sup>485</sup>

285. In *EC – Sardines*, the Appellate Body was considering the allocation of the burden of proof in the context of a claim of inconsistency with Article 2.4 of the *TBT Agreement*. As we see it, the fact that two provisions manifest a degree of structural similarity does not, *necessarily*, support a conclusion that the allocation of the burden of proof in respect of each provision must be identical.<sup>486</sup>

286. We recall our view expressed above that the elements of a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement* are to be drawn from a proper interpretation of Article 2.12, taking into account—pursuant to Article 31(3)(a) of the *Vienna Convention*—the interpretative clarification provided by the terms of paragraph 5.2 of the Doha Ministerial Decision. In much the

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<sup>484</sup>Panel Report, para. 7.592.

<sup>485</sup>United States' appellant's submission, para. 143 (referring to Appellate Body Report, *EC – Sardines*, para. 288).

<sup>486</sup>We are not saying that the fact that the burden of proof is allocated in a particular manner with respect to a particular provision of the covered agreements is not a relevant consideration in discerning how the burden of proof is allocated under a similar provision of the covered agreements. Rather, we are saying that the conceptual or structural similarity between two provisions does not, by itself, necessitate a conclusion that the burden of proof in respect of both provisions must be allocated in an identical manner.



same way, the manner in which the burden of proof is allocated under Article 2.12 of the *TBT Agreement* must be informed by an interpretation that properly canvasses the text, context, and object and purpose of Article 2.12. In our view, the burden of proof in respect of a particular provision of the covered agreements *cannot* be understood in isolation from the overarching logic of that provision, and the function which it is designed to serve. On the contrary, it is by having regard for the function and rationale of a particular provision that an adjudicator can, adequately, assess the manner in which the burden of proof should be allocated under that provision.

287. We recall that Article 2.12 of the *TBT Agreement* explains that the reason for allowing an interval between the publication and the entry into force of a technical regulation is "to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production" to the requirements of the importing Member's technical regulation. By its own terms, Article 2.12 singles out producers in exporting Members, and particularly in developing country Members, as the beneficiaries of a "reasonable interval" between the publication and the entry into force of an importing Member's technical regulation. Thus, the concept of a "reasonable interval" within the meaning of Article 2.12 is meant to provide a degree of certainty to producers in exporting Members, and particularly in developing country Members, with regard to the time within which an importing Member's technical regulation can reasonably be expected to enter into force.

288. Paragraph 5.2 of the Doha Ministerial Decision provides interpretative clarification of the concept of a "reasonable interval" within the meaning of Article 2.12 by establishing a rule that producers in exporting Members require a period of at least six months to adapt their products or production methods to the requirements of the importing Member's technical regulation. Thus, paragraph 5.2 enhances the degree of certainty that the concept of a "reasonable interval" is meant to provide to producers in exporting Members, and particularly in developing country Members, with regard to the time within which an importing Member's technical regulation can reasonably be expected to enter into force.

289. The rule in Article 2.12, as clarified by paragraph 5.2 of the Doha Ministerial Decision, is expressly designed to allow producers in the complaining Member, and in particular in a complaining developing country Member, sufficient time to adapt their products or production methods to the requirements of the responding Member's technical regulation. Thus, it seems to us that, where a responding Member seeks to deviate from this rule, which, by its own terms, singles out producers in the complaining Member as the beneficiaries of a "reasonable interval" between the publication and the entry into force of a technical regulation, the responding Member must shoulder the burden of establishing a *prima facie* case that the conditions under which derogations from the rule are

permitted are extant. Thus, we disagree with the Panel that it was for Indonesia to establish a *prima facie* case that a period of at least six months between the publication of Section 907(a)(1)(A) and its entry into force would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective. Instead, we consider that, under Article 2.12 of the *TBT Agreement*, as clarified by paragraph 5.2 of the Doha Ministerial Decision, the burden rests upon the responding Member to make a *prima facie* case that an interval of not less than six months "would be ineffective to fulfil the legitimate objectives pursued" by its technical regulation.

290. In sum, under Article 2.12 of the *TBT Agreement*, as clarified by paragraph 5.2 of the Doha Ministerial Decision, a complaining Member is required to establish a *prima facie* case that the responding Member has failed to allow for a period of at least six months between the publication and the entry into force of the technical regulation at issue. If the complaining Member establishes such a *prima facie* case, the burden rests on the responding Member that has allowed for an interval of less than six months between the publication and the entry into force of its technical regulation to establish *either*: (i) that the "urgent circumstances" referred to in Article 2.10 of the *TBT Agreement* surrounded the adoption of the technical regulation at issue; (ii) that producers of the complaining Member could have adapted to the requirements of the technical regulation at issue within the shorter interval that it allowed; *or* (iii) that a period of "not less than" six months would be ineffective to fulfil the legitimate objectives of its technical regulation.

291. In order to establish a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement*, Indonesia was required to establish that the United States did not allow an interval of at least six months between the publication and the entry into force of the technical regulation at issue. In this connection, we note the Panel's finding that the actual interval allowed by the United States between the publication and the entry into force of Section 907(a)(1)(A) was a "90-day period or a three-month period".<sup>487</sup> Thus, we agree with the Panel that Indonesia established a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement*.

292. In order to rebut the *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement* made by Indonesia, the United States was required to submit evidence and argument sufficient to establish *either*: (i) that the "urgent circumstances" referred to in Article 2.10 of the *TBT Agreement* surrounded the adoption of Section 907(a)(1)(A); (ii) that producers in Indonesia could have adapted to the requirements of Section 907(a)(1)(A) within a three-month interval; *or* (iii) that a period of "not less than" six months would be ineffective to fulfil the legitimate objectives of Section 907(a)(1)(A).

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<sup>487</sup>Panel Report, para. 7.567.

293. With regard to whether the "urgent circumstances" referred to in Article 2.10 of the *TBT Agreement* surrounded the adoption of Section 907(a)(1)(A), we note that the Panel found that "[i]n the absence of any evidence or argument that such urgent problems of safety, health, environmental protection or national security arose or threatened to arise upon adoption of Section 907(a)(1)(A)", it could "only conclude that these urgent circumstances were not present".<sup>488</sup> Thus, the United States did not contend that the "urgent circumstances" referred to in Article 2.10 surrounded the adoption of Section 907(a)(1)(A).

294. With regard to the question of whether producers in Indonesia could have adapted to the requirements of Section 907(a)(1)(A) within a three-month period, the United States argued before the Panel that "Indonesian producers have been and are able to market tobacco-flavoured and menthol-flavoured cigarettes in the United States' market", and that "Indonesian producers, even 16 months after the enactment of [Section 907(a)(1)(A)] have not adjusted their product lines to produce tobacco or menthol-flavoured cigarettes."<sup>489</sup> Thus, according to the United States, whether it waited "three months or six months after the measure's enactment to allow it to enter into force appears not to have affected Indonesia producers in any way".<sup>490</sup> On appeal, the United States submits that "[t]his evidence and argument" was sufficient to rebut the *prima facie* case that the Panel found Indonesia to have established.<sup>491</sup> We are not persuaded that the evidence and argument submitted by the United States before the Panel was sufficient to establish that producers in Indonesia could have adapted to the requirements of Section 907(a)(1)(A) within a three-month period. Contrary to what the United States argues, the fact that Indonesian producers had not adjusted to the requirements of Section 907(a)(1)(A) sixteen months after its entry into force is evidence that points in the direction of Indonesian producers requiring a significantly longer period than the three months allowed by the United States. Thus, the United States failed to establish that producers in Indonesia could have adapted to the requirements of Section 907(a)(1)(A) within a three-month period.

295. We turn now to consider whether the United States established, with sufficient evidence and argument, that a period of at least six months between the publication and the entry into force of Section 907(a)(1)(A) would be ineffective in fulfilling the legitimate objective pursued by Section 907(a)(1)(A). We note that the Panel stated that the United States had not explained "why it deemed that allowing a 90 day/three month interval between the publication and entry into force of Section 907(a)(1)(A) was not ineffective in fulfilling the objective pursued by Section 907(a)(1)(A), while a six month interval would be".<sup>492</sup> Before the Panel, the United States argued that the

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<sup>488</sup>Panel Report, para. 7.507.

<sup>489</sup>Panel Report, para. 7.583 (referring to United States' first written submission to the Panel, para. 303).

<sup>490</sup>Panel Report, para. 7.583.

<sup>491</sup>United States' appellant's submission, para. 153.

<sup>492</sup>Panel Report, para. 7.593.

FSPTCA "directly addresses a serious problem—youth smoking" and that "Congress intended to limit this behaviour as much as practicable".<sup>493</sup> While the arguments advanced by the United States before the Panel identify the legitimate objective of Section 907(a)(1)(A), these arguments are insufficient to establish that allowing a period of not less than six months between the publication and entry into force of Section 907(a)(1)(A) would have been ineffective to fulfil the legitimate objective of Section 907(a)(1)(A).

296. Thus, while we disagree with the Panel that it was for Indonesia to establish a *prima facie* case that an interval of at least six months between the publication of the FSPTCA and the entry into force of Section 907(a)(1)(A) would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective, we nevertheless share the Panel's view that the United States failed to establish that an interval of at least six months between publication and entry into force would be ineffective in fulfilling the legitimate objective pursued by Section 907(a)(1)(A). Accordingly, we agree with the Panel that the United States failed to rebut the *prima facie* case of inconsistency that Indonesia established under Article 2.12 of the *TBT Agreement*.

297. In the light of the foregoing reasons, we *uphold*, albeit for different reasons, the Panel's finding, in paragraphs 7.595 and 8.1(h) of the Panel Report, that, by failing to allow an interval of not less than six months between the publication and the entry into force of Section 907(a)(1)(A) of the FFDCAs, the United States acted inconsistently with Article 2.12 of the *TBT Agreement*.

## VII. Findings and Conclusions

298. For the reasons set out in this Report, the Appellate Body:

- (a) With respect to Article 2.1 of the *TBT Agreement*:
  - (i) upholds, albeit for different reasons, the Panel's finding, in paragraph 7.248 of the Panel Report, that clove cigarettes and menthol cigarettes are "like products" within the meaning of Article 2.1 of the *TBT Agreement*;
  - (ii) finds that the Panel did not act inconsistently with Article 11 of the DSU in its analysis of consumer tastes and habits;
  - (iii) upholds, albeit for different reasons, the Panel's finding, in paragraph 7.292 of the Panel Report, that, by banning clove cigarettes while exempting menthol cigarettes from the ban, Section 907(a)(1)(A) of the FFDCAs accords imported clove cigarettes less favourable treatment than that accorded to

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<sup>493</sup>Panel Report, para. 7.588 (referring to United States' first written submission to the Panel, para. 302).

domestic menthol cigarettes, within the meaning of Article 2.1 of the *TBT Agreement*;

- (iv) finds that the Panel did not act inconsistently with Article 11 of the DSU in its less favourable treatment analysis; and, therefore,
  - (v) upholds, albeit for different reasons, the Panel's finding, in paragraphs 7.293 and 8.1(b) of the Panel Report, that Section 907(a)(1)(A) of the FFDCA is inconsistent with Article 2.1 of the *TBT Agreement* because it accords to imported clove cigarettes less favourable treatment than that accorded to like menthol cigarettes of national origin; and
- (b) With respect to Article 2.12 of the *TBT Agreement*:
- (i) upholds the Panel's finding, in paragraph 7.576 of the Panel Report, that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the *Vienna Convention*, on the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*; and
  - (ii) upholds, albeit for different reasons, the Panel's finding, in paragraphs 7.595 and 8.1(h) of the Panel Report, that, by failing to allow an interval of not less than six months between the publication and the entry into force of Section 907(a)(1)(A) of the FFDCA, the United States acted inconsistently with Article 2.12 of the *TBT Agreement*.

299. The Appellate Body recommends that the DSB request the United States to bring its measure, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *TBT Agreement*, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 22nd day of March 2012 by:

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Shotaro Oshima  
Presiding Member

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Ricardo Ramírez-Hernández  
Member

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Peter Van den Bossche  
Member



ANNEX I

**WORLD TRADE  
ORGANIZATION**

**WT/DS406/6**  
10 January 2012

(12-0103)

Original: English

**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

<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.



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>

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>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.

<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.