

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

*Report of the Panel*



**TABLE OF CONTENTS**

	<u>Page</u>
<b>I. INTRODUCTION .....</b>	<b>1</b>
<b>II. FACTUAL ASPECTS .....</b>	<b>1</b>
A. INTRODUCTION .....	1
B. THE MEASURE AT ISSUE .....	2
C. FACTUAL CONTEXT .....	4
<b>1. The United States' legislative regime for tobacco control .....</b>	<b>4</b>
(a) History of tobacco-control measures in the United States .....	4
(b) The scope of the FSPTCA .....	6
<b>2. The market for cigarettes in the United States.....</b>	<b>7</b>
<b>3. International efforts to curb smoking: The <i>Framework Convention on Tobacco Control</i>.....</b>	<b>8</b>
<b>III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS.....</b>	<b>9</b>
<b>IV. ARGUMENTS OF THE PARTIES .....</b>	<b>10</b>
<b>V. ARGUMENTS OF THE THIRD PARTIES .....</b>	<b>10</b>
<b>VI. INTERIM REVIEW.....</b>	<b>10</b>
A. GENERAL.....	10
B. UNITED STATES' COMMENTS ON THE INTERIM REPORT .....	11
<b>1. Factual aspects .....</b>	<b>11</b>
<b>2. Whether Section 907(a)(1)(A) is inconsistent with Article 2.1 of the TBT Agreement .....</b>	<b>13</b>
<b>3. Whether Section 907(a)(1)(A) is inconsistent with Article 2.2 of the TBT Agreement.....</b>	<b>18</b>
<b>4. Whether the United States has acted inconsistently with Article 12.3 of the TBT Agreement.....</b>	<b>22</b>
<b>5. Miscellaneous .....</b>	<b>23</b>
<b>VII. FINDINGS.....</b>	<b>23</b>
A. INTRODUCTION .....	23
B. ORDER OF ANALYSIS .....	24
C. WHETHER SECTION 907(A)(1)(A) IS A "TECHNICAL REGULATION" WITHIN THE MEANING OF ANNEX 1.1 OF THE <i>TBT AGREEMENT</i> .....	27
<b>1. Arguments of the parties .....</b>	<b>27</b>
<b>2. Analysis by the Panel.....</b>	<b>27</b>
(a) Introduction.....	27
(b) The legal provision at issue.....	28
(c) Elements of the definition of a technical regulation .....	28

(i)	<i>First element: Whether Section 907(a)(1)(A) applies to an "identifiable product or group of products"</i> .....	28
(ii)	<i>Second element: Whether Section 907(a)(1)(A) lays down one or more "product characteristics"</i> .....	29
(iii)	<i>Third element: Whether compliance with the product characteristics is mandatory</i> .....	31
(d)	Conclusion .....	32
D.	WHETHER SECTION 907(A)(1)(A) IS INCONSISTENT WITH ARTICLE 2.1 OF THE <i>TBT AGREEMENT</i> .....	32
<b>1.</b>	<b>Arguments of the parties</b> .....	<b>32</b>
<b>2.</b>	<b>Analysis by the Panel</b> .....	<b>39</b>
(a)	Introduction .....	39
(b)	The legal provision at issue .....	39
(c)	Whether imported clove cigarettes and the domestic cigarettes at issue are "like products" within the meaning of Article 2.1 of the <i>TBT Agreement</i> .....	41
(i)	<i>Interpreting likeness under Article 2.1 of the TBT Agreement</i> .....	41
	Parties' arguments on the interpretation of "like products" in the context of Article 2.1 of the <i>TBT Agreement</i> .....	41
	The Panel's approach to interpreting "like products" in the context of Article 2.1 of the <i>TBT Agreement</i> .....	44
(ii)	<i>The traditional likeness criteria</i> .....	51
(iii)	<i>Likeness analysis of the products concerned</i> .....	52
	Relevant domestic and imported products for the purpose of the likeness analysis in this case .....	52
	The properties, nature and quality of the products concerned .....	57
	The end-uses of the products .....	67
	Consumers' tastes and habits in respect of the products .....	69
	The tariff classification of the products .....	77
(iv)	<i>Conclusion on likeness</i> .....	78
(d)	Whether imported clove cigarettes are accorded less favourable treatment than that accorded to like products of national origin .....	79
(i)	<i>Introduction</i> .....	79
(ii)	<i>The Panel's approach to interpreting the less favourable treatment test under Article 2.1 of the TBT Agreement</i> .....	80
(iii)	<i>De jure versus de facto discrimination</i> .....	80
(iv)	<i>The less favourable treatment test under Article 2.1 of the TBT Agreement</i> .....	81
	Which are the products to be compared .....	83
	Whether the products at issue are treated differently .....	85
	Whether the different treatment is to the detriment of imported products .....	85
	Whether that less favourable treatment is related to the national origin of the imports .....	85
(v)	<i>Conclusion on less favourable treatment</i> .....	89

(e)	Overall conclusion on Indonesia's claim under Article 2.1 of the <i>TBT Agreement</i> .....	89
E.	WHETHER SECTION 907(A)(1)(A) IS JUSTIFIED UNDER ARTICLE XX(B) OF THE GATT 1994.....	89
<b>1.</b>	<b>Arguments of the parties .....</b>	<b>89</b>
<b>2.</b>	<b>Analysis by the Panel .....</b>	<b>91</b>
(a)	Introduction.....	91
(b)	The legal provision at issue.....	91
(c)	Whether it is necessary for the Panel to determine whether Section 907(a)(1)(A) is justified under Article XX(b) of the GATT 1994 .....	91
(d)	Conclusion .....	92
F.	WHETHER SECTION 907(A)(1)(A) IS INCONSISTENT WITH ARTICLE 2.2 OF THE <i>TBT AGREEMENT</i> .....	92
<b>1.</b>	<b>Arguments of the parties .....</b>	<b>92</b>
<b>2.</b>	<b>Analysis by the Panel .....</b>	<b>97</b>
(a)	Introduction.....	97
(b)	The legal provision at issue.....	98
(c)	Whether the ban on clove cigarettes pursues a legitimate objective.....	100
(i)	<i>Whether Indonesia has correctly identified the objective of the ban.....</i>	<i>100</i>
(ii)	<i>Whether the objective of the ban on clove cigarettes is "legitimate".....</i>	<i>103</i>
(d)	Whether the ban on clove cigarettes is "more trade-restrictive than necessary" to fulfil the legitimate objective of reducing youth smoking .....	104
(i)	<i>Whether jurisprudence developed under Article XX(b) of the GATT 1994 is relevant to the interpretation of the "more trade-restrictive than necessary" standard in Article 2.2 of the TBT Agreement .....</i>	<i>105</i>
(ii)	<i>Whether Indonesia has demonstrated that the ban on clove cigarettes exceeds the level of protection sought by the United States.....</i>	<i>109</i>
(iii)	<i>Whether Indonesia has demonstrated that the ban on clove cigarettes makes no "material contribution" to the objective of reducing youth smoking .....</i>	<i>111</i>
	Introduction.....	111
	Whether clove cigarettes pose a greater health risk than other cigarettes .....	112
	Whether youth smoke clove cigarettes in insignificant numbers .....	113
	Whether the United States' failure to ban other flavoured tobacco products most popular with youth demonstrates that banning clove cigarettes makes no "material contribution" to reducing youth smoking .....	114
	Whether the available scientific evidence shows that banning clove cigarettes will do little to deter youth from smoking .....	115
	Conclusion.....	121
(iv)	<i>Whether Indonesia has demonstrated that there are less-trade restrictive alternative measures that would make an equivalent contribution to the achievement of the objective at the level of protection sought by the United States .....</i>	<i>121</i>
(e)	Overall conclusion on Indonesia's claim under Article 2.2 of the <i>TBT Agreement</i> .....	125

G.	WHETHER THE UNITED STATES HAS ACTED INCONSISTENTLY WITH ARTICLE 2.5 OF THE <i>TBT AGREEMENT</i> .....	126
1.	<b>Arguments of the parties</b> .....	<b>126</b>
2.	<b>Analysis by the Panel</b> .....	<b>130</b>
(a)	Introduction .....	130
(b)	The legal provision at issue .....	130
(c)	Whether Indonesia requested the United States to provide an explanation for Section 907(a)(1)(A) pursuant to Article 2.5, first sentence, of the <i>TBT Agreement</i> .....	131
(d)	Conclusion .....	133
H.	WHETHER THE UNITED STATES HAS ACTED INCONSISTENTLY WITH ARTICLE 2.8 OF THE <i>TBT AGREEMENT</i> .....	133
1.	<b>Arguments of the parties</b> .....	<b>133</b>
2.	<b>Analysis by the Panel</b> .....	<b>134</b>
(a)	Introduction .....	134
(b)	The legal provision at issue .....	135
(c)	First issue: whether Article 2.8 obliges Members to provide "a certain level of specificity" in their technical regulations .....	135
(d)	Second issue: whether it would be "appropriate" to specify the ban on clove cigarettes in terms of performance, rather than on design or descriptive characteristics .....	138
(e)	Conclusion .....	141
I.	WHETHER THE UNITED STATES HAS ACTED INCONSISTENTLY WITH ARTICLE 2.10 OF THE <i>TBT AGREEMENT</i> .....	141
1.	<b>Arguments of the parties</b> .....	<b>141</b>
2.	<b>Analysis by the Panel</b> .....	<b>142</b>
(a)	Introduction .....	142
(b)	The legal provision at issue .....	142
(c)	Conclusion .....	143
J.	WHETHER THE UNITED STATES HAS ACTED INCONSISTENTLY WITH ARTICLES 2.9.2 AND 2.9.3 OF THE <i>TBT AGREEMENT</i> .....	143
1.	<b>Arguments of the parties</b> .....	<b>143</b>
2.	<b>Analysis by the Panel</b> .....	<b>145</b>
(a)	Introduction .....	145
(b)	The legal provisions at issue .....	145
(c)	Conditions for the application of Article 2.9 of the <i>TBT Agreement</i> .....	146
(i)	<i>First condition: absence of a relevant international standard, or a proposed technical regulation not in accordance with a relevant international standard</i> .....	<i>146</i>
(ii)	<i>Second condition: whether the technical regulation may have a significant effect on trade of other Members</i> .....	<i>147</i>
(d)	Article 2.9.2: Obligation to notify the proposed technical regulation .....	148

(e)	Article 2.9.3: Obligation to provide particulars or copies of the proposed technical regulation .....	149
(f)	Conclusion .....	150
K.	WHETHER THE UNITED STATES HAS ACTED INCONSISTENTLY WITH ARTICLE 2.12 OF THE <i>TBT AGREEMENT</i> .....	151
<b>1.</b>	<b>Arguments of the parties .....</b>	<b>151</b>
<b>2.</b>	<b>Analysis by the Panel .....</b>	<b>153</b>
(a)	Introduction.....	153
(b)	The legal provision at issue.....	153
(c)	Conclusion .....	160
L.	WHETHER THE UNITED STATES HAS ACTED INCONSISTENTLY WITH ARTICLE 12.3 OF THE <i>TBT AGREEMENT</i> .....	160
<b>1.</b>	<b>Arguments of the parties .....</b>	<b>160</b>
<b>2.</b>	<b>Analysis by the Panel .....</b>	<b>163</b>
(a)	Introduction.....	163
(b)	The legal provision at issue.....	164
(c)	Scope of the obligation in Article 12.3 of the <i>TBT Agreement</i> .....	164
(d)	Elements of the obligation in Article 12.3 of the <i>TBT Agreement</i> .....	166
(i)	<i>First element: whether Indonesia is a "developing country"</i> .....	166
(ii)	<i>Second element: whether Indonesia has "special development, financial and trade needs" that are affected by Section 907(a)(1)(A)</i> .....	166
(iii)	<i>Third element: whether the United States failed to "take account of" Indonesia's special financial, development and trade needs</i> .....	167
(e)	Conclusion .....	171
<b>VIII.</b>	<b>CONCLUSIONS AND RECOMMENDATIONS.....</b>	<b>171</b>

**TABLE OF CASES CITED IN THIS REPORT**

<b>Short Title</b>	<b>Full Case Title and Citation</b>
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Short Title	Full Case Title and Citation
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Short Title	Full Case Title and Citation
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Short Title	Full Case Title and Citation
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<i>India – Additional Import Duties</i>	Appellate Body Report, <i>India – Additional and Extra-Additional Duties on Imports from the United States</i> , WT/DS360/AB/R, adopted 17 November 2008
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<i>India – Autos</i>	Appellate Body Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/AB/R, WT/DS175/AB/R, adopted 5 April 2002, DSR 2002:V, 1821

Short Title	Full Case Title and Citation
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<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
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<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and 2, adopted 23 July 1998, and Corr. 3 and 4, DSR 1998:VI, 2201
<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
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<i>Japan – Alcoholic Beverages I</i>	GATT Panel Report, <i>Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages</i> , L/6216, adopted 10 November 1987, BISD 34S/83
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<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
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<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
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Short Title	Full Case Title and Citation
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<i>Thailand – Cigarettes</i>	GATT Panel Report, <i>Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes</i> , DS10/R, adopted 7 November 1990, BISD 37S/200
<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
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<i>US – 1916 Act</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
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<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
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<i>US – Continued Suspension</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, 3507
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<i>US – COOL (Canada)</i> <i>US – COOL (Mexico)</i>	<i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384, WT/DS386
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3

Short Title	Full Case Title and Citation
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<i>US – DRAMS</i>	Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea</i> , WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
<i>US – FSC (Article 21.5 – EC)</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, 119
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<i>US – Lead and Bismuth II</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595
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<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481

Short Title	Full Case Title and Citation
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<i>US – Superfund</i>	GATT Panel Report, <i>United States – Taxes on Petroleum and Certain Imported Substances</i> , L/6175, adopted 17 June 1987, BISD 34S/136
<i>US – Tuna II (Mexico)</i>	<i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381
<i>US – Tyres (China)</i>	Panel Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/R, circulated 13 December 2010 [appeal pending]
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<i>US – Zeroing (EC)</i> (Article 21.5 – EC)	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW and Corr.1, adopted 11 June 2009
<i>US – Zeroing (EC)</i> (Article 21.5 – EC)	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW
<i>US – Zeroing (Japan)</i> (Article 21.5 – Japan)	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009
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### LIST OF ABBREVIATIONS

COP	WHO Conference of Parties
CTP	Center for Tobacco Products
FCTC	<i>Framework Convention on Tobacco Control</i>
FDA	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
FFDCA	<i>Federal Food, Drug and Cosmetic Act</i>
FSPTCA	<i>Family Smoking Prevention and Tobacco Control Act</i>
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)
NSDUH	National Survey on Drug Use and Health
NYTS	National Youth Tobacco Survey
<i>SPS Agreement</i>	<i>Agreement on Sanitary and Phytosanitary Measures</i>
<i>TBT Agreement</i>	<i>Agreement on Technical Barriers to Trade</i>
TPSAC	Tobacco Products Scientific Advisory Committee
VLCT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WHO <i>Partial Guidelines</i>	WHO <i>Partial Guidelines for implementation of Articles 9 and 10 of the [FCTC]Convention</i>
WTO	World Trade Organization



**LIST OF ANNEXES**

**ANNEX A**

**EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS  
OF THE PARTIES**

<b>Contents</b>		<b>Page</b>
Annex A-1	Executive summary of the first written submission of Indonesia	A-2
Annex A-2	Executive summary of the first written submission of the United States	A-11

**ANNEX B**

**EXECUTIVE SUMMARIES OF THE THIRD PARTY SUBMISSIONS**

<b>Contents</b>		<b>Page</b>
Annex B-1	Executive summary of the third party submission of Brazil	B-2
Annex B-2	Executive summary of the oral statement of Brazil at the first substantive meeting	B-5
Annex B-3	Executive summary of the oral statement of Colombia at the first substantive meeting	B-6
Annex B-4	Executive summary of the third party submission and oral statement of the European Union	B-10
Annex B-5	Oral statement of Guatemala at the first substantive meeting	B-13
Annex B-6	Oral statement of Mexico at the first substantive meeting	B-16
Annex B-7	Executive summary of the oral statement of Norway at the first substantive meeting	B-20
Annex B-8	Executive summary of the third party submission of Turkey	B-24

**ANNEX C**

**EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS  
OF THE PARTIES**

<b>Contents</b>		<b>Page</b>
Annex C-1	Executive summary of the second written submission of Indonesia	C-2
Annex C-2	Executive summary of the second written submission of the United States	C-12

**ANNEX D**

**EXECUTIVE SUMMARIES OF THE ORAL STATEMENTS BY THE PARTIES  
AT THE FIRST AND SECOND SUBSTANTIVE MEETINGS**

<b>Contents</b>		<b>Page</b>
Annex D-1	Executive summary of the opening oral statement of Indonesia at the first substantive meeting	D-2
Annex D-2	Executive summary of the opening oral statement of the United States at the first substantive meeting	D-7
Annex D-3	Closing oral statement of Indonesia at the first substantive meeting	D-12
Annex D-4	Closing oral statement of the United States at the first substantive meeting	D-13
Annex D-5	Executive summary of the opening oral statement of Indonesia at the second substantive meeting	D-15
Annex D-6	Executive summary of the opening oral statement of the United States at the second substantive meeting	D-21
Annex D-7	Closing oral statement of Indonesia at the second substantive meeting	D-26

**ANNEX E**

**REQUEST FOR THE ESTABLISHMENT OF A PANEL BY INDONESIA**

<b>Contents</b>		<b>Page</b>
Annex E	Request for the establishment of a Panel by Indonesia	E-1

## I. INTRODUCTION

1.1 On 7 April 2010, Indonesia requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 11 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("*SPS Agreement*") and Article 14 of the *Agreement on Technical Barriers to Trade* ("*TBT Agreement*") with respect to "the measure applied by the Government of the United States regarding the ban of clove cigarettes".<sup>1</sup> Indonesia and the United States held consultations on 13 May 2010. However, no mutually agreed solution was found.

1.2 On 9 June 2010, Indonesia requested the establishment of a panel pursuant to Article 6 of the DSU.<sup>2</sup>

1.3 At its meeting on 20 July 2010, the DSB established a panel pursuant to the request of Indonesia in document WT/DS406/2, in accordance with Article 6 of the DSU.

1.4 The Panel's terms of reference are the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Indonesia in document WT/DS406/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5 On 9 September 2010, the parties agreed to the following composition of the Panel:

Chairman: Mr Ronald Saborío Soto

Members: Mr Ichiro Araki  
Mr Hugo Cayrús

1.6 Brazil, Colombia, Dominican Republic, the European Union, Guatemala, Mexico, Norway and Turkey have reserved their rights to participate in the Panel proceedings as third parties.

1.7 The Panel held its first substantive meeting with the parties on 13 and 14 December 2010. The session with the third parties was held on 14 December 2010. The second substantive meeting was held on 15 February 2011.

1.8 On 13 April 2011, the Panel issued the descriptive section of its draft report to the parties. The Panel issued its Interim Report to the parties on 27 May 2011. The Panel issued its Final Report on 24 June 2011.

## II. FACTUAL ASPECTS

### A. INTRODUCTION

2.1 This dispute concerns a tobacco-control measure<sup>3</sup> adopted by the United States that prohibits cigarettes with characterizing flavours, other than tobacco or menthol.

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<sup>1</sup> WT/DS406/1.

<sup>2</sup> WT/DS406/2.

<sup>3</sup> Article 1(d) of the WHO *Framework Convention on Tobacco Control* (see Section II.C.3 below) defines "tobacco control" to mean "a range of supply, demand and harm reduction strategies that aim to improve

2.2 In this section of the Report, the Panel will describe the measure at issue as well as its broader factual context, including the United States' legal regime for tobacco control, the market for cigarettes in the United States, and the WHO *Framework Convention on Tobacco Control*.

2.3 The parties disagree on a number of factual issues. To the extent it is necessary for the Panel to resolve those disputed factual issues, it will do so in its Findings.

B. THE MEASURE AT ISSUE

2.4 The measure at issue is Section 907(a)(1)(A) of the *Federal Food, Drug and Cosmetic Act* ("FFDCA"), which was added to the FFDCA by Section 101(b) of the *Family Smoking Prevention and Tobacco Control Act* ("FSPTCA").<sup>4</sup> Section 907(a)(1)(A) reads as follows:

"SEC. 907. TOBACCO PRODUCT STANDARDS.

(a) IN GENERAL.—

(1) SPECIAL RULES.—

(A) SPECIAL RULE FOR CIGARETTES.—Beginning 3 months after the date of enactment of the Family Smoking Prevention and Tobacco Control Act, a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke. Nothing in this subparagraph shall be construed to limit the Secretary's authority to take action under this section or other sections of this Act applicable to menthol or any artificial or natural flavor, herb, or spice not specified in this subparagraph."<sup>5</sup>

2.5 The FSPTCA became law in the United States on 22 June 2009.<sup>6</sup> As its text provides, Section 907(a)(1)(A) entered into force three months after the enactment of the FSPTCA, i.e., on 22 September 2009.

2.6 The Panel notes that the objective of Section 907(a)(1)(A) is not set forth in the FSPTCA itself. However, both parties have referred the Panel to a report prepared by the House Energy and Commerce Committee ("House Report") after favourably reporting the legislation out of that Committee.<sup>7</sup> The House Report explains the meaning of each section of the FSPTCA and articulates both the objectives of the FSPTCA overall, and of Section 907(a)(1)(A) in particular. According to the House Report:

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the health of a population by eliminating or reducing their consumption of tobacco products and exposure to tobacco smoke".

<sup>4</sup> In response to Panel question No. 9, the parties have clarified that the measure at issue is properly referred to as "Section 907(a)(1)(A) of the *Federal Food, Drug, and Cosmetic Act* (as amended by the *Family Smoking Prevention and Tobacco Control Act*)" or, as shorthand, "Section 907(a)(1)(A) of the FFDCA". It can also be referred to as "21 U.S.C. § 387g(a)(1)(A)" (which is section 387g(a)(1)(A) of title 21 of the U.S. Code).

<sup>5</sup> H.R. 1256, Section 907 (a)(1)(A) (Exhibit IND-1).

<sup>6</sup> Indonesia's first written submission, footnote 1.

<sup>7</sup> H.R. Rep. No. 111-58, Pt. 1 (2009). Indonesia submitted the House Report as Exhibit IND-2; the United States submitted the same House Report as Exhibit US-67.

"The 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>8</sup>

2.7 The House Report explains the purpose of Section 907(a)(1) in particular:

"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) is intended to prohibit the manufacture and sale of cigarettes with certain 'characterizing flavors' that appeal to youth."<sup>9</sup>

2.8 In addition, the Food and Drug Administration ("FDA"), which as explained in Section II.C.1(b) below is the U.S. agency empowered with tobacco control and regulation, issued a document entitled "Guidance for Industry and FDA Staff, General Questions and Answers on the Ban of Cigarettes that Contain Characterizing Flavors" ("FDA Guidance") on 23 December 2009. This FDA Guidance is non-binding, although it represents the FDA's "current thinking on the topic".<sup>10</sup> According to the FDA Guidance, the rationale for the prohibition of cigarettes with characterizing flavours imposed by Section 907(a)(1)(A) is the following:

"Smoking is the leading cause of preventable death in the United States, claiming over 400,000 lives each year. An important way to reduce the death and disease caused by smoking is to prevent children and adolescents from starting to smoke. Studies have shown that 17 year old smokers are three times as likely to use flavored cigarettes as are smokers over the age of 25. In addition to being more attractive to young people, flavored products make it easier for new smokers to start smoking by masking the unpleasant flavor of tobacco. Studies have also demonstrated that young people believe that flavored tobacco products are safer than unflavored tobacco products.

Flavored cigarettes are just as addictive and have the same types of harmful effects as regular cigarettes. Removing these flavored products from the market is important because it removes an avenue that young people can use to begin regular tobacco use. Congress specifically enacted the ban on sale of cigarettes and their component parts, such as filters and papers, which contain certain characterizing flavors. The removal from the market of cigarettes that contain certain characterizing flavors is an important step in the Nation's efforts to reduce the burden of illness and death caused by tobacco products as authorized by the FSPTCA, signed by President Obama on June 22, 2009."<sup>11</sup>

2.9 According to the FDA Guidance, Section 907(a)(1)(A) applies to all flavoured tobacco products that meet the definition of a cigarette in Section 900(3) of the FFDCA, even if they are not labelled as cigarettes.<sup>12</sup> Section 900(3) of the FFDCA defines the term "cigarette" as follows:

**"(3) Cigarette**

The term 'cigarette'—

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<sup>8</sup> Exhibit US-67, p. 14.

<sup>9</sup> Exhibit US-67, p. 37.

<sup>10</sup> Guidance, disclaimer (Exhibit IND-41).

<sup>11</sup> Guidance, answer to question No. 1 (Exhibit IND-41). See also FDA Advisory – *Flavored Tobacco Products; What you need to know* (Exhibit IND-25).

<sup>12</sup> Guidance, answer to question No. 2 (Exhibit IND-41).

(A) means a product that—

(i) is a tobacco product; and

(ii) meets the definition of the term 'cigarette' in section 3(1) of the Federal Cigarette Labeling and Advertising Act; and

(B) includes tobacco, in any form, that is functional in the product, 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 or as roll-your-own tobacco.

#### **(4) Cigarette tobacco**

The term 'cigarette tobacco' means any product that consists of loose tobacco that is intended for use by consumers in a cigarette. Unless otherwise stated, the requirements applicable to cigarettes under this subchapter shall also apply to cigarette tobacco."<sup>13</sup>

2.10 Subsection (ii) refers to a provision of the *Federal Cigarette Labeling and Advertising Act*, which defines the term "cigarette" as follows:

"(1) The term "cigarette" means—

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A)."<sup>14</sup>

2.11 The FDA clarifies in its FDA Guidance that the ban contained in Section 907(a)(1)(A) also applies to flavoured loose tobacco and rolling papers and filters intended to be used in roll-your-own cigarettes.<sup>15</sup>

### **C. FACTUAL CONTEXT**

#### **1. The United States' legislative regime for tobacco control**

(a) History of tobacco-control measures in the United States

2.12 The marketing and selling of tobacco products in the United States was not extensively regulated during the first half of the 20<sup>th</sup> century. In 1957, the U.S. Surgeon General declared that there was a causal relationship between smoking and lung cancer. A subsequent report prepared in 1964 by the Advisory Committee to the Surgeon General quantified the health damages caused by cigarette smoking and submitted that smoking increased the possibilities of developing three particular diseases: lung cancer, emphysema and coronary heart disease.<sup>16</sup>

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<sup>13</sup> Guidance, answer to question No. 2 (Exhibit IND-41).

<sup>14</sup> Guidance, answer to question No. 2 (Exhibit IND-41).

<sup>15</sup> Guidance, answer to question Nos. 3 and 4 (Exhibit IND-41).

<sup>16</sup> United States' first written submission, para. 79.

2.13 As a result of the findings of the above-mentioned Report, the United States enacted its first major federal legislation for tobacco products: the *Federal Cigarette Labeling and Advertising Act*. This piece of legislation mandated, for the first time, the inclusion of a health warning label on cigarettes.<sup>17</sup> The United States further regulated tobacco products over the following decades. In the 1990s, the FDA and the U.S. Congress investigated the U.S. tobacco industry "concerning the industry's knowledge of, and efforts to conceal, the dangers of cigarettes, as well as their efforts to market cigarettes to children".<sup>18</sup>

2.14 These investigations led to private litigation against tobacco companies, as well as lawsuits by several states initiated to recover the tobacco-related costs incurred by the public health system. By the mid-1990s, nearly every state in the United States had brought a lawsuit against the tobacco industry. To settle the litigation, the five largest U.S. tobacco companies (Brown and Williamson Tobacco Corporation, Lorillard Tobacco Company, Phillip Morris Incorporated, RJ Reynolds Tobacco Company and Commonwealth Tobacco Company) signed a Master Settlement Agreement ("MSA") with the states. Among other things, this Agreement: (i) established annual payments to the States totalling USD 206 billion through 2025; (ii) prohibited brand-name sponsorships and advertising that target young people; and (iii) dissolved certain tobacco industry promoting organizations.<sup>19</sup> This MSA did not ban any type of cigarettes and did not address flavoured cigarettes in particular.<sup>20</sup>

2.15 In the early 2000s, several companies, and in particular RJ Reynolds, began to market a new variety of cigarettes with characterizing flavours, such as vanilla, chocolate/mint, lime, spice, watermelon, toffee and liquor.<sup>21</sup> Illinois and New York considered that this contravened the MSA's prohibition against marketing cigarettes to youth. This led RJ Reynolds to sign a Consent Agreement with the MSA-signatory states (the "2006 Consent Agreement"), in which it committed to remove from the market those flavoured cigarettes it sold at the time. The 2006 Consent Agreement still allowed RJ Reynolds the possibility of developing new brands of flavoured cigarettes in the future.<sup>22</sup>

2.16 The FSPTCA was the result of years of legislative effort by the U.S. federal government.<sup>23</sup> In 1996, the FDA asserted authority to regulate tobacco products and issued regulations (later adopted in large part as part of the FSPTCA), including one establishing 18 as the national minimum age to purchase tobacco products and another banning free samples of tobacco products except in adult-only venues.<sup>24</sup> In 1997, before the regulations were fully implemented, U.S. tobacco companies challenged the FDA's regulatory authority and in 2000 the U.S. Supreme Court invalidated the FDA's rules, finding that the U.S. Congress had not granted the FDA the authority to regulate cigarettes and smokeless tobacco as customarily marketed.<sup>25</sup>

2.17 The U.S. Supreme Court reasoned that the FDA's statutory charge was to ensure that drugs are "safe and effective" for the market, and if tobacco products were to fall under the FDA's jurisdiction, the FDA would be forced to ban all tobacco products based on the FDA's findings that the products were unsafe and dangerous; therefore, the U.S. Supreme Court concluded that because

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<sup>17</sup> United States' first written submission, para. 80.

<sup>18</sup> United States' first written submission, para. 81.

<sup>19</sup> United States' first written submission, paras. 83-84.

<sup>20</sup> United States' first written submission, paras. 85-88.

<sup>21</sup> United States' first written submission, para. 48 (Exhibit US-35).

<sup>22</sup> United States' first written submission, paras. 89-92.

<sup>23</sup> United States' first written submission, paras. 103-110.

<sup>24</sup> United States' first written submission, para. 103.

<sup>25</sup> United States' first written submission, paras. 103-105.

the U.S. Congress had foreclosed a ban on all tobacco products, it could not have intended that the products would fall under FDA regulatory authority.<sup>26</sup>

2.18 In response, the U.S. Congress developed legislation specifically to grant authority to the FDA, and directed the FDA to apply a different standard to tobacco products from that applied to any other product or device that it regulates. Following the 2000 Supreme Court ruling that the "safe and effective" standard could not be applied to tobacco products without requiring their removal from the market, the U.S. Congress authorized the FDA to regulate tobacco products "as appropriate for the protection of the public health".<sup>27</sup> A bill containing a ban on cigarettes with characterizing flavours other than tobacco or menthol was introduced for consideration in the U.S. Senate and House of Representatives in 2004.<sup>28</sup> The legislation went through various iterations over the period 2004-2009, prior to the final version of the legislation being enacted into U.S. law in 2009.<sup>29</sup>

(b) The scope of the FSPTCA

2.19 The FSPTCA was enacted in 2009 with a view to protecting public health by providing the FDA with authority to regulate tobacco products.<sup>30</sup> In addition to being the first piece of U.S. federal legislation<sup>31</sup> banning the production and sale of cigarettes with certain characterizing flavours, the FSPTCA imposes significant restrictions and requirements on how tobacco products are manufactured, marketed, distributed and sold, and it also empowers the FDA to adopt additional regulations as appropriate.<sup>32</sup>

2.20 The FSPTCA regulates the manufacture of tobacco products by, for example, empowering the FDA to set new product standards to reduce or eliminate harmful ingredients and additives or otherwise modify the design and characteristics of tobacco products if it is determined that such regulation is appropriate to protect the public health.<sup>33</sup>

2.21 In addition, the FSPTCA regulates marketing by, for example, establishing a range of advertising restrictions and requirements<sup>34</sup>, requiring graphic warning labels and other disclosures<sup>35</sup>, and by authorizing the FDA to establish additional standards and restrictions related to the labelling, advertising, and promotion of tobacco products.<sup>36</sup>

2.22 The FSPTCA also regulates the distribution and sale of tobacco products by, for example, establishing a federal minimum age of 18 for the sale of cigarettes<sup>37</sup>, and generally banning free samples.<sup>38</sup> The legislative history of the FSPTCA explains that:

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<sup>26</sup> United States' first written submission, footnote 134.

<sup>27</sup> United States' first written submission, paras. 106-110.

<sup>28</sup> United States' first written submission, para. 308.

<sup>29</sup> United States' first written submission, paras. 90, 308.

<sup>30</sup> H.R.1256, Heading of the Act (Exhibit IND-1).

<sup>31</sup> Prior to the entry into force of the FSPTCA, several U.S. states (including Maine, Hawaii, Massachusetts, New Jersey, New York and Minnesota) had considered the possibility of prohibiting the production and sale of tobacco products with certain characterizing flavours. Indonesia's response to Panel question No. 15, para. 46; United States' comments on Indonesia's response to Panel question No. 110, para. 72.

<sup>32</sup> United States' first written submission, para. 113.

<sup>33</sup> Section 907(a)(4)(A)-(D) of the FFDCA (Exhibit US-7).

<sup>34</sup> FSPTCA Section 102(a) (Exhibit US-7).

<sup>35</sup> For example, FSPTCA Section 201 and Section 915(b) of the FFDCA (Exhibit US-7).

<sup>36</sup> Sections 906, 910, 911 of the FFDCA (Exhibit US-7).

<sup>37</sup> Section 906(d)(3)(A)(ii) of the FFDCA (Exhibit US-7).

<sup>38</sup> FSPTCA Section 102(a)(2)(G) (Exhibit US-7).



"Past efforts to restrict the advertising and marketing of tobacco products to youth have failed to adequately curb tobacco use by adolescents. [The FSPTCA] provides the FDA with the authority it needs to promulgate comprehensive restrictions on the sale, promotion, and distribution of tobacco products, actions that most public health experts agree can significantly reduce the number of people who start to use tobacco and significantly increase the number of people who quit using tobacco."<sup>39</sup>

2.23 The FSPTCA directed the FDA to establish two new entities: the Center for Tobacco Products ("CTP") in the FDA, which is responsible for implementing the FSPTCA, and the Tobacco Products Scientific Advisory Committee ("TPSAC"), a 12-member body charged with advising the CTP on issues related to nicotine yields and other safety, dependence, or health issues related to tobacco products.<sup>40</sup> As regards menthol cigarettes, which are specifically excluded from the prohibition imposed by Section 907(a)(1)(A), the FSPTCA directed the TPSAC "to deliver a report to FDA on the public health impact of menthol in cigarettes within a year of the committee's formation establishment".<sup>41</sup> The March 2011 TPSAC Report, which was delivered to the FDA on 18 March 2011<sup>42</sup>, recommends to the FDA that the "[r]emoval of menthol cigarettes from the marketplace would benefit public health in the United States".<sup>43</sup> The TPSAC Report also made suggestions for further assessment in respect of the contraband of menthol cigarettes and recommended research to address gaps in understanding of menthol cigarettes and public health. The FDA will further consider the recommendations given by the TPSAC.<sup>44</sup>

## 2. The market for cigarettes in the United States

2.24 Tobacco consumption in the United States is significant. Around 20<sup>45</sup> to 26<sup>46</sup> per cent of the U.S. adult population and 12<sup>47</sup> to 19<sup>48</sup> per cent of the U.S. youth population are smokers. Sales of cigarettes in the United States amounted to approximately 360 billion units in 2007<sup>49</sup>, 346 billion units in 2008 and 317 billion units in 2009.<sup>50</sup>

2.25 From the data submitted by the parties, the Panel understands that the vast majority of U.S. smokers use two types of cigarettes: regular cigarettes and menthol cigarettes.<sup>51</sup> In particular, approximately one-quarter of the smoking population smokes menthol cigarettes.<sup>52</sup> Clove cigarette consumption accounted for approximately 0.1 per cent of the U.S. market between 2000 and 2009.<sup>53</sup>

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<sup>39</sup> H.R. Rep. No. 111-58, Pt. 1 (2009) (Exhibit US-67).

<sup>40</sup> Section 917 of the FFDCFA (Exhibit US-7).

<sup>41</sup> March 2011 TPSAC Report, p. 1. <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM247689.pdf>.

<sup>42</sup> <http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/ucm247617.htm>.

<sup>43</sup> March 2011 TPSAC Report, p. 208. <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM247689.pdf>.

<sup>44</sup> United States' response to Panel question No. 63.

<sup>45</sup> United States' first written submission, para. 13.

<sup>46</sup> Indonesia's response to Panel question No. 106.

<sup>47</sup> Indonesia's response to Panel question No. 106.

<sup>48</sup> United States' first written submission, para. 13.

<sup>49</sup> Indonesia's first written submission, para. 18; Exhibit IND-10; Exhibit US-100.

<sup>50</sup> Exhibit US-100.

<sup>51</sup> United States' first written submission, para. 27.

<sup>52</sup> United States' first written submission, para. 32; Indonesia's second written submission, para. 32 (Exhibit IND-75).

<sup>53</sup> Indonesia's first written submission, para. 13; Indonesia's response to Panel question No. 16; United States' response to Panel question No. 16.

2.26 Imports of clove cigarettes into the United States accounted for approximately 470 million cigarettes in 2007, 430 million cigarettes in 2008 and 220 million cigarettes in 2009.<sup>54</sup> The value of these imports was approximately USD 16.2 million in 2007, USD 14.8 million in 2008 and USD 7.5 million in 2009.<sup>55</sup> During these three years virtually all clove cigarettes were imported from Indonesia.<sup>56</sup>

2.27 The Panel understands that, although the vast majority of clove cigarettes consumed in the United States appears to come from Indonesia, there was at least one U.S. company, Nat Sherman, that manufactured a clove-flavoured cigarette prior to the entry into force of the FSPTCA.<sup>57</sup>

2.28 As regards cigarettes with other characterizing flavours covered by Section 907(a)(1)(A), there is no evidence of any sizeable market share in the United States prior to the implementation of the ban in 2009.<sup>58</sup>

### 3. International efforts to curb smoking: *The Framework Convention on Tobacco Control*

2.29 During the proceedings the parties have referred to the *Framework Convention on Tobacco Control* ("FCTC"), an international treaty administered by the World Health Organization ("WHO"), as part of the current international efforts to curb smoking.<sup>59</sup> The FCTC was negotiated in response to concerns about a globalized tobacco epidemic, exacerbated by increasing international trade in tobacco and foreign direct investment.<sup>60</sup> The treaty aims to reduce demand and supply of tobacco. It contains national reporting requirements and strategies to facilitate structural adjustment for people whose livelihoods depend on tobacco production. The FCTC entered into force in 2005. At present, there are 172 parties. The United States is a signatory<sup>61</sup> to the FCTC<sup>62</sup> but Indonesia is not.<sup>63</sup>

2.30 A Conference of Parties (COP) is held biennially, which negotiates implementation of the articles of the Convention through the development of guidelines documents or additional Protocols. At the fourth COP held from 15 to 20 November 2010 in Punta del Este, a FCTC Working Group presented a draft document entitled *Partial Guidelines for implementation of Articles 9 and 10 of the Convention* with a view to promoting implementation of Articles 9 ("Regulation of the contents of

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<sup>54</sup> Exhibits US-100 and IND-68. Indonesia submits in response to Panel question No. 80 that it understands the import data for HS 24022010 reported by the U.S. International Trade Commission in Exhibits US-100 and IND-68 to be an accurate representation of clove cigarette exports from Indonesia to the United States. We note that Exhibit IND-68 only contains information on the value of imports expressed in U.S. dollars, while Exhibit US-100 contains information on both the value and number of cigarettes. We are therefore reflecting the figures regarding the number of U.S. imports of clove cigarettes presented in Exhibit US-100.

<sup>55</sup> Exhibits US-100 and US-134.

<sup>56</sup> Indonesia's first written submission, para. 18; United States' first written submission, para. 35; Exhibits US-100 and US-134.

<sup>57</sup> United States' first written submission, para. 35.

<sup>58</sup> Indonesia's response to Panel question No. 17. The United States, in response to Panel question No. 17, submits that it has been unable to attain market share data for all non-clove products banned under Section 907(a)(1)(A).

<sup>59</sup> Indonesia's first written submission, paras. 110-111; Indonesia's response to Panel question Nos. 19 and 97; United States' first written submission, paras. 140-143; United States' second written submission, paras. 7, 13, 20, 143; United States' response to Panel question Nos. 19 and 97.

<sup>60</sup> <http://whqlibdoc.who.int/publications/2003/9241591013.pdf>.

<sup>61</sup> Indonesia submits in para. 110 of its first written submission that the FCTC has been signed but not ratified by the United States.

<sup>62</sup> United States' first written submission, para. 141 and footnote 178; United States' response to Panel question No. 19; Indonesia's first written submission, para. 110.

<sup>63</sup> United States' first written submission, footnote 178.

tobacco products") and 10 ("Regulation of tobacco products disclosures") of the FCTC.<sup>64</sup> The fourth COP adopted the "WHO *Partial Guidelines*", which are non-binding on parties.

2.31 The *Partial Guidelines* provide, among other things, that "[f]rom the perspective of public health, there is no justification for permitting the use of ingredients, such as flavouring agents, which help make tobacco products attractive".<sup>65</sup> The WHO *Partial Guidelines* define "attractiveness" in terms of "factors such as taste, smell or other sensory attributes, ease of use, flexibility of the dosing system, cost, reputation or image, assumed risks and benefits, and other characteristics of a product designed to stimulate use".<sup>66</sup> By way of background to this recommendation, the WHO *Partial Guidelines* state that: "[r]egulating ingredients aimed at reducing tobacco product attractiveness can contribute to reducing the prevalence of tobacco use and dependence among new and continuing users", and that the WHO *Partial Guidelines* "recommend that restrictions apply to as many as possible of the features that make tobacco products more attractive to consumers".<sup>67</sup>

2.32 These WHO *Partial Guidelines* recommend, among other things, that the "[p]arties should regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products".<sup>68</sup> Targeted ingredients include those: (i) that are used to increase palatability; (ii) that have colouring properties; (iii) that are used to create the impression that products have health benefits; and (iv) those associated with energy and vitality. Among the ingredients that increase palatability listed in the WHO *Partial Guidelines* are sweeteners (e.g. glucose, molasses, honey and sorbitol), masking agents (e.g. benzaldehyde, maltol, menthol and vanillin), and spices and herbs (e.g. cinnamon, ginger and mint).

### III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 In its Panel Request, Indonesia requests the Panel to find that Section 907(a)(1)(A) is inconsistent with<sup>69</sup>:

- (a) Article 2.1 of the *TBT Agreement* and, alternatively, Article III:4 of the GATT 1994<sup>70</sup>, because it results in treatment that is less favourable to imported clove cigarettes than that accorded to a like domestic product, menthol cigarettes;
- (b) Article 2.2 of the *TBT Agreement* because it is more trade-restrictive than necessary to fulfil a legitimate objective;
- (c) Article 2.5 of the *TBT Agreement* because the United States did not respond to questions from Indonesia seeking an explanation and justification for the ban

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<sup>64</sup> The text of the draft Guideline, which was adopted without change at the COP, is available online at [http://apps.who.int/gb/fctc/PDF/cop4/FCTC\\_COP4\\_28draft-en.pdf](http://apps.who.int/gb/fctc/PDF/cop4/FCTC_COP4_28draft-en.pdf).

<sup>65</sup> Section 1.2.1.1 ("Attractiveness").

<sup>66</sup> Section 1.3 ("Use of Terms").

<sup>67</sup> Section 3.1.2.1 ("Ingredients - Background").

<sup>68</sup> The text of the draft Guidelines, which was adopted without change at the COP, is available online at [http://apps.who.int/gb/fctc/PDF/cop4/FCTC\\_COP4\\_28draft-en.pdf](http://apps.who.int/gb/fctc/PDF/cop4/FCTC_COP4_28draft-en.pdf).

<sup>69</sup> In its Panel Request, Indonesia presented claims under Article XX of the GATT 1994 and Articles 2, 3, 5 and 7 of the *SPS Agreement*. However, in response to Panel question Nos. 1 and 20, Indonesia clarified that it was not claiming a violation of Article XX of the GATT 1994 and that the measure at issue is not an SPS measure and is thus not subject to the *SPS Agreement*.

<sup>70</sup> In its Panel Request, Indonesia presented the claim under Article III:4 of the GATT 1994 as a main claim. However, in paragraph 69 of its first written submission and in response to Panel question No. 25, Indonesia clarified that its claim under Article III:4 of the GATT 1994 is as an alternative to its national treatment claim under Article 2.1 of the *TBT Agreement*.

submitted during bilateral discussions held 27 August 2009 and through the TBT Committee on 20 August 2009 (G/TBT/W/323);

- (d) Article 2.8 of the *TBT Agreement* because the ban on cigarettes with characterizing flavours is based on descriptive characteristics;
- (e) Article 2.9 of the *TBT Agreement* because the United States did not comply with the requirements of Articles 2.9.1, 2.9.2, 2.9.3, and 2.9.4 of the *TBT Agreement* when adopting a technical regulation that has a significant effect on the trade of Indonesia;
- (f) Article 2.10 of the *TBT Agreement* because, in the event the United States believed there was a justification for not following the procedures in Article 2.9 of the *TBT Agreement*, it did not provide the Secretariat with notification of the measure and the urgent nature of the problem;
- (g) Article 2.12 of the *TBT Agreement* because the United States failed to allow for a reasonable interval of time between the date of publication of the measure and the date that the measure went into effect; and
- (h) Article 12.3 of the *TBT Agreement* because the ban on cigarettes with characterizing flavours created an unnecessary barrier to exports from Indonesia, a developing country.

3.2 The United States requests that the Panel reject Indonesia's claims in their entirety.<sup>71</sup>

#### **IV. ARGUMENTS OF THE PARTIES**

4.1 The arguments of the parties, as set out in their submissions provided to the Panel, are attached to this Report in Annexes A, C and D (See List of Annexes, at pages xv and xvi of this Report).

#### **V. ARGUMENTS OF THE THIRD PARTIES**

5.1 The arguments of the third parties, as set out in their submissions provided to the Panel, are attached to this Report in Annex B (See List of Annexes, at pages xv and xvi of this Report).

#### **VI. INTERIM REVIEW**

##### **A. GENERAL**

6.1 On 27 May 2011, the Panel issued its Interim Report to the parties. On 10 June 2011, Indonesia informed the Panel that it did not intend to request a review of any precise aspects of the Interim Report. The United States did submit a written request for the review of precise aspects of the Interim Report. On 17 June 2011, Indonesia submitted comments on a number of requests for review presented by the United States. Neither party requested an interim review meeting.

6.2 In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out a discussion of the arguments made at the interim review stage. The Panel has modified certain aspects of its Report in the light of the parties' comments wherever it considered appropriate. Finally, the Panel has made a limited number of editorial corrections to the Report for the purposes of clarity and accuracy. References to sections, paragraph numbers and footnotes in this Section VI relate to the

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<sup>71</sup> United States' first written submission, para. 344.

Interim Report. Where appropriate, references to paragraphs and footnotes to the Final Report are included.

B. UNITED STATES' COMMENTS ON THE INTERIM REPORT

1. Factual aspects

6.3 The Panel notes that the United States put forward a number of requests for review of the language in Section II of this Report which had already been subject to the parties' review as part of the Descriptive Part. We note that the United States did not take advantage of the two-week period provided by the Panel to comment on the Descriptive Part in order to suggest those particular changes. Nevertheless, the Panel has decided to accept some of the United States' requests for changes in Section II of this Report in order to ensure the accuracy of the description of the facts in this Report.

6.4 Regarding paragraph 2.13 of the Interim Report, the **United States** suggests to the Panel that the third and fourth sentences be amended to read:

~~"The United States further regulated tobacco products were further regulated over the following decades, but it was not until In the 1990s that the United States intensified its efforts to battle tobacco-related diseases. With that objective in mind, the FDA and the U.S. Congress investigated the U.S. tobacco industry 'concerning the industry's knowledge of, and efforts to conceal, the dangers of cigarettes, as well as their efforts to market cigarettes to children'.[18]"~~

6.5 The United States submits that this change provides greater clarity and accuracy regarding the history of U.S. tobacco regulation. According to the United States, support for such changes may be found in paragraphs 80 and 81 of the United States' first written submission.

6.6 **Indonesia** does not object to the change proposed by the United States.

6.7 The Panel accepts the United States' suggestion and has accordingly amended the language in paragraph 2.13 of the Final Report.

6.8 Regarding paragraph 2.14 of the Interim Report, the **United States** suggests to the Panel that the first two sentences be amended to read:

~~"These investigations led to private litigation against tobacco companies, as well as lawsuits by several states initiated by several U.S. states against the tobacco industry with a view to recovering the tobacco-related costs incurred by the public health system. The outcome of these proceedings was the signature of a By the mid-1990s nearly every state in the United States had brought a lawsuit against the tobacco industry. To settle the litigation, the five largest U.S. tobacco companies (Brown and Williamson Tobacco Corporation, Lorillard Tobacco Company, Phillip Morris Incorporated, RJ Reynolds Tobacco Company and Commonwealth Tobacco Company) signed a Master Settlement Agreement ('MSA') with the states between these States and the five largest U.S. tobacco companies (Brown and Williamson Tobacco Corporation, Lorillard Tobacco Company, Phillip Morris Incorporated, RJ Reynolds Tobacco Company and Commonwealth Tobacco Company)."~~

6.9 The United States submits that this change provides greater clarity and accuracy regarding the history of U.S. tobacco regulation. According to the United States, support for this change may be found in paragraphs 82 and 83 of the United States' first written submission.

6.10 **Indonesia** does not object to the change proposed by the United States.

6.11 The Panel accepts the United States' suggestion and has accordingly amended the language in paragraph 2.14 of the Final Report.

6.12 Regarding paragraph 2.16 of the Interim Report, the **United States** suggests to the Panel that the final sentence be amended to read:

"In 1997, before the regulations were fully implemented, U.S. tobacco companies challenged the FDA's regulatory authority and in 2000 the U.S. Supreme Court invalidated the FDA's rules, finding that the U.S. Congress had not granted the FDA the authority to regulate cigarettes and smokeless tobacco as customarily marketed. [25]"

6.13 The United States submits that this change ensures consistency with other references to the U.S. Congress in the Interim Report.

6.14 **Indonesia** does not object to the change proposed by the United States.

6.15 The Panel accepts the United States' suggestion and has accordingly amended the language in paragraph 2.16 of the Final Report.

6.16 Regarding paragraph 2.21 of the Interim Report, the **United States** suggests to the Panel that the paragraph be amended to read:

"In addition, the FSPTCA regulates marketing by, for example, establishing a range of advertising restrictions and requirements [34], requiring graphic warning labels and other disclosures [35], and by authorizing the FDA to establish additional standards and restrictions related to the labelling, advertising, and promotion of tobacco products. [36]"

6.17 The United States submits that legislation adopted prior to the FSPTCA required certain warning labels on tobacco products and that this change clarifies that the FSPTCA specifically required graphic warning labelling.

6.18 **Indonesia** does not object to the change proposed by the United States.

6.19 The Panel accepts the United States' suggestion and has accordingly amended the language in paragraph 2.21 of the Final Report.

6.20 Regarding paragraph 2.23 of the Interim Report, the **United States** suggests to the Panel that the paragraph be amended to read:

"The March 2011 TPSAC Report, which was delivered to the FDA on 18 March 2011 [42], recommends to the FDA that the '[r]emoval of menthol cigarettes from the marketplace would benefit public health in the United States'. [43] The TPSAC Report also made suggestions for further assessment. The FDA will further consider the recommendations given by the TPSAC. [44]"

6.21 The United States argues that the TPSAC Report linked its recommendation to a discussion of specific areas for further assessment. The United States submits that this change provides greater accuracy and completeness. The United States argues that support for this change may be found in paragraph 12 of the United States' response to Panel question No. 115(a) and in Chapter 8 of the

TPSAC Report (Contraband, Evasion, Illegal production and importation of menthol cigarettes, After Market Mentholation, Potential Menthol Black Market, and Other Considerations).

6.22 **Indonesia** objects to the addition proposed by the United States. In particular, Indonesia argues that the United States could be suggesting that the "further assessment" includes the TPSAC's recommendation to ban menthol. In its view, however, Chapter 8 of the TPSAC Report suggests two areas where further assessment was suggested: (i) the development of a black market for menthol cigarettes depending on what action the FDA pursues in response to the report; and (ii) "gaps in understanding of menthol cigarettes and public health". Indonesia suggests amending the text of paragraph 2.23 as follows:

"The TPSAC Report also ~~made suggestions for~~ further assessment of the potential development of a black market and further research to address gaps in understanding of menthol cigarettes and public health."

6.23 Having considered the comments of both parties, the Panel has inserted in paragraph 2.23 of the Final Report the sentence proposed by the United States and completed the reference in line with Indonesia's comments, following the language used in the TPSAC Report. The sentence in question reads as follows: "The TPSAC Report also made suggestions for further assessment in respect of the contraband of menthol cigarettes and recommended research to address gaps in understanding of menthol cigarettes and public health."

## **2. *Whether Section 907(a)(1)(A) is inconsistent with Article 2.1 of the TBT Agreement***

6.24 Regarding paragraph 7.60 of the Interim Report, the **United States** suggests to the Panel that the final sentence be amended to read:

"In its second written submission, the United States argues that the relevant physical characteristics that differentiate clove cigarettes from menthol and regular cigarettes are: (i) the nearly equal mixture of tobacco and clove; (ii) the 'special sauce' contained in them; and (iii) the ~~existence~~ presence of eugenol.[169]"

6.25 The United States submits that this change provides greater clarity.

6.26 **Indonesia** does not object to the change proposed by the United States.

6.27 The Panel accepts the United States' suggestion and has accordingly amended the language in paragraph 7.60 of the Final Report.

6.28 Regarding paragraph 7.64 of the Interim Report, the **United States** suggests to the Panel that the paragraph be amended to read:

"The United States accuses Indonesia of failing to prove that Indonesian clove cigarettes and regular or menthol cigarettes are viewed as 'interchangeable' in the market, and of presenting unreliable data to suggest that clove cigarettes have a pattern of use similar to tobacco or menthol cigarettes, just on a smaller scale.[183] In fact, in contrast ~~contrary~~ to clove cigarettes, menthol cigarettes are not predominantly a starter cigarette for youth in the United States because they are used by adults in large numbers. [84]"

6.29 The United States submits that this change reflects the nuance in its argument. The United States contends that support for this change may be found in paragraphs 38 and 39 of the United States' response to Panel question No. 91. According to the United States, it maintained that

menthol cigarettes are not "starter" cigarettes in the same way as clove and other flavoured cigarettes given that clove and other flavours are used far more prevalently during the period of initiation than at any other time, while menthol cigarettes are used heavily by adults. The United States argues that it maintained that, notwithstanding, menthol cigarettes, like all cigarettes, can be starter cigarettes for any particular individual.

6.30 **Indonesia** argues that the paragraphs to which the United States refers focus more on the use of clove cigarettes by youth and indicate only with respect to menthol cigarettes that the pattern of use is different, concluding that "rates of use among young people and older adults are much more even." Accordingly, Indonesia requests that the new language proposed by the United States be revised to read:

"In contrast to clove cigarettes, menthol cigarettes are not predominantly a starter cigarette for youth in the United States because rates of use among young people and older adults are much more even."

6.31 Having considered the comments of both parties, the Panel has amended the language in paragraph 7.64 of the Final Report as follows: "In contrast to clove cigarettes, menthol cigarettes are not predominantly a starter cigarette for youth in the United States. According to the United States, rates of use of regular and menthol cigarettes among young people and older adults are much more even."<sup>72</sup>

6.32 Concerning paragraph 7.139 of the Interim Report, the **United States** suggests to the Panel that the first sentence be amended to read:

"However, we disagree with the United States in that the identification of the like domestic product in a panel request merely amounts ~~in all cases~~ to argumentation in this dispute."

6.33 The United States argues that this change clarifies its position. According to the United States, it had argued that the identification of the domestic "like product" is an aspect of the argumentation in support of (or in opposition to) a national treatment claim of a party. The United States contends that it does not consider that "in all cases" the identification of the like domestic product is, necessarily, an aspect of argumentation and not an aspect of the claim itself. The United States argues that support for such a clarification may be found in paragraph 7 of the United States' response to Panel question No. 83.

6.34 **Indonesia** objects to the change suggested by the United States on the grounds that paragraph 7 of the United States' response to Panel question No. 83 does not narrow the United States' contention only to the facts of this dispute.

6.35 Having considered the United States' suggestion and Indonesia's comments thereon, the Panel agrees with Indonesia that paragraph 7 of the response<sup>73</sup> of the United States to Panel question No. 83 does not appear to support the United States' request. On the contrary, the language of the relevant paragraph indicates that the United States was making a general statement that applies in all cases. The Panel therefore declines to include the words "in this dispute" at the end of the relevant sentence.

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<sup>72</sup> United States' response to Panel question No. 91, para. 39.

<sup>73</sup> The relevant paragraph reads:

"The domestic products to be considered in the Article III like product analysis are elements of the disputing parties argumentation in support of (and in opposition to) the national treatment claim, and should be set up in the parties' written and oral submission to the panel. The domestic products being used as the basis for the argument would thus not constitute part of the panel's terms of reference."



Nevertheless, the Panel has deleted the words "in all cases" in order to better reflect the language in paragraph 7 of the relevant response. The relevant sentence of paragraph 7.139 of the Final Report reads as follows: "However, we disagree with the United States in that the identification of the like domestic product in a panel request merely amounts to argumentation".

6.36 Regarding paragraph 7.170 of the Interim Report, the **United States** suggests to the Panel that the second sentence be amended to read:

"Indonesia submits that menthol cigarettes also have their own flavouring agents, which are referred to as 'sauce' or 'casing'.<sup>[366]</sup> In this regard, the United States argues that the special sauce used by Indonesian clove cigarettes is not the same 'casing' used in all cigarettes, including menthol cigarettes <sup>[367]</sup>, because clove cigarette manufacturers specifically design and market the sauce for its unique appeal whereas manufacturers of menthol and regular cigarettes do not."

6.37 The United States submits that this change clarifies that it had argued that the differences between the "casing" of regular or menthol cigarettes and the "special sauce" in clove cigarette include the "special sauce" that is part of the marketing and unique appeal of clove cigarettes. The United States argues that support for this change may be found in paragraph 19 of the United States' response to Panel question No. 87.

6.38 **Indonesia** objects to the change proposed by the United States. In its view, paragraph 19 says nothing about marketing and nothing about menthol or regular cigarettes. Indonesia contends that there is no evidence in the record to support the United States' claim that menthol and regular cigarette manufacturers do not market the taste or flavour achieved by the casing or flavourings used in regular and menthol cigarettes. To more accurately reflect paragraph 19 of the United States' response to Panel question No. 87, Indonesia suggests the following language replacing that proposed by the United States: "because clove cigarette manufactures use a special recipe essential to the specific flavor of clove cigarettes."

6.39 Having considered the United States' suggestion and Indonesia's comments thereon, the Panel is of the view that paragraph 19 of the United States' response to Panel question No. 87<sup>74</sup> does not contain the language proposed by the United States. The Panel therefore declines to make the change suggested by the United States, but has nevertheless added the following language from that response to the text of paragraph 7.170 of the Final Report: "The United States explains that the flavour imparted by the sauce is part of the essential flavour and identity of the products."

6.40 Regarding paragraph 7.183 of the Interim Report, the **United States** suggests to the Panel that the paragraph be amended to read:

"As regards the toxicity, both parties agree that all of these cigarettes are harmful to health and may cause death. Both parties initially agreed that their relative toxicity is not an issue in this dispute. However, ~~In addition,~~ the United States appears to have changed its position in its second written submission, where it has maintained that certain additives contained in clove cigarettes, such as eugenol and coumarin, are uniquely harmful to health. <sup>[386]</sup>"

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<sup>74</sup> Paragraph 19 reads as follows:

"The sauce used in clove cigarettes is not a generic 'casing' – it is a special recipe essential to the specific flavor of clove cigarettes. Nor is there any evidence that the description of the special sauce added to clove cigarettes is merely a transient or temporary marketing strategy;<sup>74</sup> rather, the flavor imparted by the sauce is part of the essential flavor and identity of the products. Indonesia has not presented evidence as to the ingredients and flavor of the sauce to rebut what its own industry contends."

6.41 The United States submits that this change clarifies its position throughout the proceedings. The United States argues that support for this change may be found in paragraphs 164 and 166 of the United States' first written submission. According to the United States, it consistently argued, including in its first submission, that all cigarettes are harmful and may cause death but that clove cigarettes also pose unique risks for health. The United States contends that it elaborated upon the unique risks for health of clove cigarettes in rebuttal to the arguments of Indonesia and in response to questions from the Panel. According to the United States, in doing so, it did not change its position.

6.42 **Indonesia** objects to the change suggested by the United States. In particular, Indonesia notes that the addition of the word "uniquely" is not supported by the text referenced in the United States' first written submission. For Indonesia, evidence provided by both parties demonstrates that the effect of numbing the throat is not unique to the eugenol in clove cigarettes as menthol has this same property and coumarin is not specifically banned as an additive from cigarettes. Indonesia refers to footnote 210 of the United States' first written submission, Exhibit US-73 at 705 and 708, and Exhibit IND-21, as support for its position.

6.43 Having considered the United States' suggestions and Indonesia's comments thereon, the Panel declines to make the changes proposed by the United States. The Panel is of the view that the language in paragraph 7.183 of the Final Report correctly reflects the argumentation presented by the United States.

6.44 Regarding paragraph 7.203 of the Interim Report, the **United States** suggests to the Panel that the paragraph be amended to read:

"The United States considers that the relevant consumers are all the potential and current smokers in the United States and defines 'potential' consumers as young people within the age of initiation. The United States defines 'current' smokers as including older adults. The United States submits that patterns of use by both young people within the age window of initiation and older adults should be evaluated and considered in the 'consumer tastes and habits' criterion of the like product analysis, and in relationship to the public health basis for the measure."

6.45 The United States argues that this change provides a more complete summary of its argument related to relevant consumers for purposes of the analysis of the like product. The United States submits that support for this change may be found in paragraph 42 of the United States' response to Panel question No. 92 and paragraph 17 of in the United States' comments on Indonesia's response to Panel question No. 92. According to the United States, its argument concerning the relevance of "current" consumers, including adults, in the analysis of the like product is as important as its argument concerning "potential consumers".

6.46 **Indonesia** objects to the change proposed by the United States. In particular, Indonesia contends that the paragraphs cited by the United States in support of the suggested change do not contain the definition of "current" smokers proposed by the United States. In its view, both the initial response from the United States and its comments on Indonesia's response emphasized the need to include "potential" consumers, as reflected in the Panel's Report.

6.47 Having considered the United States' suggestion and Indonesia's comments thereon, the Panel agrees with Indonesia that the paragraphs referenced by the United States do not include a definition of "current smokers". We do however agree with the United States in that it has argued the relevance of the patterns of use in the likeness analysis, in particular, under the 'consumer tastes and habits' criterion. The Panel has therefore added the following sentence to the text of paragraph 7.203 of the Final Report: "The United States submits that the patterns of use as between young people in the window of initiation and older, regular smokers should be evaluated and considered in the consumer

tastes and habits criterion of the like product analysis, and in relation to the public health basis for the measure."

6.48 Regarding paragraph 7.272 of the Interim Report, the **United States** suggests to the Panel that the paragraph be divided into two paragraphs and be amended to read:

"According to the United States, the Panel should compare the treatment accorded to all imported cigarettes (to the extent that they are like), and not just clove cigarettes, with the treatment accorded to all domestically-produced cigarettes (to the extent that they are like). From this point of view, the United States emphasizes that Section 907(a)(1)(A) applies to both imported and domestic cigarettes with characterizing flavours, which comprise a small category of cigarettes in general. At the same time, the ban does not apply to regular and menthol cigarettes of any origin, including regular cigarettes imported from Indonesia, and both imported and domestic menthol cigarettes.

[New Paragraph 7.273]

In ~~its~~the United States' view, Indonesia is incorrect that Section 907(a)(1)(A) accords less favourable treatment 'if one Indonesian import is included among the prohibited characterizing flavours and one U.S. produced cigarette is not'.<sup>[494]</sup> For the United States, the "best treatment" approach advocated by Indonesia is inconsistent with the language of Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement. Rather, it submits, as established by the Appellate Body in *EC - Asbestos*, the relevant comparison is between the group of 'like' imported products and the group of 'like' domestic products. <sup>[495]</sup> According to the United States, the Appellate Body recognized that a Member may draw distinctions between products determined to be 'like' without affording protection to domestic production or according less favourable treatment to imported products. <sup>[496]</sup>"

6.49 The United States submits that this change clarifies its position. The United States submits that support for this change may be found in paragraphs 54-56 of the United States' opening oral statement at the second substantive meeting of the Panel. According to the United States, it argued that the treatment of all products determined to be "like" – including both imported and domestic – provides relevant evidence to the less favourable treatment analysis. The United States contends that it argued that the Panel should consider regular tobacco cigarettes imported from Indonesia, as well as menthol cigarettes which are imported, and other flavoured cigarettes from any origin.

6.50 **Indonesia** does not object to the change suggested by the United States.

6.51 The Panel accepts the change proposed by the United States and has amended the language in paragraph 7.272 of the Final Report accordingly. The Panel however prefers to keep one single paragraph.

6.52 Regarding paragraph 7.289 of the Interim Report, the **United States** suggests to the Panel that the second sentence be amended to read:

"The United States has told this Panel that it was not including menthol cigarettes, which we have found to be like to clove cigarettes for the purpose of Article 2.1 of the TBT Agreement, because ~~of~~ doing so without further assessment would not be appropriate for the public health, because of issues including the potential impact on ~~its~~the health care system and the potential development of a black market and smuggling ~~of~~ menthol cigarettes. <sup>[518]</sup>"

6.53 The United States argues that this change reflects more accurately its position. The United States argues that support this change may be found in paragraphs 107-110 of the United States' first written submission, paragraphs 9 to 32 of the United States' second written submission, and paragraphs 34 and 35 of the United States' response to Panel question No. 92(b). According to the United States, it argued that it would be inappropriate to ban menthol without further assessment, given that banning such a heavily used, addictive product could have negative consequences for the public health and be unachievable, unfeasible or ineffective.

6.54 **Indonesia** objects to the change suggested by the United States. Indonesia first points out that the United States' citation in support of its view is incorrect as it believes that the relevant question on this subject is Panel question No. 90(b), not 92(b). Second, Indonesia contends that none of the sources to which the United States refers the Panel in support of its proposed new language discusses the possibility of banning menthol cigarettes subject to "any further assessment." In its view, the sections of the U.S. submissions referred to by the United States defend the approach contained in Section 907 and attempt to provide a justification for exempting menthol cigarettes. The United States' response to Panel question No. 90(b) indicates that this decision was the result of "pragmatic, reasonable weighing." For Indonesia, none of the U.S. statements referenced by the United States, including its response to Panel question No. 90(b), paragraph 34, give any indication that the ban on flavourings would be re-evaluated and potentially expanded to include menthol after "further assessment." In fact, it submits, paragraph 53 indicates that it was "not feasible" and there was no intention of banning most cigarettes. As a result, the Panel should not accept the addition of the phrase, "doing so without further assessment would not be appropriate for the public health, because of issues including."

6.55 Having considered the United States' suggestion and Indonesia's comments thereon, the Panel accepts the change proposed by the United States and accordingly amends paragraph 7.289 of the Final Report. In the Panel's view, Indonesia is not correct in arguing that the United States has not referred to the need for further assessment in respect of menthol cigarettes in its submissions. In particular, we note that paragraph 34 of the United States' first written submission reads: "The United States further argued that "[a]lthough menthol cigarettes are not banned, they are, like all cigarettes, unquestionably harmful products. The general public's use of menthol cigarettes, and the methods of advertising and marketing of the product by cigarette companies, remain a significant concern of Congress, FDA, as well as health advocates, and continues to be the subject of intense study in the United States. In particular, Congress, in Section 907(e) of the FSPTCA, instructed a statutorily-created committee, the Tobacco Products Scientific Advisory Committee ("TPSAC"), to 'issue a report and recommendation on the issue of the impact of the use of menthol in cigarettes on the public health, including such use among children, African-Americans, Hispanics, and other racial and ethnic minorities.' TPSAC's review of the issue is ongoing." Furthermore, in paragraphs 21 and 23 of its second written submission, the United States argues that "the prohibition of the heavily-used tobacco and menthol flavoured products may cause negative consequences" and that it "assign[ed] menthol-flavored cigarettes to intensive study by the TPSAC to better understand the public health issues related to possible future restrictions". However, Indonesia is correct that the United States wrongly referred to paragraphs 34 and 35 of the United States' response to Panel question No. 92(b). It should be paragraphs 34 and 35 of the United States' response to Panel question No. 90(b).

### **3. Whether Section 907(a)(1)(A) is inconsistent with Article 2.2 of the TBT Agreement**

6.56 Regarding paragraph 7.319 of the Interim Report, the **United States** suggests to the Panel that footnote 584 be amended to read:

"The Panel notes that the United States has argued that its position that the objective of Section 907(a)(1)(A) includes the consideration of negative consequences for the public health is supported by the text of section 907(a)(1)(A) itself, as well as other

provisions of section 907, including section 907(b)(2). As the United States has discussed, section 907(b)(2) requires FDA to consider the negative consequences of any proposed new tobacco product standard, or proposed revision to or revocation of an existing standard, prior to approving, revising, or revoking such a standard. United States' response to Panel question Nos. 60, 100."

6.57 The United States argues that this change summarizes more accurately its position regarding the objective of Section 907(a)(1)(A). According to the United States, not only the text of Section 907(a)(1)(A), but also other provisions of Section 907 support its position whereby the objective includes the consideration of negative consequences.

6.58 **Indonesia** does not object to the change proposed by the United States.

6.59 The Panel agrees that the additional text proposed by the United States would more accurately summarize its position on what the objective of Section 907(a)(1)(A) is. Accordingly, the Panel has made this change to footnote 588 of the Final Report.

6.60 Regarding paragraph 7.321 of the Interim Report, the **United States** suggests to the Panel that footnote 590 be amended to read:

"The United States understands that the complaining party does not establish a breach of Article 2.2 by proving the existence of an alternative measure that fulfills the importing Member's legitimate objective at the level the Member considers appropriate that is less trade restrictive, but only by a de minimis amount. See U.S. First Written Submission, para. 263 (citing to Letter from Peter D. Sutherland, Director-General of the GATT, to Ambassador John Schmidt, Chief U.S. Negotiator (December 15, 1993), Exhibit US-79). However, as all of the alternative measures that Indonesia has offered do not ban trade in any flavoured cigarettes, the United States considers that the issue of whether Article 2.2 embodies a 'significantly less trade-restrictive' standard would 'not appear to arise in this dispute.' United States' response to Panel question No. 57, para. 130."

6.61 The United States argues that this change summarizes more accurately its argument.

6.62 **Indonesia** does not object to the change proposed by the United States.

6.63 The Panel agrees that the additional text proposed by the United States would more accurately summarize its argument. Accordingly, the Panel has made this change to footnote 594 of the Final Report.

6.64 Regarding paragraphs 7.362 and 7.363 of the Interim Report, the **United States** suggests to the Panel that the following language be inserted following the second sentence of paragraph 7.363:

"The United States further notes that while Article XX(b) focuses on whether a measure is necessary to protect human, animal, or plant life or health, Article 2.2 applies more broadly to any legitimate objective, and focuses on whether the degree of trade restriction is necessary rather than whether the measure is necessary to fulfill an objective. One way in which these examples are significant is that not only those technical regulations that can be considered 'necessary' are consistent with the requirements of Article 2.2. In the U.S. view, Article 2.2 does not limit a Member's ability to apply technical regulations that the Member considers desirable rather than necessary. In addition, and we noted above, [Interim Report, paragraph 7.323] the United States argued that these differences mean that the 'material contribution'

element of the Article XX(b) jurisprudence is not part of the Article 2.2 analysis. Rather, the test of Article 2.2 is different – whether the measure is more trade restrictive than necessary to achieve the legitimate objective at the level sought by the Member."

6.65 The United States argues that this change ensures that its argument is accurately presented. The United States submits that support for this change may be found in the United States' response to Panel question No. 103(a), paragraphs 78-79, the United States' second written submission, paragraphs 181-182 and the United States' response to Panel question No. 55, paragraphs 121-125.

6.66 The United States disagrees with the Panel's statement, in paragraph 7.362, that "the United States has not actually identified any significant differences between the tests that have been developed under Article XX(b) of the GATT 1994 and Article 5.6 of the *SPS Agreement*, or any aspect of the Article XX(b) jurisprudence relating to the interpretation of the term 'necessary' that would be inapplicable to Article 2.2 of the TBT Agreement." The United States argues that it has. For example, while both Articles XX(b) of the GATT 1994 and 2.2 of the *TBT Agreement* use the term "necessary", the remainder of the two provisions are very different. According to the United States, the use of one word in common is not enough to indicate that it is appropriate to apply interpretative concepts which are used in one context in the other one. The United States contends that Article XX(b) of the GATT 1994 focuses on whether a measure is necessary to protect human, animal, or plant life or health. Article 2.2 of the *TBT Agreement* applies more broadly to any legitimate objective, and focuses on whether the degree of trade restriction is necessary rather than whether the measure is necessary to fulfil an objective. According to the United States, not only those technical regulations that can be considered "necessary" are consistent with the requirements of Article 2.2 of the *TBT Agreement*. The United States argues that Article 2.2 of the *TBT Agreement* does not limit the ability of a Member to apply technical regulations that it holds desirable rather than necessary. Additionally, and as acknowledged in paragraph 7.323 of the Interim Report, the United States submits that it argued that such differences mean that the "material contribution" element of the jurisprudence on Article XX(b) of the GATT 1994 is not part of the analysis concerning Article 2.2 of the *TBT Agreement*. Instead, according to the United States, the test of Article 2.2 of the *TBT Agreement* is different: whether a measure is more trade restrictive than necessary to achieve the legitimate objective at the level sought by the Member.

6.67 **Indonesia** does not object to the change proposed by the United States.

6.68 The Panel understands the United States to be requesting the addition of new language in paragraph 7.363 to reflect its argument that the question under Article XX(b) of the GATT 1994 is whether the *measure itself* is necessary, whereas under Article 2.2 the question is whether the *degree of trade-restrictiveness* is necessary. The Panel agrees with the United States that this U.S. argument could be more clearly reflected in the Report. However, the Panel considers that inserting the additional text suggested by the United States following the first sentence of paragraph 7.363 could create some confusion as to which argument the Panel is responding to in the remaining part of paragraph 7.363. Accordingly, the Panel has added the following new text to existing footnote 662 of the Final Report in order to reflect and respond to this U.S. argument:

"Based on this difference in wording between Article XX(b) of the GATT 1994 and Article 2.2 of the *TBT Agreement*, the United States further argues that there is another significant difference between these provisions, which is that the question under Article XX(b) is whether the *measure itself* is necessary, whereas under Article 2.2 the question is whether the *degree of trade-restrictiveness* is necessary (United States' second written submission, para. 181; United States' response to Panel question No. 55, para. 123). We agree with the United States that Article XX(b) is drafted in terms of whether the trade-restrictive measure is necessary to fulfil its

objective, whereas Article 2.2 is drafted in terms of whether the degree of trade-restrictiveness of that measure is necessary to fulfil its objective. However, the United States has not explained why or how an analysis framed in terms of the necessity of the 'trade-restrictiveness' of a trade-restrictive measure would be significantly different from an analysis framed in terms of the necessity of that trade-restrictive measure. For example, the United States' arguments in this case suggest that a Panel analysing the necessity of the *degree of trade-restrictiveness* of a trade-restrictive measure under Article 2.2 (as opposed to the necessity of a trade-restrictive *measure*) would still need to consider the extent to which that *measure* makes a 'contribution' to its objective. In this regard, we recall that the United States recognizes that '[w]hile Article 2.2 does not require that the measure fulfill its objective, it is difficult to believe that a measure fails to fulfill its objective completely – that is to say, a measure that does not even make a marginal contribution to its objective – could be found consistent with Article 2.2.' (United States' response to Panel question No. 103(a))."

6.69 Regarding paragraph 7.365 of the Interim Report, the **United States** suggests to the Panel that a new footnote at the end of the first sentence be added to read:

"New footnote 661:

The Panel notes that the United States further contends that the 1993 letter from Peter D. Sutherland, Director-General of the GATT, to Ambassador John Schmidt, Chief U.S. Negotiator, Exhibit US-79, provides additional support, as a supplemental means of interpretation under Article 32 of the Vienna Convention, that TBT Article 2.2 should be interpreted similarly to SPS Article 5.6, specifically that a measure cannot be considered more trade-restrictive than necessary in the absence of a reasonably available alternative measure that is significantly less-trade restrictive."

6.70 The United States argues that this change summarizes more accurately its argument. The United States contends that support for such changes may be found in the United States' second written submission, paragraph 178.

6.71 According to the United States, the letter of the 1993 GATT Director-General (Exhibit US-79) offers additional support, as supplementary means of interpretation under Article 32 of the VCLT, that Article 2.2 of the *TBT Agreement* should be interpreted similarly to Article 5.6 of the *SPS Agreement*, and, more in detail, that a measure cannot be considered more trade-restrictive than necessary without a reasonably available alternative measure that is significantly less-trade restrictive.

6.72 **Indonesia** does not object to the change proposed by the United States.

6.73 The Panel agrees that the additional text proposed by the United States would more accurately summarize its argument. Accordingly, the Panel has added a new footnote 665 at the end of the first sentence of paragraph 7.365 of the Final Report containing the text proposed by the United States.

6.74 Regarding paragraph 7.392 of the Interim Report, the **United States** suggests to the Panel that the paragraph be amended to read:

"Accordingly, we do not consider that the survey data ~~numbers~~ provided by Indonesia offer a sufficient ~~very solid~~ basis for determining that ~~whether~~ the ban on clove cigarettes does not makes a material contribution to the objective of reducing youth smoking."

6.75 The United States submits that this change is needed because the Panel found that Indonesia's own evidence establishes that clove cigarettes are disproportionately used by people aged 17 and younger (see e.g. paragraphs 7.390-7.391 of the Interim Report) and to ensure that the statement of the Panel is not misread on this point.

6.76 **Indonesia** does not object to the change proposed by the United States.

6.77 The Panel agrees with the United States that the statement contained in paragraph 7.392 of the Interim Report could be misread. For the sake of greater clarity, the Panel has amended the language in paragraph 7.392 of the Final Report in the manner proposed by the United States.

6.78 Regarding paragraph 7.426 of the Interim Report, the **United States** suggests to the Panel that the final sentence be amended to read:

"More importantly, however, is that it is not clear that the laws implemented to date by other countries should serve as some kind of benchmark for the United States or any other sovereign WTO Member, particularly where Indonesia has not established the objectives of these foreign measures and at what level those measures fulfill their respective objectives, and whether the objectives of the foreign measures are the same as the U.S. objective and that the foreign countries seek to achieve that objective at the same level the United States does."

6.79 The United States argues that Panel's argumentation in paragraph 7.426 is well founded. The United States submits that this change improves the argumentation by offering a more explicit explanation concerning why this is so in this case.

6.80 **Indonesia** does not object to the change proposed by the United States.

6.81 The Panel considers that the additional language proposed by the United States is helpful in explaining the point being made in the final sentence of paragraph 7.426. Accordingly, the Panel has amended paragraph 7.426 of the Final Report as proposed by the United States.

#### **4. Whether the United States has acted inconsistently with Article 12.3 of the TBT Agreement**

6.82 Regarding paragraph 7.608 of the Interim Report, the **United States** suggests to the Panel that the first sentence be amended to read:

~~"As to The United States submits that the as regards the legal standard at issue, the United States submits that it is not sufficient for Indonesia to simply say that "something" more than what the United States has done is required. Indonesia will only say that "something" more than what the United States has done is required, without explaining what that "something" more is exactly. [993] It is not sufficient to simply say that "something" more than what the United States has done is required. [994]"~~

6.83 The United States argues that this change corrects a possible mistake in the first sentence and more effectively reflects its argument.

6.84 **Indonesia** does not object to the change proposed by the United States.

6.85 The Panel agrees with the United States' drafting suggestion. Accordingly, the Panel has made this change to paragraph 7.608 of the Final Report.



6.86 Also regarding paragraph 7.608 of the Interim Report, the **United States** suggests to the Panel that footnotes 993 and 994 be combined to read:

"Footnote 993

United States' oral statement at the second substantive meeting of the Panel, para. 106; United States' response to Panel question No. 112, para. 118.

Footnote 994

~~United States' response to Panel question No. 112, para. 118."~~

6.87 The United States argues that this change is needed in connection with the suggested modification to paragraph 7.608.

6.88 **Indonesia** does not object to the change proposed by the United States.

6.89 The Panel accepts the change proposed by the United States and has combined both footnotes into footnote 998 to paragraph 7.608 of the Final Report.

## 5. Miscellaneous

6.90 In addition to the substantive comments presented above, the United States offered two typographical suggestions. The Panel has accommodated the United States' suggestions.

## VII. FINDINGS

### A. INTRODUCTION

7.1 This dispute concerns Section 907(a)(1)(A)<sup>75</sup>, a tobacco-control measure adopted by the United States for reasons of public health. Cigarettes are inherently harmful to human health, as recognized by the WHO, the scientific community and both parties to this dispute.

7.2 At the outset, this Panel would like to emphasize that measures to protect public health are of the utmost importance, and that the WTO Agreements fully recognize and respect the sovereign right of Members to regulate in response to legitimate public health concerns.

7.3 We note that the WTO seeks to promote general well-being through trade liberalization and recognizes the right of WTO Members to adopt measures to protect public health. In fact, WTO Members have a large measure of autonomy to determine their own policies to protect human health. This autonomy is only circumscribed by the need to ensure that the *means* chosen for realizing those policies are consistent with WTO rules. These rules require Members to ensure that those means be non-discriminatory, and otherwise in accordance with the provisions of the WTO Agreements. The sixth preambular recital of the *TBT Agreement* is explicit in this regard:

*"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*

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<sup>75</sup> See Section II.B above.

countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement".

7.4 The importance of public health was also highlighted by WTO Members in the Ministerial Declaration launching the Doha Round, in which Ministers underscored that WTO rules do not prevent Members from taking measures for the protection of human health subject to complying with the WTO Agreements.<sup>76</sup>

7.5 Furthermore, we are aware of the important international efforts to curb smoking within the context of the WHO FCTC and its WHO *Partial Guidelines*.<sup>77</sup>

7.6 The task before us is to objectively assess whether Section 907(a)(1)(A) is in conformity with U.S. obligations pursuant to the provisions of the WTO Agreements within our terms of reference. We recall the words of the Appellate Body when it acknowledged that the objective of preserving human life and health "is both vital and important in the highest degree"<sup>78</sup>, and that "few interests are more 'vital' and 'important' than protecting human beings from health risks".<sup>79</sup>

## B. ORDER OF ANALYSIS

7.7 Before commencing our analysis of Indonesia's legal claims, we would like to explain our decision to follow a certain order of analysis.

7.8 If we examine Indonesia's Panel Request, we observe that Indonesia puts forward claims under Articles III:4 and XX of the GATT 1994, Articles 2.1, 2.2, 2.5, 2.8, 2.9 (including 2.9.1, 2.9.2, 2.9.3, and 2.9.4), 2.10, 2.12 and 12.3 of the *TBT Agreement* and, conditionally upon the United States asserting that Section 907(a)(1)(A) is an SPS measure, Articles 2, 3, 5 and 7 of the *SPS Agreement*.<sup>80</sup>

7.9 In its first written submission, though, Indonesia clarified that its claim under Article III:4 of the GATT 1994 is an alternative claim to that under Article 2.1 of the *TBT Agreement*.<sup>81</sup> It further explained that its claim under Article XX of the GATT 1994 was a rebuttal of a potential defence by the United States.<sup>82</sup> In addition, no analysis or request for findings was made in respect of its conditional SPS claims.

7.10 In response to a number of questions posed by this Panel aimed at clarifying the scope of its mandate, and in later submissions, Indonesia confirmed that: (i) its claim under Article III:4 of the GATT 1994 is as an alternative to its national treatment claim under Article 2.1 of the *TBT Agreement*; (ii) it is not claiming a violation of Article XX of the GATT 1994 by the United States; and (iii) it believes the measure is a technical regulation subject to the *TBT Agreement*, not an SPS measure subject to the *SPS Agreement*.<sup>83</sup>

7.11 Additionally, we also observed that while in its Panel Request Indonesia brought claims under Articles 2.9.1, 2.9.2, 2.9.3 and 2.9.4 of the *TBT Agreement*, subsequently it only presented arguments and evidence with respect to its claims under Articles 2.9.2 and 2.9.3 of the *TBT Agreement*. We

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<sup>76</sup> Doha Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, para. 6.

<sup>77</sup> See Section ILC.3 above.

<sup>78</sup> Appellate Body Report, *EC – Asbestos*, para. 172.

<sup>79</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 144 (footnotes omitted).

<sup>80</sup> WT/DS406/2.

<sup>81</sup> Indonesia's first written submission, para. 69.

<sup>82</sup> Indonesia's first written submission, paras. 114-127, and, in particular, para. 115.

<sup>83</sup> Indonesia's responses to Panel question Nos. 1, 20 and 25.

therefore understand Indonesia to have abandoned its claims under Articles 2.9.1 and 2.9.4 of the *TBT Agreement* and we will thus not examine them.<sup>84</sup>

7.12 The question before us therefore is whether there is a particular sequencing of the legal claims that should be followed in examining Indonesia's claims. Further to the Appellate Body Report in *US – Zeroing (EC) (Article 21.5 – EC)*, we understand that panels are not bound by the order of claims made by the complainant. As put by the Appellate Body, "in fulfilling its duties under Article 11 of the DSU, a panel may depart from the sequential order suggested by the complaining party, in particular, when this is required by the correct interpretation or application of the legal provisions at issue".<sup>85</sup> Nevertheless, it is customary for panels to follow the order of the claims presented by the complainant, unless they believe it inappropriate.

7.13 We recall that the panel in *India – Autos* explained that it is important to first consider if a particular order is compelled by principles of valid interpretative methodology, which, if not followed, might constitute an error of law.<sup>86</sup> That panel also pointed out that the order selected for examination of the claims may also have an impact on the potential to apply judicial economy.<sup>87</sup> For the Appellate Body, it is the nature of the relationship between the provisions that will determine in each case whether there is a prescribed order of analysis.<sup>88</sup>

7.14 As the United States has not asserted that Section 907(a)(1)(A) is an SPS measure and Indonesia refrained from arguing its SPS claims, we will not examine them. Hence, we do not need to decide between Indonesia's SPS and TBT claims as the starting point of our analysis.<sup>89</sup> In addition, given that Indonesia's claim under Article III:4 of the GATT 1994 is an alternative claim to that under Article 2.1 of the *TBT Agreement*, there is no issue as to which covered agreement, the *TBT Agreement* or the GATT 1994, must be addressed first.

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<sup>84</sup> We note that previous panels have followed a similar approach in respect of abandoned claims. See e.g. Panel Report, *India – Additional Import Duties*, paras. 7.402-7.405; Panel Report, *Egypt – Steel Rebar*, para. 7.30; Panel Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, fn 16.

<sup>85</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 277.

<sup>86</sup> Panel Report, *India – Autos*, para. 7.154. Panel Report, *EC – Sardines*, paras. 7.17-7.18.

<sup>87</sup> Panel Report, *India – Autos*, para. 7.161.

<sup>88</sup> The Appellate Body found:

"Thus, in each case it is the nature of the relationship between two provisions that will determine whether there exists a mandatory sequence of analysis which, if not followed, would amount to an error of law. In some cases, this relationship is such that a failure to structure the analysis in the proper logical sequence will have repercussions for the substance of the analysis itself."

Appellate Body Report in *Canada – Wheat Exports and Grain Imports*, para. 109.

The Appellate Body further stated:

"At the same time, panels must ensure that they proceed on the basis of a properly structured analysis to interpret the substantive provisions at issue. As the Appellate Body found in *US – Shrimp* and *Canada – Autos*, panels that ignore or jump over a prior logical step of the analysis run the risk of compromising or invalidating later findings. This risk is compounded in the case of two legally interrelated provisions, where one of those provisions must, as a matter of logic and analytical coherence, be analyzed before the other, as is the case with subparagraphs (a) and (b) of Article XVII:1 of the GATT 1994."

Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 127.

<sup>89</sup> If Indonesia's SPS claims were to be examined by this Panel, the first threshold issue would have been whether the Panel should start its analysis by Indonesia's conditional SPS claims or rather by Indonesia's TBT claims. Indeed, whether the measure at issue is an SPS measure would have been of particular relevance in deciding the order of analysis in this dispute because Article 1.5 of the *TBT Agreement* specifically provides that SPS measures, as defined in Annex A of the *SPS Agreement*, are *excluded* from the scope of the *TBT Agreement*. Panel Report, *EC – Asbestos*, para. 8.29.

7.15 There is nevertheless a threshold issue that we must address before entering into an examination of Indonesia's claims under the *TBT Agreement*. Indeed, we need to consider whether the *TBT Agreement* applies to Section 907(a)(1)(A). We note that Indonesia argued that Section 907(a)(1)(A) is a technical regulation. We shall therefore begin by examining whether Section 907(a)(1)(A) is a "technical regulation" within the meaning of Annex 1.1 of the *TBT Agreement* and thus whether the obligations embodied in Indonesia's claims under the *TBT Agreement* apply.

7.16 If we find that Section 907(a)(1)(A) is a technical regulation, we will proceed to examine the claims presented by Indonesia under the *TBT Agreement*, starting with Indonesia's claim under Article 2.1 of the *TBT Agreement*. If we do not make a finding of violation under that provision, we shall examine the alternative claim pursuant to Article III:4 of the GATT 1994.<sup>90</sup> If we do make a finding of violation, we will proceed with our examination of the remainder of Indonesia's claims under the *TBT Agreement* in numerical order.

7.17 We will however make an exception to that numerical order with our examination of Articles 2.9.2 and 2.9.3, and 2.10 of the *TBT Agreement*, as we will first examine Indonesia's claim pursuant to Article 2.10 of the *TBT Agreement*. As we will explain in more detail in Section VII.I.2 below, Article 2.10 of the *TBT Agreement* applies only when a Member is departing from the general obligations established in Article 2.9 of the *TBT Agreement*. We will therefore first examine whether the conditions of urgency described in Article 2.10 are present in this dispute and, if we find that these conditions are not present, we will continue and examine Indonesia's claims under Articles 2.9.2 and 2.9.3 of the *TBT Agreement*.

7.18 Finally, we note that Indonesia made certain statements to the effect that Section 907(a)(1)(A) violates the above-mentioned provisions of the *TBT Agreement* and the GATT 1994 "both on its face and as applied".<sup>91</sup> The Panel attempted to clarify Indonesia's position in this respect as those statements could be understood to mean that Indonesia is advancing both "as such" and "as applied" claims in respect of Section 907(a)(1)(A).<sup>92</sup> Notwithstanding, Indonesia has not clearly explained to us how its "as applied" claims would differ, if at all, from its "as such" claims.<sup>93</sup> Indeed, we are unable to identify anything in Indonesia's argumentation that relates to Section 907(a)(1)(A) "as applied", as distinguished from its "as such" claims pertaining to Section 907(a)(1)(A). We ourselves are unable to see how the "as such"/"as applied" distinction is of importance in the present case.<sup>94</sup>

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<sup>90</sup> We note that both parties have followed different approaches to the order of analysis of Indonesia's claims under Article 2.1 of the *TBT Agreement* and Article III:4 of the GATT 1994. Indonesia first addressed Article 2.1 of the *TBT Agreement*, followed by, in the alternative, Article III:4 of the GATT 1994; the United States commenced its argumentation in its first written submission by looking at Article III:4 of the GATT 1994, without referring to the fact that Indonesia is presenting this claim as an alternative to that under Article 2.1 of the *TBT Agreement*. The United States' reasoning was that Article III:4 has been more fully elaborated by previous panels and the Appellate Body than Article 2.1 of the *TBT Agreement*. It did analyse Article 2.1 of the *TBT Agreement* briefly thereafter and had a common conclusion on "the national treatment claims". To follow suit, Indonesia's second written submission, although it commences with Article 2.1 of the *TBT Agreement*, nevertheless rebuts most of the U.S. arguments within the section dedicated to Article III:4. In its second written submission, though, the United States addresses both claims at the same time.

<sup>91</sup> See, for example, Indonesia's first written submission, paras. 43, 127 and 149.

<sup>92</sup> Panel question Nos. 2, 3 and 82.

<sup>93</sup> The Panel put two questions to Indonesia asking it to explain how its "as applied" claims differ from its "as such" claims. In its responses, Indonesia explained how an "as applied" claim differs from an "as such" claim. Indonesia's responses to Panel question Nos. 2 and 82. However, we are still unclear on whether and if so how *its* "as applied" claims differ from *its* "as such" claims in *this* dispute.

<sup>94</sup> The Appellate Body has explained that "the import of the 'mandatory/discretionary distinction' may vary from case to case". Appellate Body Report, *US – Zeroing (EC) (Article 21.5-EC)*, para. 214, citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93. The panel in *US – Tyres (China)* explained that "[i]n practice, the import of the mandatory/discretionary distinction is most pronounced

Accordingly, we have decided not rely on the "as such"/"as applied" distinction in analysing Indonesia's claims, and we thus do not present any separate analyses of, or findings on, Section 907(a)(1)(A) "as applied".

7.19 We shall therefore commence our analysis by examining whether Section 907(a)(1)(A) is a technical regulation within the meaning of Annex 1.1 of the *TBT Agreement*.

C. WHETHER SECTION 907(A)(1)(A) IS A "TECHNICAL REGULATION" WITHIN THE MEANING OF ANNEX 1.1 OF THE *TBT AGREEMENT*

## 1. Arguments of the parties

7.20 **Indonesia** submits that Section 907(a)(1)(A) is a "technical regulation" as defined in Annex 1.1 of the *TBT Agreement*.<sup>95</sup> Recalling the Appellate Body's guidance in *EC – Asbestos*, Indonesia submits that Section 907(a)(1)(A) applies to an "identifiable group of products" (i.e., certain flavoured cigarettes, and especially clove cigarettes), lays down "product characteristics" (i.e., it prohibits the addition of characterizing flavours, except menthol), and compliance with the prohibition is "mandatory".<sup>96</sup> Indonesia observes that the United States does not dispute that Section 907 is a "technical regulation".<sup>97</sup>

7.21 The **United States** acknowledges that "the measure is a technical regulation"<sup>98</sup>. However, the United States submits that its view as to the nature of Section 907(a)(1)(A) as a technical regulation should not change the standard of review of the Panel, which is to make an objective assessment based on the facts presented as to whether the measure at issue is a technical regulation.<sup>99</sup>

## 2. Analysis by the Panel

### (a) Introduction

7.22 Indonesia claims that the United States has acted inconsistently with Articles 2.1, 2.2, 2.5, 2.8, 2.9, 2.10, 2.12, and 12.3 of the *TBT Agreement*. We note that, by their own terms, these provisions apply to "technical regulations".<sup>100</sup> This means that, if Section 907(a)(1)(A) is not a "technical regulation" within the meaning of the *TBT Agreement*, these provisions would not apply to that measure. Thus, a threshold issue in our examination of Indonesia's claims under the *TBT Agreement* is whether Section 907(a)(1)(A) is a "technical regulation".

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in cases where, although a Member's law appears to be WTO-inconsistent on its face, there is sufficient discretion to allow national authorities to apply the law in a WTO-consistent manner." Panel Report, *US – Tyres (China)*, para. 7.118. In this case, Indonesia's claims relate to the ban on clove cigarettes mandated by Section 907(a)(1)(A). The United States does not dispute that Section 907(a)(1)(A) mandates a ban on clove cigarettes (along with certain other cigarettes with a characterizing flavour). Moreover, the United States has never suggested that its national authorities have any discretion to apply Section 907(a)(1)(A) in such a way as to exclude clove cigarettes from the scope of the ban.

<sup>95</sup> Indonesia's first written submission, para. 44.

<sup>96</sup> Indonesia's first written submission, paras. 46-47.

<sup>97</sup> Indonesia's oral statement at the first substantive meeting of the Panel, para. 128.

<sup>98</sup> United States' oral statement at the first substantive meeting of the Panel, paras. 26 and 60.

<sup>99</sup> United States' first written submission, para. 213; United States' response to Panel question No. 22, para. 58.

<sup>100</sup> Article 12.3 of the *TBT Agreement* applies not only to "technical regulations", but also to "standards and conformity assessment procedures". However, Indonesia does not allege that the measure at issue in this dispute is either a "standard" or a "conformity assessment procedure".

(b) The legal provision at issue

7.23 Article 1.2 of the *TBT Agreement* provides that "for the purposes of this Agreement the meaning of the terms given in Annex 1 applies". Annex 1.1 of the *TBT Agreement* defines a "technical regulation" as follows:

"Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."

7.24 We note that the definition of the term "technical regulation" in Annex 1.1 of the *TBT Agreement* has already been examined by the Appellate Body: first in *EC – Asbestos*, and then again in *EC – Sardines*.<sup>101</sup> In those cases, the Appellate Body set out three criteria that a document must meet to fall within the definition of "technical regulation" in Annex 1.1:

"... *First*, the document must apply to an identifiable product or group of products. The *identifiable* product or group of products need not, however, be expressly *identified* in the document. *Second*, the document must lay down one or more characteristics of the product. These product characteristics may be intrinsic, or they may be related to the product. They may be prescribed or imposed in either a positive or a negative form. *Third*, compliance with the product characteristics must be mandatory. As we stressed in *EC – Asbestos*, these three criteria are derived from the wording of the definition in Annex 1.1. ..."102

7.25 The Panel will therefore proceed to analyse whether Section 907(a)(1)(A) constitutes a "technical regulation" within the meaning of Annex 1.1 of the *TBT Agreement* by examining these three criteria.

(c) Elements of the definition of a technical regulation

(i) *First element: Whether Section 907(a)(1)(A) applies to an "identifiable product or group of products"*

7.26 In *EC – Asbestos*, the Appellate Body elaborated on the first element of the definition of a "technical regulation":

"A 'technical regulation' must, of course, be applicable to an *identifiable* product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. This consideration also underlies the formal obligation, in Article 2.9.2 of the *TBT Agreement*, for Members to notify other Members, through the WTO Secretariat, of 'the *products to be covered*' by a proposed 'technical regulation'. (emphasis added) Clearly, compliance with this obligation requires identification of the product coverage of a technical regulation. However, in contrast to what the Panel suggested, this does not mean that a 'technical regulation' must apply to '*given*' products which are actually *named, identified* or *specified* in the regulation. (emphasis

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<sup>101</sup> Appellate Body Report, *EC – Asbestos*, paras. 59-77; Appellate Body Report, *EC – Sardines*, paras. 171-195. See also Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.426-7.459; Panel Report, *EC – Trademarks and Geographical Indications (US)*, paras. 492-515.

<sup>102</sup> Appellate Body Report, *EC – Sardines*, para. 176 (emphasis original, footnote omitted), citing Appellate Body Report, *EC – Asbestos*, paras. 66-70.

added) Although the *TBT Agreement* clearly applies to 'products' generally, nothing in the text of that Agreement suggests that those products need be named or otherwise expressly identified in a 'technical regulation'. Moreover, there may be perfectly sound administrative reasons for formulating a 'technical regulation' in a way that does *not* expressly identify products by name, but simply makes them identifiable – for instance, through the 'characteristic' that is the subject of regulation."<sup>103</sup>

7.27 We observe that the measure at issue in this case, Section 907(a)(1)(A), explicitly identifies the products it covers: cigarettes and any of their component parts. In our view, the products covered by Section 907(a)(1)(A) are not merely "identifiable", as was apparently the case in *EC – Asbestos*. Rather, they are "expressly identified". In this respect, we note that Section 907 is entitled "Tobacco Product Standards", and Section 907(a)(1)(A) is entitled "Special Rule for Cigarettes". We further note that Section 907(a)(1)(A) provides in relevant part that "a cigarette or any of its component parts (including the tobacco, filter, or paper)" shall not contain any characterizing flavour other than tobacco or menthol. In addition, the FDA Guidance<sup>104</sup> explains, under the heading "What products are covered", that Section 907(a)(1)(A) "applies to all tobacco products that meet the definition of a cigarette" set forth in Section 900(3) of the FFDCA.<sup>105</sup>

7.28 We therefore find that Section 907(a)(1)(A) applies to an "identifiable product or group of products" and it thus meets the first element of the definition of a "technical regulation".

(ii) *Second element: Whether Section 907(a)(1)(A) lays down one or more "product characteristics"*

7.29 In *EC – Asbestos*, the Appellate Body stated that "[t]he heart of the definition of a 'technical regulation' is that a 'document' must 'lay down' – that is, set forth, stipulate or provide – 'product characteristics'".<sup>106</sup> The Appellate Body explained that the term "product characteristics" in Annex 1.1 of the *TBT Agreement* should be interpreted in accordance with its ordinary meaning:

"... The word 'characteristic' has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the 'characteristics' of a product include, in our view, any objectively definable 'features', 'qualities', 'attributes', or other 'distinguishing mark' of a product. Such 'characteristics' might relate, *inter alia*, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a 'technical regulation' in Annex 1.1, the *TBT Agreement* itself gives certain examples of 'product characteristics' – 'terminology, symbols, packaging, marking or labelling requirements'. These examples indicate that 'product characteristics' include, not only features and qualities intrinsic to the product itself, but also related 'characteristics', such as the means of identification, the presentation and the appearance of a product. ..." <sup>107</sup>

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<sup>103</sup> Appellate Body Report, *EC – Asbestos*, para. 70. In *EC – Asbestos*, the Appellate Body concluded that the measure at issue in that case was applicable to an identifiable product or group of products. Appellate Body Report, *EC – Asbestos*, para. 74.

<sup>104</sup> See paras. 2.8-2.11 above.

<sup>105</sup> FDA Guidance, answer to question No. 2 (Exhibit IND-41).

<sup>106</sup> Appellate Body Report, *EC – Asbestos*, para. 67 (emphasis original).

<sup>107</sup> Appellate Body Report, *EC – Asbestos*, para. 67. In *EC – Asbestos*, the Appellate Body concluded that the measure at issue laid down one or more "product characteristics". Appellate Body Report, *EC – Asbestos*, para. 74.

7.30 In *EC – Sardines*, the Appellate Body recalled the above-quoted passage, and emphasized that product characteristics include not only "features and qualities intrinsic to the product", but also those that are related to it, such as means of identification.<sup>108</sup>

7.31 Section 907(a)(1)(A) lays down "product characteristics". Indeed, a measure that prohibits cigarettes from containing certain constituents or additives with a "characterizing flavour" is by definition a measure that lays down one or more "product characteristics". Among other things, the flavour of a cigarette is not only a "feature" (and probably also a "quality" and "attribute") of that product, but a feature that is "intrinsic to the product itself". Section 907(a)(1)(A) also clearly "relate[s] ... to a product's composition", as it states that no cigarette may contain, as a constituent or additive, any artificial or natural flavour that is a characterizing flavour (other than tobacco or menthol). In other words, the "composition" of a cigarette cannot be such as to give rise to a characterizing flavour (other than tobacco or menthol).

7.32 In our view, the fact that Section 907(a)(1)(A) lays down product characteristics in the negative form ("a cigarette ... shall not contain") does not alter the conclusion that Section 907(a)(1)(A) lays down product characteristics. We find support for our conclusion in the fact that the measures at issue in *EC – Asbestos* and *EC – Sardines* both laid down product characteristics in negative form, and both were found to be "technical regulations" within the meaning of Annex 1.1 of the *TBT Agreement*.

7.33 We recall that, in *EC – Asbestos*, the Appellate Body found that the measure at issue was "formulated *negatively* – products containing asbestos are prohibited", and that "in effect, the measure provides that *all* products must *not* contain asbestos fibres".<sup>109</sup> The Appellate Body explained that:

"Product characteristics' may, in our view, be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively, that products *must possess* certain 'characteristics', or the document may require, negatively, that products *must not possess* certain 'characteristics'."<sup>110</sup>

7.34 We also recall that the panel in *EC – Sardines* found that by requiring the use of only the species *Sardina pilchardus* as preserved sardines, the measure at issue "in effect lays down product characteristics in a negative form".<sup>111</sup> The panel in *EC – Sardines* considered that a technical regulation within the meaning of Annex 1.1 of the *TBT Agreement* "may prescribe or impose product characteristics in either a positive or negative form".

7.35 In our view, the fact that Section 907(a)(1)(A) does not expressly define what constitutes a "characterizing flavour" does not alter the conclusion that the measure regulates product characteristics.<sup>112</sup> In the passage from *EC – Asbestos* quoted above, the Appellate Body indicated that the "characteristics" of a product include "any objectively definable" features, qualities, attributes, or

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<sup>108</sup> Appellate Body Report, *EC – Sardines*, para. 189, quoting Appellate Body Report, *EC – Asbestos*, para. 67. In *EC – Sardines*, the Appellate Body agreed with the panel's conclusion that the measure at issue laid down one or more "product characteristics". Appellate Body Report, *EC – Sardines*, para. 193.

<sup>109</sup> Appellate Body Report, *EC – Asbestos*, para. 72 (emphasis original).

<sup>110</sup> Appellate Body Report, *EC – Asbestos*, para. 69 (emphasis original). Panel Report, *EC – Sardines*, para. 7.44.

<sup>111</sup> Panel Report, *EC – Sardines*, para. 7.45, quoted at paragraph 179 of the Appellate Body Report in *EC – Sardines*.

<sup>112</sup> In the context of its claim under Article 2.8 of the *TBT Agreement*, Indonesia states that: "... the Special Rule imposes a ban on cigarettes with a 'characterizing flavor'. However, the Act provides no definition of 'characterizing flavor' for purposes of the Special Rule. Moreover, the FDA has not provided further specification on what constitutes a 'characterizing flavor' in either its guidance on the Special Rule or in the public notice announcing its enforcement of the Special Rule." Indonesia's first written submission, para. 135.



other distinguishing mark of a product. The absence of any express definition of "characterizing flavour" in the measure does not mean that the characteristic at issue is not "objectively *definable*". In addition, while Section 907(a)(1)(A) does not define the terms "characterizing flavour", it does provide a number of illustrative examples of characterizing flavours that are prohibited – including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry or coffee.

7.36 We therefore find that Section 907(a)(1)(A) lays down one or more "product characteristics" and it thus meets the second element of the definition of a "technical regulation".

(iii) *Third element: Whether compliance with the product characteristics is mandatory*

7.37 The third element of the definition of a "technical regulation" is that the measure lays down product characteristics with which compliance is "mandatory".<sup>113</sup> In *EC – Asbestos*, the Appellate Body made the following observations about the requirement that a document lay down product characteristics with which compliance is "mandatory":

"The definition of a 'technical regulation' in Annex 1.1 of the *TBT Agreement* also states that '*compliance*' with the 'product characteristics' laid down in the 'document' must be '*mandatory*'. A 'technical regulation' must, in other words, regulate the 'characteristics' of products in a binding or compulsory fashion ..."<sup>114</sup>

7.38 In *EC – Sardines*, both the panel and the Appellate Body concluded that the measure at issue set forth product characteristics that were "mandatory". The conclusion was based on the fact that the measure at issue stated that the requirements contained therein were "binding in its entirety and directly applicable in all Member States".<sup>115</sup> In this regard, the panel in *EC – Trademarks and Geographical Indications (Australia)* noted that the word "mandatory" means "obligatory in consequence of a command, compulsory".<sup>116</sup>

7.39 We are of the view that Section 907(a)(1)(A) lays down product characteristics with which compliance is "mandatory". The mandatory nature of Section 907(a)(1)(A) is apparent to us from the language of that provision, which provides that a cigarette or any component part "shall not" contain as a constituent or additive, any artificial or natural flavour (other than tobacco or menthol) or an herb or spice that is a characterizing flavour. In addition, the effect of the law is "to prohibit the manufacture and sale" of cigarettes with certain characterizing flavours.<sup>117</sup> The FDA Guidance explains how "this ban [will] be enforced".<sup>118</sup> There also are specific provisions contained in the

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<sup>113</sup> The *TBT Agreement* distinguishes "technical regulations" from "standards". The essential distinction between the two types of measures is that the former is mandatory, whereas the latter is voluntary. Annex 1.1 of the *TBT Agreement*, already quoted above, provides the definition of a "technical regulation". It provides in relevant part that a technical regulation is a document that lays down product characteristics "with which compliance is mandatory". Annex 1.2 of the *TBT Agreement* defines the term "standard". The definition provides in relevant part that a "standard" is a "[d]ocument ... that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory". The *Explanatory note* in Annex 1.2 reiterates that "[f]or the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents".

<sup>114</sup> Appellate Body Report, *EC – Asbestos*, para. 68 (emphasis original). In *EC – Asbestos*, the Appellate Body found that the measure at issue in that case laid down product characteristics with which compliance was "mandatory". Appellate Body Report, *EC – Asbestos*, para. 74.

<sup>115</sup> Panel Report, *EC – Sardines*, para. 7.30; Appellate Body Report, *EC – Sardines*, para. 194.

<sup>116</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.453.

<sup>117</sup> See e.g. H.R. Rep. No. 111-58, Pt. 1 (2009) (Exhibit IND-2) p. 37.

<sup>118</sup> FDA, Guidance for Industry and FDA Staff, General Questions and Answers on the Ban of Cigarettes that Contain Characterizing Flavors (2d ed., 23 December 2009), 74 Fed. Reg. 48,974 (25 September 2009) (Exhibit IND-41) p. 4 ("As of September 22, 2009, cigarettes and their component parts that contain

*Tobacco Control Act* to address non-compliance with Section 907(a)(1)(A); *inter alia*, (i) products that fail to comply with Section 907(a)(1)(A) are deemed "adulterated" under Section 902(5) of the FFDCFA; (ii) under the FFDCFA, adulterated products sold or held for sale in the United States may be subject to seizure under Section 304 of the FFDCFA; (iii) under Sections 301, 302, and 303 of the FFDCFA, the FDA has the authority to initiate, among other actions, injunction actions and criminal prosecution to address violations of Section 907(a)(1)(A) and other provisions of the FFDCFA.<sup>119</sup>

7.40 We therefore find that Section 907(a)(1)(A) lays down product characteristics with which compliance is "mandatory" and it thus meets the third element of the definition of a "technical regulation".

(d) Conclusion

7.41 For these reasons, the Panel finds that Section 907(a)(1)(A) is a "technical regulation" within the meaning of Annex 1.1 of the *TBT Agreement*. The Panel will now turn to examine Indonesia's claims under Articles 2.1, 2.2, 2.5, 2.8, 2.9, 2.10, 2.12, and 12.3 of the *TBT Agreement*.

D. WHETHER SECTION 907(A)(1)(A) IS INCONSISTENT WITH ARTICLE 2.1 OF THE *TBT AGREEMENT*

**1. Arguments of the parties**

7.42 **Indonesia** claims that Section 907(a)(1)(A) is inconsistent with Article 2.1 of the *TBT Agreement* "because the measure results in treatment that is 'less favourable' to imported clove cigarettes than that accorded to a like domestic product, menthol cigarettes".<sup>120</sup> In its first submission, though, Indonesia submits that Section 907(a)(1)(A), "both on its face and as applied", violates Article 2.1 because it accords 'less favorable' treatment to imports of clove cigarettes than it accords to a like domestic product – that is, regular and menthol cigarettes."<sup>121</sup> Indonesia argues that clove cigarettes are "like" "all other domestically produced cigarettes, generally, and menthol cigarettes, in particular"<sup>122</sup>, because they share the same physical properties, end-uses, consumer preferences and tariff classification. In response to a question from the Panel, Indonesia clarified that it requests the Panel first to conduct a like product analysis of clove cigarettes *vis-à-vis* menthol and tobacco-flavoured cigarettes produced in the United States. In the event that the Panel decides to limit the likeness analysis to cigarettes with a particular "characterizing flavour", Indonesia argues, clove cigarettes are "like" domestic menthol cigarettes.<sup>123</sup>

7.43 Indonesia argues that, in the context of Article 2.1 of the *TBT Agreement*, a determination of likeness is fundamentally a determination about the nature and extent of a competitive relationship among products, as established by jurisprudence on Article III:4 of the GATT 1994. Indonesia's reasoning is based on the fact that the GATT 1994 and the *TBT Agreement* are each context for the interpretation of the other.<sup>124</sup> At the same time, Indonesia suggests that "a case-by-case analysis of

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characterizing flavors (other than tobacco or menthol) or an herb or spice are illegal. FDA has a range of enforcement and regulatory tools to address violations of the ban by, among others, manufacturers, importers, distributors, and retailers. Before taking enforcement action, it is the agency's general practice to issue Warning Letters to firms to notify them that their products are in violation of the law and to give them the opportunity to come into compliance. As always, when circumstances are appropriate, FDA may take enforcement action to protect the public health without first issuing a Warning Letter.")

<sup>119</sup> See the parties' responses to Panel question Nos. 10 and 24.

<sup>120</sup> Indonesia's Panel Request, WT/DS406/2, p. 2.

<sup>121</sup> Indonesia's first written submission, para. 43.

<sup>122</sup> Indonesia's first written submission, para. 65.

<sup>123</sup> Indonesia's first written submission, para. 65; Indonesia's response to Panel question No. 27.

<sup>124</sup> Indonesia's response to Panel question No. 26.

likeness in the context of a different measure reasonably could conclude that all cigarettes are not like *for the purpose of that particular measure*".<sup>125</sup>

7.44 As regards the *Border Tax Adjustments* criteria<sup>126</sup>, Indonesia first submits that clove cigarettes and domestically-produced cigarettes, including menthol cigarettes, have the same physical characteristics.<sup>127</sup> According to Indonesia, both types of cigarettes contain cured and blended tobacco in a paper wrapper with a filter and are considered "class A" cigarettes for U.S. tax purposes. Indonesia further adds that clove and menthol cigarettes share more properties because they contain tobacco and an added ingredient (i.e., herb or spice). Finally, Indonesia argues that there is no evidence that clove cigarettes are more toxic or pose greater health risks than domestically-produced regular or menthol cigarettes and, thus, there is no difference in their physical characteristics.<sup>128</sup> In fact, Indonesia argues that in the present dispute, "the relative toxicity of clove and domestic cigarettes is not an issue".<sup>129</sup>

7.45 Furthermore, Indonesia clarifies that the so-called "candy flavour" cigarettes (e.g., chocolate, strawberry) may not be "like" regular, menthol or clove cigarettes, because they may pose greater health risks as they encourage youth to start smoking.<sup>130</sup> Indonesia has indicated that it "is not asking the Panel to include candy-flavoured cigarettes in its like product analysis".<sup>131</sup>

7.46 Second, Indonesia submits that clove cigarettes have the same end-uses as domestically produced cigarettes, especially menthol cigarettes, because they are all used to smoke tobacco.<sup>132</sup> Indonesia disagrees with the United States that cigarettes have two other end-uses: (i) satisfying the addiction to nicotine; and (ii) creating a pleasurable experience associated with the taste of the cigarette and aroma of the smoke. On the contrary, argues Indonesia, the delivery of nicotine is a consequence of smoking tobacco, and "providing a pleasurable experience" does not qualify as an end-use, but is rather a consumer behaviour.<sup>133</sup>

7.47 Third, with respect to "consumer preferences", Indonesia argues that most consumers perceive regular, menthol and clove cigarettes as alternative means of smoking.<sup>134</sup> Indonesia also points out that smokers most frequently choose regular or menthol cigarettes and use clove cigarettes as a "special occasion" cigarette.<sup>135</sup> In its second written submission, "Indonesia disputes that clove cigarettes are used only as an occasional cigarette"<sup>136</sup>, as certain adults have reported smoking them more than other cigarettes. In essence, Indonesia contends that smokers are willing to substitute clove, menthol and tobacco cigarettes to achieve the same end-use of smoking.<sup>137</sup> In fact, "[t]he relative proportion of time that consumers use clove versus menthol or regular cigarettes does not have to be equal".<sup>138</sup>

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<sup>125</sup> Indonesia's response to Panel question No. 47 (emphasis added).

<sup>126</sup> This is explained in Section VII.D.2(c)(ii) below.

<sup>127</sup> Indonesia's first written submission, para. 54.

<sup>128</sup> Indonesia's first written submission, paras. 55, 57; Indonesia's responses to Panel question Nos. 36-40; Indonesia's second written submission, paras. 70-74.

<sup>129</sup> Indonesia's second written submission, para. 71.

<sup>130</sup> Indonesia's first written submission, para. 63.

<sup>131</sup> Indonesia's response to Panel question No. 27, para. 71.

<sup>132</sup> Indonesia's first written submission, para. 59.

<sup>133</sup> Indonesia's second written submission, paras. 78-80.

<sup>134</sup> Indonesia's first written submission, para. 60.

<sup>135</sup> Indonesia's first written submission, para. 60.

<sup>136</sup> Indonesia's second written submission, para. 82.

<sup>137</sup> Indonesia's second written submission, para. 82.

<sup>138</sup> Indonesia's response to Panel question No. 42.

7.48 For Indonesia, all cigarettes are in a competitive relationship with one another for access to channels of distribution, shelf space, and market share.<sup>139</sup> Indonesia clarifies that the Panel should confine its evaluation of consumers' tastes and habits to U.S. consumers.<sup>140</sup> Indonesia further clarifies that the relevant consumers for the likeness analysis are smokers, with no analysis by age group.<sup>141</sup> In case the Panel decides to proceed with an analysis by age group, Indonesia contends that the proper groups should be "youth" (under 18) and "adults" (18 and over).<sup>142</sup> Indonesia also contends that the "pre-smoking" youth population should not be included among the relevant consumers for the likeness analysis.<sup>143</sup> As regards the smoking preferences of youth, Indonesia concludes that clove cigarettes are not "overwhelmingly" used by young smokers, as menthol cigarettes are much more popular with youth.<sup>144</sup> For Indonesia, the relevant evidence demonstrates that clove cigarettes do not appeal to youth.<sup>145</sup>

7.49 Finally, Indonesia submits that clove cigarettes and domestically-produced cigarettes have the same international tariff classification at the 6-digit level.<sup>146</sup> The tariff classification of cigarettes containing tobacco, which covers both clove cigarettes and U.S. cigarettes, is HS07 24.02.20. Moreover, the United States' 8-digit level tariff classification is irrelevant for the present dispute, as comparisons among countries are done only at the 6-digit level.<sup>147</sup>

7.50 Regarding the "less favourable treatment" element, Indonesia argues that the treatment accorded to imported clove cigarettes is less favourable than that accorded to domestically-produced cigarettes.<sup>148</sup> Indonesia submits that a ban on clove cigarettes, which are mainly imported from Indonesia, but not on regular or menthol cigarettes, which are mainly locally produced, creates unequal conditions of competition in the U.S. market.<sup>149</sup> Indonesia clarifies that, although facially neutral, Section 907(a)(1)(A) results in *de facto* discrimination against imported products.<sup>150</sup> Additionally, Indonesia argues that a violation can be established "by showing that there are some imported products that are treated less favourably than the most favourably treated domestic like product".<sup>151</sup>

7.51 According to Indonesia, while menthol- and tobacco-flavoured cigarettes are mainly produced in the United States, clove cigarettes were mainly imported from Indonesia. Thus, Indonesia explains that "the treatment accorded to all cigarettes imported from all countries is irrelevant to this dispute".<sup>152</sup>

7.52 Indonesia notes that it has not argued that if a single imported product is restricted by a measure and a single domestic product is not, less favourable treatment may be identified. According to Indonesia, in the case at hand almost all the clove cigarettes subject to the ban were imported, while

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<sup>139</sup> Indonesia's first written submission, para. 60.

<sup>140</sup> Indonesia's response to Panel question No. 44.

<sup>141</sup> Indonesia's response to Panel question No. 92, para. 22.

<sup>142</sup> Indonesia's response to Panel question No. 92, para. 23.

<sup>143</sup> Indonesia's response to Panel question No. 92, para. 24.

<sup>144</sup> Indonesia's second written submission, paras. 84-85; Indonesia's response to Panel question No. 43.

<sup>145</sup> Indonesia's response to Panel question No. 85, para. 20.

<sup>146</sup> Indonesia's first written submission, para. 64.

<sup>147</sup> Indonesia's second written submission, para. 90; Indonesia's response to Panel question No. 45 (Exhibit IND-67).

<sup>148</sup> Indonesia's first written submission, para. 69; Indonesia's oral statement at the second substantive meeting of the Panel, para. 57.

<sup>149</sup> Indonesia's oral statement at the second substantive meeting of the Panel, para. 58.

<sup>150</sup> Indonesia's second written submission, para. 94; Indonesia's response to Panel question No. 48.

<sup>151</sup> Indonesia's second written submission, para. 100; Indonesia's response to Panel question Nos. 49 and 51.

<sup>152</sup> Indonesia's comments on the United States' response to Panel question No. 95, para. 42.

the vast majority of cigarettes not subject to the ban were "like" cigarettes produced domestically. Indonesia argues that this is, in particular, the case of menthol cigarettes, given that only a negligible part of those cigarettes is imported in the United States.<sup>153</sup>

7.53 Indonesia argues that the fact that Section 907(a)(1)(A) may also affect cigarettes produced in the United States "does not save the measure". In fact, Indonesia contends that, as such, Section 907(a)(1)(A) applies almost exclusively with regard to imported cigarettes.<sup>154</sup> Indonesia also contends that the allegation of the United States, according to which the vast majority of cigarettes imported are still allowed under Section 907(a)(1)(A), is not relevant. Indonesia argues that the treatment of products imported from other countries is not an issue before the Panel.<sup>155</sup>

7.54 Indonesia posits that, contrary to the position of the United States whereby Indonesia must demonstrate that cigarettes containing clove are subject to different treatment on the basis of their national or foreign origin, no panel or Appellate Body report "has ever required both a 'less favorable treatment' test and a second 'based on national origin' test".<sup>156</sup> Indonesia argues that, contrary to the position of the United States, the "less favourable treatment" analysis under Articles 2.1 of the *TBT Agreement* and III:4 of the GATT 1994 does not require a separate analysis focused on whether a measure is applied "so as to afford protection to domestic production".<sup>157</sup>

7.55 The **United States** submits that Indonesia's claim under Article 2.1 of the *TBT Agreement* is based on a flawed analysis and insufficient evidence.<sup>158</sup> The United States contends that the national treatment obligation contained in Article 2.1 "[is] *not* intended to prevent legitimate measures, such as section 907(a)(1)(A), that establish neutral product standards based on public health criteria".<sup>159</sup>

7.56 According to the United States, Section 907(a)(1)(A) is intended to eliminate the availability of the types of cigarette used primarily by youth, often as a "starter cigarette."<sup>160</sup> It further contends that the most credible evidence demonstrates that cigarettes with a characterizing flavour other than tobacco or menthol (and including clove), are overwhelmingly smoked by youth and are not smoked by adults in appreciable numbers.<sup>161</sup> The United States does not disagree with Indonesia's general assertion that clove cigarettes are smoked by a small fraction of the population while menthol cigarettes are smoked in much larger numbers. However, in its view, the relevant point with respect to Section 907(a)(1)(A) is that of the small amount of the population that smokes cloves, it is especially youth to whom they appeal.<sup>162</sup>

7.57 The United States explains that banning clove cigarettes and other flavoured cigarettes does not present the same public health risk in the United States as banning regular or menthol cigarettes.<sup>163</sup> It argues that the public health effects of removing precipitously a cigarette which tens of millions of people smoke regularly have not been sufficiently evaluated to justify a ban and that is why Section 907(a)(1)(A) does not ban regular or menthol cigarettes.<sup>164</sup> The United States explains that precipitously banning tobacco and menthol cigarettes would risk producing negative

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<sup>153</sup> Indonesia's oral statement at the second substantive meeting of the Panel, para. 60.

<sup>154</sup> Indonesia's oral statement at the second substantive meeting of the Panel, para. 61.

<sup>155</sup> Indonesia's oral statement at the second substantive meeting of the Panel, para. 62; Indonesia's response to Panel question No. 95, para. 28.

<sup>156</sup> Indonesia's oral statement at the second substantive meeting of the Panel, para. 63.

<sup>157</sup> Indonesia's oral statement at the second substantive meeting of the Panel, para. 65.

<sup>158</sup> United States' first written submission, para. 144.

<sup>159</sup> United States' second written submission, para. 87.

<sup>160</sup> United States' first written submission, para. 146.

<sup>161</sup> United States' first written submission, para. 147.

<sup>162</sup> United States' first written submission, para. 149.

<sup>163</sup> United States' first written submission, para. 148.

<sup>164</sup> United States' first written submission, para. 150.

consequences for the smokers, the U.S. health care system, or society as a whole through an expansion of the black market for cigarettes.<sup>165</sup>

7.58 The United States argues that Indonesian clove cigarettes are not like U.S.-manufactured tobacco or menthol cigarettes as clove cigarettes are not in a competitive relationship with tobacco or menthol cigarettes and are not substitutable or interchangeable among retailers or consumers.<sup>166</sup> The United States submits that, even though the *TBT Agreement* does not contain an equivalent to Article III:1 of the GATT 1994, it is still possible to base the "likeness" analysis on the nature and extent of the competitive relationship between the products at issue.<sup>167</sup> According to the United States, in the case at hand, like in *EC – Asbestos*, the dissimilarities between clove, tobacco and menthol cigarettes are directly related to the diverse perceptions of the product by consumers and the public health risk involved.<sup>168</sup>

7.59 The United States notes that Section 907(a)(1)(A) makes distinctions among a group of broadly similar products – cigarettes – based on factors relevant to the legitimate objective of protecting public health. Accordingly, a "likeness" determination, in addition to focusing on the competitive relationship of the products, will need carefully to parse the significance of traits that are generally shared among all cigarettes and traits that are significant with respect to the public health provision at issue.<sup>169</sup> The United States specifies that the public health basis of Section 907(a)(1)(A) should be considered for the "likeness" analysis under both the GATT 1994 and the *TBT Agreement*, as there are certain "contextual principles" that inform the national treatment obligation under both agreements.<sup>170</sup>

7.60 Accordingly, the Panel should accord weight to the physical characteristics of the products at issue and the consumer tastes and preferences that are relevant to the public health basis upon which Section 907(a)(1)(A) differentiates among products.<sup>171</sup> In its second written submission, the United States argues that the relevant physical characteristics that differentiate clove cigarettes from menthol and regular cigarettes are: (i) the nearly equal mixture of tobacco and clove; (ii) the "special sauce" contained in them; and (iii) the presence of eugenol.<sup>172</sup>

7.61 The United States further argues that the unique taste and physical properties of menthol influence consumer choices. Whereas clove cigarette smokers enjoy the unique experience of cloves as a starter cigarette or "from time to time," smokers of menthol cigarettes tend to choose menthols as their daily cigarette.<sup>173</sup> Additionally, with respect to the toxicity and addictiveness of the cigarettes at issue, the United States makes two main clarifications. First, in the present dispute the relative toxicity of cigarettes is not the basis for the public health distinctions made between them, even though, in general terms, the toxicity of cigarettes is an aspect of their physical properties.<sup>174</sup> Second, despite the fact that all cigarettes contain nicotine and are thus addictive, the health effects must be analysed on the basis of both the health effects of an individual smoker and the overall public health consideration. This last aspect focuses on the possibility that certain types of cigarettes might increase the use of cigarettes and tobacco products by the population as a whole. Accordingly, the United States argues that clove cigarettes are different because they are used disproportionately by

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<sup>165</sup> United States' first written submission, para. 22; United States' response to Panel question No. 89.

<sup>166</sup> United States' first written submission, para. 154.

<sup>167</sup> United States' response to Panel question No. 26.

<sup>168</sup> United States' oral statement at the second substantive meeting of the Panel, para. 45.

<sup>169</sup> United States' first written submission, para. 159.

<sup>170</sup> United States' second written submission, para. 111.

<sup>171</sup> United States' second written submission, para. 112.

<sup>172</sup> United States' second written submission, para. 113.

<sup>173</sup> United States' first written submission, para. 172.

<sup>174</sup> United States' response to Panel question No. 36.

youth and therefore, serve as "trainer cigarettes".<sup>175</sup> The United States contends that Indonesia appears to agree with the United States that cigarettes which are specifically appealing to youth involve a particular health risk and can be regulated in a more restrictive manner than tobacco and menthol cigarettes.<sup>176</sup>

7.62 Contrary to Indonesia's conclusion on end-use, the United States submits that cigarettes have a number of end-uses and are not just used to "smoke tobacco." In its view, cigarettes have at least two other end-uses in the United States, which clove, menthol and tobacco cigarettes serve in differing degrees:<sup>177</sup> (i) the end-use of satisfying an addiction to nicotine<sup>178</sup>, and (ii) the end-use of creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke.<sup>179</sup> The United States further submits that the first end-use – delivering nicotine to the body – is not the most relevant one, because if that were the case, all cigars, pipes and cigarettes would be like products.<sup>180</sup>

7.63 Regarding the criterion of consumer tastes and habits, the United States argues that Indonesia presented no evidence to demonstrate that clove cigarettes seek to compete with tobacco or menthol cigarettes, or that consumers view them as substitutable.<sup>181</sup> The United States clarifies that the relevant consumers are all the "potential and current smokers in the United States". The United States contends that the potential consumers are young people within the age of initiation and that such persons, more likely than adults, find clove cigarettes appealing.<sup>182</sup> For the United States, consumers clearly differentiate between the products at issue in this case:<sup>183</sup> clove cigarettes are marketed, sold and used as a "special occasion" tobacco product, while tobacco and menthol cigarettes are marketed, sold and used as a daily, regular cigarette; clove cigarettes are smoked overwhelmingly by young people, who tend to be novice smokers, and tobacco and menthol cigarettes are used regularly by a large population of young people, but especially adults, who smoke them regularly.<sup>184</sup> In fact, the United States submits, rather than competition among products, there is in fact an overlap and likely symbiosis since clove cigarettes not only attract new users to tobacco, but are used as a supplemental, special occasion cigarette among those who already smoke.<sup>185</sup>

7.64 The United States accuses Indonesia of failing to prove that Indonesian clove cigarettes and regular or menthol cigarettes are viewed as "interchangeable" in the market, and of presenting unreliable data to suggest that clove cigarettes have a pattern of use similar to tobacco or menthol cigarettes, just on a smaller scale.<sup>186</sup> In fact, in contrast to clove cigarettes, menthol cigarettes are not predominantly a starter cigarette for youth in the United States. According to the United States, rates of use of regular and menthol cigarettes among young people and older adults are much more even.<sup>187</sup> The United States further clarifies that the consumers' tastes and habits analysis should be confined to

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<sup>175</sup> United States' response to Panel question No. 37.

<sup>176</sup> United States' comments on the Indonesia's response to Panel question No. 85, paras. 9 and 12.

<sup>177</sup> United States' first written submission, para. 179.

<sup>178</sup> United States' first written submission, para. 180.

<sup>179</sup> United States' first written submission, para. 181.

<sup>180</sup> United States' response to Panel question No. 41.

<sup>181</sup> United States' first written submission, para. 184; United States' oral statement at the second substantive meeting of the Panel, paras. 24 and 26.

<sup>182</sup> United States' response to Panel question No. 92, para. 42.

<sup>183</sup> United States' first written submission, para. 184.

<sup>184</sup> United States' first written submission, para. 185.

<sup>185</sup> United States' first written submission, para. 186.

<sup>186</sup> United States' first written submission, para. 189.

<sup>187</sup> United States' response to Panel question No. 43. United States' response to Panel question No. 91, paragraph. 39.

the U.S. market, as consumers outside the United States are not relevant for deciding any of the factual or legal issues in this dispute.<sup>188</sup>

7.65 As regards the tariff classification, the United States argues that "clove cigarettes are treated differently than all 'other' cigarettes at the 8-digit level under the U.S. GATT 1994 Schedule".<sup>189</sup>

7.66 As regards the less favourable treatment analysis, the United States submits that Section 907(a)(1)(A) on its face is "origin-neutral" and that Indonesia does not appear to dispute this fact.<sup>190</sup> According to the United States, Section 907(a)(1)(A) does not draw a line between imported and domestic products, but between products on the basis of the patterns of use of different cigarettes by consumers in the United States and related public health considerations.<sup>191</sup> For the United States, Indonesia has not met its burden to prove *de facto* discrimination. Indonesia, it argues, asserts without analysis that "there is no question that a ban on one product but not other like products creates unequal conditions of competition and is 'less favorable' treatment" and that "a ban on clove cigarettes but not menthol or tobacco cigarettes creates unequal conditions of competition in the U.S. market and is, accordingly, 'less favorable' treatment." Indonesia does not, however, demonstrate that the allegedly different treatment is based on the national origin of clove cigarettes.<sup>192</sup>

7.67 According to the United States, Indonesia is incorrect when insinuating that the "less favourable treatment" analysis is simply an issue of looking at which cigarettes are banned and which ones are not banned. The United States submits that all relevant evidence should be examined, including the objective aim of the measure and whether the alleged detrimental effects to imported products depend on their national origin.<sup>193</sup>

7.68 Moreover, the United States argues that Indonesia is incorrect when it states that Section 907(a)(1)(A) accords less favourable treatment if one Indonesian import is included among the prohibited characterizing flavours and one U.S.-produced cigarette is not. In fact, argues the United States, the "best treatment" approach advocated by Indonesia is inconsistent with the language of GATT Article III:4 and Article 2.1 of the *TBT Agreement*. Rather, as established by the Appellate Body in *EC – Asbestos*, the relevant comparison is between the *group* of "like" imported products and the *group* of "like" domestic products.<sup>194</sup> This is so because the Appellate Body recognized that a Member may draw distinctions between products determined to be "like" without affording protection to domestic production or according less favourable treatment to imported products.<sup>195</sup> The United States also refers to the findings of the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes* and of the panel in *EC – Approval and Marketing of Biotech Products*. According to the United States, the Appellate Body and the panel in those reports found that "where an alleged detrimental effect on an imported product is not attributable to its foreign origin, but to some other factor, that effect is not evidence of less favourable treatment".<sup>196</sup>

7.69 The United States points out that Indonesia has failed to prove that Section 907(a)(1)(A) accords less favourable treatment to Indonesian products because: (i) it ignores the fact that this

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<sup>188</sup> United States' response to Panel question No. 44.

<sup>189</sup> United States' second written submission, para. 116.

<sup>190</sup> United States' first written submission, para. 199.

<sup>191</sup> United States' oral statement at the second substantive meeting of the Panel, paras. 21 and 59.

<sup>192</sup> United States' first written submission, para. 202.

<sup>193</sup> United States' oral statement at the second substantive meeting of the Panel, para. 50.

<sup>194</sup> United States' second written submission, paras. 119-123.

<sup>195</sup> United States' first written submission, para. 204.

<sup>196</sup> United States' oral statement at the second substantive meeting of the Panel, para. 50; United States' response to Panel question No. 95, para. 49.



regulation affects U.S.-produced cigarettes and (ii) it has not adduced any evidence to demonstrate that any detriment to clove cigarettes is dependent on the foreign origin of the product.<sup>197</sup>

## 2. Analysis by the Panel

### (a) Introduction

7.70 The question before the Panel therefore is whether Section 907(a)(1)(A) is inconsistent with the national treatment obligation under Article 2.1 of the *TBT Agreement*. In particular, Indonesia is claiming that Section 907(a)(1)(A) violates Article 2.1 because it accords less favourable treatment to imports of clove cigarettes than it accords to a like domestic product, which it defines in its Panel Request as menthol cigarettes.<sup>198</sup>

7.71 As we observe in several instances throughout this Report, we face an issue of first impression. Indeed, the only report that has addressed Article 2.1 thus far is the panel report in *EC – Trademarks and Geographical Indications (Australia)*, which briefly examined this provision.<sup>199</sup>

7.72 We shall commence by examining the legal provision at issue to ascertain the applicable legal test.

### (b) The legal provision at issue

7.73 Article 2.1 of the *TBT Agreement* provides that:

"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."

7.74 Hence, Article 2.1 of the *TBT Agreement* requires WTO Members to provide imported products with "treatment no less favourable than that accorded to like products of national origin". We note that Article 2.1 also includes an MFN obligation, but in this dispute there is no claim in respect of this element of Article 2.1.

7.75 We recall that in *Korea – Various Measures on Beef*, when interpreting Article III:4 of the GATT 1994<sup>200</sup>, the Appellate Body established a three-tier test for a finding of violation under that provision:

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<sup>197</sup> United States' second written submission, para. 130.

<sup>198</sup> In its subsequent submissions to the Panel, Indonesia asks the Panel to find that clove cigarettes are like both menthol *and* regular cigarettes. We examine the issue of which products to compare for the purpose of the likeness and less favourable treatment tests in paragraphs 7.124-7.148 below.

<sup>199</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.464-7.476. The Panel is aware that there are other on-going panel proceedings in which claims under Article 2.1 of the *TBT Agreement* have been raised. See *US – Tuna II (Mexico)*, WT/DS381/4; *US – COOL (Canada)*, WT/DS384/8 and *US – COOL (Mexico)*, WT/DS386/7. However, at the time of the issuance of the interim report in this dispute, the panel reports in these other cases had not yet been circulated.

<sup>200</sup> Article III:4 of the GATT 1994 reads:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges

"For a violation of Article III:4 to be established, three elements must be satisfied: that the imported and domestic products at issue are 'like products', that the measure at issue is a 'law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use'; and that the imported products are accorded 'less favourable' treatment than accorded to like domestic products."<sup>201</sup>

7.76 The language of Article 2.1 of the *TBT Agreement* is very similar to that of Article III:4 of the GATT 1994, the difference being that under the former, the national treatment obligation is restricted to a particular type of measure, i.e., technical regulations, while Article III:4 of the GATT 1994 encompasses a larger group of measures, i.e., "laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

7.77 The panel in *EC – Trademarks and Geographical Indications (Australia)* followed a similar approach to that of the Appellate Body without referring to the existing jurisprudence under Article III:4 of the GATT 1994. The panel reasoned as follows:

"The Panel considers that the essential elements of an inconsistency with Article 2.1 of the TBT Agreement are, as a minimum, that the measure at issue is a 'technical regulation'; that the imported and domestic products at issue are 'like products' within the meaning of that provision; and that the imported products are accorded 'less favourable' treatment than that accorded to like domestic products."<sup>202</sup>

7.78 We also note that both parties appear to follow this line of analysis as regards the main elements of a violation under Article 2.1 of the *TBT Agreement*.<sup>203</sup>

7.79 With respect to the second element in the analysis, we recall that we have already found that Section 907(a)(1)(A) is a technical regulation within the meaning of Annex 1.1 of the *TBT Agreement*.<sup>204</sup> We shall thus proceed to examine the two remaining elements of the test in turn.

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which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

<sup>201</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.

<sup>202</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.444. A possible reading of the panel's use of the words "as a minimum" to qualify the "essential elements of an inconsistency with Article 2.1" could be that there are *more* essential elements than those present in the three-tier test. Another possible reading is that the panel was saying "at least this much is clear", without suggesting more. We do not find in the text of Article 2.1 of the *TBT Agreement* justification for the first approach and the panel did not explain what it meant by its words. Under the circumstances, we prefer to analyse the issue before us along the lines of the second approach.

<sup>203</sup> Indonesia refers to the above three-tier test for a finding of violation under Article III:4 of the GATT 1994 in *Korea – Various Measures on Beef* and adapts it to Article 2.1 of the *TBT Agreement* (Indonesia's first written submission, para. 42). In its second written submission, Indonesia specifies that the elements for establishing a violation are the same for Articles III:4 and 2.1, "except that Article III:4 does not require that a measure be a technical regulation, but instead 'a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of the imported and domestic like products'." (Indonesia's second written submission, para. 59). The United States follows the same test in its first written submission in respect of Article III:4 of the GATT 1994 without examining the type of measure at issue. Having done so, the United States briefly examines Article 2.1 of the *TBT Agreement*, indicating that it is Indonesia's burden to prove that Section 907(a)(1)(A) is a technical regulation and pointing out the relevance of the words "in respect of", which qualify "technical regulations", in the interpretation of both likeness and less favourable treatment. In its second written submission, the United States presents the arguments on Articles 2.1 of the *TBT Agreement* and III:4 of the GATT 1994 together, with the caveat that an interpreter must give due consideration to the particular context and requirements of each claim, "as they inform and mutually reinforce the other." (United States' second written submission, para. 101).

(c) Whether imported clove cigarettes and the domestic cigarettes at issue are "like products" within the meaning of Article 2.1 of the *TBT Agreement*

(i) *Interpreting likeness under Article 2.1 of the TBT Agreement*

7.80 As indicated above, at the time of writing this Report, examining the concept of likeness under Article 2.1 of the *TBT Agreement* remains an issue of first impression, as the only report that has addressed this provision until now,-- the panel report in *EC – Trademarks and Geographical Indications (Australia)* -- did not enter into an analysis of likeness given its findings that the complainant had not made a prima facie case of "less favourable treatment".<sup>205</sup>

7.81 The Panel is therefore tasked with interpreting for the first time the concept of likeness under Article 2.1 of the *TBT Agreement*. There seem to be two alternative approaches to interpreting this provision: on the hand, it could be argued that the jurisprudence under Article III:4 of the GATT 1994 is directly transposable to Article 2.1 of the *TBT Agreement*, based on the similarity of their respective language; on the other hand, it could be argued that the concept of likeness must be interpreted in the context of the *TBT Agreement* without directly transposing the jurisprudence on Article III:4 of the GATT 1994.

7.82 We sought the parties' views on this and they suggested that, in order to interpret Article 2.1 of the *TBT Agreement*, we should take into account both the jurisprudence under Article III:4 of the GATT 1994 and the context of the *TBT Agreement*. The United States, in particular, asks the Panel to take into account the "public health objectives" of Section 907(a)(1)(A) when interpreting likeness under Article 2.1 of the *TBT Agreement*. We note, however, that in their submissions, the parties rely heavily on the jurisprudence under Article III:4 of the GATT 1994. We also note that parties suggest that we incorporate the traditional likeness criteria of the GATT Working Party on *Border Tax Adjustments*.<sup>206</sup>

7.83 The central interpretative issue for us in this regard is whether a determination of "likeness" under Article 2.1 of the *TBT Agreement* is fundamentally about the nature and extent of a competitive relationship between the products being compared, as is the case with a determination of "likeness" in the context of Article III:4 of the GATT 1994. This issue has important consequences in this case. Accordingly, we shall set out the arguments of the parties, followed by our own reasoning on this issue, in detail.

Parties' arguments on the interpretation of "like products" in the context of Article 2.1 of the *TBT Agreement*

7.84 The parties' position on the interpretation of this provision has evolved during the proceedings. It is thus worth explaining the *parcours* followed by each party in this respect.

7.85 We recall that **Indonesia** put forward in its Panel Request national treatment claims under both Article 2.1 of the *TBT Agreement* and Article III:4 of the GATT 1994. In its first written submission, Indonesia appears to adjust its approach and declares that its claim under Article III:4 of the GATT 1994 is an alternative claim to that under Article 2.1 of the *TBT Agreement*. Accordingly, Indonesia first addresses the claim under Article 2.1 of the *TBT Agreement*, being the provision more

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<sup>204</sup> See Section VII.C.2(d) above.

<sup>205</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.475.

<sup>206</sup> Indonesia's first written submission, paras. 48-52, referring to the Appellate Body Report in *EC – Asbestos* (para. 103), the panel report in *Dominican Republic – Import and Sale of Cigarettes* (para. 7.165) and the GATT panel report in *Thailand – Cigarettes* (para. 42); Indonesia's second written submission, paras. 87-91; United States' first written submission, para. 157, referring to the Appellate Body Report in *EC – Asbestos* (paras. 99, 101); United States' response to Panel question No. 26.

specific to the dispute. However, after explaining that the obligation to accord national treatment has been addressed by various WTO panels and the Appellate Body on a number of occasions in the context of Article III:4 of the GATT 1994<sup>207</sup>, Indonesia bases its argumentation under Article 2.1 of the *TBT Agreement* almost exclusively on Article III:4 jurisprudence.<sup>208</sup>

7.86 In response to a question from the Panel<sup>209</sup>, Indonesia contends that, although it is possible to address the claims under Articles 2.1 of the *TBT Agreement* and III:4 of the GATT 1994 together, the Panel should be cautious if it chooses that approach because "these claims/provisions are not identical".<sup>210</sup> For example, it explains that claims under Article III:4 of the GATT 1994 need not establish that the measure at issue is a technical regulation.<sup>211</sup> However, Indonesia submits that the analysis of "likeness" under Article 2.1 of the *TBT Agreement* is a determination about the nature and extent of a competitive relationship between and among products, as established by the Appellate Body in *EC – Asbestos* in respect of Article III:4. Also responding to a question from the Panel<sup>212</sup>, Indonesia submits that, although Article 2.1 of the *TBT Agreement* does not contain a specific reference to a "general principle" similar to the one found in Article III:1 of the GATT 1994, "the GATT 1994 and the *TBT Agreement* are each context for the interpretation of the other". Accordingly, "Indonesia believes the Panel should consider the competitive relationship between the products at issue as relevant in its likeness analysis under Article 2.1 of the *TBT Agreement*".<sup>213</sup> Thus while seemingly endorsing the idea that what matters is a "competitive relationship" between the products at issue, Indonesia at the same times suggests that "a case-by-case analysis of likeness in the context of a different measure reasonably could conclude that all cigarettes are not like for the purpose of that particular measure".<sup>214</sup>

7.87 In its second written submission, Indonesia points out that "[t]he United States agrees with Indonesia that TBT Article 2.1 should be interpreted similarly to GATT Article III:4".<sup>215</sup> Nevertheless, Indonesia stresses that "these are two separate claims grounded in separate agreements and separate treaty obligations, and giving rise to separate rights".<sup>216</sup> Specifically, Indonesia argues that the elements for establishing a breach of these provisions are the same, except that Article III:4

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<sup>207</sup> Indonesia's first written submission, para. 42.

<sup>208</sup> Indonesia's first written submission, paras. 48-69.

<sup>209</sup> Panel question No. 21(b) reads:

"Indonesia has made claims under Articles 2.1, 2.2, 2.5, 2.8, 2.9, 2.10, 2.12, and 12.3 of the *TBT Agreement*. Indonesia has also made a claim under Article III:4 of the GATT 1994, and the United States has invoked Article XX(b) of the GATT 1994:

...

(b) Can one or more of these claims/provisions be addressed together, e.g. Article 2.1 of the *TBT Agreement* / Article III:4 of the GATT 1994?"

<sup>210</sup> Indonesia's response to Panel question No. 21(b).

<sup>211</sup> Indonesia's response to Panel question No. 21(b).

<sup>212</sup> Panel question No. 26 reads:

"The Appellate Body has explained that 'a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products'.

(a) Is the same true of a determination of 'likeness' under Article 2.1 of the *TBT Agreement*?

(b) If yes, must the Panel consider the competitive relationship between the products at issue as relevant in its likeness analysis under Article 2.1 of the *TBT Agreement* in the absence of a reference to a similar general principle as imbedded in Article III:1 of the GATT 1994?"

<sup>213</sup> Indonesia's response to Panel question No. 26(b).

<sup>214</sup> Indonesia's response to Panel question No. 47.

<sup>215</sup> Indonesia's second written submission, para. 58.

<sup>216</sup> Indonesia's second written submission, para. 58; Indonesia's oral statement at the second substantive meeting of the Panel, paras. 12 and 14.

"does not require that a measure be a technical regulation, but instead 'a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of the imported and domestic products'".<sup>217</sup> According to Indonesia, as stated by many panels and the Appellate Body, claims under the more specific of the two agreements should be analysed first.<sup>218</sup>

7.88 In its first written submission, the **United States** does not acknowledge that Indonesia indicated in its first written submission that its claim under Article III:4 of the GATT 1994 is an alternative claim to that under Article 2.1 of the *TBT Agreement* and commences its argumentation with Article III:4 of the GATT 1994 "for analytic clarity".<sup>219</sup> The United States, however, notes that "certain textual and contextual differences should be taken into account in the Panel's analysis of 'likeness' and 'less favourable treatment' under Article 2.1 of the *TBT Agreement*".<sup>220</sup> In particular, the United States refers to three specific differences between the *TBT Agreement* and the GATT 1994: first, the language in the preamble of the *TBT Agreement*, which establishes that "no country should be prevented from taking measures necessary ... for the protection of human ... life or health";<sup>221</sup> second, the fact that the obligation contained in Article 2.1 applies "in respect of" a technical regulation;<sup>222</sup> and finally, the "like product" analysis should "distinguish between characteristics that make a product or group of products identifiable for purposes of the regulation, and characteristics that demonstrate a competitive relationship or substitutability in the marketplace".<sup>223</sup>

7.89 In its oral statement at the first substantive meeting, the United States submits that "[t]he national treatment obligation contained in Article 2.1 of the *TBT Agreement* should be interpreted similarly to Article III:4 of the GATT 1994". The United States further argues that "each Agreement provides context for the other, and the analyses developed under Article III are relevant to an interpretation of Article 2.1".<sup>224</sup> However, in its oral statement, the United States also submits that in the context of analysing whether the products at issue in this case are "like products", a relevant factor in this case "is the degree to which differences among the regulated products directly *relate to the public health objectives* of Section 907(a)(1)(A)".<sup>225</sup> The United States reiterates that "those product differences *that relate to these public health objectives* are relevant to the 'like product' analysis".<sup>226</sup>

7.90 In response to a question from the Panel, the United States argues that, although it is possible for the Panel to address the national treatment claims together, "each claim is separate and the individual elements of each particular claim must be satisfied".<sup>227</sup> It says however in response to another question from the Panel that a determination of likeness under Article 2.1 of the *TBT Agreement* is "fundamentally a determination about the nature and extent of a competitive relationship between and among products". Accordingly, the United States does not consider the absence of "an Article III:1 analog in the *TBT Agreement* to be a basis for adopting a fundamentally different view of 'likeness' in the *TBT Agreement*".<sup>228</sup> Finally, the "likeness" analysis under both Agreements should be informed by the specific context of the *TBT Agreement* by considering "not

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<sup>217</sup> Indonesia's second written submission, para. 59.

<sup>218</sup> Indonesia's oral statement at the second substantive meeting of the Panel, para. 12.

<sup>219</sup> United States' first written submission, para. 145.

<sup>220</sup> United States' first written submission, para. 214.

<sup>221</sup> United States' first written submission, para. 215.

<sup>222</sup> United States' first written submission, para. 216.

<sup>223</sup> United States' first written submission, para. 217.

<sup>224</sup> United States' oral statement at the first substantive meeting of the Panel, para. 58.

<sup>225</sup> United States' oral statement at the first substantive meeting of the Panel, para. 24 (emphasis added).

<sup>226</sup> United States' oral statement at the first substantive meeting of the Panel, para. 27 (emphasis added).

<sup>227</sup> United States' response to Panel question 21(b). This was confirmed as well in its second written submission where the United States contended that that the Panel can consider together the national treatment claims under the GATT 1994 and the *TBT Agreement*, taking into account the particular context and requirements of each claim. United States' second written submission, para. 95.

<sup>228</sup> United States' response to Panel question 26.

only the nature of the competitive relationship among and between products but also the nature of the public health basis upon which the technical regulation at issue is based".<sup>229</sup>

The Panel's approach to interpreting "like products" in the context of Article 2.1 of the TBT Agreement

7.91 We must decide how we will approach the interpretation of the national treatment component of Article 2.1 of the *TBT Agreement*, in particular with respect to our "likeness" analysis. We see several options open to us. First, we could interpret Article 2.1 of the *TBT Agreement* following Article III:4 of the GATT 1994 jurisprudence. Under this approach, the jurisprudence under Article III:4 of the GATT 1994, which is mainly focussed on the nature and extent of a competitive relationship between the domestic and imported products at issue, would be directly transposable in its entirety to Article 2.1 of the *TBT Agreement*, based on the similarity of their respective language.

7.92 Second, we could interpret Article 2.1 of the *TBT Agreement* in the context of the provision itself and that of the *TBT Agreement*, without transposing any of the jurisprudence on Article III:4 of the GATT 1994, as this is but one of the concepts of "like products" found in the WTO Agreement. Under this approach, one would not focus on the competition-based approach that has been developed in the jurisprudence on Article III:4 of the GATT 1994.

7.93 Third, we could follow the approach suggested by the parties, which consists of interpreting Article 2.1 of the *TBT Agreement* taking into account both the jurisprudence under Article III:4 of the GATT 1994 and the context of the *TBT Agreement*. We could also follow the United States' suggestion to take into account the "public health objectives" of Section 907(a)(1)(A) when interpreting likeness under Article 2.1 of the *TBT Agreement*.

7.94 The starting point in any interpretation of a legal provision in a treaty is, as directed by Article 31(1) of the Vienna Convention on the Law of Treaties ("VCLT")<sup>230</sup>, the ordinary meaning of the terms.<sup>231</sup> Accordingly, we commence our examination by examining the terms of Article 2.1 of the *TBT Agreement*.

7.95 We recall that the first option we envisaged above favours an interpretation of the terms of Article 2.1 of the *TBT Agreement* following Article III:4 of the GATT 1994 jurisprudence. The extent to which the interpretations developed in the context of Article III:4 of the GATT 1994 may be simply transposed to Article 2.1 of the *TBT Agreement* is not clear to us, especially since the latter provision has not yet been interpreted in depth by panels or the Appellate Body. Certainly, Article 2.1 of the *TBT Agreement* appears to be modelled on Article III:4 of GATT 1994.<sup>232</sup> Indeed, both refer to

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<sup>229</sup> United States' response to Panel question No. 26. See also United States' second written submission, para. 111.

<sup>230</sup> The Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

<sup>231</sup> Article 3.2 of the DSU indicates that Members recognise that the WTO dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Articles 31 and 32 of the VCLT are recognized as codifying such rules. Appellate Body Report, *US – Gasoline*, p. 17, DSR 1996:I, 3 at 15-16. See also Appellate Body Report, *India – Patents (US)*, paras. 43-46; Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 10-12, DSR 1996:I, 97; and Panel Report, *US – DRAMS*, para. 6.13.

<sup>232</sup> The Appellate Body in *EC – Asbestos* examined the ordinary meaning of the word "like" when examining the concept of "like products" in Article III:4. It looked into its dictionary meaning to find that "like" means "[h]aving the same characteristics or qualities as some other ... thing; of approximately identical shape, size, etc., with something else; similar." (The Appellate Body referred to the definition in *The New Shorter Oxford English Dictionary*, Lesley Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 1588.) Appellate Body

imported products: "The products of the territory of any contracting party imported into the territory of any other contracting party" in the case of Article III:4 of the GATT 1994, and "products imported from the territory of any Member" in the case of Article 2.1 of the *TBT Agreement*. They both also impose an identically worded obligation on Members to provide in respect of those imports "treatment no less favourable than that accorded to like products of national origin".

7.96 However, we observe that both provisions differ in respect of the kinds of measures regulated by each provision. While Article 2.1 of the *TBT Agreement* applies only to technical regulations; Article III:4 of the GATT 1994 applies to a broader group of measures that would subsume technical regulations.<sup>233</sup> As we will discuss below, such difference should certainly be accorded some significance.

7.97 Given the similarity, and in some instances, identity, of the language of both national treatment provisions, the use of interpretations developed in the context of Article III:4 may seem relatively straightforward with respect to the likeness aspect of Article 2.1 of the *TBT Agreement*. In fact, as we indicated above, the parties generally appear to be persuaded that the jurisprudence developed under Article III:4 of the GATT 1994, in particular that relating to the competition approach to analysing likeness, is directly transposable to an analysis under Article 2.1 of the *TBT Agreement*. Indonesia defends the position whereby the analysis of "likeness" under Article 2.1 of the *TBT Agreement* is a determination about the nature and extent of a competitive relationship between and among products, as established by the Appellate Body in *EC – Asbestos* in respect of Article III:4.<sup>234</sup> The United States is also of the view that the national treatment obligation contained in Article 2.1 of the *TBT Agreement* is to be interpreted similarly to Article III:4 of the GATT 1994.<sup>235</sup>

7.98 While we agree with the parties that the similarity in wording must be given weight, we do so cautiously because, as noted by the Appellate Body in *EC – Asbestos*, even to the extent that the terms used are identical, they "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".<sup>236</sup> The Appellate Body further said that "while the meaning attributed to the term 'like products' in other provisions of the GATT 1994, or in other covered agreements, may be relevant context in interpreting Article III:4 of the GATT 1994, the interpretation of 'like products' in Article III:4 need not be identical, in all respects, to those other meanings."<sup>237</sup> The same may be said of the term "like product" under Article 2.1 of the *TBT Agreement* in relation to Article III:4 jurisprudence.

7.99 In our view, 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* because that approach was developed by the Appellate Body in *EC – Asbestos* on the basis of the general principle in Article III:1 of the GATT 1994, which does not have an equivalent in

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Report, *EC – Asbestos*, para. 90. Such dictionary definition would stand even if the Panel decides not to rely on jurisprudence under Article III:4 of the GATT 1994.

<sup>233</sup> Article III:4 of the GATT 1994 applies to "all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

<sup>234</sup> Panel question No. 26 reads: "[t]he Appellate Body has explained that "a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products".

(a) Is the same true of a determination of "likeness" under Article 2.1 of the *TBT Agreement*?

(b) If yes, must the Panel consider the competitive relationship between the products at issue as relevant in its likeness analysis under Article 2.1 of the *TBT Agreement* in the absence of a reference to a similar general principle as imbedded in Article III:1 of the GATT 1994?"

<sup>235</sup> United States' oral statement at the first substantive meeting of the Panel, para. 59.

<sup>236</sup> Appellate Body Report, *EC – Asbestos*, paras. 88-89.

<sup>237</sup> Appellate Body Report, *EC – Asbestos*, para. 89.

the *TBT Agreement*. In *EC – Asbestos*, the Appellate Body stressed the relevance of the "general principle" articulated in Article III:1 as expressed in Article III:4 and how it informs the interpretation of the concept of like products in Article III:4. According to the Appellate Body<sup>238</sup>, "the term 'like product' in Article III:4 of the GATT 1994 must be interpreted to give proper scope and meaning to" the "general principle" articulated in Article III:1 of the GATT 1994, enunciated by the Appellate Body in *Japan – Alcoholic Beverages II* as follows:

"The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III 'is to ensure that internal measures 'not be applied to imported and domestic products so as to afford protection to domestic production'. Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products . . . Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. . . ." <sup>239</sup>

7.100 As observed by the Appellate Body in *EC – Asbestos*, "there must be consonance between the objective pursued by Article III, as enunciated in the 'general principle' articulated in Article III:1, and the interpretation of the specific expression of this principle in the text of Article III:4."<sup>240</sup> For the Appellate Body, this interpretation "must, therefore, reflect that, in endeavouring to ensure 'equality of competitive conditions', the 'general principle' in Article III 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>241</sup>

7.101 The Appellate Body thus explained that "a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products."<sup>242</sup> However, as the Appellate Body acknowledged, "there is a spectrum of degrees of 'competitiveness' or 'substitutability' of products in the marketplace, and . . . it is difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word 'like' in Article III:4 of the GATT 1994 falls."<sup>243</sup> It further clarified that "[it is] not saying that *all* products which are in *some* competitive relationship are 'like products' under Article III:4."<sup>244</sup>

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<sup>238</sup> Appellate Body Report, *EC – Asbestos*, para. 98.

<sup>239</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 15. See also Appellate Body Report, *EC – Asbestos*, para. 97.

<sup>240</sup> Appellate Body Report, *EC – Asbestos*, para. 98.

<sup>241</sup> Appellate Body Report, *EC – Asbestos*, para. 98 (emphasis original).

<sup>242</sup> Appellate Body Report, *EC – Asbestos*, para. 99.

<sup>243</sup> Appellate Body Report, *EC – Asbestos*, para. 99.

<sup>244</sup> Appellate Body Report, *EC – Asbestos*, para. 99 (emphasis original). We note that this discussion must be situated in the context of the Appellate Body's accordion image aimed at differentiating the concept of "like product" in the first sentence of Article III:2 of the GATT 1994 from that in Article III:4 of the GATT 1994. (See below where we discuss the Appellate Body's accordion approach.) In a nutshell, the Appellate Body considered that the concept of "like product" under Article III:4 of the GATT 1994 must be interpreted in a broader manner than the same concept under Article III:2 of the GATT 1994, because the latter includes a different obligation in respect of directly competitive or substitutable products, and this second type of product is not reflected in Article III:4 of the GATT 1994. Immediately following the passage cited above, the Appellate Body indicated in particular that:

"In ruling on the measure at issue, we also do not attempt to define the precise scope of the word 'like' in Article III:4. Nor do we wish to decide if the scope of 'like products' in Article III:4 is co-extensive with the combined scope of 'like' and 'directly competitive or substitutable' products in Article III:2. However, we recognize that the relationship between these two provisions is important, because there is no sharp distinction between fiscal



7.102 When asked by the Panel about this issue, both parties considered that it is not necessary to have similar language to that of Article III:1 of the GATT 1994 within the *TBT Agreement* in order to transpose the competition-driven jurisprudence under Article III:4 of the GATT 1994 into Article 2.1 of the *TBT Agreement*.<sup>245</sup> The United States goes further and contends that it does not consider the absence of "an Article III:1 analog in the *TBT Agreement* to be a basis for adopting a fundamentally different view of 'likeness' in the *TBT Agreement*".<sup>246</sup>

7.103 In our view, the absence in the *TBT Agreement* of language such as that in Article III:1 of the GATT 1994 has meaning for our interpretive exercise. Even 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. As we will discuss below, we consider 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.

7.104 We also find support in the Appellate Body's accordion image of likeness. The Appellate Body in *Japan – Alcoholic Beverages II* cautioned the interpreter on the use of the four general criteria of the *Border Tax Adjustment Working Group* and did so by illustrating likeness as an *accordion* that "stretches and squeezes" depending on the context and the covered agreement in which it appears:

"No one approach to exercising judgment will be appropriate for all cases. The criteria in *Border Tax Adjustments* should be examined, but there can be no one precise and absolute definition of what is 'like'. The concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different provisions of the WTO Agreements are applied. The width of the accordion in any one of those places must be determined by 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>247</sup>

7.105 Accordingly, the "accordion" of like products as envisaged by the Appellate Body 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>248</sup>

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regulation, covered by Article III:2, and non-fiscal regulation, covered by Article III:4. Both forms of regulation can often be used to achieve the same ends. It would be incongruous if, due to a significant difference in the product scope of these two provisions, Members were prevented from using one form of regulation – for instance, fiscal – to protect domestic production of certain products, but were able to use another form of regulation – for instance, non-fiscal – to achieve those ends. This would frustrate a consistent application of the 'general principle' in Article III:1. For these reasons, we conclude that the scope of 'like' in Article III:4 is broader than the scope of 'like' in Article III:2, first sentence. Nonetheless, we note, once more, that Article III:2 extends not only to 'like products', but also to products which are 'directly competitive or substitutable', and that Article III:4 extends only to 'like products'. In view of this different language, and although we need not rule, and do not rule, on the precise product scope of Article III:4, we do conclude that the product scope of Article III:4, although broader than the *first* sentence of Article III:2, is certainly *not* broader than the *combined* product scope of the *two* sentences of Article III:2 of the GATT 1994."

<sup>245</sup> Indonesia's response to Panel question No. 26(b).

<sup>246</sup> United States' response to Panel question No. 26.

<sup>247</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 21.

<sup>248</sup> See footnote 244 above.

7.106 We also emphasize, as we pointed out before, 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 instruments. This is relevant in interpreting this provision. In particular, the obligation in Article 2.1 of the *TBT Agreement* applies "in respect of" a technical regulation. As the United States argues, the ordinary meaning of the term "in respect of" is "be directed to; refer to; relate to; deal with; be concerned with." We recall that the United States has asked the Panel to take into account this textual difference with Article III:4 of the GATT 1994 in analysing Article 2.1 of the *TBT Agreement*.<sup>249</sup>

7.107 Recalling the Appellate Body findings in *EC – Asbestos* whereby, even to the extent that the terms used are identical, they "must be interpreted in light of the context ... of the provision at issue"<sup>250</sup>, and Article 31(2) of the VCLT, which provides that the *context* for the purpose of interpreting a treaty comprises the text of the Agreement, including its preamble and annexes, we turn to the immediate context of the national treatment obligation in Article 2.1 of the *TBT Agreement*, namely Article 2.1 of the *TBT Agreement* itself, as well as the *TBT Agreement* as a whole.

7.108 Annex 1 of the *TBT Agreement* sets out the definition of technical regulation for the purposes of the *TBT Agreement* and thus serves as context for the interpretation of Article 2.1 of that *Agreement*. We recall that a technical regulation is defined as a "[d]ocument which lays down product characteristics ... with which compliance is mandatory". Section 907(a)(1)(A)<sup>251</sup> does lay down, in negative form<sup>252</sup>, a product characteristic with which compliance is mandatory: cigarettes cannot have a characterizing flavour. An exception is made for those cigarettes with tobacco or menthol as a characterizing flavour.<sup>253</sup>

7.109 The fact that Section 907(a)(1)(A) is a technical regulation and has as its immediate purpose to regulate product characteristics (characterizing flavours) for certain types of products (cigarettes) should have some weight, and potentially great weight, in the determination of whether the products at issue are like. Indeed, cigarettes with characterizing flavours are regulated by Section 907(a)(1)(A) as a single group of products.

7.110 In response to a question from the Panel, the United States explained that a Senate commentary in the legislative record of Section 907(a)(1)(A) clarifies that "[w]hile the term 'characterizing flavor' is undefined in the legislation, it is intended to capture those additives that produce a distinguishing flavor, taste, or aroma imparted by the product."<sup>254</sup> Therefore, for the purpose of being regulated and thus prohibited under Section 907(a)(1)(A), a cigarette must have an additive that produces a distinguishing flavour, taste or aroma. Under this interpretative approach, the fact that cigarettes contain such additives should figure in the likeness determination more so than competition-related or other criteria, as it is that precise feature that determines whether or not a cigarette falls within the scope of application of the technical regulation at issue, i.e., Section 907(a)(1)(A).

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<sup>249</sup> United States' first written submission, para. 216.

<sup>250</sup> Appellate Body Report, *EC – Asbestos*, para. 88.

<sup>251</sup> As explained above, both parties agree that Section 907(a)(1)(A) is a technical regulation.

<sup>252</sup> We refer to Section VII.C where the definition of technical regulation is examined, including the Appellate Body Report in *EC – Sardines*, where it found that technical regulations "may be prescribed or imposed in either a positive or a negative form". Appellate Body Report, *EC – Sardines*, para. 176.

<sup>253</sup> We will address the issue of whether it could be said that a cigarette has a tobacco flavour, since all cigarettes are mainly composed of and thus taste of tobacco, in the section dedicated to physical characteristics (see para. 7.131 below).

<sup>254</sup> United States' response to Panel question No. 14, para. 32. The United States provides the following reference: 155 Cong. Rec. S64111 (June 10, 2009) (Exhibit US-98).

7.111 We recall that Article 31(1) of the VCLT directs an interpreter to look into the object and purpose of the treaty, in this case the *TBT Agreement*. As the United States explains<sup>255</sup>, the Preamble to the *TBT Agreement* sets out its object and purpose. In particular, the second preambular recital of the *TBT Agreement* indicates the purpose of the Members as "[d]esiring to further the objectives of GATT 1994". The United States reads this as meaning that the Members contemplated that the *TBT Agreement* is consistent with the GATT 1994, and its provisions should be read in the context of furthering the objectives of the GATT 1994.

7.112 We note that "to further" means to "help the progress or development of (something); promote".<sup>256</sup> This may be interpreted as meaning that jurisprudence on Article III:4 of the GATT 1994 cannot simply be transposed to Article 2.1 of the *TBT Agreement*, as the latter is meant to be a development - a step forward - from the disciplines of the GATT 1994, including Article III:4. However, it may also suggest that the *TBT Agreement* serves to "promote" the GATT 1994 and in that sense it could be argued that Article III:4 jurisprudence could be transposed to Article 2.1.

7.113 The Preamble further provides in its sixth recital that Members "*recogniz[e]* that no country should be prevented from taking measures necessary ... for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the level it considers appropriate[...]."<sup>257</sup> For the United States, this statement confirms the general right of Members to take measures for legitimate objectives, including to protect human health, even when those measures affect or even restrict international trade, so long as certain conditions are met. In its view, this statement recognizes the legitimacy and WTO-consistency of technical regulations that are adopted to meet objectives such as to protect human health or the environment.<sup>258</sup>

7.114 In our view, the sixth preambular recital combined with the necessity requirement in Article 2.2 of the *TBT Agreement*<sup>259</sup> 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, given the nature of the measures contemplated under the *TBT Agreement*.

7.115 The United States also argues that this means that the "likeness" analysis under both the GATT 1994 and the *TBT Agreement* should be informed by the specific context of the *TBT Agreement* by considering "not only the nature of the competitive relationship among and between products but also the nature of the public health basis upon which the technical regulation at issue is based".<sup>260</sup> In particular, the United States has asked the Panel to "carefully parse the significance of traits that are generally shared among all cigarettes and traits that are significant with respect to the public health objective of the measure at issue."<sup>261</sup> The United States tells us that the public health basis of Section 907(a)(1)(A) should be considered for the "likeness" analysis under Article 2.1 of the *TBT Agreement*, "as there are certain 'contextual principles' that inform the national treatment obligation".<sup>262</sup> We note that this position goes further than that explained above about taking into account the immediate purpose of Section 907(a)(1)(A) as a technical regulation, which is to regulate cigarettes with characterizing flavours.

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<sup>255</sup> United States' second written submission, paras. 96-101.

<sup>256</sup> Oxford English Dictionary on-line, accessed on 30 April 2011. See also *Shorter Oxford English Dictionary*, 5<sup>th</sup> edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. I, p. 1053, defining "further" to mean, among other things, "Help on, assist; promote, favour"; *Webster's Online Dictionary*, assessed on 30 April 2011, defining "further" to mean "to help forward".

<sup>257</sup> For full citation, see para. 7.3 above.

<sup>258</sup> United States' second written submission, para. 98.

<sup>259</sup> We examine Indonesia's claim under Article 2.2 of the *TBT Agreement* in Section VII.F below.

<sup>260</sup> United States' response to Panel question No. 26. See also United States' second written submission, para. 111.

<sup>261</sup> United States' first written submission, para. 159.

<sup>262</sup> United States' second written submission, para. 111.

7.116 We agree that, in the context of the *TBT Agreement* and in the light of its object and purpose expressed by the preambular recitals referred to above, we must bear in mind the significance of the public health objective of a technical regulation and how certain features of the relevant products, their end-uses as well as the perception consumers have about them, must be evaluated in the light of that objective. In the present case, the declared legitimate public health objective of Section 907(a)(1)(A), i.e., the reduction of youth smoking, must permeate and inform our likeness analysis.

7.117 On the basis of the considerations above, we conclude that our approach to interpreting Article 2.1 of the *TBT Agreement* must ensure that the *TBT Agreement* is addressed first as immediate context of Article 2.1 of the *TBT Agreement*. The jurisprudence under Article III:4 of the GATT 1994, which provision also serves as context albeit not immediate, may also be considered. In our view, such jurisprudence is relevant because Article III:4 of the GATT 1994 shares almost identical wording with Article 2.1 of the *TBT Agreement*.

7.118 As put by the Appellate Body in *EC – Asbestos*, however, we acknowledge that even to the extent that the terms used are identical, they "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".<sup>263</sup> Paraphrasing the Appellate Body, while the meaning attributed to the term "like products" in other provisions of the WTO Agreements may be relevant in interpreting Article 2.1 of the *TBT Agreement*, the interpretation of like products in Article 2.1 need not be identical, in all respects, to those other meanings. This approach to interpreting Article 2.1 finds support in the Appellate Body's accordion image described above.

7.119 From our considerations above, we do not believe that the interpretation of Article 2.1 of the *TBT Agreement*, in the circumstances of this case where we are dealing with a technical regulation which has a legitimate public health objective, should be approached primarily from a competition perspective. We rather think 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. As explained above, we must pay special notice to the significance of the public health objective of a technical regulation and how certain features of the relevant products, their end-uses as well as the perception consumers have about them, must be evaluated in light of that objective. In the present case, the declared legitimate public health objective of Section 907(a)(1)(A), i.e., the reduction of youth smoking, must permeate and inform our likeness analysis. As we will explain in more detail below, this is particularly relevant in the consideration of the physical characteristics that are important for the immediate purpose of Section 907(a)(1)(A) of regulating cigarettes with characterizing flavours, as well as the consumer tastes and habits criterion where 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.

7.120 We shall therefore proceed with our likeness analysis bearing in mind our considerations above. We start by setting out the traditional likeness criteria.

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<sup>263</sup> Appellate Body Report, *EC – Asbestos*, paras. 88-89.

(ii) *The traditional likeness criteria*

7.121 The Report of the GATT Working Party on Border Tax Adjustments outlines an approach for analysing "likeness" that has since been followed and developed by panels and the Appellate Body.<sup>264</sup> This approach consists, essentially, of employing four general criteria in analysing "likeness":

- (a) the properties, nature and quality of the products;
- (b) the end-uses of the products;
- (c) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and
- (d) the tariff classification<sup>265</sup> of the products.<sup>266</sup>

7.122 We recall that, in *EC – Asbestos*, the Appellate Body asserted that the four general criteria "provide a framework for analysing the 'likeness' of particular products on a case-by-case basis".<sup>267</sup> The Appellate Body further clarified that these criteria are "simply tools to assist in the task of sorting and examining the relevant evidence" and that they are "neither a treaty-mandated nor a closed list of criteria".<sup>268</sup> The Appellate Body also warned that, even though each criterion addresses, in principle, a different aspect of the products at issue to be examined separately, these criteria are interrelated.<sup>269</sup>

7.123 In this regard, we acknowledge our duty to examine, in each case, *all* of the pertinent evidence before us.<sup>270</sup> We recall that the Appellate Body enjoined panels to, once all the relevant evidence has been examined, determine whether "that evidence, as a whole, indicates that the products in question are 'like' in terms of the legal provision at issue."<sup>271</sup> Consequently, it would be

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<sup>264</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 19; Panel Report, *US – Gasoline*, para. 6.8, where the approach set forth in the *Border Tax Adjustment* case was adopted by a panel in a dispute concerning Article III:4 of the GATT 1994. This point was not appealed. Appellate Body Report, *EC – Asbestos*, para. 101.

<sup>265</sup> The fourth criterion, tariff classification, was not mentioned by the Working Party on *Border Tax Adjustments*, but was included by subsequent panels (see, for instance, GATT panel reports, *EEC – Animal Feed Proteins*, para. 4.2, and *Japan – Alcoholic Beverages I*, para. 5.6).

<sup>266</sup> The Appellate Body in *EC – Asbestos* asserted:

"We note that these four criteria comprise four categories of 'characteristics' that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) 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; and (iv) the international classification of the products for tariff purposes."

Appellate Body Report, *EC – Asbestos*, para. 101.

<sup>267</sup> Appellate Body Report, *EC – Asbestos*, para. 102.

<sup>268</sup> Appellate Body Report, *EC – Asbestos*, para. 102.

<sup>269</sup> The Appellate Body explained:

"... the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence. In addition, although each criterion addresses, in principle, a different aspect of the products involved, which should be examined separately, the different criteria are interrelated. For instance, the physical properties of a product shape and limit the end-uses to which the products can be devoted. Consumer perceptions may similarly influence – modify or even render obsolete – traditional uses of the products. Tariff classification clearly reflects the physical properties of a product."

Appellate Body Report, *EC – Asbestos*, para. 102.

<sup>270</sup> Appellate Body Report, *EC – Asbestos*, para. 102.

<sup>271</sup> Appellate Body Report, *EC – Asbestos*, para. 103.

for us, once we have examined all the evidence presented by the parties, to determine whether the products at issue are "like" in terms of Article 2.1 of the *TBT Agreement*.

(iii) *Likeness analysis of the products concerned*

Relevant domestic and imported products for the purpose of the likeness analysis in this case

7.124 The first step in a likeness examination is to identify the domestic and imported products that must be compared. We note that this issue arises both in the "likeness" step of the national treatment analysis, and then again in the "less favourable treatment" step of such an analysis.

7.125 The identification of the products which the Panel needs to compare for the purpose of its likeness analysis under Article 2.1 of the *TBT Agreement* is an issue that, in the present case, appears to touch upon our terms of reference. Indeed, if we examine Indonesia's Panel Request, which, as we explain below, demarcates our terms of reference, we observe that it defines the domestic like product as "menthol cigarettes". In fact, we see no reference in Indonesia's Panel Request to a type of cigarette other than clove or menthol cigarettes.

7.126 In particular, Indonesia's Panel Request states that "banning clove cigarettes in the United States while exempting *menthol cigarettes* from the ban is inconsistent", *inter alia*, with "Article III:4 of the GATT 1994 because the measure provides treatment to an imported product, clove cigarettes, that is 'less favourable' than that accorded to a like domestic product, *menthol cigarettes*" (emphasis added).<sup>272</sup>

7.127 Likewise, Indonesia's Panel Request claims that the measure at issue<sup>273</sup> is inconsistent with "TBT Article 2.1 because the measure results in treatment that is 'less favourable' to imported clove cigarettes than that accorded to a like domestic product, *menthol cigarettes*".<sup>274</sup> (emphasis added)

7.128 In its first written submission, however, Indonesia introduces a new category of domestic cigarettes in its national treatment claims argumentation. While, at first, Indonesia refers to this new category of domestic cigarettes mostly as "regular" cigarettes,<sup>275</sup> from its second written submission onwards, Indonesia mainly uses the term "tobacco-flavoured"<sup>276</sup> cigarettes, and on occasion, "regular-flavoured"<sup>277</sup> cigarettes or "regular tobacco flavour".<sup>278</sup>

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<sup>272</sup> Indonesia's Panel Request, WT/DS406/2, p. 1.

<sup>273</sup> Indonesia's Panel Request refers to Section 907 of the *Family Smoking Prevention and Tobacco Control Act*, but Indonesia's first written submission refers to Section 101 of the same Act. In response to Panel question No. 9, the parties clarified that the measure at issue is properly referred to as "Section 907(a)(1)(A) of the *Federal Food, Drug, and Cosmetic Act* (as amended by the *Family Smoking Prevention and Tobacco Control Act*)". See para. 2.4 above.

<sup>274</sup> Indonesia's Panel Request, WT/DS406/2, p. 2.

<sup>275</sup> See e.g. Indonesia's first written submission, paras. 40 (and related footnote 50), 43, 57, 60, 62, 63, 72; Indonesia's oral statement at the first substantive meeting of the Panel, paras. 93, 94, 95, 96, 97, 98, 102, 104, 105, 106, 107, 113, 118, 119, 120, 123.

<sup>276</sup> See e.g. Indonesia's second written submission, paras. 65-74, 77-78, 81-82, 84, 87-90, 92-93, 96, 100 and 104; Indonesia's oral statement at the second substantive meeting of the Panel, paras. 48-50, 52, 54, 56-58, 61 and 66.

<sup>277</sup> See e.g. Indonesia's response to Panel question No. 83, paras. 13-14; Indonesia's response to Panel question No. 88; Indonesia's response to Panel question No. 92, paras. 22, 24; Indonesia's response to Panel question No. 93; Indonesia's response to Panel question No. 94, paras. 26-27; Indonesia's comments on the United States' response to Panel question No. 87, paras. 25; Indonesia's response to Panel question No. 89, paras. 29-30; Indonesia's response to Panel question Nos. 95-96.

<sup>278</sup> See e.g. Indonesia's first written submission, para. 54.

7.129 We note that Indonesia's argumentation also evolved in parallel to the use of different terminology for this new category of domestic cigarettes. While in its first written submission, the domestic product for the purpose of comparison presented by Indonesia were both regular and menthol cigarettes, its likeness argumentation was mainly focused on a comparison between clove and menthol cigarettes.<sup>279</sup> However, in response to a question from the Panel, Indonesia requested us to first conduct a like product analysis of clove cigarettes, on the one hand, and menthol- and "tobacco-flavoured" cigarettes, i.e., regular cigarettes, produced in the United States, on the other hand. And, "only if that analysis does not lead to a determination of likeness, would it be necessary for the Panel to analyse the likeness of clove cigarettes, on the one hand, and menthol-flavoured cigarettes produced in the United States, on the other hand".<sup>280</sup>

7.130 Indonesia was not alone in the use of different terminology to refer to the new category of domestic cigarettes. The United States also followed a mixed approach, using both "regular"<sup>281</sup> and "tobacco-flavoured"<sup>282</sup> cigarettes, although it used the term "regular" more often. The United States used the terms "regular tobacco"<sup>283</sup> and "regular tobacco-flavoured"<sup>284</sup> cigarettes as well.

7.131 The parties have therefore often used the terms "regular" and "tobacco-flavoured" cigarettes interchangeably in this dispute. We find this to be susceptible of causing confusion as to which product is being addressed. Indeed, 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 cigarettes, kreteks, bidis, etc., contain, as well, an additive that imparts the characterizing flavour that Section 907(a)(1)(A) speaks of or, as the international community argues<sup>285</sup>, that which increases palatability. As put by Indonesia, "cigarettes may contain a variety of ingredients and flavors that are added to the tobacco ...".<sup>286</sup> We have therefore decided to use the term "regular" cigarettes as we think it better describes the fact that they do not include additional characterizing flavours.

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<sup>279</sup> Indonesia's first written submission, paras. 48-52; Indonesia's oral statement at the first substantive meeting of the Panel, para. 123.

<sup>280</sup> Indonesia's response to Panel question No. 27, para. 71

<sup>281</sup> See e.g. United States' first written submission, paras. 148, 164, 165, 167, 174, 185, 189, footnote 246 to para. 192, footnote 254 to para. 203; United States' response to Panel question No. 30, footnote 59 to para. 68; 31; 33, para. 75; 34, para. 79; 37, paras. 85, 86; 38, paras. 91, 94, 96; 41, para. 105; United States' second written submission, para. 116; United States' response to Panel question No. 86, paras. 14, 15, 16; Indonesia's response to Panel question No. 87, para. 18; Indonesia's response to Panel question No. 88, para. 23; Indonesia's response to Panel question No. 91, paras. 38, 39, 40; Indonesia's response to Panel question No. 92, para. 44; United States' comments on Indonesia's response to Panel question No. 92, para. 17; United States' comments on Indonesia's response to Panel question No. 93, paras. 22, 23; United States' comments on Indonesia's response to Panel question No. 94, footnote 22 to para. 27.

<sup>282</sup> See e.g. United States' first written submission, paras. 148, 209; United States' oral statement at the first substantive meeting of the Panel, paras. 24, 31-32, 47; United States' oral statement at the second substantive meeting of the Panel, paras. 22, 32, 45, 55; United States' response to Panel question No. 84, paras. 10; United States' response to Panel question No. 86, paras. 13; United States' response to Panel question No. 90, paras. 31, 35; United States' comments on Indonesia's response to Panel question No. 85, paras. 9-10, 13; United States' comments on Indonesia's response to Panel question No. 93, para. 23; United States' comments on Indonesia's response to Panel question No. 94, paras. 25-26.

<sup>283</sup> See e.g. United States' response to Panel question No. 30, para. 69.

<sup>284</sup> See e.g. United States' response to Panel question No. 88, paras. 23 and 91, para. 38.

<sup>285</sup> See Descriptive Part, paras. 2.29-2.32.

<sup>286</sup> Indonesia's first written submission, para. 4; footnote 7 to para. 4 (making reference to Exhibit IND-5, which contains the following document: Richard R. Baker, Eian D. Massey, and Graham Smith, "An overview of the effects of tobacco ingredients on smoke chemistry and toxicology," Food and Chemical Toxicity 42S (2004) at S57-S64 ("*Baker Study*").

7.132 When we asked the parties whether we would be exceeding our terms of reference if we conducted a likeness analysis between, on the one hand, clove cigarettes and, on the other hand, both menthol and regular cigarettes produced in the United States, **Indonesia** said we would not.<sup>287</sup> Indonesia explains that it referred to menthol cigarettes in its Panel Request as an example of a like product produced domestically.<sup>288</sup> Indonesia however also explains that, at the beginning of the proceedings, it was convinced that clove cigarettes produced in Indonesia were "like" cigarettes containing menthol produced in the United States but that, later on, it realised that imported cigarettes containing clove are like both menthol and regular cigarettes.<sup>289</sup> Indonesia further argues that referring only to domestic menthol cigarettes in its Panel Request did not prejudice the United States.<sup>290</sup>

7.133 The **United States** agrees with Indonesia in that the Panel could include domestic regular cigarettes in the likeness analysis without exceeding its terms of reference. For the United States, a panel request must identify the relevant measure or measures and the claims which are raised. The United States contends that the Appellate Body has made a distinction between "claims" and "arguments" in reviewing a panel request according to Article 6.2 of the DSU.<sup>291</sup> The United States argues that the domestic products to be considered in the likeness analysis are elements related to the argumentation of the disputing parties in support of or opposition to the national treatment claim and should be set out in the written and oral submissions of the parties. Hence, according to the United States, the domestic products which are used as the basis of the argument would not be part of the terms of reference of a panel.<sup>292</sup>

7.134 In spite of the parties' views, we consider that it is necessary for us to examine this issue as it touches upon our jurisdiction. In this respect, the Appellate Body has cautioned panels that there are certain inherent powers to their adjudicative function and that "panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction."<sup>293</sup> The Appellate Body has also clarified that "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative".<sup>294</sup> We shall therefore examine whether we would be exceeding our terms of reference if we include regular cigarettes in the likeness analysis.

7.135 We start by looking at the wording of Article 6.2 of the DSU which reads as follows:

"The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complainant sufficient to present the problem clearly."

7.136 Article 6.2 of the DSU thus provides, *inter alia*, that a panel request must identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. As found by the Appellate Body in *Guatemala – Cement I*, these requirements: "together ... constitute the 'matter referred to the DSB', which forms the basis for a panel's terms of reference" under Article 7 of the DSU.<sup>295</sup> As further explained by the panel in *Colombia – Ports of*

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<sup>287</sup> Indonesia's response to Panel question No. 83, para. 6.

<sup>288</sup> Indonesia's response to Panel question No. 83, para. 12.

<sup>289</sup> Indonesia's response to Panel question No. 83, para. 14.

<sup>290</sup> Indonesia's response to Panel question No. 83, para. 12.

<sup>291</sup> United States' response to Panel question No. 83, para. 7.

<sup>292</sup> United States' response to Panel question No. 83, para. 7.

<sup>293</sup> Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 45.

<sup>294</sup> Appellate Body Report, *US – 1916 Act*, footnote 30 to para. 54.

<sup>295</sup> Appellate Body Report, *Guatemala – Cement I*, para. 73; Panel Report, *Colombia – Ports of Entry*, paras. 7.22 and 7.26.



*Entry*, the request for establishment of a panel "defines and limits the scope of the dispute and thereby the extent of a panel's jurisdiction".<sup>296</sup>

7.137 The Panel acknowledges that Article 6.2 of the DSU does not mention the need to specify the products concerned in a panel request. We do however think that the absence of such an obligation should not be taken to mean that, when the particular products affected by the measure at issue are specified in a panel request, such specification is deprived of all relevance. We note that prior panels share our understanding.<sup>297</sup>

7.138 We are well aware that, as argued by the United States, the Appellate Body has made a distinction between "claims" and "arguments" in reviewing a panel request pursuant to Article 6.2 of the DSU.<sup>298</sup> Indeed, as explained by the Appellate Body, "Article 6.2 of the DSU requires that the *claims*, but not the *arguments* must all be specified sufficiently in the request for the establishment of a panel".<sup>299</sup>

7.139 However, we disagree with the United States in that the identification of the like domestic product in a panel request merely amounts to argumentation. It seems to us that in certain instances, such as the present one, the identification of the specific products at issue in a panel request pertains to the claim at issue, i.e., providing "a brief summary of the legal basis of the complaint", rather than to the arguments relating to that claim. Indeed, Article 2.1 of the *TBT Agreement* defines the national treatment obligation it embodies in direct reference to the imported product and the like domestic product; both concepts serve to orient the determination of the scope of such an obligation. Therefore, the identification of those two types of products in the panel request rather pertains to the realm of "providing a brief summary of the legal basis to the complaint" than purely to argumentation.

7.140 The Panel acknowledges that, as explained by the Appellate Body in *EC – Computer Equipment*, "Article 6.2 of the DSU does *not* explicitly require that the products to which the 'specific measures at issue' apply be identified".<sup>300</sup> Furthermore, the Appellate Body in *EC – Chicken Cuts* noted that "the identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference".<sup>301</sup>

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<sup>296</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.30.

<sup>297</sup> In *China – Publications and Audiovisual Products*, the complainant (the United States) had specified in its panel request a particular list of relevant products (i.e. books, newspapers and periodicals). The panel examined whether the use by the United States of such a limited list of publications in its panel request had been sufficient to put the respondent (China) on notice that it was making a claim with respect to a certain product (i.e. electronic publications). The panel found that, given that the United States "expressly limited the scope of its claim to 'books, newspaper, and periodicals' and did not refer to the broader category of 'publications'", China "could reasonably conclude, in good faith, that the United States was not including the treatment of electronic publications in its claim". Panel Report, *China – Publications and Audiovisual Products*, paras. 7.145 – 7.147. In *EC – IT Products*, the panel found that the complainants (the United States, Japan and Chinese Taipei) had, *inter alia*, defined the multifunctional digital machines (the "MFMs") products in footnote 15 of their joint panel request. According to the panel, as a result, the complainants had informed the European Union that their complaints were limited to the products defined in the footnote. The panel thus found that the claim of inconsistency with Article II of the GATT 1994 with reference to products other than the MFMs illustrated in footnote 15 of the joint panel request was outside the terms of reference of the panel. Panel Report, *EC – IT Products*, paras. 7.1204-7.1205.

<sup>298</sup> United States' response to Panel question No. 83, para. 7.

<sup>299</sup> Appellate Body Report, *EC – Bananas III*, para. 143.

<sup>300</sup> However, as also explained by the Appellate Body in relation to certain WTO obligations, "in order to identify 'the specific measures at issue', it may also be necessary to identify the products subject to the measures in dispute". Appellate Body Report, *EC – Computer Equipment*, para. 67. See also, Appellate Body Report, *EC – Chicken Cuts*, para. 165.

<sup>301</sup> Appellate Body Report, *EC – Chicken Cuts*, para. 165.

7.141 We do not disagree with these prior findings and we should not be misinterpreted as saying that a complainant must in all cases identify the products to which the measure at issue applies in order to comply with Article 6.2. We are saying that when the complainant has specified the products in its panel request, as in the present case, and when the claim pertains to a WTO obligation that requires a comparison of particular products, as in the present case, such identification becomes an integral part of the panel's terms of reference, and cannot be "cured" through argumentation.<sup>302</sup>

7.142 Indonesia has argued that its reference to menthol cigarettes in its Panel Request is just an example. The wording of its Panel Request does not seem to coincide with that view. Indeed, as explained above, Indonesia's Panel Request states that "banning clove cigarettes in the United States while exempting *menthol cigarettes* from the ban is inconsistent", *inter alia*, with "Article III:4 of the GATT 1994 because the measure provides treatment to an imported product, clove cigarettes, that is 'less favourable' than that accorded to a like domestic product, *menthol cigarettes*" (emphasis added).<sup>303</sup> Similarly, Indonesia's Panel Request claims that the measure at issue is inconsistent with "TBT Article 2.1 because the measure results in treatment that is 'less favourable' to imported clove cigarettes than that accorded to a like domestic product, *menthol cigarettes*"<sup>304</sup> (emphasis added). This wording does not seem to us to be referring to menthol cigarettes simply as an example, but rather as identifying menthol cigarettes as the domestic like product at issue. If it were to serve only as an example, we would have expected Indonesia to say so or at least include language implying it. Moreover, if the domestic product identified in Indonesia's Panel Request should be treated as a mere example, then given how the claim is phrased, it would necessarily follow that the imported product identified in the Panel Request (i.e., clove cigarettes) should also be treated as a mere example, meaning that Indonesia would have been in principle free to expand the scope of its national treatment claim in its subsequent submissions to include not only clove cigarettes, but also one or more other types of imported products.

7.143 Indonesia also tells us that the mere fact that in the request for the establishment of a panel it referred only to menthol cigarettes did not prejudice the United States<sup>305</sup>, and points out that the United States concurs that the Panel would not exceed its terms of reference should it include both menthol and regular cigarettes in its likeness analysis.<sup>306</sup>

7.144 Indonesia is right to point to the important due process role that a panel request plays in delimiting a panel's terms of reference. In fact, "[d]ue process considerations ... caution against allowing measures and *products* into the Panel's terms of reference that a respondent party had not received notice of".<sup>307</sup> (emphasis added)

7.145 But due process concerns are of relevance not only to the right of a respondent to know the extent of the claims against it; but also in respect of other WTO Members with an interest in the dispute. In this respect, the Appellate Body in *US – Carbon Steel* clarifies that "the terms of reference and the request for the establishment of a panel on which they are based, serve the *due process*

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<sup>302</sup> Recently, the Appellate Body has reiterated that: "a party's submissions during panel proceedings cannot cure a defect in a panel request. We consider this principle paramount in the assessment of a panel's jurisdiction. Although subsequent events in panel proceedings, including submissions by a party, may be of some assistance in confirming the meaning of the words used in the panel request, those events cannot have the effect of curing the failings of a deficient panel request. In every dispute, the panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing." Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642 (citing Appellate Body Report, *EC – Bananas III*, para. 143; Appellate Body Report, *US – Carbon Steel*, para. 127).

<sup>303</sup> Indonesia's Panel Request, WT/DS406/2, p. 1.

<sup>304</sup> Indonesia's Panel Request, WT/DS406/2, p. 2.

<sup>305</sup> Indonesia's response to Panel question No. 83, para. 12.

<sup>306</sup> Indonesia's response to Panel question No. 83, para. 14.

<sup>307</sup> Panel Report, *EC – IT Products*, para. 7.1202.

objective of notifying the parties and *third parties* of the nature of a complainant's case" (emphasis added).<sup>308</sup>

7.146 We would go further and include the rights of all WTO Members who have a right to make their interest in a particular dispute known and to request to join the proceedings as third parties. We could easily contemplate the possibility that a WTO Member may have decided not to join as a third party to this dispute in the belief that the dispute only concerned clove and menthol cigarettes. It is thus not unthinkable that there might have been a different reaction among tobacco-producing WTO Members if Indonesia had either included regular cigarettes in its Panel Request or simply referred to domestic cigarettes instead of just to menthol.

7.147 In light of the above, we feel compelled to conclude that we are bound by Indonesia's summary of the legal basis of its national treatment complaint, which identifies the products at issue as imported clove cigarettes *versus* domestic menthol cigarettes. In our view, we would be exceeding our terms of reference if we were to expand the scope of Indonesia's national treatment claim by including domestic regular cigarettes in our examination.

7.148 With that in mind, we will examine each of the four criteria of the traditional likeness analysis in turn. We recall that the Appellate Body has ruled that panels which decide to follow this path must examine "the evidence relating to *each* of those four criteria and, then, weigh ... *all* of that evidence, along with any other relevant evidence, in making an *overall* determination of whether the products at issue could be characterized as 'like'".<sup>309</sup> We also recall that the Panel, once all the relevant evidence has been examined, must determine whether "that evidence, as a whole, indicates that the products in question are 'like' in terms of the legal provision at issue"<sup>310</sup>, i.e., in terms of Article 2.1 of the *TBT Agreement*.

#### The properties, nature and quality of the products concerned

7.149 The Report of the GATT Working Party on *Border Tax Adjustments* established that the first criterion that should be analysed when assessing "likeness" is the *properties, nature and quality* of the products. In *EC – Asbestos*, the Appellate Body clarified that this first criterion covers the physical qualities and characteristics of the products.<sup>311</sup> In that same dispute, the Appellate Body instructed panels to "examine fully the physical properties of products" and, in particular, as it was in the context of an Article III:4 of the GATT 1994 analysis, to "examine those physical properties of products that are likely to influence the competitive relationship between products in the marketplace".<sup>312</sup>

7.150 As we explained before, we are bound to examine likeness under Article 2.1 of the *TBT Agreement* in its own context and that of the *TBT Agreement*. As we also explained, the absence of similar wording to that of the general principle in Article III:1 of the GATT 1994 in the *TBT Agreement* makes us reluctant to import a competition-approach analysis in our interpretation. We do however transpose the above conclusions from the Appellate Body in our analysis under Article 2.1 of the *TBT Agreement* as the Panel's duty to examine those physical properties that are of relevance to the immediate purpose of Section 907(a)(1)(A), namely the presence of a characterizing flavour in the cigarettes.

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<sup>308</sup> Appellate Body Report, *US – Carbon Steel*, para. 126; Panel Report, *Colombia – Ports of Entry*, para. 7.23.

<sup>309</sup> Appellate Body Report, *EC – Asbestos*, para. 109.

<sup>310</sup> Appellate Body Report, *EC – Asbestos*, para. 103.

<sup>311</sup> Appellate Body Report, *EC – Asbestos*, para. 110.

<sup>312</sup> Appellate Body Report, *EC – Asbestos*, para. 114.

7.151 The Appellate Body further explained that the different "likeness" criteria are interrelated. For example, as regards the physical properties of a product, the Appellate Body observed that they shape and limit the end-uses to which the products can be devoted, and that tariff classification clearly reflects the physical properties of a product.<sup>313</sup>

7.152 Nevertheless, the Appellate Body called for a separate and thorough examination of each criterion and thus underscored the importance of a full examination of the physical characteristics of a product by the panel:

"Although not decisive, the extent to which products share common physical properties may be a useful indicator of 'likeness'. Furthermore, the physical properties of a product may also influence how the product can be used, consumer attitudes about the product, and tariff classification. It is, therefore, important for a panel to examine fully the physical character of a product. We are also concerned that it will be difficult for a panel to draw the appropriate conclusions from the evidence examined under each criterion if a panel's approach does not clearly address each criterion separately, but rather entwines different, and distinct, elements of the analysis along the way."<sup>314</sup>

7.153 The Appellate Body insisted that the separate analysis of the physical characteristics criterion must *not* be intermingled with the examination of end-uses.<sup>315</sup> It is also worth noting that products with quite different physical properties may, in some situations, be capable of performing similar or identical end-uses, but this does not mean that they are equivalent. In the view of the Appellate Body, although the end-uses may be "equivalent", the physical properties of the products may not be thereby affected and the products would thus remain different.<sup>316</sup>

7.154 It is worth emphasizing the relevance of the health risk-related features in a likeness examination<sup>317</sup>, which the Appellate Body has situated within the realm of the physical properties of the products at issue.<sup>318</sup> In our case, though, it is medically proven and conceded by the parties that all cigarettes are toxic. In general terms, both parties agree that the relative toxicity of clove, menthol and regular cigarettes is not an issue in this dispute.<sup>319</sup> The United States confirms this view but appears to suggest that clove cigarettes may be more dangerous than other cigarettes. We will cover this in more detail when concluding on the comparison of the various products at issue.

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<sup>313</sup> Appellate Body Report, *EC – Asbestos*, para. 102.

<sup>314</sup> Appellate Body Report, *EC – Asbestos*, para. 111.

<sup>315</sup> Appellate Body Report, *EC – Asbestos*, para. 111.

<sup>316</sup> This was the Appellate Body's response to a panel's conviction that when two products can be used for the same end-use, their "*properties* are then *equivalent*, if not identical." The Appellate Body disagreed. Appellate Body Report, *EC – Asbestos*, paras. 111-112.

<sup>317</sup> The Appellate Body in *EC – Asbestos* indicated that "[w]e are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of 'likeness' under Article III:4 of the GATT 1994." Appellate Body Report, *EC – Asbestos*, para. 113.

<sup>318</sup> In *EC – Asbestos*, the Appellate Body found that the carcinogenic properties of chrysotile asbestos fibres were not shared to the same extent with PCG fibres. The Appellate Body observed that

"Panels must examine fully the physical properties of products. In particular, ... those physical properties of products that are likely to influence the competitive relationship between products in the market place. In the cases of chrysotile asbestos fibres, their molecular structure, chemical composition, and fibrillation capacity are important because the microscopic particles and filaments of chrysotile asbestos fibres are carcinogenic in humans, following inhalation."

The Appellate Body referred to carcinogenicity as "a defining aspect of the physical properties of chrysotile asbestos fibres" Appellate Body Report, *EC – Asbestos*, para. 114.

<sup>319</sup> Indonesia's first written submission, para. 57; Indonesia's second written submission, para. 71.

7.155 Accordingly, we will proceed to examine the physical properties of imported clove cigarettes and domestic menthol cigarettes on the basis of the evidence provided by the parties. We recall that the parties to this dispute have framed the national treatment analysis in terms of categories of cigarettes (i.e., clove, menthol and regular cigarettes), instead of individual cigarette brands.<sup>320</sup> Accordingly, the evidence that they have submitted focuses on general features attributable to each category, rather than the exact ingredients that a given cigarette brand may contain. Such information is, in fact, proprietary to the manufacturer.<sup>321</sup>

7.156 The question before the Panel is, in line with the Appellate Body in *EC – Asbestos*, "the degree or extent to which products must share qualities or characteristics in order to be 'like products'".<sup>322</sup> We recall that Section 907(a)(1)(A) is a technical regulation that regulates cigarettes having a characterizing flavour, which may be understood as having an additive that produces a distinguishing flavour, taste or aroma. The presence of such an additive should therefore be part of the characteristics that a cigarette must have to be "like" for the purpose of this dispute.

#### Properties, nature and quality of clove cigarettes

7.157 From the evidence presented by the parties, we can conclude that clove cigarettes are composed of tobacco combined with flavouring substances, which is presented to the consumer in a paper wrapper with a filter.<sup>323</sup> Clove cigarettes are, as is the case of menthol cigarettes, "Class A" cigarettes for U.S. tax purposes and comply with the U.S. definition<sup>324</sup> of cigarette.<sup>325</sup>

7.158 Clove cigarettes are generally manufactured with 60 per cent to 80 per cent tobacco content.<sup>326</sup> Additionally, clove cigarettes usually contain a blend of different types of tobacco.<sup>327</sup> In terms of the types of tobacco that compose the blend, Indonesia submits that the tobacco composition is usually the following: (i) Virginia/bright tobacco, which is flue cured, accounts for approximately 25 per cent to 50 per cent; (ii) Oriental tobacco, which is sun-cured, ranges from 25 per cent to 35 per cent; (iii) Burley tobacco, which is air-cured, accounts between 0 per cent and 10 per cent; and (iv) Java tobacco (the local Indonesian tobacco), which is sun-cured, is present from 20 per cent to 30 per cent.<sup>328</sup> Indonesia further explains that Java tobacco is similar to Burley tobacco, but the former is sun-cured instead of air-cured.<sup>329</sup> The United States, by contrast, submits that clove cigarettes usually contain Virginia and Java tobacco, each making up approximately 30 per cent of the content of the cigarette.<sup>330</sup>

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<sup>320</sup> Indonesia's first written submission, para. 54; Indonesia's response to Panel question No. 27; United States' first written submission, para. 154.

<sup>321</sup> Indonesia's second written submission, para. 69; United States' responses to Panel question Nos. 32 and 33.

<sup>322</sup> United States' second written submission, para. 109.

<sup>323</sup> Indonesia's first written submission, para. 54; Indonesia's second written submission, para. 67. We note that Exhibit IND-29 (p. 2) describes clove cigarettes as usually machine rolled, available with or without the filters, and sold in brightly coloured packages.

<sup>324</sup> The definition of cigarette contained in 26 U.S.C. §5702(b) provides as follows:

"(1) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (2) 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 in paragraph (1)."

<sup>325</sup> Indonesia's first written submission, para. 55.

<sup>326</sup> Exhibit IND-29; United States' first written submission, para. 163.

<sup>327</sup> Indonesia's response to Panel question No. 33; United States' response to Panel question No. 33.

<sup>328</sup> Indonesia's response to Panel question No. 33.

<sup>329</sup> Indonesia's response to Panel question No. 33.

<sup>330</sup> United States' response to Panel question No. 33.

7.159 As regards additives, clove cigarettes contain approximately 20 per cent to 40 per cent cloves<sup>331</sup>, either in the form of clove buds or ground/minced<sup>332</sup> cloves. As the United States argues, it seems that the clove additive can also be clove oil, or any combination of the three (i.e., clove buds, minced cloves and clove oil).<sup>333</sup> We also understand that ground cloves contain about 20 per cent clove oil.<sup>334</sup>

7.160 Clove cigarettes generally include a "sauce" as part of the flavouring ingredients chosen by each manufacturer.<sup>335</sup> In fact, the United States submits, this "sauce" is touted by manufacturers as a distinguishing physical feature of clove cigarettes.<sup>336</sup> Indonesia clarifies that this "sauce" contains "vanilla, sugars, mint, licorice, fruit concentrates and liquors".<sup>337</sup>

7.161 We note that the parties have extensively argued about the presence of eugenol in clove cigarettes and the resulting toxicity of clove cigarettes. The United States points out that eugenol is one of the active ingredients in clove oil and defines it as "a common topical anesthetic used in dental procedures".<sup>338</sup> The United States contends that clove cigarettes are sweetly aromatic, and smoking the product may cause some numbing of the mouth to occur.<sup>339</sup> The United States reasons that eugenol has the effect of removing much of the unpleasantness of cigarette smoking for new smokers<sup>340</sup>, which makes "[t]he clove cigarette ... nearly ideal in design as a 'trainer' cigarette for capturing young people as smokers."<sup>341</sup> The United States argues that evidence shows that clove

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<sup>331</sup> Indonesia provides in Exhibit IND-29 that the clove additive ranges around 20 per cent to 40 per cent. Subsequently, in response to Panel question No. 28, Indonesia lowers the minimum clove content to 15 per cent. The United States submits in paragraph 36 of its first written submission that cloves account for 30 per cent to 40 per cent of the content of clove cigarettes.

<sup>332</sup> We note that Indonesia uses the term "ground cloves", while the United States refers to "minced cloves". They appear to be referring to the same thing.

<sup>333</sup> United States' response to Panel question No. 28.

<sup>334</sup> Indonesia's response to Panel question No. 28.

<sup>335</sup> United States' first written submission, para. 165.

<sup>336</sup> United States' second written submission, para. 113.

<sup>337</sup> Indonesia's response to Panel question No. 29. The United States provides in its first submission an excerpt from PT Djarum's website, which describes clove cigarettes and mentions a "secret sauce":

"It is not just the cloves that make kretek special, but also the secret sauce that adds to its enjoyment. Blending the unique taste of tobacco, fruit and herb extracts, and other natural flavorings, some say the kretek sauce recipe is more closely guarded than that of Coca Cola. Known only by two or three members of each kretek company, the sauce is used to *soften* the bite of tobacco and the pungency of clove. And, to further enhance the flavor, the tip of the kretek is *sweetened*. All adds to a *richer and fruity* taste, *sweet-scented* aroma and *pleasant* aftertaste than any regular cigarettes, and well-appreciated by kretek connoisseurs."

United States' first written submission, para. 36. Demirtas, "Djarum Cigarettes & Cigars," <http://www.demirtas.com.tr/Djarum.htm> (emphasis added) (Exhibit US-39).

<sup>338</sup> United States' first written submission, para. 38; citing Guidotti & Laing, "Clove Cigarettes," *The Western Journal of Medicine*, at 538 (August 1992) ("Clove Cigarettes") (Exhibit US-41); CDC Article Regarding Epidemiology and Illnesses Possibly Associated with Cloves (Exhibit US-37).

<sup>339</sup> The United States refers to *Clove Cigarettes* (Exhibit US-41), at 537; *Clove Cigarettes: the Basis for Concern* (Exhibit US-38) at 222.

<sup>340</sup> *Clove Cigarettes* (Exhibit US-41) at 537.

<sup>341</sup> United States' first written submission, para. 38; citing *Clove Cigarettes: the Basis for Concern* (Exhibit US-38) at 226; Susan Farrer, "Alternative Cigarettes May Deliver More Nicotine Than Conventional Cigarettes," *National Institute on Drug Abuse ("NIDA")*, Vol. 18, No. 2 (August 2003) ("Alternative Cigarettes May Deliver More Nicotine Than Conventional Cigarettes") ("Clove cigarettes are sometimes referred to as 'trainer cigarettes' and may serve as 'gateway' products that introduce young people to smoking.") (Exhibit US-42); *CDC Article Regarding Epidemiology and Illnesses Possibly Associated with Cloves* ("Use of clove cigarettes may be changing the smoking patterns of American teenagers. Some researchers have suggested that eugenol anaesthetizes the backs of smokers' throats and tracheas, permitting deeper inhalation and possibly encouraging smoking in person who might otherwise be dissuaded by the harshness of regular

cigarettes involve unique health risks to individual users.<sup>342</sup> According to the United States, eugenol is suspected of causing aspiration pneumonia or direct lung toxicity.<sup>343</sup>

7.162 Indonesia does not deny that clove cigarettes contain eugenol and explains that clove oil is known chemically as eugenol<sup>344</sup>, and that eugenol can be found in clove buds.<sup>345</sup> With respect to the allegations by the United States on the numbing effects of eugenol, Indonesia specifies that there is no scientific research on humans to prove that eugenol in clove smoke numbs the throat. Rather, Indonesia argues, more recent studies cast doubt on the proposition that eugenol desensitizes the throat. Further, Indonesia submits that the same allegation of numbing the throat has been made regarding the use of menthol in cigarettes.<sup>346</sup>

7.163 We note that both parties agree that the Polzin paper<sup>347</sup>, a study on certain ingredients of Indonesian clove cigarettes, shows that 19 of 33 clove cigarette brands analysed contained coumarin.<sup>348</sup> According to the United States, coumarin is a chemical linked to hepatotoxicity in humans which is no longer found in most cigarettes. In one study, the United States explains, 64 per cent of clove cigarette brands tested contained coumarin at levels between 9.2 and 215µg per cigarette. By contrast, only a single brand of 68 conventional cigarettes available in the United States had detectable levels of coumarin. The United States stresses that coumarin is banned as a food-flavouring agent in the United States, and is currently listed by the FDA among "Substances Generally Prohibited from Direct Addition or Use as Human Food".<sup>349</sup> It does however admit that coumarin has not been banned as an additive in cigarettes.<sup>350</sup> Indonesia puts forward a number of arguments on the toxicity and presence of coumarin in the cigarettes at issue. First, it notes that not all clove cigarettes contain coumarin, while some U.S. menthol and regular cigarettes do contain this ingredient. Second, coumarin is simply a natural constituent of many types of tobacco. Finally, Indonesia stresses that the United States itself allows coumarin as an additive in cigarettes.<sup>351</sup>

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cigarettes.") (Exhibit US-37); *Clove Cigarettes*, at 538 ("Of equal concern has been the potential for conditioning smoking behaviour among adolescents. Clove cigarettes are a less noxious smoking habit because of their acceptable taste and an aesthetic effect on mucous membranes that lessening discomfort. The habit has been associated with many social trends important among adolescent peer groups . . . . As such, clove cigarettes may represent a dangerous potential for initiating previously inexperienced smokers to the habit.") (Exhibit US-41); Committee on Substance Abuse, "Hazards of Clove Cigarettes," *Pediatrics*, Vol 88, at 395 (1991) ("Clove cigarettes should be suspected as a gateway drug because of their properties and the manner in which they are smoked. Because the eugenol in the clove cigarette acts as a topical anesthetic to the posterior oropharynx, it reduces the noxious elements of smoking. Thus it may facilitate the learning of smoking techniques, both regular inhalation and the deep inhalation toking technique used in marijuana smoking. In addition, the aroma and mystique of the use of clove cigarettes have made them very popular among those nondrug-using adolescents who are seeking to be accepted by and participate in the experiences of a drug-using peer group.") (Exhibit US-43).

<sup>342</sup> United States' response to Panel question No. 38(b), paras. 90-94. See also WHO, "The Scientific Basis of Tobacco Product Regulation", at 35 ("Bidis ... and Kreteks (clove-flavoured tobacco cigarettes, often imported from Indonesia) are alternative tobacco products that have higher concentrations of nicotine, tar, and carbon monoxide than conventional cigarettes. ... Kretek smoking is associated with increased risk for lung damage and abnormal lung function.") Exhibit US-113; Exhibit US-37, Exhibit US-38, Exhibit US-45, Exhibit US-48, Exhibit US-105.

<sup>343</sup> United States' response to Panel question No. 38; Exhibit US-37, US-38 and US-41.

<sup>344</sup> Indonesia's first written submission, para. 55.

<sup>345</sup> Indonesia's response to Panel question Nos. 28 and 30; United States' response to Panel question No. 28.

<sup>346</sup> Indonesia's second written submission, para. 45.

<sup>347</sup> Exhibit US-45.

<sup>348</sup> Indonesia's response to Panel question No. 34; United States' response to Panel question No. 34.

<sup>349</sup> 21 CFR 189.130. United States' first written submission, para. 166.

<sup>350</sup> United States' first written submission, para. 166, footnote 210.

<sup>351</sup> Indonesia's second written submission, paras. 73 and 75.

Indonesia adds that the U.S. Secretary of Health and Human Services ("HHS") is required to report to Congress any ingredient in cigarettes that may pose health risks to smokers, and that the HHS has not done so with eugenol nor coumarin.<sup>352</sup>

7.164 Finally, Indonesia clarifies that clove cigarettes also contain other components inherent to cloves, such as benzyl acetate, methyl salicylate, trans anethole and methyl eugenol.<sup>353</sup>

7.165 The United States argues that evidence shows that clove cigarettes involve unique health risks to individual users.<sup>354</sup> Indonesia responds that there is no evidence that clove cigarettes are more toxic or pose greater health risks<sup>355</sup> than domestically-produced regular or menthol cigarettes and thus, because there is no difference in toxicity, there is no difference in their physical characteristics.<sup>356</sup>

#### Properties, nature and quality of menthol cigarettes

7.166 From the evidence presented by the parties, we can conclude that menthol cigarettes are composed of approximately 90 per cent of tobacco by weight. As regards the type of tobacco, generally menthol cigarettes are made from a blend of Virginia, Maryland burley, Oriental and reconstituted tobacco.<sup>357</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>358</sup>

7.167 The main additive in menthol cigarettes is menthol oil. Menthol is a chemical compound extracted from the peppermint plant (*Mentha piperita*), the corn mint (*Mentha arvensis*) or produced by synthetic or semi-synthetic means.<sup>359</sup> According to the March 2011 TPSAC Report, some cigarette manufacturers only use natural menthol oil, while others use a mixture of natural and synthetic menthol. The March 2011 TPSAC Report establishes that menthol is added to cigarettes in the following ways: (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; (g) any combination of the above. In any event, menthol diffuses throughout the cigarette, irrespective of the original place of application.<sup>360</sup>

7.168 According to the March 2011 TPSAC Report, menthol is added to cigarettes both as a characterizing flavour (higher levels of menthol) and for other taste reasons (lower levels of menthol). These other taste reasons include brightening the flavour of tobacco blends and/or smoothing the taste

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<sup>352</sup> Indonesia's second written submission, paras. 41, 49 and 75; Indonesia's second oral statement, para. 52.

<sup>353</sup> Indonesia's response to Panel question No. 30.

<sup>354</sup> See footnote 342 above.

<sup>355</sup> The Appellate Body has considered that toxicity is a physical quality that must be considered when examining the physical properties of a product as part of a determination of "likeness" under Article III:4 of the GATT 1994. Appellate Body Report, *EC – Asbestos*, para. 114.

<sup>356</sup> Indonesia's first written submission, paras. 55 and 57.

<sup>357</sup> United States' response to Panel question No. 31. Indonesia did not provide the Panel with any specific information in this regard.

<sup>358</sup> March 2011 TPSAC Report, p. 19. <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM247689.pdf>.

<sup>359</sup> United States' first written submission, para. 31; March 2011 TPSAC Report, p. 19. <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM247689.pdf>.

<sup>360</sup> March 2011 TPSAC Report, p. 19. <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM247689.pdf>.



of the blend.<sup>361</sup> Further, menthol may have cooling, analgesic or irritating properties<sup>362</sup>, and is reported to reduce sensitivity to noxious chemicals, including nicotine.<sup>363</sup> In fact, adds the March 2011 TPSAC Report, "smokers report that menthol reduces irritation and that menthol cigarettes are less harsh and smoother than non-menthol cigarettes."<sup>364</sup>

7.169 This additive amounts to approximately 1 per cent of the ingredients contained in the cigarette, although the specific amount varies from brand to brand. In this regard, Indonesia argues that the menthol content is reported to range up to 3 percent<sup>365</sup>, while the United States specifies that some menthol brands may have "slightly more or less than 1 per cent of menthol oil".<sup>366</sup> In terms of menthol levels, the United States highlights that such levels in brands marketed as menthol cigarettes range between 0.15-0.58 mg/cigarette.<sup>367</sup> The March 2011 TPSAC Report specifies that "[i]n a recent survey of 48 U.S. menthol cigarette brands and sub-brands, the average menthol content in cigarettes by weight was 2.64 mg/cigarette, with a range from 1.61 to 4.38 mg."<sup>368</sup>

7.170 Indonesia submits that menthol cigarettes also have their own flavouring agents, which are referred to as "sauce" or "casing".<sup>369</sup> In this regard, the United States argues that the special sauce used by Indonesian clove cigarettes is not the same "casing" used in all cigarettes, including menthol cigarettes.<sup>370</sup> The United States explains that the flavour imparted by the sauce is part of the essential flavour and identity of the products.<sup>371</sup> Indonesia replies that it has never argued that the "sauce" or "casing" in clove cigarettes is identical to that used in menthol or regular flavoured cigarettes; rather, it has submitted that each brand of cigarettes has a unique proprietary blend of ingredients that give them a unique taste.<sup>372</sup>

7.171 Regarding its health effects, Indonesia argues that menthol has been claimed to have numbing properties. This seems to be confirmed by the March 2011 TPSAC Report, which establishes that the effects that appear to appeal to menthol smokers include cooling effects, antiseptic effects, numbing and anaesthetic effects.<sup>373</sup> Further, the parties dispute whether menthol cigarettes also contain eugenol and coumarin.<sup>374</sup> As mentioned before, Indonesia argues that menthol cigarettes also contain these additives<sup>375</sup>, whereas the United States refutes that on the basis of a study conducted in 2010 showing that none of the "regular" or menthol cigarette brands contained either eugenol or coumarin.<sup>376</sup> In response to this argument, Indonesia argues that the real reason why eugenol and coumarin were not detected in the study conducted in 2010 is "because the United States 'rigged' the

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<sup>361</sup> March 2011 TPSAC Report, pp.19-20. <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM247689.pdf>.

<sup>362</sup> March 2011 TPSAC Report, p. 18. <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM247689.pdf>.

<sup>363</sup> March 2011 TPSAC Report, p. 22. <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM247689.pdf>.

<sup>364</sup> March 2011 TPSAC Report, p. 25. <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM247689.pdf>.

<sup>365</sup> Indonesia's response to Panel question No. 32.

<sup>366</sup> United States' response to Panel question No. 32.

<sup>367</sup> United States' first written submission, para. 171; United States' response to Panel question No. 32.

<sup>368</sup> March 2011 TPSAC Report, p. 20. <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM247689.pdf>.

<sup>369</sup> Indonesia's second written submission, para. 69.

<sup>370</sup> United States' response to Panel question No. 87.

<sup>371</sup> United States' response to Panel question No. 87, para. 19.

<sup>372</sup> Indonesia's comments to the United States' response to Panel question No. 87.

<sup>373</sup> March 2011 TPSAC Report, p. 103. <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM247689.pdf>.

<sup>374</sup> Indonesia's second written submission, para. 74.

<sup>375</sup> Indonesia's second written submission, para. 72, referencing Exhibit US-71.

<sup>376</sup> United States' response to Panel question No. 86.

system so that eugenol and coumarin would not be detected"<sup>377</sup> by setting higher limits of detection for these ingredients.

A comparison of the properties, nature and quality of clove and menthol cigarettes

7.172 We proceed now to compare the physical properties, nature and qualities of both types of relevant cigarettes.

7.173 We note that Indonesia argues that clove cigarettes and domestically-produced cigarettes, including menthol cigarettes, have the same physical characteristics.<sup>378</sup> In its second written submission, Indonesia nuances this position by asserting that "[a]lthough Indonesia agrees that the ingredients in a clove cigarette differ in some respects from the ingredients in menthol- and tobacco-flavoured cigarettes, these difference[s] are not determinative".<sup>379</sup>

7.174 The United States responds that Indonesia only addresses a few generic characteristics when arguing that the cigarettes at issue are alike, and thus ignores the characteristics most relevant to the marketplace.<sup>380</sup> The United States further submits that "the key interpretive task is to determine which similarities and differences are significant and relevant to determining likeness in this particular case, and for this task, the context of the provisions and Agreements at issue and the factual circumstances of the case are essential".<sup>381</sup> Accordingly, for the United States, the likeness analysis should consider not only the nature of the competitive relationship, but also the basis upon which Section 907(a)(1)(A) is based.<sup>382</sup>

7.175 Before addressing the comparison between clove and menthol cigarettes, we consider it important to address the definition of "characterizing flavour", as it is one of the core elements of Section 907(a)(1)(A). As mentioned above, in response to a question from the Panel, the United States explained that a Senate commentary in the legislative record of Section 907(a)(1)(A) clarifies that "[w]hile the term 'characterizing flavor' is undefined in the legislation, it is intended to capture those additives that produce a distinguishing flavor, taste, or aroma imparted by the product."<sup>383</sup> This, in our view, shows that, for the purpose of being regulated by Section 907(a)(1)(A), a cigarette must have an additive that produces a distinguishing flavour, taste or aroma. Accordingly, as explained in Section VII.D.2(c)(i) above, the Panel will give greater weight in the likeness analysis to the fact that a cigarette contains an additive which produces a distinguishing flavour, taste or aroma.

7.176 From the arguments and evidence presented by the parties and described above pertaining to the description of the properties, nature and quality of clove and menthol cigarettes, we are able to reach the following conclusions.

7.177 First, in general, clove and menthol cigarettes are made of tobacco combined with additives contained in a paper wrapper. The predominant ingredient in all of them is thus tobacco in quantities that range from 60 to 90 per cent. The exact content of tobacco, the types of tobacco used, and the additives included change from brand to brand of cigarettes within each type of cigarette.

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<sup>377</sup> Indonesia's comments to the United States' response to Panel question No. 86 (Exhibit US-72).

<sup>378</sup> Indonesia's first written submission, para. 54.

<sup>379</sup> Indonesia's second written submission, para. 67.

<sup>380</sup> United States' first written submission, para. 161.

<sup>381</sup> United States' second written submission, para. 110.

<sup>382</sup> United States' second written submission, para. 111.

<sup>383</sup> United States' response to Panel question No. 14, para. 32. The United States provides the following reference: 155 Cong. Rec. S64111 (June 10, 2009), Exhibit US-98.

7.178 Second, although both clove and menthol cigarettes are predominantly composed of tobacco, what appears to differentiate both from regular cigarettes<sup>384</sup> is the presence of an additive, which results in a distinguishing flavour, taste or aroma, other than plain tobacco. This additive is, or is extracted from, an herb or a spice. The fact that clove cigarettes contain a substantial amount of clove buds<sup>385</sup> and menthol cigarettes only contain approximately 1 per cent of menthol oil does not change the conclusion that in both instances, whatever brand we may examine, the presence of such additives substantially transforms the flavour of the cigarette.

7.179 Third, the addition of a "sauce" is not exclusive to clove cigarettes, as all cigarettes include a different combination of ingredients that give each cigarette brand a particular and distinct taste. In other words, each brand has its own specific composition of ingredients and additives that is generally considered proprietary information.

7.180 Several differences are however present between clove and menthol cigarettes, namely, in general, clove cigarettes contain Java tobacco, eugenol and coumarin, while menthol cigarettes generally do not contain these components in significant quantities or at all. However, these differences appear to us as minor or secondary, because the main trait of these types of cigarettes is that they contain additives that produce characterizing flavours to the cigarette and reduce the harshness of tobacco.

7.181 Further, the United States argues that menthol and the clove buds contained in clove cigarettes are completely different physical products.<sup>386</sup> This is important, argues the United States, because dried clove buds impart a sweet and spicy flavour and aroma and are often used in baked goods, candies, and beverages.<sup>387</sup> Indonesia, in contrast, submits that clove cigarettes and menthol cigarettes both contain tobacco and an added ingredient (i.e., an herb or spice) with soothing properties. Indonesia submits that both clove oil and menthol are widely used in consumer products and are recognized as having an anaesthetic effect.<sup>388</sup>

7.182 This, in our view, demonstrates that regardless of the specific flavour of the additive (clove or menthol), the main trait of these types of cigarettes remains the same: they contain an additive that substantially imparts flavour to the cigarette and reduces the harshness of tobacco. This fact is reinforced by the alleged numbing properties of both clove and menthol. We consider that these similarities are highly significant in the context of this dispute, in light of the fact that the immediate purpose of Section 907(a)(1)(A) is to regulate certain tobacco products with additives that provide them with a characterizing flavour with the public health objective of reducing youth smoking. We find support for this conclusion in a WHO Study entitled "*The Scientific Basis of Tobacco Product Regulation*" which establishes the following:

"Certain additives (menthol in manufactured cigarettes, eugenol in kreteks [i.e. clove cigarettes]) are added specifically to reduce the smoke harshness and enable the smoker to take in more dependence-causing and toxic substances. Many smokers smoke kreteks [i.e. clove cigarettes] and menthol cigarettes, which are often marketed

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<sup>384</sup> With regard to the use of the term "regular cigarettes" see above, Section B, (iii), para. 7.8.

<sup>385</sup> We note that we are referring to imported clove cigarettes. Indonesia submits that there was a domestic clove-flavoured cigarette ("A Touch of Clove") that had been sold by the U.S. company Nat Sherman before the entry into force of Section 907(a)(1)(A). Indonesia argues that Nat Sherman's "Touch of Clove" did not contain natural clove; rather, it contained clove crystals in the filter to produce an artificial clove flavour. (Indonesia's first written submission, footnote 24). In response to a question from the Panel, the United States explains that this type of cigarette was made "with clove flavor in the filter, rather than with cloves mixed into the tobacco" (United States' response to Panel question No. 28(a), para. 66).

<sup>386</sup> United States' first written submission, para. 171.

<sup>387</sup> United States' first written submission, para. 162.

<sup>388</sup> Indonesia's first written submission, para. 55.

as less toxic; and the added ingredients possibly contribute to the perception that the cigarettes are less noxious and harmful".<sup>389</sup>

7.183 As regards the toxicity, all of these cigarettes are harmful to health and may cause death. Both parties initially agreed that their relative toxicity is not an issue in this dispute. However, the United States appears to have changed its position in its second written submission, where it maintained that certain additives contained in clove cigarettes, such as eugenol and coumarin, are harmful to health.

7.184 Nonetheless, the evidence filed by the United States suggesting that the presence of eugenol and coumarin in clove cigarettes makes them more harmful to health does not lead us to a different conclusion in terms of toxicity. Regardless of whether eugenol and coumarin might allegedly cause further health problems, the principal reason why cigarettes create health risks is the inhalation of combusted substances, which may cause different types of cancer, different types of cardiovascular disease and various respiratory diseases and harms, among others.<sup>390</sup>

7.185 Besides the alleged harmful effects of additives, the United States argues that "[c]ompared to conventional (menthol or regular) cigarettes, clove cigarettes deliver more tar, nicotine, and carbon monoxide under machine-smoked conditions".<sup>391</sup> Moreover, submits the United States, certain studies indicate that people inhale more deeply when smoking clove cigarettes, increasing the amount of nicotine extracted from each cigarette, making it possible for the smoker to achieve comparable blood concentrations of nicotine, even though clove cigarettes contain less nicotine per cigarette than do conventional brands.<sup>392</sup> Indonesia contests this by arguing that the Malson study<sup>393</sup> acknowledged that estimates from machine smoking are not reliable indicators of delivery and rather, focused on clinical tests on human subjects showing that clove cigarettes produce identical increases in heart rate, blood pressure, plasma nicotine levels, and exhaled carbon monoxide.<sup>394</sup>

7.186 In our view, this debate over the additional effects of clove cigarettes does not substantially alter the conclusion that clove and menthol cigarettes are harmful to health for the same reason: the inhalation of combusted substances. As mentioned above, the parties agree that, in general, cigarettes are harmful to human health and may cause cancer and several cardiovascular and respiratory diseases.<sup>395</sup>

7.187 Therefore, we find that, overall, the physical properties of both groups of cigarettes are similar. The main reason is that they share their main traits as cigarettes, i.e., having tobacco as a main ingredient, and an additive which imparts a characterizing flavour, taste and aroma, and reduces the harshness of tobacco. We find useful guidance in the Appellate Body Report in *EC-Asbestos*, where the Appellate Body held that the *degree or extent to which products must share qualities or*

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<sup>389</sup> World Health Organization, "The Scientific Basis of Tobacco Product Regulation", WHO Technical Report Series 945 (2007) (Exhibit US-113) p. 11.

<sup>390</sup> Indonesia's first written submission, paras. 6, 57; United States' first written submission, para. 14.

<sup>391</sup> United States' response to Panel question No. 38.

<sup>392</sup> United States' first written submission, para. 40; citing scientific research, which using conventional smoking-machine analysis, has found that clove cigarettes produce more nicotine, tar and carbon monoxide than conventional cigarettes. "Alternative Cigarettes May Deliver More Nicotine Than Conventional Cigarettes", (Exhibit US-42); *see also* "CDC Article Regarding Epidemiology and Illnesses Possibly Associated with Cloves" ("Exposure to tar, nicotine and carbon monoxide is higher from clove cigarettes than from regular American cigarettes.") (Exhibit US-37); Malston, *et al.*, "Clove Cigarette Smoking: Biochemical, Physiological, and Subjective Effects," *Pharmacology Biochemistry and Behavior* 74(3): 739-45 (February, 2003), <http://www.ncbi.nlm.nih.gov/pubmed/12543240> (Exhibit US-44).

<sup>393</sup> Exhibit US-44, quoted in Indonesia's second written submission, para. 53.

<sup>394</sup> Indonesia's second written submission, para. 54.

<sup>395</sup> Indonesia's first written submission, paras. 6, 57; United States' first written submission, para. 14.

*characteristics* is a relevant inquiry under the "likeness test".<sup>396</sup> Thus, products do not have to be *identical* in every respect.

7.188 This conclusion is further reinforced by taking into account the measure at issue, Section 907(a)(1)(A), which is a technical regulation with the immediate purpose of regulating cigarettes with a characterizing flavour. In this context, we find relevant that clove and menthol cigarettes share common physical properties to a substantial extent as they both contain tobacco and *an additive* that provides them with a *characterizing flavour*.

7.189 We recall that the United States has asked us to take into account the health objective of Section 907(a)(1)(A) when analysing likeness. As we explained before, we agree that the legitimate objective of reducing youth smoking that is behind the adoption of Section 907(a)(1)(A) should be taken into account in our analysis. Precisely, Section 907(a)(1)(A) prohibits the presence of characterizing flavours in cigarettes on health grounds. We find support in this to conclude that the presence of additives in both clove and menthol cigarettes, which provide them with characterizing flavours, should weigh heavily in our likeness analysis.

7.190 Notwithstanding the above conclusion, we will weigh these similarities and differences between clove and menthol cigarettes with all the evidence on the other "likeness" criteria to make an *overall* determination of whether the products at issue could be characterized as "like".<sup>397</sup> Accordingly, we will weigh the evidence under this first criterion with the *end-uses* to which the products can be devoted and the *consumer perceptions* towards these products. In other words, we will examine the evidence on the physical properties of clove and menthol cigarettes with "first, the extent to which products are capable of performing the same, or similar, functions (end-uses), and, second, the extent to which consumers are willing to use the products to perform these functions (consumers' tastes and habits)".<sup>398</sup>

#### The end-uses of the products

7.191 The Appellate Body has defined this criterion as "the extent to which products are capable of performing the same, or similar, functions (end-uses)".<sup>399</sup> In the context of an analysis of Article III:4 of the GATT 1994, the Appellate Body has ruled that the end-use criterion involves certain of the key elements relating to the competitive relationship between products in so far as "the extent to which products are capable of performing the same, or similar, functions (end-uses)". The Appellate Body notes that "evidence of this type is of particular importance under Article III of the GATT 1994, precisely because that provision is concerned with competitive relationships in the marketplace. If there is – or could be – no competitive relationship between products, a Member cannot intervene, through internal taxation or regulation, to protect domestic production." Accordingly, for the Appellate Body, evidence about the extent to which products can serve the same end-uses is highly relevant in a likeness analysis under Article III:4 of the GATT 1994.<sup>400</sup> A question for the Panel is whether this is also the case for an analysis under Article 2.1 of the *TBT Agreement*. As we have explained before, we are not persuaded that a fundamentally competition-based analysis would always be the correct approach in analysing likeness under Article 2.1 of the *TBT Agreement*.

7.192 The Appellate Body warns panels not to confuse the analysis of the end-use criterion with the analysis of the physical characteristics of the products<sup>401</sup> and that of consumer tastes and habits. In

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<sup>396</sup> Appellate Body Report, *EC – Asbestos*, para. 92.

<sup>397</sup> Appellate Body Report, *EC – Asbestos*, para. 109.

<sup>398</sup> Appellate Body Report, *EC – Asbestos*, para. 117.

<sup>399</sup> Appellate Body Report, *EC – Asbestos*, para. 117.

<sup>400</sup> Appellate Body Report, *EC – Asbestos*, para. 117.

<sup>401</sup> Appellate Body Report, *EC – Asbestos*, para. 111.

regard to the latter, the Appellate Body explains that end use deals with the extent to which two products are capable of performing the same functions, while consumer tastes and habits deals with "the extent to which consumers are willing to use the products to perform these functions".<sup>402</sup>

7.193 As the Appellate Body explained, "[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>403</sup>

7.194 The Appellate Body has ruled that the evidence on the end-uses (and of consumer preferences) of the products is especially relevant in cases where the evidence relating to properties, nature and quality of the products indicates that the products at issue are physically quite different.<sup>404</sup> We do not consider this to be the case in this dispute.

7.195 Indonesia's argument on the end-use criterion is rather succinct: "[t]he end use of all cigarettes, including clove and menthol cigarettes, is the same – that is, they are used to smoke tobacco."<sup>405</sup> The United States, however, submits that cigarettes actually have a number of end-uses and are not just used to "smoke tobacco." In its view, cigarettes have at least two other end-uses in the United States, which clove, menthol and tobacco cigarettes serve in differing degrees:<sup>406</sup> (i) the end-use of satisfying an addiction to nicotine<sup>407</sup>, and (ii) the end-use of creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke.<sup>408</sup> The United States adds that "[r]egular and occasional use of cigarettes could be described as different "end-uses" in the United States".<sup>409</sup> Further, argues the United States, their "regular market" has been dominated by tobacco-flavoured and menthol cigarettes. In addition to this market, there is an "occasional cigarette market" composed of cigarettes that are smoked less prevalently, which seek to appeal to novice smokers and to regular young smokers by creating the impression of a "special" or "indulgent" smoking experience.

7.196 Indonesia contests that delivery of nicotine is a distinct end-use and considers it a consequence of the end-use of smoking tobacco since all tobacco products contain nicotine.<sup>410</sup> In any event, Indonesia argues, the United States has not demonstrated that the end-uses of clove cigarettes and menthol- or tobacco-flavoured cigarettes are different. With respect to the United States' proposed end-use of satisfying an addiction to nicotine, Indonesia submits that all three cigarettes at issue deliver nicotine when smoked and that the amount of nicotine delivered from a cigarette is determined by how much smoke is drawn from a cigarette.<sup>411</sup> Indonesia further explains that (i) smokers expose themselves to as much smoke as necessary to obtain a specific, satisfying quantity of nicotine<sup>412</sup>, and (ii) the United States itself provided a study showing that subjects' nicotine blood levels and heart rates were exactly the same after smoking a clove cigarette and a regular cigarette.

7.197 As regards the second end-use proposed by the United States of "providing a pleasurable experience", Indonesia argues that this is not an end-use, but a consumer behaviour. Indonesia refers

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<sup>402</sup> Appellate Body Report, *EC – Asbestos*, para. 117.

<sup>403</sup> Appellate Body Report, *EC – Asbestos*, para. 119.

<sup>404</sup> Appellate Body Report, *EC – Asbestos*, para. 118.

<sup>405</sup> Indonesia's first written submission, para. 59. Indonesia's second written submission, para. 78.

<sup>406</sup> United States' first written submission, para. 179.

<sup>407</sup> United States' first written submission, para. 180.

<sup>408</sup> United States' first written submission, para. 181.

<sup>409</sup> United States' response to question No. 41.

<sup>410</sup> Indonesia's second written submission, para. 78.

<sup>411</sup> Indonesia's oral statement at the first substantive meeting of the Panel, para. 107. Indonesia's second written submission, paras. 78-79.

<sup>412</sup> Indonesia's second written submission, para. 79, referring to CDC, "The Health Consequences of Smoking – Nicotine Addiction a Report of the Surgeon General", 1988 (Exhibit IND-84).

to the Appellate Body Report in *EC – Asbestos*<sup>413</sup> where it clarified that end use deals with the extent to which two products are capable of performing the same functions, while consumer tastes and habits deals with the extent to which consumers are willing to use products to perform these functions. For Indonesia, the United States' comments regarding the appeal of flavours fall more properly into consumer tastes and habits than end-use.

7.198 In our view, Indonesia's succinct and pointed argument is correct: the end-use of a cigarette is to be smoked.<sup>414</sup> We consider that the end-uses the United States presents pertain rather to the resulting effects from smoking. People smoke cigarettes for many reasons; we could certainly include the two mentioned by the United States. But that does not mean that cigarettes have several end-uses. For example, the end-use proposed by the United States of satisfying an addiction to nicotine is a circular proposition. Indeed, smokers become addicted to nicotine as a consequence of smoking cigarettes. As to the second end-use proposed by the United States, "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke", assuming for the sake of argument that smoking some types of cigarettes is a more pleasurable experience than smoking other types of cigarettes, this does not alter the fact that the end-use of these products is the same, i.e., to be smoked. In any event, as we said above, both clove and menthol cigarettes contain nicotine and both contain additives that mask the harshness of tobacco.

7.199 Our conclusion under this criteria therefore is that both clove and menthol cigarettes have the same end-use, i.e., to be smoked.

#### Consumers' tastes and habits in respect of the products

7.200 In *EC – Asbestos*, the Appellate Body defined "consumer preferences" as the "extent to which consumers are – or would be – willing to choose one product instead of another to perform those end-uses".<sup>415</sup> The obvious question would appear to be to which extent smokers are, or would be, willing to choose clove cigarettes over menthol cigarettes, for the same end-use, i.e., that of smoking.

7.201 However, if we examine this criterion in the light of the immediate purpose of Section 907(a)(1)(A) of regulating the content of cigarettes with the legitimate objective of reducing youth smoking, the question may need to be phrased differently. Indeed, as we will explain in more detail when we examine Indonesia's claim under Article 2.2 of the *TBT Agreement*, Section 907(a)(1)(A) responds to a decision of the United States to reduce youth smoking. This leads to the question of which consumers the tastes and habits of we are to examine: all smokers in the United States?; only young smokers?; or potential consumers, i.e., youth who do not yet smoke and those who do so sporadically and have not yet become addicted?

7.202 We asked the parties which consumers we need to take into account in our examination, their responses diverge. **Indonesia** is of the view that the relevant consumers for the likeness analysis are smokers, with no analysis by age group.<sup>416</sup> It nevertheless argues that, in case the Panel decides to proceed with an analysis by age group, the proper groups should be "youth" (under 18), and "adults"

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<sup>413</sup> Appellate Body Report, *EC – Asbestos*, para. 117.

<sup>414</sup> We note that the panels in *Dominican Republic – Import and Sale of Cigarettes* and *Thailand – Cigarettes (Philippines)* also concluded that the end-use of cigarettes is to be smoked/smoking. Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.330. Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.441.

<sup>415</sup> Appellate Body Report, *EC – Asbestos*, para. 117.

<sup>416</sup> Indonesia's response to Panel question No. 92, para. 22.

(18 and over).<sup>417</sup> In its view, the "pre-smoking" youth population should not be included between the relevant consumers for the likeness analysis.<sup>418</sup>

7.203 The **United States** considers that the relevant consumers are all the potential and current smokers in the United States and defines "potential" consumers as young people within the age of initiation. The United States submits that the patterns of use as between young people in the window of initiation and older, regular smokers should be evaluated and considered in the consumer tastes and habits criterion of the like product analysis, and in relation to the public health basis for the measure.<sup>419</sup>

7.204 We therefore have as a first option considering that the relevant consumers are smokers. If we choose to follow this option, the next question that arises is whether we should consider the relevant U.S. market for cigarettes in general, or whether we should focus on particular segments of the market on the basis of age differentiation. This issue seems to be of particular importance because the declared objective of Section 907(a)(1)(A) is reducing youth smoking.

7.205 The second option is to consider as the relevant consumers the "pre-smoking" youth population -- in other words, the youth that have not yet taken up smoking but could potentially experiment with cigarettes. This option is in line with the objective of Section 907(a)(1)(A) -- i.e. reducing youth smoking -- because the group that we understand is subject to the regulation are youth who are starting or may start to smoke.

7.206 In our view, the legitimate objective of the technical regulation at issue, Section 907(a)(1)(A), i.e., reducing youth smoking, delimits the scope of the consumers whose tastes and habits we should examine under this criterion, all the more so as we are to examine how consumers perceive the cigarettes at issue. The aim of the measure is to stop youth from becoming smokers and dissuade those who are currently sporadic smokers of these type of more attractive cigarettes from smoking. It is thus obvious to us that we need to consider youth in examining this criterion. Furthermore, we agree with the United States that we should also consider potential consumers, i.e., youth that do not as yet smoke or that do so sporadically and thus is not addicted.

7.207 We recall that, according to the Appellate Body, in reference to the general principle in Article III:1 of the GATT 1994, a determination of "likeness" under Article III:4 is an overall determination of the extent of a competitive relationship between and among products. For the Appellate Body, to the extent that consumer preferences affect the "competitive relationship" of the products on the marketplace, they should be considered. As we have said before, we do not think that the competition-based jurisprudence should be automatically transposed onto a likeness analysis of Article 2.1 of the *TBT Agreement*. However, we believe we can glean some useful guidance from previous analyses under Article III of the GATT 1994 when analysing consumer preferences.

7.208 We recall that, in *EC – Asbestos*, the Appellate Body rejected Canada's argument that consumers' tastes and habits were irrelevant in that dispute because "the existence of the measure has disturbed normal conditions of competition between the products".<sup>420</sup> When demand on the market has been influenced by regulatory barriers to trade or to competition, a Member still has to analyse consumers' tastes and habits, perhaps by submitting evidence regarding substitutability from some relevant third market, or evidence of latent, or suppressed, consumer demand in that market.<sup>421</sup> It

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<sup>417</sup> Indonesia's response to Panel question No. 92, para. 23.

<sup>418</sup> Indonesia's response to Panel question No. 92, para. 24.

<sup>419</sup> United States' comments on Indonesia's response to Panel question No. 92, para. 17.

<sup>420</sup> Appellate Body Report, *EC – Asbestos*, para. 123.

<sup>421</sup> The Appellate Body referred to its ruling in *Korea – Alcoholic Beverages*. Appellate Body Report, *EC – Asbestos*, para. 123.



therefore appears that, to the extent that the competitive relationship is distorted by the measures at issue themselves, this could be taken into account, provided that it is explained and analysed. In other words, the "likeness" test is intended to ascertain that the products to be compared would normally be expected to be in a strong competitive relationship, and factors that distort this expected relationship in reality, such as a measure at issue, may be taken into account (while the subsequent "less favourable treatment" test would determine whether this competitive relationship has in fact been adversely affected by the measures, to the detriment of the imported products). The ban imposed further to Section 907(a)(1)(A), which removes clove cigarettes from the United States' market, obviously constitutes a distortion of the competitive relations in the market as it eliminates competition.

7.209 Bearing this in mind, we note that the evidence on consumer preferences submitted by the parties may not provide clear guidance in this regard. On the one hand, Indonesia argues that "smokers are known to switch among clove, menthol and tobacco cigarettes, which shows that they are, in fact, willingly substituting the products to achieve the same end use of smoking".<sup>422</sup> Subsequently, Indonesia asserts that "almost 90 per cent of youth smokers (under 18 years of age) are not using clove cigarettes".<sup>423</sup> The United States, on the other hand, submits in its first written submission that clove cigarettes are especially appealing to youth, while adults prefer to smoke tobacco and menthol cigarettes regularly.<sup>424</sup> In its second written submission, the United States focuses its argumentation on the fact that "[y]oung people within the window of initiation are enticed by the appealing physical characteristics of clove cigarettes, and do not view them as interchangeable with tobacco or menthol cigarettes".<sup>425</sup>

7.210 We observe that, in order to support these arguments, both parties rely on a series of surveys addressing smoking patterns in the United States.<sup>426</sup> These surveys, however, do not share the same research parameters. Indeed, they examine different age groups<sup>427</sup>, pose different questions<sup>428</sup> and are based on different methodological approaches.<sup>429</sup> Therefore, as the information from the different surveys presented by the parties is not directly comparable, we consider that we cannot rely on the

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<sup>422</sup> Indonesia's second written submission, para. 82.

<sup>423</sup> Indonesia's second written submission, para. 84.

<sup>424</sup> United States' first written submission, para. 185.

<sup>425</sup> United States' second written submission, para. 114.

<sup>426</sup> Indonesia relies on the following surveys: a) the 2007 National Survey on Drug Use and Health (Exhibit IND-3); b) the Western Watts Survey (Exhibit IND-26); c) the Monitoring the Future Survey (Exhibit IND-33); and d) a telephone survey conducted by Opinion Research Corporation (Exhibit IND-34). The United States, on the other hand, bases its arguments on the following surveys: a) the 2002 and 2003 National Survey on Drug Use and Health (Exhibit US-53); and b) the National Youth Tobacco Survey (Exhibit US-53).

<sup>427</sup> For instance, the 2007 National Survey on Drug Use and Health used by Indonesia examines the use of clove, menthol and regular cigarettes by youth under 18 years of age and adults, while the 2002 and 2003 National Survey on Drug Use and Health referred to by the United States gathers information on cigarette consumption by two main age groups: a) 12-25 years of age and b) over 26 years of age.

<sup>428</sup> For instance, one of the questions contained in the Western Watts survey filed by Indonesia is "which type of cigarette do you smoke *most frequently*?" (emphasis added), whereas the National Youth Tobacco Survey presented by the United States inquires on the use of clove and menthol cigarettes over the past 30 days.

<sup>429</sup> Exhibit US-55 shows that the methodological differences between the National Survey on Drug Use and Health and the Monitoring the Future Survey have had an impact on their results. The main difference is the focus of each survey; while the Monitoring the Future Survey focuses on youth, the National Survey on Drug Use and Health covers a broader population. Further, other differences include: (a) different response rates; (b) sampling error; (c) the effect of different time periods; (d) the different wording of questions; (e) different data processing; and (f) different interview setting.

information they provide on market shares for the purposes of analysing the consumers' tastes and habits criterion.<sup>430</sup>

7.211 Having said this, we note that the Appellate Body stated that the "extent to which consumers are – or would be – willing to choose one product instead of another to perform those end-uses, is highly relevant evidence in assessing 'likeness' of [] products".<sup>431</sup> An analysis of consumer preferences would thus involve determining the substitutability of one good with another one. The concept of *substitutability* and *substitutable* (as contained in Article III:2, 2<sup>nd</sup> sentence of the GATT 1994) is based on the potential of a consumer substituting something with another. Thus actual or current *substitution* is not required; on the contrary, the concept rather seems to reflect "the extent to which consumers are ... *willing* to use the products to perform these functions"<sup>432</sup>.

7.212 We also recall that, as the Appellate Body acknowledged, "there is a spectrum of degrees of 'competitiveness' or 'substitutability' of products in the marketplace, and ... it is difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word 'like' in Article III:4 of the GATT 1994 falls."<sup>433</sup> The Appellate Body also said, though, that "[it is] not saying that *all* products which are in *some* competitive relationship are 'like products' under Article III:4."<sup>434</sup>

7.213 An example that may serve to illustrate this point is found in the following analogy that builds on that proposed by Indonesia<sup>435</sup> between Coca-Cola and Pepsi. In principle, Coca-Cola consumers are very loyal to this soft-drink. However, if a Coca-Cola consumer takes a Virgin flight, it might *substitute* Coca-Cola with Virgin Cola, even though it would not be its main choice, as there is only Virgin cola on offer. This means that, for this consumer, these products are, to some extent, substitutable. A similar situation might be possible in the context of cigarettes. Smokers are very loyal to their brand, but if there is no possibility of getting cigarettes of that brand, they would likely smoke what is available. We nevertheless asked the parties about the relevance of brand loyalty in our analysis of likeness under this criterion and their response was that it is not relevant. In this respect, the United States argues that in the present dispute, brand loyalty is not significant in the likeness analysis.<sup>436</sup> According to Indonesia, given that consumers are willing to substitute the flavours among clove, menthol and tobacco cigarettes, brand loyalty does not prevent such cigarettes from being substitutable.<sup>437</sup>

7.214 In our view, it is appropriate to examine the substitutability of clove and menthol cigarettes from the perspective of the relevant group of consumers which, as we explained above, includes young smokers and those ready to become smokers. For them, arguably, any cigarette would likely be fine to start smoking. We note that, as explained further below, the evidence submitted by the parties shows that flavoured cigarettes, a category that includes both menthol and clove cigarettes, are particularly appealing to youth. Therefore, for the purpose of determining how youth perceive cigarettes and whether they would be willing to replace or substitute one or other cigarette to start smoking, we find relevant the fact that both types of cigarettes appeal to youth.

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<sup>430</sup> We note that the information presented by Indonesia on market shares presupposes that the market comprises the cigarettes smoked in the United States, which include, at a minimum, clove, menthol and regular cigarettes. Therefore, if we wish to compare the fluctuations in market shares of only clove cigarettes vis-à-vis those of menthol cigarettes, this information may be unreliable.

<sup>431</sup> Appellate Body Report, *EC – Asbestos*, para. 117.

<sup>432</sup> Appellate Body Report, *EC – Asbestos*, para. 117 (emphasis added).

<sup>433</sup> Appellate Body Report, *EC – Asbestos*, para. 99.

<sup>434</sup> Appellate Body Report, *EC – Asbestos*, para. 99.

<sup>435</sup> Indonesia's second written submission, para. 83.

<sup>436</sup> United States' comments on the Indonesia's response to Panel question No. 93, para. 21.

<sup>437</sup> Indonesia's comments on the United States' response to Panel question No. 93, para. 39.

7.215 We recall the explanation for implementing Section 907(a)(1)(A) found in the House Report on the FSPTCA<sup>438</sup>, which reads "[c]onsistent 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>439</sup>

7.216 Furthermore, according to the FDA Guidance<sup>440</sup>, explaining the rationale for the prohibition of cigarettes with characterizing flavours imposed by Section 907(a)(1)(A), flavoured cigarettes "[i]n addition to being more attractive to young people, flavored products make it easier for new smokers to start smoking by masking the unpleasant flavor of tobacco. Studies have also demonstrated that young people believe that flavored tobacco products are safer than unflavored tobacco products."<sup>441</sup>

7.217 The evidence submitted by the parties further shows that both types of cigarettes at issue, precisely because of their characterizing flavour which helps mask the harshness of tobacco, appeal to youth and are better vehicles for youth to start smoking than regular cigarettes.

7.218 For example, the WHO Study entitled "The Scientific Basis of Tobacco Product Regulation", submitted by the United States, indicates that "[s]tudies based on the tobacco industry's internal documents suggest that flavouring agents may also play an important role in the industry's targeting of young and inexperienced smokers".<sup>442</sup> That Study also says that "[m]enthol has been used to target new smokers across different ethnic groups".<sup>443</sup>

7.219 The Study entitled "Tobacco Policy Trend Alert on the Marketing of Candy-Flavored Cigarettes", submitted by the United States, concludes that "... numbers and industry documents clearly indicate that flavored cigarettes appeal to younger smokers and, combined with tobacco-company advertising for these products, target minors".<sup>444</sup>

7.220 We recall that the WHO Study entitled "The Scientific Basis of Tobacco Product Regulation" explains how menthol and eugenol derived from cloves are added to cigarettes "specifically to reduce the smoke harshness and enable the smoker to take in more dependence-causing and toxic substances." This study also stresses the fact that menthol and clove cigarettes are often marketed as less toxic and concludes that "the added ingredients possibly contribute to the perception that the cigarettes are less noxious and harmful".<sup>445</sup>

7.221 Interestingly, the U.S. National Survey on Drug Use and Health Report entitled "Use of Menthol Cigarettes", submitted by Indonesia, indicates that: "[m]enthol may mask the harshness of cigarette smoke and thereby make it easier for adolescents to start smoking".<sup>446</sup> This is also the conclusion reached by the above-mentioned "Tobacco Policy Trend Alert on the Marketing of

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<sup>438</sup> See paras. 2.6-2.7 above.

<sup>439</sup> Exhibit US-67.

<sup>440</sup> See paras. 2.8-2.11 above.

<sup>441</sup> Guidance. answer to question No. 1 (Exhibit IND-41). See also FDA Advisory – "Flavored Tobacco Products; What you need to know" (Exhibit IND-25).

<sup>442</sup> World Health Organization, "The Scientific Basis of Tobacco Product Regulation," WHO Technical Report Series 945 (2007) (Exhibit US-113) p. 26.

<sup>443</sup> World Health Organization, "The Scientific Basis of Tobacco Product Regulation," WHO Technical Report Series 945 (2007) (Exhibit US-113) p. 26.

<sup>444</sup> American Lung Association, "Tobacco Policy Trend Alert, From Joe Camel to Kauai Kolada – The Marketing of Candy-Flavored Cigarettes" (July 2005, updated May 2006) (Exhibit US-35) p. 7.

<sup>445</sup> For full citation, see para. 7.182 above.

<sup>446</sup> Use of Menthol Cigarettes, "The National Survey on Drug Use and Health Report", 19 November 2009 (Exhibit IDN-66) p. 1.

Candy-Flavored Cigarettes", submitted by the United States, which concludes that "[b]ecause of its cooling effect on the mouth and throat, menthol helped mask the harshness of cigarette smoke".<sup>447</sup>

7.222 Moreover, an article in a specialized medical journal entitled "Clove Cigarettes: the Basis for Concern Regarding Health Effects", submitted by the United States, states "[c]love cigarettes appeal to adolescents experimenting with smoking practices and may influence the development of later smoking habits".<sup>448</sup>

7.223 Furthermore, the March 2011 report from the TPSAC to the FDA<sup>449</sup> corroborates our understanding that menthol cigarettes are particularly appealing to youth.

7.224 For example, the March 2011 TPSAC report concludes that the industry developed menthol marketing to appeal to youth:

"[T]he section on youthful imagery in menthol marketing and the studies of industry documents described in this section confirm that the industry developed menthol marketing to appeal to youth. This is particularly true of the Newport brand, but that strategy was also adopted by other tobacco companies. Marketing messages positioned menthol cigarettes as an attractive starter product for new smokers who are unaccustomed to intense tobacco taste and/or high levels of menthol. Empirical studies provide further evidence of targeting: youth pay attention to and are attracted to menthol cigarette advertising. Cigarette advertising, including menthol advertising,

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<sup>447</sup> American Lung Association, "Tobacco Policy Trend Alert, From Joe Camel to Kauai Kolada – The Marketing of Candy-Flavored Cigarettes" (July 2005, updated May 2006) (Exhibit US-35) p. 5.

<sup>448</sup> Guidotti, et al, "Clove Cigarettes: the Basis for Concern Regarding Health Effects", *The Western Journal of Medicine* (August 1989) (Exhibit US-38) p. 1.

<sup>449</sup> As explained in paragraph 2.23, the FSPTCA directed the TPSAC to deliver a report to the FDA on the public health impact of menthol cigarettes. The March 2011 TPSAC Report was delivered to the FDA on 18 March 2011. The March 2011 TPSAC Report noted, inter alia, that "menthol cigarettes are particularly popular among younger smokers" and contained the following overall recommendation to the FDA: "[r]emoval of menthol cigarettes from the marketplace would benefit public health in the United States". March 2011 TPSAC Report, pp. 36 and 208, available at <http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/ucm237359.htm>, accessed 10 May 2011. In light of the conclusions of the March 2011 TPSAC Report, the Panel asked the parties: (i) whether the above mentioned recommendation contained in the March 2011 TPSAC Report was relevant to the dispute; (ii) what was the relevance of the March 2011 TPSAC Report to the question of whether menthol-flavoured cigarettes are "like" clove cigarettes; (iii) to comment on the significance of the evidence presented by the March 2011 TPSAC Report concerning the rate of menthol cigarettes smoked by youth, in relation to the dispute; and (iv) whether the Panel could conduct an "objective assessment" of the matter before it under Article 11 of the DSU without taking into consideration the March 2011 TPSAC Report. According to the United States, (i) the recommendation is, at most, marginally relevant to the issues in the dispute (United States' response to Panel question No. 115, para. 10); (ii) any relevance of the March 2011 TPSAC Report to the "like product" comparison in the dispute is very limited (United States' response to Panel question No. 115, para. 16); (iii) the data contained in the March 2011 TPSAC Report is of limited relevance to the issues that the Panel must decide (United States' response to Panel question No. 115, para. 21); and (iv) the Panel would not be acting inconsistently with Article 11 of the DSU if its Report did not take the March 2011 TPSAC Report into consideration (United States' response to Panel question No. 115, para. 4). According to Indonesia, (i) the recommendation of the TPSAC concerning menthol is not relevant to the dispute (Indonesia's response to Panel question No. 115, para. 1); (ii) the March 2011 TPSAC Report is not particularly relevant to the question of whether menthol-flavoured cigarettes are "like" other flavoured cigarettes (Indonesia's response to Panel question No. 115, para. 4); (iii) the evidence and conclusions of the March 2011 TPSAC Report are consistent with facts affirmed by Indonesia in the dispute (Indonesia's response to Panel question No. 115, para. 5); and (iv) the Panel can make an "objective assessment" of the matter before it without taking into account the March 2011 TPSAC Report (Indonesia's response to Panel question No. 115, para. 6).

has a greater impact on the brand choice of adolescents than it does for adult smokers."<sup>450</sup>

7.225 The March 2011 TPSAC report also points out that menthol cigarettes appeal to youth and starting smokers because of their sensory effects:

"[T]he evidence suggests that youth choose menthol cigarettes, particularly at lower menthol yields, mainly because of the relative ease of smoking a menthol cigarette for the naive smoker and because they perceive menthol to be less harmful than non - menthol cigarettes... .Taken together, the various lines of evidence support an appeal of menthol cigarettes to youth and starting smokers because of their sensory effects."<sup>451</sup>

7.226 The March 2011 TPSAC report also indicates that "[t]he evidence is sufficient to conclude that a relationship is more likely than not that the availability of menthol cigarettes increases the likelihood of addiction and the degree of addiction in youth smokers."<sup>452</sup>

7.227 Furthermore, under the chapter "Public Health Impact", the March 2011 TPSAC report concludes, *inter alia*, that the availability of menthol cigarettes increases initiation among youth, i.e., the number of smokers, and therefore represents an adverse impact on public health in the United States:

"TPSAC does conclude that the availability of menthol cigarettes has led to an increase in the number of smokers and that this increase does have adverse public health impact in the United States. TPSAC found evidence that the availability of menthol cigarettes increases initiation; of particular concern was the high rate of menthol cigarette smoking among youth and the trend over the last decade of increasing menthol cigarette smoking among 12 to 17 year olds, even as smoking of non - menthol cigarettes declines. TPSAC also concluded that cessation is less likely to be successful among smokers of menthol cigarettes. Thus, the availability of menthol cigarettes increases initiation and reduces cessation, thereby increasing the number of people who are smoking. This increase in the number of smokers represents an adverse impact of the availability of menthol cigarettes on public health."<sup>453</sup>

7.228 We note that, with regard to the March 2011 TPSAC report, the United States recognizes that "the report is mentioned in the U.S. legislation; the parties referred to it in their submissions to the Panel; and the issuance of the report was widely reported in the media".<sup>454</sup> We are of the view that we may rely upon the March 2011 TPSAC report for the purpose of corroborating our findings as this would be consistent with Articles 11 and 13 of the DSU.

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<sup>450</sup> March 2011 TPSAC Report, p. 66, available at <http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/ucm237359.htm>, accessed 22 April 2011.

<sup>451</sup> March 2011 TPSAC Report, p. 103, available at <http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/ucm237359.htm>, accessed 22 April 2011.

<sup>452</sup> March 2011 TPSAC Report, p. 199, available at <http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/ucm237359.htm>, accessed 22 April 2011.

<sup>453</sup> March 2011 TPSAC Report, p. 204, available at <http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/ucm237359.htm>, accessed 22 April 2011.

<sup>454</sup> United States' response to Panel question No. 115, para. 5.

7.229 The WHO *Partial Guidelines* reinforce our understanding. Indeed, they appear to show that the scientific community perceive cigarettes including additives that increase palatability, i.e., those which Section 907(a)(1)(A) refers as having a characterizing flavour, as part of a same basket or category of cigarettes that attract consumers. In this regard, the WHO *Partial Guidelines* argue that "[r]egulating ingredients aimed at reducing tobacco product attractiveness can contribute to reducing the prevalence of tobacco use and dependence among new and continuing users". They therefore recommend, among other things, that the "[p]arties should regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products".<sup>455</sup> Targeted ingredients include those that are used to increase palatability. Among the ingredients that increase palatability listed in the WHO *Partial Guidelines* we find masking agents such as menthol as well as spices and herbs, which include mint and may cover clove.

7.230 Both parties seem to agree that the WHO *Partial Guidelines* are potentially relevant to the dispute. Initially, in response to a question from the Panel Indonesia argued that the WHO *Partial Guidelines* were not relevant for the factual and legal matters before the Panel.<sup>456</sup> Subsequently, however, Indonesia nuanced its position by arguing that the principal factual findings and recommendations contained in both the Guidelines and Report apply equally to both clove-flavoured and menthol-flavoured cigarettes.<sup>457</sup> The United States argued that the WHO *Partial Guidelines* support the U.S. regulatory approach of banning characterizing flavours in cigarettes.<sup>458</sup> The United States subsequently clarified that, although the WHO *Partial Guidelines* present general factual findings and recommendations relevant to this dispute, these findings do not specifically take into account the particular circumstances in the United States and, thus, should not be viewed as applying equally to all flavours or additives.<sup>459</sup> We agree with the United States' view that the WHO *Partial Guidelines* do not necessarily apply directly to the particular regulatory needs of a particular country. However, these Guidelines, "drawing on the best available scientific evidence and the experience of Parties"<sup>460</sup>, do show a growing consensus within the international community to strengthen tobacco-control policies through regulation of the content of tobacco products, including additives that increase the attractiveness and palatability of cigarettes. Thus, we consider that the WHO *Partial Guidelines* corroborate our understanding.

7.231 The inevitable conclusion is 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. Indeed, the above reports, studies and academic articles show that additives such as clove, menthol, vanilla, chocolate, coffee, etc. which provide a certain characterizing flavour to cigarettes are internationally thought to increase palatability and thus attract youth. We observe that the WHO studies and the WHO *Partial Guidelines* support the view that youth are attracted to cigarettes with flavours that increase palatability and the studies do not differentiate between categories of flavours in terms of whether they attract more or less youth; rather, they are all put in the same basket as appealing to youth. These studies are therefore based on the premise that youth is generally attracted to cigarettes with characterizing flavours or additives that increase palatability. In simple terms, all these flavoured cigarettes are perceived as vehicles to start smoking. This view is shared by the FDA Guidance<sup>461</sup> and to a certain extent, by the various explanatory comments on the reasons behind the adoption of Section 907(a)(1)(A) found in the House Report.

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<sup>455</sup> The text of the draft Guidelines, which was adopted without change at the COP, is available online at [http://apps.who.int/gb/fctc/PDF/cop4/FCTC\\_COP4\\_28draft-en.pdf](http://apps.who.int/gb/fctc/PDF/cop4/FCTC_COP4_28draft-en.pdf).

<sup>456</sup> Indonesia's response to Panel question No. 19.

<sup>457</sup> Indonesia's response to Panel question No. 97.

<sup>458</sup> United States' response to Panel question No. 19.

<sup>459</sup> United States' response to Panel question No. 97.

<sup>460</sup> WHO *Partial Guidelines*, Section 1.1.

<sup>461</sup> The FDA Guidance for example indicates:

7.232 It is our view that the various studies mentioned above and their conclusions indicate that in the mind of youth, flavoured cigarettes, including those flavoured with clove or menthol, are similar. Therefore, we conclude that the perception of many of the consumers at issue in this case, i.e., young smokers and potential young smokers, is that menthol-flavoured and clove-flavoured cigarettes are similar for the purpose of starting to smoke.

The tariff classification of the products

7.233 The last criterion is that of the tariff classification of the products. For the Appellate Body in *EC – Asbestos*, "[t]ariff classification clearly reflects the physical properties of a product."<sup>462</sup> However, it did clarify that, even when the customs classification of the products being compared is the same, "this indication of 'likeness' cannot, on its own, be decisive."<sup>463</sup>

7.234 **Indonesia** submits that clove cigarettes and domestically-produced cigarettes have the same international tariff classification at the 6-digit level<sup>464</sup> which, in response to a question, it indicates as being 2402.20.<sup>465</sup> Further, to rebut an argument presented by the United States, Indonesia clarifies that any difference in tariff classification at the 8-digit level is irrelevant, as only the 6-digit level classification can be compared internationally.<sup>466</sup>

7.235 In its first written submission, the **United States** has no comment on Indonesia's statement that clove cigarettes and domestically-produced cigarettes have the same international tariff classification, except to note that the Appellate Body emphasized that tariff classification, on its own, cannot be decisive.<sup>467</sup> Subsequently, in its second written submission, the United States argues that "clove cigarettes are treated differently than all "other" cigarettes at the 8-digit level under the U.S. GATT 1994 Schedule".<sup>468</sup>

7.236 Cigarettes are classifiable under Chapter 24 of the Harmonised System, in Heading 2402 for "Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes". We have found three relevant HS 6-digit codes for cigarettes, namely:

"240210 Cigars, Cheroots, Cigarillos (Containing Tobacco)

240220 Cigarettes (Containing Tobacco)

240290 Other Cigars, Cheroots, Cigarillos, Cigarettes"

7.237 Therefore, the 6-digit heading for clove, menthol and regular cigarettes is 2402.20.

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"Studies have also demonstrated that young people believe that flavored tobacco products are safer than unflavored tobacco products.

Flavored cigarettes are just as addictive and have the same types of harmful effects as regular cigarettes. Removing these flavored products from the market is important because it removes an avenue that young people can use to begin regular tobacco use."

FDA Guidance, p.2.

<sup>462</sup> Appellate Body Report, *EC – Asbestos*, para. 102.

<sup>463</sup> Appellate Body Report, *EC – Asbestos*, para. 146.

<sup>464</sup> Indonesia's first written submission, para. 64.

<sup>465</sup> Indonesia's response to Panel question No. 45, para. 98. Indonesia's second written submission, para. 90.

<sup>466</sup> Indonesia's second written submission, para. 90.

<sup>467</sup> United States' first written submission, para. 168.

<sup>468</sup> United States' second written submission, para. 116.

7.238 Under the heading of tariff classification, the United States further submits that the fiscal treatment of two different products should have very little weight in the "like product" analysis when the domestic measure under consideration is adopted not for fiscal purposes, but in order to protect human health.<sup>469</sup> However, to the extent it is relevant, the United States notes that Indonesia apparently does not treat clove cigarettes "like" imported tobacco or menthol cigarettes for domestic tax purposes.<sup>470</sup>

7.239 We do not see the relevance of Indonesia's taxation policy in the assessment of this criterion. We are to examine whether the tariff classification of these types of cigarettes is similar. In this regard, the Appellate Body has pointed out that in examining this criterion, panels should normally have regard to the tariff nomenclatures based on the Harmonized System.<sup>471</sup> In this respect, we find that both clove and menthol cigarettes are classified under HS Subheading 2402.20.

(iv) *Conclusion on likeness*

7.240 We have found above that clove and menthol cigarettes are physically similar and both include an additive that provides them with a characterizing flavour. We have also said that the presence of such an additive is especially relevant if examined in the context of the immediate purpose of Section 907(a)(1)(A), which is a technical regulation aimed at regulating cigarettes which include such additives.

7.241 We have also found that both clove and menthol cigarettes share the same end-use of smoking.

7.242 We have further found that the perception of the consumers at issue in this case, i.e., young smokers and potential young smokers, is that flavoured cigarettes are similar for the purpose of starting to smoke.

7.243 Finally, we have found that clove and menthol cigarettes are classified under the same 6-digit HS code, namely 2402.20.

7.244 As we have explained throughout our findings, the Panel has reached the above conclusions 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. As we have explained, we believe that such legitimate objective must permeate and inform our likeness analysis. In the weighing of these criteria, we have therefore carefully considered the relevance of those traits that are significant for the public health objective of Section 907(a)(1)(A), i.e., to reduce youth smoking.

7.245 We consider that our basic approach to "likeness" in this case is consistent with a very helpful hypothetical presented by the United States at the second meeting of the Panel, and reiterated in response to a question from the Panel:

"Certain products may be considered like in certain contexts but not in others. For example, as the United States noted at the Second Substantive Meeting with Panel, cups made from paper, plastic and aluminum might be considered 'like' products regardless of these physical differences with respect to a tax or other fiscal measure. They all serve the same end-use of holding liquids, and may be viewed as interchangeable by consumers in this context. The different materials used in the

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<sup>469</sup> United States' first written submission, para. 191.

<sup>470</sup> United States' first written submission, para. 192.

<sup>471</sup> Appellate Body Report, *Japan - Alcoholic Beverages II*, p. 22.



cups may be considered to be less important in the like product analysis in this situation. However, the same cups might not be considered 'like' with respect to a measure regulating products that can be used safely in microwave ovens. In that case, the different materials used to make the cups would be more relevant, as aluminum may not be safely used in a microwave. This difference would effect whether consumers viewed each cup as suitable for use in a microwave and would be relevant to measures regulating which cups could be used in microwaves. In this context, the different materials used would be significant differences among the cups. The particular measure at issue is relevant to whether the different physical properties of the cup mean that one cup is not 'like' another cup."<sup>472</sup>

7.246 We think that clove cigarettes and menthol cigarettes may be considered "like" in certain contexts but not in others. For example, these two kinds of cigarettes might not be considered "like" in the context of a hypothetical measure regulating products on the basis of characteristics that clove cigarettes and menthol cigarettes do not have in common, for example whether they contain eugenol (clove cigarettes do, and most menthol cigarettes do not). Along the same lines, they might not be considered "like" in the context of a hypothetical tax or fiscal measure based on the type of tobacco they contain (clove cigarettes tend to contain Java sun-cured tobacco, menthol cigarettes do not). However, these same two types of cigarettes might be considered "like" in the context of other measures that regulate products on the basis of characteristics that clove and menthol cigarettes do have in common, for example a hypothetical measure distinguishing between various tobacco products on the basis of whether or not those products are carcinogenic (which clove cigarettes and menthol cigarettes both are).

7.247 The measure at issue in this case plainly regulates cigarettes on the basis of a characteristic that clove cigarettes and menthol cigarettes have in common, which in the words of Section 907(a)(1)(A), is the shared characteristic that they "contain, as a constituent ... or additive, an artificial or natural flavor ... or an herb or spice ... that is a characterizing flavor". In the context of this particular measure, which regulates tobacco products on the basis of this particular characteristic – which may be regarded as perhaps the defining feature of each type of product – we find it very difficult to see how clove cigarettes and menthol cigarettes would not be considered to be "like". As discussed in our findings, we are aware that there are certain differences between clove cigarettes and menthol cigarettes. These differences may well lead to the conclusion that these two products are not "like" in the context of different measures. However, in the context of the measure at issue in this dispute, these differences are less significant, and less relevant. In other words, contrary to what the United States argues<sup>473</sup>, those differences do not relate to the public health objective of the measure at issue and therefore, are not relevant to the like product analysis in this case. In our view, the similarities related to the public health objective of Section 907(a)(1)(A) are highly relevant to the like product analysis in the circumstances of this case.

7.248 Accordingly, given our conclusions above, we find that clove cigarettes and menthol cigarettes are like products for the purpose of Article 2.1 of the *TBT Agreement*.

(d) Whether imported clove cigarettes are accorded less favourable treatment than that accorded to like products of national origin

(i) *Introduction*

7.249 The fact that Section 907(a)(1)(A) differentiates between like products is not in itself sufficient to violate the national treatment obligation embodied in Article 2.1 of the *TBT Agreement*.

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<sup>472</sup> United States' response to Panel question No. 96, para. 52.

<sup>473</sup> United States' oral statement at the first substantive meeting of the Panel, para. 27 (emphasis added).

Indeed, we must also find that Section 907(a)(1)(A) accords to imported clove cigarettes "less favourable treatment" than it accords to the like domestic product, i.e., menthol cigarettes.<sup>474</sup>

7.250 There are two preliminary issues that we need to clarify before examining this element of the national treatment test in detail. The first is the interpretative approach of the Panel, and the second is the nature of Indonesia's allegation of less favourable treatment.

(ii) *The Panel's approach to interpreting the less favourable treatment test under Article 2.1 of the TBT Agreement*

7.251 As with "likeness", the concept of "less favourable treatment" has been interpreted in the context of Article III:4 of the GATT 1994. This jurisprudence reflects a competition-based analysis which rests upon explicit references to the general principle embodied in Article III:1 of the GATT 1994. We are therefore again facing the question of whether we are to follow that jurisprudence, or rather interpret this concept in the context of the *TBT Agreement* and in the light of the legitimate objective<sup>475</sup> of Section 907(a)(1)(A).

7.252 The parties have argued their respective positions regarding this element of the national treatment claim by invoking different aspects of the jurisprudence developed by the Appellate Body in the context of Article III:4 of the GATT 1994.<sup>476</sup>

7.253 As we explained above, the wording of Article 2.1 of the *TBT Agreement* appears to be modelled on that of Article III:4 of GATT 1994. They both impose a similarly worded obligation upon Members to provide imported products "treatment no less favourable than that accorded to like products of national origin". However, this obligation applies only to technical regulations, and that, as we have also said before, is most significant to the interpretation of Article 2.1 of the *TBT Agreement* in the present case.

7.254 While we agree with the parties that the similarity in wording must be given weight, we do so cautiously because, as noted by the Appellate Body in *EC – Asbestos*, even to the extent that the terms used are identical, they "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".<sup>477</sup>

7.255 We think that our approach to interpreting "likeness" under Article 2.1 of the *TBT Agreement* should also apply, for the same reasons, to our analysis of whether imported clove cigarettes were accorded "less favourable treatment" than that accorded to the domestic like product, i.e., menthol cigarettes. We explained before that, in our view, the legitimate objective of reducing youth smoking must permeate and inform our likeness analysis. We will follow a similar approach in our examination of this element.

(iii) *De jure versus de facto discrimination*

7.256 We note that there has been a significant evolution, or perhaps clarification, in Indonesia's argumentation under this test. Initially, Indonesia appeared to allege *de jure* discrimination in its first written submission, notwithstanding Section 907(a)(1)(a) being facially origin-neutral. Indonesia did

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<sup>474</sup> Appellate Body Report, *EC – Asbestos*, para. 100.

<sup>475</sup> We refer to Section VII.F.2(c) where we have concluded that Indonesia has failed to demonstrate that the objective of the ban is not "legitimate".

<sup>476</sup> Indonesia's first written submission, paras. 66-68; Indonesia's second written submission, paras. 93-104; United States' first written submission, paras. 196-212; United States' second written submission, paras. 126-144.

<sup>477</sup> Appellate Body Report, *EC – Asbestos*, paras. 88-89.

not mention *de facto* discrimination in its first written submission. The United States responded that Indonesia had not met its burden to demonstrate that clove cigarettes are accorded less favourable treatment based on their national origin.<sup>478</sup> The United States recalled that Article III:4 forbids Members from according less favourable treatment "on a *de jure* or *de facto* basis" to imported products as compared to domestic products, and nevertheless proceeded to refute a potential *de facto* discrimination claim in its first written submission.

7.257 In response to a question from the Panel, and following the third party submissions, Indonesia alleged that Section 907(a)(1)(A) results in *de facto* discrimination against imported products. Indonesia emphasized that while menthol cigarettes (and regular cigarettes) are produced domestically in the United States, clove cigarettes, which were banned, were predominantly imported from Indonesia. According to Indonesia, this means that virtually all domestically produced cigarettes with relevant market shares were unaffected by the ban imposed by Section 907(a)(1)(A).<sup>479</sup>

7.258 Indonesia points out (in reference to Brazil's oral statement<sup>480</sup>) that the panel in *Canada – Pharmaceutical Patents* explained that "[d]e facto discrimination is a general term describing the legal conclusion that an ostensibly neutral measure transgresses a non-discrimination norm because its actual effect is to impose differentially disadvantageous consequences on certain parties, and because those differential effects are found to be wrong or unjustifiable."<sup>481</sup>

7.259 Indonesia also refers to Norway's oral statement<sup>482</sup> to further elaborate on the existing jurisprudence on *de facto* discrimination. It points out that panels and the Appellate Body have examined the design, structure and operation of the measure when assessing *de facto* discrimination.<sup>483</sup> It also highlights that panels and the Appellate Body have found *de facto* discrimination if domestically produced products tended to be subject to more favourable treatment than like imported products.<sup>484</sup>

7.260 We observe that Section 907(a)(1)(A) does not explicitly ban certain kinds of cigarettes on the basis of origin, but rather on the type of characterizing flavour a cigarette has. *De jure* less favourable treatment would therefore be excluded. In addition, Indonesia's Panel Request does not contain any indication that its claim is limited to *de jure* less favourable treatment; the Panel Request merely states that the measure at issue violates Article 2.1 of the *TBT Agreement* because it "results in treatment that is 'less favorable' to imported clove cigarettes than that accorded to a like domestic product, menthol cigarettes." In addition, the United States has not argued that it was prejudiced in any way by the evolution in Indonesia's argumentation, and addressed the issue of *de facto* discrimination at some length in its first written submission.

7.261 Under these circumstances, we decide to examine Indonesia's claim as consisting of an allegation of *de facto* less favourable treatment.

(iv) *The less favourable treatment test under Article 2.1 of the TBT Agreement*

7.262 As explained above, the concept of "less favourable treatment" has not been interpreted in the context of Article 2.1 of the *TBT Agreement* except very briefly by the panel in *EC – Trademarks and*

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<sup>478</sup> United States' first written submission, para. 174.

<sup>479</sup> Indonesia's response to Panel question No. 48, paras. 100-102.

<sup>480</sup> Brazil's third party oral statement, para. 7.

<sup>481</sup> Panel Report, *Canada – Pharmaceutical Patents*, para. 7.101.

<sup>482</sup> Norway's third party oral statement, para. 19.

<sup>483</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.

<sup>484</sup> Appellate Body Report, *Chile – Alcoholic Beverages*, paras. 51-53; Panel Report, *Mexico – Taxes on Soft Drinks*, paras. 8.119 – 8.121.

*Geographical Indications (Australia)*.<sup>485</sup> As also explained above, this concept has been interpreted in a national treatment context by panels and the Appellate Body with respect to Article III:4 of the GATT 1994.

7.263 The concept of "less favourable treatment" with respect to Article III:4 of the GATT 1994 was first interpreted by the GATT panel in *US – Section 337 Tariff Act* as calling for "effective equality of opportunities" for imported products<sup>486</sup> and this same line of interpretation has been followed by later panels and the Appellate Body.<sup>487</sup>

7.264 In *Korea – Various Measures on Beef*, the Appellate Body observed that "whether or not imported products are treated 'less favourably' than like domestic products should be assessed ... by examining whether a measure *modifies the conditions of competition in the relevant market* to the detriment of imported products."<sup>488</sup>

7.265 We note that, as with the concept of "like product", the Appellate Body in *EC – Asbestos* interpreted "less favourable treatment" in Article III:4 of the GATT 1994 in light of the general principle in Article III:1, and thus considered that "[t]he term 'less favourable treatment' expresses the general principle, in Article III:1, that internal regulations 'should not be applied ... so as to afford protection to domestic production'."

7.266 The Appellate Body has explained that, "[i]f there is 'less favourable treatment' of the group of 'like' imported products, there is, conversely, 'protection' of the group of 'like' domestic products."<sup>489</sup> As put by the Appellate Body in *EC – Asbestos*, "a WTO 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>490</sup> Therefore, the fact that distinctions of treatment are made between different products does not necessarily constitute "less favourable" treatment. Furthermore, there may be cases where the application of formally *identical* legal provisions would in practice accord less favourable treatment to imported product.<sup>491</sup> Hence, "less favourable treatment" would seem to exist, at least in respect of Article III:4 of the GATT 1994, where the imported product is placed at a competitive disadvantage on the domestic market as a result of the measure.

7.267 Accordingly, under Article III:4 of the GATT 1994, whether "treatment less favourable" is accorded to imported products compared to like domestic products rests essentially on an assessment of the conditions of competition on the market. We observe, however, that the examination of whether the measure at issue provides for "effective equality of competitive opportunities" needs *not* be based on the actual effects of the measure in the market.<sup>492</sup>

7.268 Therefore, we understand from the above jurisprudence under Article III:4 of the GATT 1994 that what should be considered is whether the equality of competitive conditions between imported and domestic products is affected.<sup>493</sup> The Appellate Body indicated in *Korea – Various Measures on*

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<sup>485</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.464-7.476.

<sup>486</sup> GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.11.

<sup>487</sup> Panel Report, *US – Gasoline*, para. 6.10; Panel Report, *EC – Bananas III*, paras. 7.179-7.180; Panel Report, *Japan – Film*, para. 10.379.

<sup>488</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 137 (emphasis added).

<sup>489</sup> We note that in this case, the Appellate Body was not called upon reviewing the Panel's findings on less favourable treatment. Appellate Body Report, *EC – Asbestos*, para. 100.

<sup>490</sup> Appellate Body Report, *EC – Asbestos*, para. 100.

<sup>491</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

<sup>492</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.

<sup>493</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, citing GATT Panel Reports, *US – Superfund*, para. 5.1.9 and *Japan – Alcoholic Beverages I*, para. 5.5(b).

*Beef* that imported products are treated less favourably than like products if a measure modifies the conditions of competition in the relevant market *to the detriment of imported products*.<sup>494</sup> However, as observed by the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes*, "the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances *unrelated to the foreign origin of the product*, such as the market share of the importer in this case."<sup>495</sup> Hence, it is not sufficient to find inconsistency with Article III:4 solely on the basis that the measure at issue adversely affects the conditions of competition for an imported product. The complainant must also show that those adverse effects are related to the foreign origin of the product at issue.

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

#### Which are the products to be compared

7.270 Before proceeding further, we must first determine which are the *products to be compared* for the purpose of the analysis of less favourable treatment, i.e., which are the domestic products and which the imported products for the purpose of the less favourable treatment test.

7.271 When asked by the Panel, **Indonesia** submitted that, for purposes of the "less favourable treatment" analysis, the imported product is only clove cigarettes and the domestic product(s) would only be any type of cigarette not banned by Section 907(a)(1)(A) that the Panel found to be "like" clove cigarettes (e.g., menthol- or tobacco-flavoured cigarettes). Indonesia notes that it has not raised any claims with respect to the treatment of clove cigarettes as compared to "candy"-flavoured cigarettes.<sup>496</sup> For Indonesia, when arguing in the context of Article III:4 of the GATT 1994, a violation can be established by showing that there are *some* (i.e., the least favourably treated) imported products that are treated less favourably than *some* (i.e., the most favourably treated) domestic like product. According to Indonesia, in the present case, the relevant comparison is whether imported clove cigarettes are "like" *any* domestic cigarettes that were *not* banned, namely menthol- or tobacco-flavoured cigarettes. According to Indonesia, it is not necessary for the Panel to consider whether clove cigarettes are treated less favourably than domestic cigarettes that were also banned or than imported cigarettes that were not banned.<sup>497</sup>

7.272 According to the **United States**, the Panel should compare the treatment accorded to *all* imported cigarettes (to the extent that they are like), and not just clove cigarettes, with the treatment accorded to *all* domestically-produced cigarettes (to the extent that they are like). From this point of view, the United States emphasizes that Section 907(a)(1)(A) applies to both imported and domestic cigarettes with characterizing flavours, which comprise a small category of cigarettes in general. At the same time, the ban does not apply to regular and menthol cigarettes of any origin, including regular cigarettes imported from Indonesia, and both imported and domestic menthol cigarettes. In

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<sup>494</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

<sup>495</sup> Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96 (emphasis added).

<sup>496</sup> Indonesia's response to Panel question No. 49, paras. 103-105.

<sup>497</sup> Indonesia's second written submission, para. 100.

the United States' view, Indonesia is incorrect that Section 907(a)(1)(A) accords less favourable treatment "if *one* Indonesian import is included among the prohibited characterizing flavours and *one* U.S. produced cigarette is not".<sup>498</sup> For the United States, the "best treatment" approach advocated by Indonesia is inconsistent with the language of Article III:4 of the GATT 1994 and Article 2.1 of the *TBT Agreement*. Rather, it submits, as established by the Appellate Body in *EC-Asbestos*, the relevant comparison is between the *group* of "like" imported products and the *group* of "like" domestic products.<sup>499</sup> According to the United States, the Appellate Body recognized that a Member may draw distinctions between products determined to be "like" without affording protection to domestic production or according less favourable treatment to imported products.<sup>500</sup>

7.273 In our view, WTO jurisprudence does not support the proposition that "less favourable treatment" can be established merely by showing that there are *some* imported products that are treated less favourably than *some* domestic like product. Indeed, we agree with the United States that this is an "extreme view that has been squarely rejected by the Appellate Body" in *EC – Asbestos*.<sup>501</sup>

7.274 We nonetheless believe that for the purposes of the "less favourable treatment" analysis, Indonesia is correct in its conclusion that the comparison should be between: (i) imported *clove* cigarettes (as opposed to all kinds of cigarettes imported into the United States from all countries); and (ii) the domestically produced cigarettes that the Panel has found to be "like" products, i.e., menthol cigarettes.

7.275 Our reasoning, which is quite different from the legal argument advanced by Indonesia, is fairly simple and straightforward. 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".<sup>502</sup> 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>503</sup>

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

7.277 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

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<sup>498</sup> United States' second written submission, section II.A.4.a., paras. 119-125 (emphasis original).

<sup>499</sup> United States' second written submission, paras. 119-123.

<sup>500</sup> United States' first written submission, para. 204.

<sup>501</sup> United States' second written submission, para. 119.

<sup>502</sup> We note that Article III:4 of the GATT 1994 likewise calls for a comparison of "products of the territory of any contracting party" imported into the territory of any other contracting party" with "like products of national origin".

<sup>503</sup> In response to an argument by Indonesia that all cigarette imports into the United States were clove cigarettes despite the fact that US-91 showed a small percentage of non-clove cigarettes being imported into the United States, the United States clarifies that it is unlikely that clove cigarette manufacturers would have mistakenly imported their cigarettes under the wrong subheading (the non-clove cigarette subheading), as it applies a lower tariff to clove cigarettes than to any other cigarettes (United States' response to Panel question No. 81).

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.

7.278 We will therefore proceed to examine whether the United States accorded imported clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes.

Whether the products at issue are treated differently

7.279 Once we have identified the products which we will compare, the next step should be to determine whether the products at issue are *treated differently*. In the present dispute, the obvious conclusion is that the treatment cannot be more different. Clove cigarettes are banned while menthol cigarettes are excluded from the ban.

7.280 We therefore conclude that the products at issue are treated in a fundamentally different manner.

Whether the different treatment is to the detriment of imported products

7.281 We recall that the Appellate Body's jurisprudence for Article III:4 of the GATT 1994 explains that it is not sufficient to find that the treatment is different, but that it must be found that the different treatment modifies the conditions of competition to the detriment of the imported products.<sup>504</sup> We agree that it should not be sufficient *per se* to find that domestic products and imported like products are treated differently but such different treatment must result on imported products being treated less favourably. In this case, there is an obvious conclusion: imported clove cigarettes are banned while the like domestic menthol cigarettes are allowed to remain in the market.

Whether that less favourable treatment is related to the national origin of the imports

7.282 The parties disagree on how to interpret the Appellate Body's findings in *Dominican Republic – Import and Sale of Cigarettes*, whereby there is no less favourable treatment where the detrimental effect is explained by factors or circumstances *unrelated to the foreign origin of the product*. The **United States** interprets these findings as calling for a two-step analysis in order to find less favourable treatment: (i) it must be determined that like imported and domestic products have been *treated differently based on national origin*, and (ii) it must be determined whether such different treatment accords less favourable treatment to the imported product. The United States further relies on the Appellate Body's approach in *Korea – Various Measures on Beef* in support of this two-step approach.<sup>505</sup> The United States explains that the Appellate Body in *Korea – Various Measures on Beef* initially found that the Korean measure at issue provided different treatment to imported and domestic products by requiring them to be distributed through separate distribution channels. After the initial finding of different treatment, the Appellate Body turned to examine whether this different treatment meant that imported products were treated less favourably based on the national origin of the product. The Appellate Body concluded that because the Korean measure itself imposed on retailers the "necessity of making a choice" between domestic and imported beef, it limited the marketing opportunities for imported beef, and thereby modified the conditions of competition to the detriment of this product.

7.283 For the United States, whether a measure accords less favourable treatment turns on how the measure treats imported products as compared to domestic products. For this purpose, it argues, the

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<sup>504</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

<sup>505</sup> United States' first written submission, footnote 249, referring to Appellate Body Report, *Korea – Various Measures on Beef*, paras. 144-146.

Appellate Body has examined whether the measure alters the conditions of competition to the detriment of imported products as compared to domestic products – but has made clear that a measure does *not* alter the conditions of competition to the detriment of imported products when the alleged detriment is "explained by factors or circumstances *unrelated to the foreign origin of the products*."<sup>506</sup> The United States argues that while there is no single approach or necessarily decisive factor in reaching a legal conclusion of "less favourable treatment" – and different factors are significant given particular facts and circumstances – the guiding principle to the analysis is that a measure must not single out imports based on national origin so as to afford protection to domestic product.<sup>507</sup> According to the United States, where an alleged detrimental effect on an imported product is not attributable to its foreign origin, but to some other factor, that effect is not evidence of less favourable treatment.<sup>508</sup>

7.284 The United States submits that this reasoning also holds with respect to Article 2.1 of the *TBT Agreement*, which, in its view, must be interpreted so as to permit technical regulations based on legitimate product distinctions – even where those distinctions may have a different impact on different products. For the United States, Indonesia seeks to remove any analytic task by boiling down the "less favourable treatment" analysis to a mechanical question of whether a measure applies to any import and not to any like domestic product. In its view, this approach is insufficient as the essence of national treatment obligations is whether a measure accords less favourable treatment to imported products as compared to domestic products, and that question requires an examination of all relevant facts.<sup>509</sup> According to the United States, the "less favourable treatment" analysis is not simply a matter of looking at which cigarettes are banned and which are not banned, without also examining all relevant evidence, including the objective purpose of the measure and whether the alleged detrimental effects to imports depend on their national origin.<sup>510</sup>

7.285 **Indonesia** disagrees with the United States' characterization of "less favourable treatment" and argues that no panel or Appellate Body report has ever required both a "less favourable treatment" test and a second "based on national origin" test in Article III:4 of the GATT 1994.<sup>511</sup> According to Indonesia, the formulation of the United States would eliminate the concept of *de facto* discrimination.<sup>512</sup> Indonesia says that it agrees with Brazil that the United States are misreading the Appellate Body's ruling in *Dominican Republic – Import and Sale of Cigarettes* by taking a single sentence out of its factual context.<sup>513</sup> As Brazil noted, it argues, the Appellate Body in that dispute was not making a broad and unqualified assertion that a measure is consistent with Article III:4 of the GATT 1994 if its detrimental effects are unrelated to the foreign origin of the product in question. It simply stated that detrimental effects to imported products are not, *ipso facto*, tantamount to discrimination, as other characteristics of these effects are also pertinent to the evaluation of whether a less favourable treatment has been accorded to imported products.<sup>514</sup> As Indonesia and third parties have explained, domestic and imported products can be treated differently, but that treatment will be

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<sup>506</sup> The United States refers to the Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96 (emphasis added); Appellate Body Report, *Korea – Various Measures on Beef*, para. 144 and Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.118. United States' second written submission, para. 127.

<sup>507</sup> United States' second written submission, para. 127.

<sup>508</sup> United States' oral statement at the second substantive meeting of the Panel, para. 50; United States' response to Panel question No. 95, para. 49.

<sup>509</sup> United States' second written submission, para. 128.

<sup>510</sup> United States' oral statement at the second substantive meeting of the Panel, para. 50.

<sup>511</sup> Indonesia's second written submission, para. 97; Indonesia's oral statement at the second substantive meeting of the Panel, para. 63.

<sup>512</sup> Indonesia's oral statement at the second substantive meeting of the Panel, para. 63.

<sup>513</sup> Brazil's oral statement, para. 11.

<sup>514</sup> Indonesia's second written submission, para. 98; Indonesia's oral statement at the second substantive meeting of the Panel, para. 64.



"less favourable" if it has the effect of modifying the conditions of competition to the detriment of the imported products.<sup>515</sup> Indonesia urges the Panel to reject the notion proposed by the United States that Section 907(a)(1)(A) must discriminate "based on national origin" in order to result in "less favorable treatment" to imported clove cigarettes.<sup>516</sup> According to Indonesia, it is not its burden to demonstrate that imports of the same product from different countries or imports of different products are treated in a less favourable manner than domestic products. Indonesia argues that the treatment of imported products from other countries is not before the Panel.<sup>517</sup>

7.286 We recall that we are dealing with a technical regulation, Section 907(a)(1)(A), with the immediate purpose of banning cigarettes containing an additive which provides them with a characterizing flavour. The reason behind Section 907(a)(1)(A) is attaining the legitimate objective of reducing youth smoking. We also recall the explanation for Section 907(a)(1)(A) in the House Report on the FSPTCA<sup>518</sup> which reads "[c]onsistent 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>519</sup>

7.287 It is in that context that we should examine whether imported clove cigarettes are treated less favourably than domestic menthol cigarettes, i.e., whether they are discriminated against. We find useful the Appellate Body's definition of what discrimination is and how it can manifest in *Canada – Wheat Exports and Grain Imports*:

"...When viewed in the abstract, the concept of discrimination may encompass both the making of distinctions between similar situations, as well as treating dissimilar situations in a formally identical manner. The Appellate Body has previously dealt with the concept of discrimination and the meaning of the term "non-discriminatory", and acknowledged that, at least insofar as the making of distinctions between similar situations is concerned, the ordinary meaning of discrimination can accommodate both drawing distinctions per se, and drawing distinctions on an improper basis. Only a full and proper interpretation of a provision containing a prohibition on discrimination will reveal which type of differential treatment is prohibited. In all cases, a claimant alleging discrimination will need to establish that differential treatment has occurred in order to succeed in its claim."<sup>520</sup>

7.288 The preambular language of the *WTO Agreement* comes to our mind in this respect: "[b]eing desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations." As put by the Appellate Body in *US – Shrimp*: "[a]s this preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*".<sup>521</sup> We do not think that it was the intention of the negotiators to allow Members to regulate products in a discriminatory manner.

7.289 The *TBT Agreement* allows Members to regulate products for the purpose of attaining a legitimate objective, in this case, a public health objective of reducing youth smoking. The

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<sup>515</sup> Indonesia's second written submission, para. 99; Indonesia's oral statement at the second substantive meeting of the Panel, para. 57.

<sup>516</sup> Indonesia's second written submission, para. 99.

<sup>517</sup> Indonesia's response to Panel question No. 95, (a).

<sup>518</sup> See paras. 2.6-2.7 above.

<sup>519</sup> Exhibit US-67.

<sup>520</sup> Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 87.

<sup>521</sup> Appellate Body Report, *US – Shrimp*, para. 153.

United States has told this Panel that it was not including menthol cigarettes, which we have found to be like to clove cigarettes for the purpose of Article 2.1 of the *TBT Agreement*, because doing so without further assessment would not be appropriate for the public health, because of issues including the potential impact on the health care system and the potential development of a black market and smuggling of menthol cigarettes.<sup>522</sup> 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<sup>523</sup>, 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<sup>524</sup> and for a very significant proportion of the cigarettes smoked by youth in the United States.<sup>525</sup> 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.

7.290 We are not saying that the United States is not allowed to adopt measures such as Section 907(a)(1)(A) to regulate products for public health reasons; on the contrary, that is permitted provided it respects the boundaries set forth in Article 2.2 of the *TBT Agreement* such as not being a measure more trade restrictive than necessary to fulfil a legitimate objective. We are saying that if the United States chooses to do so, it must not accord less favourable treatment to imported clove cigarettes than that it accords to the like domestic menthol cigarettes for reasons of avoiding potential costs. In this case, the United States has adopted a technical regulation in order to attain the legitimate objective of reducing youth smoking, but at the same time limited the product scope of that

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<sup>522</sup> The United States refers the Panel to the following FDA conclusions:

"The sudden withdrawal from the market of products to which so many millions of people are addicted would be dangerous. First, there could be significant health risks to many of these individuals. Second, it is possible that our health care system would be overwhelmed by treatment demands that these people would create, and it is unlikely that the pharmaceuticals available could successfully treat the withdrawal symptoms of many tobacco users. Third, the agency also believes that, given the strength of the addiction and the resulting difficulty of quitting tobacco use, a black market and smuggling would develop to supply smokers with these products. It also seems likely that any black market products would be even more dangerous than those currently marketed, in that they could contain even higher levels of tar, nicotine, and toxic additives."

*Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 61 Fed. Reg. at 44, 413 (Exhibit US-25). United States' first written submission, para. 22. See also paras. 23-25; United States' response to Panel question Nos. 40, 89 and 100.

<sup>523</sup> See paras. 7.200-7.232 above.

<sup>524</sup> 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 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>525</sup> According to the United States "approximately 31% of youth smokers smoke menthol cigarettes, although that number could be higher" (United States' first written submission, para. 33). According to Indonesia, menthol cigarettes account for approximately 43 per cent of the cigarettes consumed by adolescents (Indonesia's first written submission, paras. 2, 7, 40, 93).

technical regulation in order to minimize, or even to eliminate, the potential costs it may incur while triggering costs to producers of like products of other Members.

7.291 The object and purpose of Article 2.1 of the *TBT Agreement* is to prohibit discrimination between imported products and like domestic products in respect of technical regulations. In our view, this purpose would be defeated if Members were allowed to remove their domestic products from the application of those same regulations to avoid potential costs that it might otherwise incur.

(v) *Conclusion on less favourable treatment*

7.292 We therefore conclude 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 it accords to domestic menthol cigarettes, for the purpose of Article 2.1 of the *TBT Agreement*.

(e) Overall conclusion on Indonesia's claim under Article 2.1 of the *TBT Agreement*

7.293 Having concluded that (i) Section 907(a)(1)(A) is a technical regulation within the definition of Annex 1.1 of the *TBT Agreement*; (ii) clove cigarettes and menthol cigarettes are like products for the purpose of Article 2.1 of the *TBT Agreement* and (iii) by banning clove cigarettes while excepting menthol cigarettes from the ban, Section 907(a)(1)(A) does accord imported clove cigarettes less favourable treatment than that it accords to domestic menthol cigarettes, for the purpose of Article 2.1 of the *TBT Agreement*, we find that Section 907(a)(1)(A) is inconsistent with Article 2.1 of the *TBT Agreement*.

7.294 Having found that Section 907(a)(1)(A) is inconsistent with Article 2.1 of the *TBT Agreement*, we will therefore not examine Indonesia's alternative claim under Article III:4 of the GATT 1994.

E. WHETHER SECTION 907(A)(1)(A) IS JUSTIFIED UNDER ARTICLE XX(B) OF THE GATT 1994

**1. Arguments of the parties**

7.295 The **United States** submits that Section 907(a)(1)(A) is justified under Article XX(b) of the GATT 1994.<sup>526</sup>

7.296 The United States submits that Indonesia has failed to establish that Section 907(a)(1)(A) is inconsistent with Article III:4 of the GATT 1994. However, the United States submits that "should the Panel reach the issue of GATT exceptions", the application of Section 907(a)(1)(A) would be justified under Article XX(b) of the GATT 1994.<sup>527</sup> The United States clarifies that it is not invoking Article XX of the GATT as a defence with respect to the claims raised by Indonesia under the *TBT Agreement*<sup>528</sup>, and the Panel therefore does not need to make a finding on the availability of Article XX to justify a violation of a provision of the *TBT Agreement*.<sup>529</sup>

7.297 The United States submits that Section 907(a)(1)(A) falls within the scope of Article XX(b).<sup>530</sup> According to the United States, Section 907(a)(1)(A) was enacted in order to

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<sup>526</sup> United States' first written submission, paras. 311-342.

<sup>527</sup> United States' first written submission, para. 311; United States' oral statement at the first substantive meeting of the Panel, para. 72.

<sup>528</sup> United States' response to Panel question No. 78, para. 159.

<sup>529</sup> United States' response to Panel question No. 79, para. 160.

<sup>530</sup> United States' first written submission, paras. 315-329; United States' oral statement at the first substantive meeting of the Panel, paras. 73-77.

protect human life and health from the risk posed by smoking and was necessary to ensure that products that are predominantly used as "starter" products by youth, leading to years of addiction, health problems, and possibly death, cannot be sold in the United States.<sup>531</sup> The United States recalls that, when faced with the question of whether a measure is "necessary", other panels have engaged in "a process of weighing and balancing a series of factors". In this case, all of the factors weigh in favour of a determination that Section 907(a)(1)(A) is necessary. First, "the interest at stake is of fundamental importance".<sup>532</sup> Second, Section 907(a)(1)(A) is "directly contributing" to the protection of human life and health, and there is a "genuine relationship of ends and means between the objective pursued and the measure at issue".<sup>533</sup> Third, the context in which Section 907(a)(1)(A) was enacted – namely, the unacceptably high youth smoking rates such that severe restrictions were required – is relevant in assessing the "trade restrictiveness" of the measure, which under the circumstances is limited.<sup>534</sup>

7.298 The United States submits that Section 907(a)(1)(A) also meets the requirements of the chapeau to Article XX.<sup>535</sup> First, the United States argues that there is "no differential treatment at all", and therefore cannot be any "discrimination," arbitrary, unjustified, or otherwise.<sup>536</sup> However, even if Section 907(a)(1)(A) were found to "discriminate," such conduct could not be considered "arbitrary" or "unjustified".<sup>537</sup> Finally, the evidence demonstrates that Section 907(a)(1)(A) is not a "disguised restriction" on trade.<sup>538</sup>

7.299 **Indonesia** argues that the measure at issue is "not condoned" by Article XX of the GATT 1994 because it "constitutes a restriction on international trade masquerading as a measure necessary to protect human health".<sup>539</sup> In addition, Indonesia submits that Article XX(b) of the GATT 1994 cannot be invoked in respect of any violations of the *TBT Agreement*.<sup>540</sup>

7.300 Indonesia submits that it has already demonstrated, in the context of its analysis of the measure under Article 2.2 of the *TBT Agreement*, that: (a) the measure is not "necessary" to achieve the level of protection sought by the FSPTCA<sup>541</sup>; and (b) less trade-restrictive measures were reasonably available to the United States.<sup>542</sup>

7.301 Indonesia submits that even if the measure is somehow "necessary" to protect youth from smoking, it is still a "disguised restriction" on international trade within the meaning of the chapeau to Article XX.<sup>543</sup> In Indonesia's view, this is so because by "tailoring the ban on 'characterizing flavours' in such a way that virtually no domestic cigarettes, including those most popular with youth, were

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<sup>531</sup> United States' first written submission, paras. 315-318, 322; United States' oral statement at the first substantive meeting of the Panel, paras. 73-74.

<sup>532</sup> United States' first written submission, para. 324; United States' oral statement at the first substantive meeting of the Panel, para. 76.

<sup>533</sup> United States' first written submission, paras. 325-326; United States' oral statement at the first substantive meeting of the Panel, para. 76.

<sup>534</sup> United States' first written submission, paras. 327-329.

<sup>535</sup> United States' first written submission, paras. 330-342.

<sup>536</sup> United States' first written submission, para. 334; United States' oral statement at the first substantive meeting of the Panel, para. 79.

<sup>537</sup> United States' first written submission, paras. 335-337; United States' oral statement at the first substantive meeting of the Panel, para. 79.

<sup>538</sup> United States' first written submission, paras. 338-341; United States' oral statement at the first substantive meeting of the Panel, para. 80.

<sup>539</sup> Indonesia's first written submission, paras. 114-127.

<sup>540</sup> Indonesia's response to Panel question No. 79, paras. 156-157.

<sup>541</sup> Indonesia's first written submission, para. 120.

<sup>542</sup> Indonesia's first written submission, para. 126.

<sup>543</sup> Indonesia's first written submission, para. 121.

removed from the market, the United States was able to generate the *appearance* of cracking down on youth smoking without actually inflicting any real harm on U.S. tobacco companies or eliminating any domestically produced cigarettes popular with youth".<sup>544</sup>

## 2. Analysis by the Panel

### (a) Introduction

7.302 The arguments of the parties raise two main issues. The first is whether it is necessary for the Panel to determine whether Section 907(a)(1)(A) is justified under Article XX(b) of the GATT 1994. If so, then the second issue is whether Section 907(a)(1)(A) is justified under Article XX(b) of the GATT 1994.

7.303 We shall commence our analysis by setting out the text of Article XX(b) of the GATT 1994. We will then address the issue of whether we need to determine whether Section 907(a)(1)(A) is justified under Article XX(b) of the GATT 1994. Depending on our conclusion, we may or may not continue our analysis of the U.S. defence under Article XX(b) of the GATT 1994.

### (b) The legal provision at issue

7.304 Article XX of the GATT 1994 is entitled "General Exceptions". Together with its chapeau, Article XX(b) reads as follows:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(b) necessary to protect human, animal or plant life or health".

### (c) Whether it is necessary for the Panel to determine whether Section 907(a)(1)(A) is justified under Article XX(b) of the GATT 1994

7.305 As explained above, the first issue that we need to consider is whether it is necessary for us to determine whether Section 907(a)(1)(A) is justified under Article XX(b) of the GATT 1994.

7.306 We recall that the Panel has found that Section 907(a)(1)(A) is inconsistent with Article 2.1 of the *TBT Agreement*. More specifically, we have found that Section 907(a)(1)(A) accords clove cigarettes (a product imported from Indonesia) less favourable treatment than that accorded to a like product of national origin (i.e., menthol cigarettes).<sup>545</sup>

7.307 We also recall that, having reached this conclusion, we decided not to examine Indonesia's alternative claim under Article III:4 of the GATT 1994<sup>546</sup>, and, therefore, we have made no finding of violation in respect of this provision. It follows that there is no need for the Panel to consider the question of whether a violation of that provision could be justified under Article XX(b) of the GATT 1994. Thus, as a consequence of our decision to not examine Indonesia's claim of violation of

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<sup>544</sup> Indonesia's first written submission, para. 125 (emphasis original).

<sup>545</sup> See Section VII.D.2(e) above.

<sup>546</sup> See Section VII.D.2(e) above.

Article III:4 of the GATT 1994, we refrain from considering the United States' defence, under Article XX(b) of the GATT 1994, to the alleged violation of Article III:4 of the GATT 1994.<sup>547</sup>

7.308 As regards the violation of Article 2.1 of the *TBT Agreement*, the United States has made clear that it "is not invoking Article XX of the GATT 1994 as a defense for the claims raised by Indonesia under the *TBT Agreement*".<sup>548</sup> Under the circumstances, we understand the United States to be of the view that the Panel does not need to make a finding on the availability of Article XX to justify a violation of a provision of the *TBT Agreement*.<sup>549</sup>

7.309 Our task is to make an objective assessment of the matter before us.<sup>550</sup> It is not for us to broaden the matter beyond that submitted to us by the parties. Therefore, we will not embark on an enquiry into Article XX(b) of the GATT 1994.

(d) Conclusion

7.310 For these reasons, the Panel concludes that it is not necessary to address the question of whether Section 907(a)(1)(A) is justified under Article XX(b) of the GATT 1994. Accordingly, the Panel refrains from doing so.

F. WHETHER SECTION 907(A)(1)(A) IS INCONSISTENT WITH ARTICLE 2.2 OF THE *TBT AGREEMENT*

**1. Arguments of the parties**

7.311 **Indonesia** claims that Section 907(a)(1)(A) is inconsistent with Article 2.2 of the *TBT Agreement* because it is more trade-restrictive than necessary to achieve the objective and level of protection sought by the United States, and is thus an unnecessary obstacle to trade.<sup>551</sup>

7.312 Indonesia asserts that the objective of the ban on clove cigarettes is to reduce youth smoking. Indonesia relies upon a statement in the House Report that Section 907(a)(1)(A) is "intended to prohibit the manufacture and sale of cigarettes with certain 'characterizing flavours' that appeal to youth".<sup>552</sup> Indonesia submits that the "youth" in question are minors (i.e., persons under the age of 18), and not, as the United States argues, minors and also young adults.<sup>553</sup> Indonesia also objects to the United States' attempt to treat the alleged justification for excluding menthol cigarettes from the scope of the ban as a second "objective" of Section 907(a)(1)(A).<sup>554</sup> However, Indonesia argues that regardless of whether the Panel accepts Indonesia's or the United States' formulation of the objective,

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<sup>547</sup> We note that in previous cases, panels have only proceeded to examine the question of whether a measure is justified under one of the general exceptions in Article XX after upholding one or more claims of violation in respect of which that Article XX defence was proffered.

<sup>548</sup> United States' response to Panel question No. 78, para. 159.

<sup>549</sup> United States' response to Panel question No. 79, para. 160.

<sup>550</sup> Article 11 of the DSU.

<sup>551</sup> Indonesia's first written submission, para. 73.

<sup>552</sup> Indonesia's response to Panel question No. 60, paras. 127-128; Indonesia's second written submission, para. 112.

<sup>553</sup> Indonesia's second written submission, para. 114; Indonesia's oral statement at the second substantive meeting of the Panel, para. 75; Indonesia's comments on the United States' response to Panel question No. 101, paras. 52-54.

<sup>554</sup> Indonesia's second written submission, para. 113; Indonesia's oral statement at the second substantive meeting of the Panel, para. 74. Indonesia refers to the U.S. statement whereby the second objective would be "to avoid the potential negative consequences associated with banning products to which tens of millions of adults are chemically and psychologically addicted due to the potential but unknown consequences for the health of the individual users or the overall population," United States' response to Panel question Nos. 60, 100.

the ban on clove cigarettes is still more trade-restrictive than necessary to achieve its objective because both parties include "reducing youth smoking" in their objectives and that is where the United States' defence fails.<sup>555</sup>

7.313 Indonesia suggests that the ban on clove cigarettes does not have a "legitimate" objective, arguing that it is a "disguised restriction" on international trade and a "wolf disguised in the sheep's clothing" of public health.<sup>556</sup> Indonesia clarifies that while the objective of Section 907(a)(1)(A) "as stated" in the FSPTCA and the House Report (i.e., to reduce youth smoking) is a "legitimate" objective within the meaning of Article 2.2 of the *TBT Agreement*, the "measure itself" is a disguised restriction on international trade.<sup>557</sup> More specifically, Indonesia asserts that the United States did not include menthol cigarettes in Section 907(a)(1)(A) because Philip Morris opposed it, that the exclusion of menthol cigarettes from the ban was the result of a political compromise, and the real concern was getting a deal on the FSPTCA through the U.S. Congress while also avoiding the potential loss of jobs in the United States if menthol cigarettes were banned.<sup>558</sup>

7.314 Indonesia submits that for the purpose of analysing whether the measure is "more trade-restrictive than necessary" to fulfil its objective, the Panel should be guided by the existing jurisprudence relating to Article XX(b) of the GATT 1994.<sup>559</sup> Indonesia notes that all the third parties that addressed Article 2.2 of the *TBT Agreement* in their submissions and statements before the Panel supported Indonesia's conclusion on this point.<sup>560</sup> According to Indonesia, the United States overemphasizes the significance of the contextual differences between Article 2.2 and Article XX(b), and the United States provides no convincing reason why the Panel should not look to interpretations of Article XX(b) for its analysis of Article 2.2.<sup>561</sup> Indonesia disagrees with the United States that Article 2.2 should be interpreted to incorporate the "significantly less trade-restrictive" language from footnote 3 to Article 5.6 of the *SPS Agreement*.<sup>562</sup> However, Indonesia considers that the application of that standard would probably not have any practical consequences in the present case, because all of the alternative measures it identifies would be "significantly" less trade restrictive than the measure applied by the United States.<sup>563</sup>

7.315 Indonesia further argues that the ban on clove cigarettes is "more trade-restrictive than necessary" because it "greatly exceeds the level of protection sought" by the United States.<sup>564</sup> Indonesia asserts that the level of protection sought by the United States through the FSPTCA is "not a dramatic reduction in the number of youth who smoke", but rather "sufficient regulation to deter, but not prohibit, the use of tobacco products by adolescents".<sup>565</sup> Indonesia submits that a ban "is the most trade-restrictive regulatory tool available and in certain circumstances may be the only option for achieving a health objective, for example where the level of protection needed is the *elimination* of risk".<sup>566</sup> Indonesia reasons that although the FSPTCA does not identify the level of protection sought,

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<sup>555</sup> Indonesia's oral statement at the second substantive meeting of the Panel, para. 81.

<sup>556</sup> Indonesia's second written submission, para. 140; Indonesia's response to Panel question No. 99.

<sup>557</sup> Indonesia's response to Panel question No. 99, para. 34.

<sup>558</sup> Indonesia's second written submission, para. 118; Indonesia's response to Panel question No. 99, para. 37; Indonesia's oral statement at the second substantive meeting of the Panel, para. 79.

<sup>559</sup> Indonesia's first written submission, paras. 75-77.

<sup>560</sup> Indonesia's second written submission, para. 107.

<sup>561</sup> Indonesia's second written submission, paras. 109-111; Indonesia's oral statement at the second substantive meeting of the Panel, para. 71.

<sup>562</sup> Indonesia's oral statement at the first substantive meeting of the Panel, para. 155; Indonesia's response to Panel question No. 56, para. 116; Indonesia's second written submission, paras. 108, 110, 135; Indonesia's oral statement at the second substantive meeting of the Panel, para. 69.

<sup>563</sup> Indonesia's response to Panel question No. 57, para. 117.

<sup>564</sup> Indonesia's first written submission, para. 85.

<sup>565</sup> Indonesia's first written submission, para. 84.

<sup>566</sup> Indonesia's first written submission, para. 85 (emphasis original).

the provisions of the law convey a much lower level of protection desired than the high level claimed by the United States.<sup>567</sup>

7.316 Indonesia further argues that the ban on clove cigarettes is "more trade-restrictive than necessary" because it makes no material contribution to the objective of reducing youth smoking.<sup>568</sup> Indonesia submits that the question the Panel must consider is "whether banning clove cigarettes, but not menthol or regular cigarettes, contributes to a reduction in the level of smoking by adolescents".<sup>569</sup> Indonesia submits that in "large measure, the answer to this question depends on whether clove cigarettes are more like those cigarettes smoked by adults, which are excluded from the ban, or whether they are more like the 'candy' flavors designed and marketed to attract kids to smoke".<sup>570</sup> Indonesia then proceeds to argue that: (i) clove cigarettes pose no greater health risk than other cigarettes<sup>571</sup>; (ii) youth do not smoke clove cigarettes in significant numbers<sup>572</sup>; (iii) other flavoured tobacco products popular with youth are not banned by the FSPTCA<sup>573</sup>; and (iv) the available scientific evidence shows that banning clove cigarettes, but not menthol or regular cigarettes, will do little to deter youth from smoking.<sup>574</sup> Indonesia concludes that the banning clove cigarettes "is unlikely to have any impact whatsoever on youth smoking", and does not even rise to the minimum level of "making a contribution to" to the objective of the FSPTCA.<sup>575</sup> Indonesia emphasizes that in "assessing the question of the necessity of the measure, the Panel would have to consider what contribution Section 907(a)(1)(A) could possibly make toward reducing youth smoking when menthol and regular cigarettes are not banned."<sup>576</sup> Indonesia emphasizes that by prohibiting only a "tiny sliver" of the cigarettes smoked by youth, the measure cannot make a "material contribution" to the objective of reducing youth smoking, and is therefore more trade-restrictive than necessary to fulfil this objective.<sup>577</sup>

7.317 Indonesia submits that is not required to prove that an alternative to the ban on clove cigarettes was reasonably available, given that the ban does not actually fulfil its objective.<sup>578</sup> However, Indonesia argues that even if the ban on clove cigarettes makes some kind of contribution to the objective of reducing youth smoking, it still cannot be considered "necessary" because there are less trade-restrictive measures were reasonably available to limit the availability of clove cigarettes to youth.<sup>579</sup> In this regard, Indonesia surveys: (i) the other provisions of the FSPTCA, which are applicable to menthol and regular cigarettes, designed to reduce the ability of cigarette companies to engage in practices that target and attract youth<sup>580</sup>; (ii) the steps that the FSPTCA expressly prevents FDA from taking (e.g. raising the smoking age) that would significantly reduce youth smoking and not be particularly trade-restrictive<sup>581</sup>; (iii) certain non-trade restrictive measures in a 2006 consent agreement between R.J. Reynolds and several State Attorneys General concerning new products that

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<sup>567</sup> Indonesia's response to Panel question No. 58(c), para. 123; Indonesia's second written submission, para. 124.

<sup>568</sup> Indonesia's first written submission, paras. 86-103.

<sup>569</sup> Indonesia's first written submission, para. 89.

<sup>570</sup> Indonesia's first written submission, para. 89.

<sup>571</sup> Indonesia's first written submission, paras. 90-91.

<sup>572</sup> Indonesia's first written submission, paras. 92-96.

<sup>573</sup> Indonesia's first written submission, paras. 97-98.

<sup>574</sup> Indonesia's first written submission, paras. 99-102.

<sup>575</sup> Indonesia's first written submission, para. 103.

<sup>576</sup> Indonesia's response to Panel question Nos. 54, para. 45.

<sup>577</sup> Indonesia's response to Panel question No. 2, para. 6; Indonesia's response to Panel question No. 58, para. 124; Indonesia's second written submission, paras. 2 and 125.

<sup>578</sup> Indonesia's oral statement at the first substantive meeting of the Panel, paras. 158-162; Indonesia's oral statement at the second substantive meeting of the Panel, para. 84.

<sup>579</sup> Indonesia's first written submission, paras. 104-111.

<sup>580</sup> Indonesia's first written submission, para. 106.

<sup>581</sup> Indonesia's first written submission, para. 107.



health advocates alleged were designed and marketed to attract youth<sup>582</sup>; (iv) non-trade restrictive measures adopted by certain other countries, including Australia and Singapore, to address youth smoking<sup>583</sup>; and (v) various measures set out in the WHO *Framework Convention on Tobacco Control* aimed at preventing cigarette sales to minors.<sup>584</sup> In its second written submission, Indonesia submits that it does not have to show that its proposed alternatives are "significantly" less trade restrictive, as the United States improperly imports this language from footnote 3 to Article 5.6 of the *SPS Agreement*.<sup>585</sup>

7.318 The **United States** submits that Indonesia's claim under Article 2.2 of the *TBT Agreement* should be rejected.

7.319 As to the objective that Section 907(a)(1)(A) pursues, the United States submits that the ban on clove and certain other flavoured cigarettes "is intended to fulfil the objective of reducing the rate of young people becoming smokers by eliminating certain products from the market place that have particular appeal to young people."<sup>586</sup> The United States rejects Indonesia's contention that the objective of the ban is to reduce smoking prevalence of only people age 17 and younger, and asserts instead that the objective is to reduce smoking of all people within the "window of initiation" (i.e., people ages 12-26).<sup>587</sup> In addition, the United States stresses that Section 907(a)(1)(A) has a second objective, which is to avoid the potential negative consequences associated with banning products to which tens of millions of adults are chemically and psychologically addicted due to the potential but unknown consequences for the health of the individual users or the overall population.<sup>588</sup> According to the United States, "Indonesia repeatedly mischaracterizes the objective of Section 907(a)(1)(A) as 'reducing youth smoking'", and that is a "gross oversimplification of the objective of Section 907(a)(1)(A)".<sup>589</sup> According to the United States, the practical implications of defining the objective simply in terms of "reducing youth smoking", without consideration of possible negative consequences, is that "this limitation may result in a different pool of alternative measures with which the challenged measure is compared".<sup>590</sup>

7.320 The United States disputes that the measure is a "disguised restriction" on international trade.<sup>591</sup> According to the United States, nothing in the text, design, architecture, or revealing structure of Section 907(a)(1)(A) supports Indonesia's allegation that the measure did not ban menthol cigarettes simply because a particular U.S. company opposed it. The extensive legislative history of the FSPTCA provides no support to Indonesia, and its evidence on this point – one media report – merely quotes one politician speculating as to his personal view of the legislation.

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<sup>582</sup> Indonesia's first written submission, para. 108.

<sup>583</sup> Indonesia's first written submission, para. 109.

<sup>584</sup> Indonesia's first written submission, para. 110.

<sup>585</sup> Indonesia's second written submission, para. 135.

<sup>586</sup> United States' first written submission, para. 229.

<sup>587</sup> United States' response to Panel question No. 12(b), para. 16; United States' response to Panel question Nos. 100 and 101, paras. 62 and 71-77.

<sup>588</sup> The Panel notes that the United States has argued that its position that the objective of Section 907(a)(1)(A) includes the consideration of negative consequences for the public health is supported by the text of Section 907(a)(1)(A) itself, as well as other provisions of Section 907, including Section 907(b)(2). As the United States has discussed, Section 907(b)(2) requires FDA to consider the negative consequences of any proposed new tobacco product standard, or proposed revision to or revocation of an existing standard, prior to approving, revising, or revoking such a standard. United States' response to Panel question Nos. 60, 100.

<sup>589</sup> United States' second written submission, para. 153.

<sup>590</sup> United States' response to Panel question No. 100, para. 63.

<sup>591</sup> United States' oral statement at the second substantive meeting of the Panel, para. 75; United States' comments on Indonesia's response to Panel question No. 99.

7.321 On the question of whether the ban on clove cigarettes is "more trade-restrictive than necessary", the United States submits that the jurisprudence relating to Article XX(b) of the GATT 1994 is not relevant to Article 2.2 of the *TBT Agreement*, and terms the opposing view as involving a "radical approach".<sup>592</sup> In its view, the Panel should instead apply the test found in Article 5.6 and footnote 3 of the *SPS Agreement*, and require Indonesia to demonstrate that: (i) there is a reasonably available alternative measure; (ii) that fulfils the objective of the measure at the level that the Member imposing the measure considers appropriate; and (iii) is "significantly" less trade restrictive.<sup>593</sup> However, in response to a question from the Panel, the United States acknowledges that the issue of whether Article 2.2 embodies a "significantly less trade-restrictive" standard would "not appear to arise in this dispute".<sup>594</sup>

7.322 The United States disagrees that the ban on clove cigarettes greatly exceeds the level of protection sought by the United States. The United States acknowledges that if the measure at issue "goes beyond the chosen level of protection", a less trade-restrictive measure may likewise fulfil the Member's legitimate objective.<sup>595</sup> However, Indonesia's understanding of the level of protection sought by the United States is erroneous.<sup>596</sup> Given the U.S. Government's long and frustrating experience in trying to limit youth smoking, the "high" level of protection sought by the United States is evidenced by the measure applied – a complete ban.<sup>597</sup> The level at which the United States considers is appropriate to protect public health is to eliminate from the market, not simply restrict access to, those products that are disproportionately used by young people.<sup>598</sup>

7.323 The United States submits that Indonesia's argument regarding the existence of a "material contribution" to the fulfilment of the objective is unfounded.<sup>599</sup> The United States considers that while this question is legally irrelevant to the analysis under Article 2.2 of the *TBT Agreement*<sup>600</sup>, banning clove cigarettes does indeed make a material contribution to the objective of reducing youth smoking.<sup>601</sup> Whether the challenged measure makes a material contribution should be judged on its own terms, not in comparison with alternative measures.<sup>602</sup> The WHO has endorsed the view that clove cigarettes disproportionately appeal to young people and therefore present the same public health concern as the other cigarettes banned under Section 907(a)(1)(A), and the survey data tracking actual clove cigarette usage by young people confirms that, in fact, young people within the window of initiation disproportionately use clove cigarettes, as they do other characterizing flavours, such as

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<sup>592</sup> United States' first written submission, footnote 310.

<sup>593</sup> United States' first written submission, paras. 262-265.

<sup>594</sup> The United States understands that the complaining party does not establish a breach of Article 2.2 by proving the existence of an alternative measure that fulfils the importing Member's legitimate objective at the level the Member considers appropriate that is less trade-restrictive, but only by a *de minimis* amount. See United States' first written submission, para. 263 (citing to Letter from Peter D. Sutherland, Director-General of the GATT, to Ambassador John Schmidt, Chief U.S. Negotiator (December 15, 1993), Exhibit US-79). However, as all of the alternative measures that Indonesia has offered do not ban trade in any flavoured cigarettes, the United States considers that the issue of whether Article 2.2 embodies a "significantly less trade-restrictive" standard would "not appear to arise in this dispute". United States' response to Panel question No. 57, para. 130.

<sup>595</sup> United States' response to Panel question No. 58(b), para. 134.

<sup>596</sup> United States' first written submission, paras. 255-257.

<sup>597</sup> United States' first written submission, para. 227.

<sup>598</sup> United States' response to Panel question No. 58(b), para. 135; United States' second written submission, para. 147.

<sup>599</sup> United States' second written submission, paras. 156-163.

<sup>600</sup> United States' response to Panel question No. 103(a). However, the United States acknowledges that "[w]hile Article 2.2 does not require that the measure fulfill its objective, it is difficult to believe that a measure fails to fulfill its objective completely – that is to say, a measure that does not even make a marginal contribution to its objective – could be found consistent with Article 2.2."

<sup>601</sup> United States' response to Panel question No. 103(b).

<sup>602</sup> United States' response to Panel question No. 103(b), paras. 82-84.

chocolate, cherry, coconut, etc.<sup>603</sup> In addition, the fact that a particular "trainer" product, such as clove cigarettes, does not have a large market share does not change this calculation; products that appeal disproportionately to young people have particular public health concerns, regardless of their market share, and the product's elimination will make a material contribution to a reduction in smoking of young people.<sup>604</sup> While one might hypothesize that the United States could have designed a measure that sought to eliminate or reduce smoking among young people to a greater degree than Section 907(a)(1)(A), nothing in the *TBT Agreement* requires Members to seek to fulfil their legitimate objectives to the maximum extent possible, nor at any particular level.<sup>605</sup> The United States asserts that clove cigarettes do in fact attract youth to smoking.<sup>606</sup> According to the United States, the evidence shows that clove cigarettes, like cigarettes flavoured with chocolate, vanilla, and the like, are overwhelmingly favoured by teenagers and young adults people rather than adults.<sup>607</sup>

7.324 With respect to the existence of less trade-restrictive measures, the United States submits that Indonesia's mere listing of a number of different restrictions drawn from other parts of the FSPTCA, the 2006 RJ Reynolds Consent Agreement, the laws of Singapore and Australia, and the FCTC does not satisfy Indonesia's burden of proving that there is a less trade-restrictive measure that would achieve the U.S. objective at the level of protection that the United States finds appropriate.<sup>608</sup> In its second written submission, the United States submits that Indonesia continues to make vague references to dozens of different measures that apply to all cigarettes, such as advertising restrictions. Indonesia does not adduce any evidence that any of these measures fulfil the legitimate objective at the level the United States considers appropriate. It has, therefore, not met its burden of establishing a prima facie case that Section 907(a)(1)(A) is more trade-restrictive than necessary to fulfil its objective.<sup>609</sup> Furthermore, the alternative measures Indonesia identifies would not in fact fulfil the objectives of Section 907(a)(1)(A) at the level the United States considers appropriate: those alternatives would all continue to allow trainer cigarettes with characterizing flavours of candy, fruit, liquor, etc. to remain on the market. The United States submits that it already imposes significant restrictions on the advertising, marketing, and sale of cigarettes<sup>610</sup>, and that many of the potentially alternative measures proposed by Indonesia are already in place in the United States.<sup>611</sup>

## 2. Analysis by the Panel

### (a) Introduction

7.325 The fundamental issue before us is whether the United States' ban on clove cigarettes<sup>612</sup> is more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create, in violation of Article 2.2 of the *TBT Agreement*.

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<sup>603</sup> United States' second written submission, paras. 46-49; United States' response to Panel question No. 103(b), para. 85.

<sup>604</sup> United States' response to Panel question No. 103(b), para. 86.

<sup>605</sup> United States' second written submission, para. 161.

<sup>606</sup> United States' first written submission, para. 245.

<sup>607</sup> United States' first written submission, para. 249.

<sup>608</sup> United States' first written submission, para. 270.

<sup>609</sup> United States' second written submission, para. 164.

<sup>610</sup> United States' second written submission, para. 165; United States' response to Panel question No. 108, para. 103.

<sup>611</sup> United States' first written submission, footnote 316; United States' second written submission, para. 165; United States' response to Panel question No. 109(c), paras. 109-110.

<sup>612</sup> We are mindful of the fact, emphasized by the United States throughout this proceeding, that Section 907(a)(1)(A) bans all cigarettes with a characterizing flavour except menthol, and not merely clove cigarettes. See e.g. United States' second written submission, para. 68.

7.326 There are a number of points of disagreement between the parties in respect of this claim. The main points of disagreement between the parties are as follows. First, the parties disagree on whether Indonesia has correctly identified the objective of the ban on clove cigarettes. Second, the parties appear to disagree on whether the objective pursued by the United States through the ban on clove cigarettes is legitimate. Third, the parties disagree on whether jurisprudence relating to Article XX(b) of the GATT 1994 is relevant to the interpretation of the "more trade-restrictive than necessary" standard in Article 2.2 of the *TBT Agreement*. Fourth, the parties disagree on whether the ban on clove cigarettes exceeds the level of protection sought by the United States. Fifth, the parties disagree on whether the ban on clove cigarettes makes a material contribution to the objective of reducing youth smoking. Finally, the parties disagree on whether there are less-trade restrictive alternative measures that would make an equivalent contribution to the achievement of the objective pursued at the level of protection sought by the United States. In our view, some of these issues are to a certain extent interrelated.

7.327 We will begin by setting out the text of the legal provision at issue.

(b) The legal provision at issue

7.328 Article 2.2 of the *TBT Agreement* states:

"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. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products."

7.329 We note that Article 2.2 of the *TBT Agreement* has been discussed in several prior<sup>613</sup> panel and Appellate Body reports, but only briefly.<sup>614</sup> In *EC – Asbestos*, the panel noted that "the criteria on

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<sup>613</sup> The Panel is aware that there are other on-going panel proceedings in which claims under Article 2.2 of the *TBT Agreement* have been raised. See *US – Tuna II (Mexico)*, WT/DS381/4, p. 2; *US – COOL (Canada)*, WT/DS384/8, p. 2 and *US – COOL (Mexico)*, WT/DS386/7, p. 3. However, at the time of the issuance of the interim report in this case, the panel reports in these other cases had not yet been circulated.

<sup>614</sup> In *EC – Asbestos*, Canada claimed that the measure at issue was inconsistent with several provisions of the *TBT Agreement*, including Article 2.2. The panel found that the measure at issue was not a "technical regulation", and therefore did not address Canada's claim under Article 2.2. Panel Report, *EC – Asbestos*, paras. 3.1, 9.1. The Appellate Body found that the measure was "technical regulation", but found that it did not have an adequate basis to properly examine Canada's claims under the *TBT Agreement*, and refrained from doing so. Appellate Body Report, *EC – Asbestos*, para. 83. In *EC – Sardines*, Peru requested that the panel examine its claim under Article 2.4 of the *TBT Agreement* first and then examine its claims under Articles 2.2 and 2.1 of the *TBT Agreement* only if it were to determine that the EC regulation was not inconsistent with Article 2.4. The panel found that the EC regulation at issue was inconsistent with Article 2.4 of the *TBT Agreement*, and did not address the claim under Article 2.2 of the *TBT Agreement*. Panel Report, *EC – Sardines*, paras. 7.14, 7.16-7.19, 7.147, 7.151-152. The Appellate Body refrained from making a finding under Article 2.2 for the same reason as the panel. Appellate Body Report, *EC – Sardines*, paras. 312-313. In *EC – Trademarks and Geographical Indications (Australia)*, Australia made a claim under Article 2.2, but the panel found that the measure at issue was not a "technical regulations" within the meaning of Annex 1.1 of the *TBT Agreement*. Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.515. In *EC – Approval and Marketing of Biotech Products*, Canada and Argentina made alternative claims under the *TBT Agreement*, including Article 2.2, in the event that the measures were found to be covered by the *TBT Agreement* in addition to, or instead of, the *SPS Agreement*. The panel found that the measures at issue

the preparation, adoption or application of technical regulations in Article 2.2 of the *TBT Agreement* are very similar to those in Article XX of the GATT 1994. The preamble to the *TBT Agreement* in fact repeats some of the wording of Article XX of the GATT."<sup>615</sup> In *EC – Sardines*, the panel observed that:

"Article 2.2 and this preambular text affirm that it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them. At the same time, these provisions impose some limits on the regulatory autonomy of Members that decide to adopt technical regulations: Members cannot create obstacles to trade which are unnecessary or which, in their application, amount to arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Thus, the TBT Agreement, like the GATT 1994, whose objective it is to further, accords a degree of deference with respect to the domestic policy objectives which Members wish to pursue. At the same time, however, the TBT Agreement, like the GATT 1994, shows less deference to the means which Members choose to employ to achieve their domestic policy goals. ..."<sup>616</sup>

7.330 In this case, the parties agree that the first sentence of Article 2.2 of the *TBT Agreement* sets out a general principle, the meaning of which is explained and defined in the second sentence of Article 2.2. In other words, the parties agree that the first sentence of Article 2.2 does not create a separate and distinct obligation from that found in the second sentence.<sup>617</sup> We see no reason to disagree<sup>618</sup>, and will proceed with our analysis on this understanding.

7.331 The parties also agree that Indonesia carries the burden of proof in respect of its claim under Article 2.2 of the *TBT Agreement*.<sup>619</sup> On this point, the parties agree that there is a significant difference between Article 2.2 and Article XX(b) of the GATT 1994.<sup>620</sup> Again, we see no reason to disagree. Thus, we proceed with our analysis on the understanding that Indonesia must demonstrate that the ban on clove cigarettes is more trade-restrictive than necessary to fulfil a legitimate objective (taking account of the risks non-fulfilment would create). At the same time, the parties agree that there is no "relevant international standard" within the meaning of Article 2.5 of the *TBT Agreement*.<sup>621</sup> Accordingly, while Indonesia carries the burden of proof to establish a violation of Article 2.2, we do not begin from any rebuttable presumption that the ban on clove cigarettes is not an unnecessary obstacle to trade.<sup>622</sup>

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were SPS measure, and consequently did not address the claims under the *TBT Agreement*. Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.2524, 7.2528, 7.3412-7.3413, 8.38, 8.42-8.46, 8.53, 8.57-8.62.

<sup>615</sup> Panel Report, *EC – Asbestos*, para. 8.55.

<sup>616</sup> Panel Report, *EC – Sardines*, para. 7.120.

<sup>617</sup> United States' first written submission, para. 275; Indonesia's response to Panel question No. 98.

<sup>618</sup> Given that the parties in this case agree on this point, there is no need for this Panel to address the point in any detail. It suffices to note that the second sentence is introduced by the words "for this purpose", thereby establishing a direct link between the two sentences and implying that the second explains the meaning of the first, and the remainder of the second sentence appears by its terms to be an elaboration of the concept of an "unnecessary" obstacle to international trade.

<sup>619</sup> See generally, Indonesia's response to Panel question Nos. 4, 12(c).

<sup>620</sup> United States' first written submission, para. 267; Indonesia's oral statement at the first substantive meeting of the Panel, para. 156; Indonesia's second written submission, para. 109 (quoting the European Union's oral statement at the first substantive meeting of the Panel, para. 15).

<sup>621</sup> Indonesia's first written submission, para. 113; parties' responses to Panel question No. 59.

<sup>622</sup> The second sentence of Article 2.5 of the *TBT Agreement* states that "[w]hen a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in

7.332 The parties also seem to agree that the nature of the analysis to be conducted under Article 2.2 of the *TBT Agreement* is different from that to be conducted under Article 2.1 of the *TBT Agreement*.<sup>623</sup> Again, we see no reason to disagree. The main issues under Article 2.1 in this case are whether clove cigarettes and menthol cigarettes are "like" products, and if so, whether clove cigarettes are accorded "less favourable treatment" than that accorded to menthol cigarettes. The main issue under Article 2.2 in this case is whether the ban on clove cigarettes is "more trade-restrictive than necessary" to fulfil the legitimate objective of reducing youth smoking. Thus, our finding that the measure is inconsistent with Article 2.1 does not prejudge the answer to the question of whether the measure is consistent with Article 2.2.

7.333 The terms of Article 2.2 of the *TBT Agreement* provide that to be consistent with that provision, a technical regulation must: (i) pursue a "legitimate objective"; and (ii) not be more trade-restrictive than "necessary" to fulfil that legitimate objective (taking into account the risks non-fulfilment would create). Thus, Article 2.2 appears to call for a two-step analysis. It is under the general framework of this two-step analysis that we will address the disputed issues identified above.

(c) Whether the ban on clove cigarettes pursues a legitimate objective

7.334 In this section, we are faced with two different albeit related questions. The first is whether Indonesia has correctly identified the objective of the ban on clove cigarettes. The second is whether the objective pursued by the United States through the ban on clove cigarettes is legitimate.

(i) *Whether Indonesia has correctly identified the objective of the ban*

7.335 In *Brazil – Retreaded Tyres*, the Appellate Body indicated that it would "begin by identifying the objective pursued by the Import Ban".<sup>624</sup> In our view, the identification of the objective pursued is the logical starting point in the analysis under Article 2.2 of the *TBT Agreement*, because it serves as the reference point for the purpose of analysing whether a measure is "more trade-restrictive than necessary" to achieve its objective.<sup>625</sup>

7.336 In this case, the parties agree that the ban on clove cigarettes is aimed at reducing youth smoking. While we recognize that the objective of Section 907(a)(1)(A) is not set forth in the text of the FSPTCA itself, there is considerable evidence before the Panel to support this understanding. For instance, it is supported by the House Report. We note that that the House Report articulates both the objectives of the FSPTCA overall, and of Section 907(a)(1)(A) in particular.<sup>626</sup> According to the House Report:

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paragraph 2 and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade."

<sup>623</sup> Indonesia's oral statement at the first meeting of the Panel, paras. 132-133, 140; Indonesia's response to Panel question No. 53, para. 113. While the United States has not expressly addressed the relationship between Articles 2.1 and 2.2, we see nothing in its argumentation to suggest that it holds a different understanding.

<sup>624</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 144.

<sup>625</sup> In the context of an analysis under Article XX(b) of the GATT 1994, the panel in *EC – Asbestos* explained that the question was whether the challenged measures were "necessary in relation to the objectives pursued". Panel Report, *EC – Asbestos*, para. 8.182.

<sup>626</sup> H.R. Rep. No. 111-58, Pt. 1 (2009). Indonesia submitted the House Report as Exhibit IND-2; the United States submitted the same House Report as Exhibit US-67.

"The 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>627</sup>

7.337 The House Report states the objective of Section 907(a)(1)(A):

"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) is intended to prohibit the manufacture and sale of cigarettes with certain 'characterizing flavors' that appeal to youth."<sup>628</sup>

7.338 In addition, the FDA Guidance supports the conclusion that the objective of the ban on clove cigarettes is to reduce youth smoking. It explains the rationale of Section 907(a)(1)(A) in the following way:

"Smoking is the leading cause of preventable death in the United States, claiming over 400,000 lives each year. An important way to reduce the death and disease caused by smoking is to prevent children and adolescents from starting to smoke. Studies have shown that 17 year old smokers are three times as likely to use flavored cigarettes as are smokers over the age of 25. In addition to being more attractive to young people, flavored products make it easier for new smokers to start smoking by masking the unpleasant flavor of tobacco. Studies have also demonstrated that young people believe that flavored tobacco products are safer than unflavored tobacco products.

Flavored cigarettes are just as addictive and have the same types of harmful effects as regular cigarettes. Removing these flavored products from the market is important because it removes an avenue that young people can use to begin regular tobacco use. Congress specifically enacted the ban on sale of cigarettes and their component parts, such as filters and papers, which contain certain characterizing flavors. The removal from the market of cigarettes that contain certain characterizing flavors is an important step in the Nation's efforts to reduce the burden of illness and death caused by tobacco products as authorized by the FSPTCA, signed by President Obama on June 22, 2009."<sup>629</sup>

7.339 However, while the parties agree that the ban aims to reduce youth smoking, they disagree on two points relating to the objective of Section 907(a)(1)(A). The first is what is meant by "youth": whereas Indonesia understands "youth" to mean minors (i.e., persons under the age of 18)<sup>630</sup>, the United States asserts that the objective of Section 907(a)(1)(A) is to reduce smoking of all people within the "window of initiation", which it defines as people ages 12-26.<sup>631</sup> The second is whether Section 907(a)(1)(A) has only one objective: whereas the United States argues that the exclusion of menthol cigarettes from Section 907(a)(1)(A) reflects a second "objective" of the measure, which is to avoid the potential negative consequences associated with banning products to which tens of millions

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<sup>627</sup> Exhibit US-67, p. 14.

<sup>628</sup> Exhibit US-67, p. 37.

<sup>629</sup> Guidance. answer to question No. 1 (Exhibit IND-41). See also FDA Advisory – *Flavored Tobacco Products; What you need to know* (Exhibit IND-25).

<sup>630</sup> Indonesia's second written submission, para. 114; Indonesia's oral statement at the second substantive meeting of the Panel, para. 75; Indonesia's comments on the United States' response to Panel question No. 101, paras. 52-54.

<sup>631</sup> United States' response to Panel question No. 12(b), para. 16; United States' response to Panel question Nos. 100 and 101, paras. 62 and 71-77.

of adults are chemically and psychologically addicted<sup>632</sup>; Indonesia considers that this relates to the alleged *justification* for excluding menthol cigarettes from the scope of the ban, and is not a second "objective" of Section 907(a)(1)(A).<sup>633</sup>

7.340 In our view, it is not clear that we need to resolve the disagreement between the parties on the precise objective of Section 907(a)(1)(A). First, the outcome of our analysis under Article 2.2 of the *TBT Agreement* does not turn on either of these points.<sup>634</sup> Second, neither party has explained why it is necessary for this Panel to identify the objective of a measure at such a level of precision.<sup>635</sup>

7.341 That having been said, we consider that while the evidence before us is not free of ambiguity, it better supports Indonesia's assertion that the objective of the ban on clove cigarettes is to reduce smoking by persons under the age of 18. As Indonesia points out, Section 2 of the FSPTCA lists 49 findings by the U.S. Congress regarding the use of tobacco, and "[f]ully one quarter of all these findings refer to tobacco use by 'youth,' 'adolescents,' 'minors,' 'children,' those 'underage,' and those 'under 18.'"<sup>636</sup> In addition, the passages from the House Report and FDA Guidance already quoted above support this understanding: the former indicates that one of the overall objectives of the FSPTCA is to "reduce the number of individuals under 18 years of age"<sup>637</sup> who use tobacco products, and that the objective of Section 907(a)(1)(A) in particular is "reducing the number of children and adolescents"<sup>638</sup> who smoke cigarettes; the latter states that an important way to reduce the death and disease caused by smoking is to prevent "children and adolescents"<sup>639</sup> from starting to smoke.

7.342 As to the second issue, we consider that it would be entirely possible, both as a factual and a legal matter, for a single technical regulation to pursue more than one objective. In addition, we are mindful of the Appellate Body's guidance on the need to examine a technical regulation as a whole, taking into account, as appropriate, both any prohibitions and any exceptions to those prohibitions.<sup>640</sup>

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<sup>632</sup> United States' response to Panel question Nos. 60, 100.

<sup>633</sup> Indonesia's second written submission, para. 113; Indonesia's oral statement at the second substantive meeting of the Panel, para. 74.

<sup>634</sup> For its part, Indonesia argues that whether the Panel accepts Indonesia's or the United States' formulation of the objective, the ban on clove cigarettes is still more trade-restrictive than necessary to achieve its objective because both parties include "reducing youth smoking" in their objectives and that is where the United States' defence fails. Indonesia's oral statement at the second substantive meeting of the Panel, para. 81. In response to a question from the Panel asking it to clarify what the practical implications would be of defining the objective simply in terms of "reducing youth smoking", without consideration of possible negative consequences, the United States simply notes that "this limitation may result in a different pool of alternative measures with which the challenged measure is compared". United States' response to Panel question No. 100, para. 63. However, the United States does not elaborate on how this would result in a different pool of alternative measures.

<sup>635</sup> We note that the "legitimate objectives" explicitly mentioned in the text of Article 2.2 of the *TBT Agreement* are formulated at a high level of generality. Indeed, defining the objective of Section 907(a)(1)(A) in terms of "reducing youth smoking" may already be more specific than required under Article 2.2, which refers generally to the "protection of human health" as a legitimate objective.

<sup>636</sup> Indonesia's response to Panel question No. 12(b).

<sup>637</sup> Exhibit US-67, p. 14.

<sup>638</sup> Exhibit US-67, p. 37.

<sup>639</sup> Guidance, answer to question No. 1 (Exhibit IND-41). See also FDA Advisory – *Flavored Tobacco Products; What you need to know* (Exhibit IND-25).

<sup>640</sup> In *EC – Asbestos*, the panel adopted a two-stage interpretive approach of examining, first, the application of the *TBT Agreement* to the "prohibition" contained in the measure and, second and separately, its application to the "exceptions" contained in the measure. Following this two-stage approach, the panel ultimately concluded that the "prohibition" element of the measure was not a "technical regulation", but that the "exceptions" element of the measure was a "technical regulation". The Appellate Body concluded that the panel's approach and conclusion constituted a legal error, and explained that "the measure at issue is to be



However, we agree with Indonesia that the United States' desire to avoid the potential negative consequences associated with banning products to which tens of millions of adults are chemically and psychologically addicted is not an "objective" of Section 907(a)(1)(A) itself, but is rather the alleged *justification* for excluding menthol cigarettes from the scope of the ban. Basically, we have difficulty in understanding how the justification for excluding certain products from the scope of a technical regulation could be characterized as an objective of that technical regulation.

7.343 For these reasons, we conclude that Indonesia has demonstrated that the objective of the ban on clove cigarettes is to reduce smoking by youth (i.e., persons under the age of 18). This will serve as the reference point for the purpose of analysing whether the ban on clove cigarettes is more trade-restrictive than necessary to achieve its objective.

(ii) *Whether the objective of the ban on clove cigarettes is "legitimate"*

7.344 Having determined the objective pursued by the United States when enacting Section 907(a)(1)(A), we proceed to examine its legitimacy. We recall that Article 2.2 of the *TBT Agreement* provides that technical regulations shall not be more trade-restrictive than necessary to fulfil a "legitimate" objective, taking account of the risks non-fulfilment would create. Article 2.2 explains that such "legitimate" objectives are, *inter alia*: "national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment". As observed by the panel in *EC – Sardines*, although the elaboration of the objectives of a measure is a prerogative of the Member establishing that measure, "[p]anels are required to determine the legitimacy of those objectives".<sup>641</sup> The Appellate Body supported this conclusion by stating that it shared the view of the panel that this part of the analysis "implies that there must be an examination and a determination on the legitimacy of the objectives of the measure".<sup>642</sup>

7.345 In this case, Indonesia suggests that the ban on clove cigarettes does not have a "legitimate" objective, arguing that the measure is a "disguised restriction" on international trade and a "wolf disguised in the sheep's clothing" of public health.<sup>643</sup> Indonesia clarifies that while the objective of the Section 907(a)(1)(A) "as stated" in the FSPTCA and the House Report (i.e., to reduce youth smoking) is a "legitimate" objective within the meaning of Article 2.2 of the *TBT Agreement*, the "measure itself" is a disguised restriction on international trade.<sup>644</sup> According to Indonesia, the United States did not include menthol cigarettes in Section 907(a)(1)(A) because Philip Morris opposed it. Indonesia submits that the exclusion of menthol cigarettes from the ban was the result of a political compromise, and the real concern was getting a deal on the FSPTCA through the U.S. Congress while also avoiding the potential loss of jobs in the United States if menthol cigarettes were banned.<sup>645</sup>

7.346 As the party challenging the legitimacy of the identified objective, Indonesia carries the burden to establish that the objective concerned is not "legitimate" within the meaning of Article 2.2 of the *TBT Agreement*.

7.347 We have already concluded that the objective of the ban on clove cigarettes is to reduce youth smoking. It is self-evident that measures to reduce youth smoking are aimed the protection of human

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examined as an integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements that are part of it". Appellate Body Report, *EC – Asbestos*, para. 64.

<sup>641</sup> Panel Report, *EC – Sardines*, para. 7.121.

<sup>642</sup> Appellate Body Report, *EC – Sardines*, para. 286.

<sup>643</sup> Indonesia's second written submission, para. 140; Indonesia's response to Panel question No. 99.

<sup>644</sup> Indonesia's response to Panel question No. 99, para. 34.

<sup>645</sup> Indonesia's second written submission, para. 118; Indonesia's response to Panel question No. 99, para. 37; Indonesia's oral statement at the second substantive meeting of the Panel, para. 79.

health, and Article 2.2 of the *TBT Agreement* explicitly mentions the "protection of human health" as one of the "legitimate objectives" covered by that provision. In *EC – Asbestos*, the Appellate Body stated that "the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree."<sup>646</sup> In addition, we recall that in *Brazil – Retreaded Tyres*, the Appellate Body agreed with the panel that "few interests are more 'vital' and 'important' than protecting human beings from health risks".<sup>647</sup>

7.348 In addition, while it is open to a complaining party to seek to demonstrate that a measure does not have a "legitimate" objective, and that appearances can be deceiving, Indonesia's argument in this case appears tantamount to saying that the United States has acted in bad faith. In *US – Offset Act (Byrd Amendment)*, the Appellate Body, recalling its previous reports in *US – Shrimp* and *US – Hot-Rolled Steel*, acknowledged that "there is a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith".<sup>648</sup> However, the Appellate Body made clear that such a finding is not to be made lightly.

7.349 Finally, even if we were to accept Indonesia's assertions for the sake of argument – i.e., that the United States did not include menthol cigarettes in Section 907(a)(1)(A) "because Philip Morris opposed it", that the exclusion of menthol cigarettes from the ban was the result of a "political compromise", and the "real concern was getting a deal on the FSPTCA through the U.S. Congress while also avoiding the potential loss of jobs in the United States if menthol cigarettes were banned"<sup>649</sup> – we fail to see how any of this would call into question the conclusion that the ban on clove cigarettes is aimed at reducing youth smoking, and that this is a legitimate objective. In our view, these assertions would seem more germane to the question of whether or not the justification advanced by the United States for excluding menthol cigarettes from the scope of the ban – i.e., allegedly to avoid the potential negative consequences associated with banning products (i.e., menthol cigarettes) to which tens of millions of adults are chemically and psychologically addicted due to the potential but unknown consequences for the health of the individual users or the overall population<sup>650</sup> – is credible or not. In our view, these are distinct issues.<sup>651</sup>

7.350 For these reasons, we conclude that Indonesia has failed to demonstrate that the objective of the ban is not "legitimate".

(d) Whether the ban on clove cigarettes is "more trade-restrictive than necessary" to fulfil the legitimate objective of reducing youth smoking

7.351 Having defined the objective of the ban on clove cigarettes as reducing youth smoking and concluded that this objective is legitimate within the meaning of Article 2.2 of the *TBT Agreement*, we will now proceed to the second step of our analysis, which is to examine whether the ban on clove cigarettes is "more trade-restrictive than necessary" to fulfil that legitimate objective (taking into account the risks that non-fulfilment would create).

7.352 Our examination focuses on four main issues. The first is whether jurisprudence relating to Article XX(b) of the GATT 1994 is relevant to the interpretation of the "more trade-restrictive than necessary" standard in Article 2.2 of the *TBT Agreement*. The second is whether the ban on clove

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<sup>646</sup> Appellate Body Report, *EC – Asbestos*, para. 172.

<sup>647</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 144 (footnotes omitted).

<sup>648</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 297.

<sup>649</sup> Indonesia's second written submission, para. 118; Indonesia's response to Panel question No. 99, para. 37; Indonesia's oral statement at the second substantive meeting of the Panel, para. 79.

<sup>650</sup> United States' response to Panel question No. 60.

<sup>651</sup> We need not and do not decide on that issue for the purposes of resolving Indonesia's claim under Article 2.2.

cigarettes exceeds the level of protection sought by the United States. The third is whether the ban on clove cigarettes makes a material contribution to the objective of reducing youth smoking. The fourth is whether there are less-trade restrictive alternative measures that would make an equivalent contribution to the achievement of the objective pursued at the level of protection sought by the United States.

- (i) *Whether jurisprudence developed under Article XX(b) of the GATT 1994 is relevant to the interpretation of the "more trade-restrictive than necessary" standard in Article 2.2 of the TBT Agreement*

7.353 In this case, the parties disagree not only about whether the ban on clove cigarettes is "more trade-restrictive than necessary", but also on the appropriate legal framework for undertaking that analysis. In its first written submission, Indonesia proceeds on the premise that the test that has been developed under Article XX(b) of the GATT 1994 is equally applicable to the second sentence of Article 2.2 of the *TBT Agreement*. The United States disagrees, and terms this a "radical approach".<sup>652</sup> In its view, the Panel should instead apply the test that has been developed by the Appellate Body in the context of Article 5.6 of the *SPS Agreement*.<sup>653</sup>

7.354 Article XX of the GATT 1994 is entitled "General Exceptions". Together with its chapeau, Article XX(b) reads as follows:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

- (b) necessary to protect human, animal or plant life or health".

7.355 There is a substantial body of jurisprudence relating to the interpretation and application of Article XX(b)<sup>654</sup>, as well as its chapeau.<sup>655</sup>

7.356 As discussed above<sup>656</sup>, we consider that a treaty interpreter should not automatically transpose jurisprudence developed in the context of one provision to another. Rather, a treaty interpreter must carefully consider any differences in the wording, context and purpose of different provisions, and assess the significance of any such differences. In our view, such a cautious approach is mandated by Article 31(1) of the VCLT, and is also consistent with previous findings by the Appellate Body. For

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<sup>652</sup> United States' first written submission, footnote 310.

<sup>653</sup> United States' first written submission, paras. 262-265.

<sup>654</sup> Panel Report, *US – Gasoline*, paras. 6.20-29; Panel Report, *EC – Asbestos*, paras. 8.184-8.223; Appellate Body Report, *EC – Asbestos*, paras. 155-175; Panel Report, *EC – Tariff Preferences*, paras. 7.178-7.224; Panel Report, *Brazil – Retreaded Tyres*, paras. 7.35-7.215, 7.375-7.380, 7.438-7.446; Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 133-212; Panel Report, *US – Poultry (China)*, paras. 7.458-483.

<sup>655</sup> Appellate Body Report, *US – Gasoline*, paras. 22-30; Panel Report, *US – Shrimp*, paras. 7.31-7.62; Appellate Body Report, *US – Shrimp*, paras. 146-186; Panel Report, *Argentina – Hides and Leather*, paras. 11.309-11.331; Panel Report, *EC – Asbestos*, paras. 8.224-8.240; Panel Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 5.43-5.144; Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 111-152; Panel Report, *EC – Tariff Preferences*, paras. 7.225-7.235; Panel Report, *Brazil – Retreaded Tyres*, paras. 7.217-7.357, 7.375-7.380; Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 213-252.

<sup>656</sup> See Section VII.D.2(c)(i) above.

example, in *US – Gambling* the Appellate Body concluded that previous decisions under Article XX of the GATT 1994 were relevant to its analysis under Article XIV of the GATS, but it reached that conclusion only after it considered some of the differences and similarities between the two provisions:

"Article XIV of the GATS sets out the general exceptions from obligations under that Agreement in the same manner as does Article XX of the GATT 1994. Both of these provisions affirm the right of Members to pursue objectives identified in the paragraphs of these provisions even if, in doing so, Members act inconsistently with obligations set out in other provisions of the respective agreements, provided that all of the conditions set out therein are satisfied. Similar language is used in both provisions<sup>349</sup>, notably the term 'necessary' and the requirements set out in their respective chapeaux. Accordingly, like the Panel, we find previous decisions under Article XX of the GATT 1994 relevant for our analysis under Article XIV of the GATS.

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<sup>349</sup> Notwithstanding the general similarity in language between the two provisions, we note that Article XIV(a) of the GATS expressly enables Members to adopt measures 'necessary to protect public morals *or to maintain public order*', whereas the corresponding exception in the GATT 1994, Article XX(a), speaks of measures 'necessary to protect public morals'. (emphasis added)"<sup>657</sup>

7.357 The United States' argument that relying on the jurisprudence developed under Article XX(b) of the GATT 1994 in the context of Article 2.2 of the *TBT Agreement* would be a "radical approach" rests on the premise that Article 2.2 should be interpreted and applied in a manner that is radically different from the manner in which Article XX(b) has been interpreted and applied. Having carefully considered the wording, context and objective of Article XX(b) and Article 2.2, we disagree.

7.358 To begin with, the wording of the second sentence of Article 2.2 of the *TBT Agreement* is very similar to that found in Article XX(b) of the GATT 1994. Indeed, in a case such as this one where the "legitimate objective" at issue is the "protection of human health", the terms appear to be interchangeable. For example, in *US – Gasoline* the panel understood the expression "necessary to protect human ... life or health" in Article XX(b) called for an analysis of whether measures "were necessary to fulfil the policy objective" of protecting human life or health.<sup>658</sup>

7.359 In addition, the context of Article 2.2 of the *TBT Agreement* establishes a direct link to Article XX(b) of the GATT 1994. In this regard, we note that the sixth recital of the preamble to the *TBT Agreement* essentially reproduces the language contained in Article XX of the GATT 1994.<sup>659</sup>

7.360 Furthermore, we note that the panel in *EC – Asbestos* observed that "the criteria on the preparation, adoption or application of technical regulations in Article 2.2 of the TBT Agreement are very similar to those in Article XX of the GATT 1994. The preamble to the TBT Agreement in fact repeats some of the wording of Article XX of the GATT. In the panel's view the TBT Agreement is a development of the GATT."<sup>660</sup> The panel then added, in a footnote, that:

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<sup>657</sup> Appellate Body Report, *US – Gambling*, para. 291 and footnote 349 (some footnotes omitted).

<sup>658</sup> Panel Report, *US – Gasoline*, para. 6.20 (cited in Panel Report, *EC – Asbestos*, para. 8.169; Panel Report, *EC – Tariff Preferences*, para. 7.197; Panel Report, *Brazil – Retreaded Tyres*, para. 7.40.)

<sup>659</sup> See paragraph 7.3 above for the text of the sixth recital of the preamble.

<sup>660</sup> Panel Report, *EC – Asbestos*, para. 8.55.

"[T]he preparatory work on the Agreement on Technical Barriers to Trade in the Tokyo Round show that the TBT Agreement that should have emerged from the Tokyo Round was already seen as being a development of the existing rules of the GATT, notably Article XX. See for example the extract from document MTN/3E/W/26, October 1974, quoted in paragraph 7 of document TRE/W/21, 17 January 1994."<sup>661</sup>

7.361 In our view, the foregoing does not support the view that Article 2.2 of the *TBT Agreement* should be given a radically different interpretation from Article XX(b) of the GATT 1994.

7.362 In addition, the United States has not actually identified any significant differences between the tests that have been developed under Article XX(b) of the GATT 1994 and Article 5.6 of the *SPS Agreement*, or any aspect of the Article XX(b) jurisprudence relating to the interpretation of the term "necessary" that would be inapplicable to Article 2.2 of the *TBT Agreement*. The United States suggests that there are three ways in which the test developed under Article XX(b) of the GATT 1994 differs from that developed under Article 5.6 of the *SPS Agreement*. We review the alleged differences below.

7.363 First, the United States indicates that under Article 2.2 of the *TBT Agreement*, a panel is inquiring as to whether a measure fulfils a legitimate objective is "more trade restrictive than necessary" to fulfil that objective, whereas under Article XX of the GATT 1994, the question is whether it is "necessary" to breach the GATT 1994 to protect human, animal or plant life or health, to protect public morals or to secure compliance with laws or regulations. Thus, the United States argues, the alternatives that are being compared under Article 2.2 are two alternatives that are WTO-consistent while the alternatives being compared under Article XX of the GATT 1994 are an alternative that is WTO-inconsistent and another that is WTO-consistent.<sup>662</sup> While the foregoing may in some cases be correct, we are unable to see what bearing this has on the question of whether legal test that has been developed under Article XX(b) is applicable to Article 2.2 of the *TBT Agreement*. We agree with the European Union that:

"This difference, however, is of relative insignificance to the question of how *the terms* Article 2.2 should be interpreted. The fact that Article XX of the *GATT 1994* constitutes an exception and Article 2.2 of the *TBT Agreement* a prohibition does not go to either the question of *how* the text in Article 2.2 should be interpreted, nor to the

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<sup>661</sup> Panel Report, *EC – Asbestos*, footnote 41.

<sup>662</sup> United States' first written submission, para. 267. Based on this difference in wording between Article XX(b) of the GATT 1994 and Article 2.2 of the *TBT Agreement*, the United States further argues that there is another significant difference between these provisions, which is that the question under Article XX(b) is whether the *measure itself* is necessary, whereas under Article 2.2 the question is whether the *degree of trade-restrictiveness* is necessary (United States' second written submission, para. 181; United States' response to Panel question No. 55, para. 123). We agree with the United States that Article XX(b) is drafted in terms of whether the trade-restrictive measure is necessary to fulfil its objective, whereas Article 2.2 is drafted in terms of whether the degree of trade-restrictiveness of that measure is necessary to fulfil its objective. However, the United States has not explained why or how an analysis framed in terms of the necessity of the "trade-restrictiveness" of a trade-restrictive measure would be significantly different from an analysis framed in terms of the necessity of that trade-restrictive measure. For example, the United States' arguments in this case suggest that a Panel analysing the necessity of the *degree of trade-restrictiveness* of a trade-restrictive measure under Article 2.2 (as opposed to the necessity of a trade-restrictive *measure*) would still need to consider the extent to which that *measure* makes a "contribution" to its objective. In this regard, we recall that the United States recognizes that "[w]hile Article 2.2 does not require that the measure fulfill its objective, it is difficult to believe that a measure fails to fulfill its objective completely – that is to say, a measure that does not even make a marginal contribution to its objective – could be found consistent with Article 2.2" (United States' response to Panel question No. 103(a)).

question of the importance of jurisprudence under Article XX of the *GATT 1994*. Rather, this "functional" difference between the two provisions affects only the burden of proof between the parties, and not the meaning of the terms of a provision."<sup>663</sup>

7.364 Second, the United States indicates that unlike the situation under Article XX of the *GATT 1994*, it is the complaining party that has the burden of establishing that the measure is "more trade-restrictive than necessary" under Article 2.2 of the *TBT Agreement*.<sup>664</sup> That is correct. However, it does not follow from this fact, i.e., that the burden of proof is allocated differently under Article XX and Article 2.2, that jurisprudence developed in the context of Article XX(b) can provide no guidance on the interpretation of the "more trade-restrictive than necessary" standard in Article 2.2.

7.365 Third, the United States relies on footnote 3 to Article 5.6 of the *SPS Agreement* to argue that the appropriate standard to be applied is whether an alternative measure exists that is "significantly" less restrictive to trade.<sup>665</sup> Article 5.6 of the *SPS Agreement* and its accompanying footnote provide that:

"Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility."<sup>3</sup>

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<sup>3</sup> For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is *significantly* less restrictive to trade." (emphasis added)

7.366 However, the United States does not explain the basis for the underlying premise that a different standard applies under Article XX(b). Indeed, we are unaware of any *GATT* or *WTO* panel or Appellate Body report which suggests that a different standard applies under Article XX(b). In addition, the United States acknowledges in response to a question from the Panel that the issue of whether Article 2.2 embodies a "significantly less trade-restrictive" standard would "not appear to arise in this dispute", where the challenged measure is an import ban, if Indonesia adduced sufficient evidence that an alternative measure exists that does not ban its product.<sup>666</sup>

7.367 We would also observe that in the context of arguing that the measure would be justified under Article XX(b) of the *GATT 1994* "should the Panel reach the issue of *GATT* exceptions", the United States provides an extensive review of the case law under that provision and then proceeds to advance substantially the same arguments that it has advanced in the context of Article 2.2 of the *TBT Agreement*. For example, the United States submits that "as discussed in section III.H", i.e., the

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<sup>663</sup> European Union's third-party oral statement, para. 15.

<sup>664</sup> United States' first written submission, para. 267.

<sup>665</sup> The Panel notes that the United States further contends that a 1993 letter from Peter D. Sutherland, Director-General of the *GATT*, to Ambassador John Schmidt, Chief U.S. Negotiator, Exhibit US-79, provides additional support, as a supplemental means of interpretation under Article 32 of the *VCLT*, that Article 2.2 of the *TBT Agreement* should be interpreted similarly to Article 5.6 of the *SPS Agreement*, specifically that a measure cannot be considered more trade-restrictive than necessary in the absence of a reasonably available alternative measure that is "significantly" less-trade restrictive.

<sup>666</sup> United States' response to Panel question No. 57, para. 130.

section of its first written submission pertaining to Article 2.2, "Section 907(a)(1)(A) was enacted in order to protect human life and health from the risk posed by smoking" and "was necessary to ensure that products that are predominantly used as 'starter' products by youth, leading to years of addiction, health problems, and possibly death, cannot be sold in the United States at all."<sup>667</sup> In the context of its Article XX(b) analysis, the United States notes that "[a]s elaborated above", which we read to mean in the context of its Article 2.2 analysis, "[s]moking presents an undeniable risk to human life and health. And by banning certain products that are predominantly used as smoking 'starter' products by young smokers, Congress clearly took at action to reduce this risk of smoking."<sup>668</sup> Again in its Article XX(b) analysis, the United States submits that "[a]s has been detailed in this submission, smoking poses a severe risk to human life and health, and the FSPTCA is the latest in a series of restrictions placed on the cigarette companies to address this risk."<sup>669</sup>

7.368 In the light of the foregoing, we are not persuaded by the United States' argument that the jurisprudence that has been developed under Article XX(b) of the GATT 1994 is inapplicable to Article 2.2 of the *TBT Agreement*. Rather, we agree with Indonesia, as well as the third parties that have addressed this issue, that the jurisprudence developed under Article XX(b) is relevant to the interpretation of Article 2.2 of the *TBT Agreement*. Therefore, in addressing the arguments of the parties relating to the question of whether the ban on clove cigarettes is "more trade-restrictive than necessary", we will look for guidance in this jurisprudence.

7.369 We do not agree with the United States that "no aspect"<sup>670</sup> of Article XX(b) jurisprudence is applicable to an Article 2.2 analysis. At the same time, we are not saying that Article XX(b) jurisprudence can be transposed in its entirety onto Article 2.2 of the *TBT Agreement*. It may well be that there are certain aspects of Article XX(b) jurisprudence that are not applicable in the context of Article 2.2 of the *TBT Agreement*. Rather, we are of the view that there are some aspects of Article XX(b) jurisprudence that may be taken into account in the context of interpreting Article 2.2 of the *TBT Agreement*.

(ii) *Whether Indonesia has demonstrated that the ban on clove cigarettes exceeds the level of protection sought by the United States*

7.370 In this case, both parties agree that the "level of protection" sought is directly connected to the question of whether a measure is "more trade-restrictive than necessary" within the meaning of Article 2.2 of the *TBT Agreement*.<sup>671</sup> We see no reason to disagree. Although the concept is not explicitly referred to in the text of Article 2.2 of the *TBT Agreement*, the sixth recital to the preamble of the *TBT Agreement* states no country should be prevented from taking measures "necessary ... for the protection of human ... life or health ... at the levels it considers appropriate". In addition, panels and the Appellate Body have considered the "level of protection" in the context of analysing measures under Article XX(b) of the GATT 1994, notwithstanding that these words are not found in that provision either. Among other things, the Appellate Body has explained that "in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued".<sup>672</sup>

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<sup>667</sup> United States' first written submission, para. 316.

<sup>668</sup> United States' first written submission, para. 318.

<sup>669</sup> United States' first written submission, para. 322.

<sup>670</sup> United States' response to Panel question No. 55, para. 121.

<sup>671</sup> Parties' responses to Panel question No. 58.

<sup>672</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156; Appellate Body Report, *US – Gambling*, para. 308.

7.371 Indonesia submits that the ban on clove cigarettes is "more trade-restrictive than necessary" because it "greatly exceeds the level of protection sought" by the United States.<sup>673</sup> Indonesia asserts that because "the vast majority of cigarettes known to be smoked by youth are not banned by the Act", the level of protection sought by the United States through the FSPTCA is "not a dramatic reduction in the number of youth who smoke", but rather "sufficient regulation to deter, but not prohibit, the use of tobacco products by adolescents".<sup>674</sup> Indonesia submits that a ban "is the most trade-restrictive regulatory tool available and in certain circumstances may be the only option for achieving a health objective, for example where the level of protection needed is the *elimination* of risk".<sup>675</sup> Indonesia submits that although the FSPTCA does not expressly state a "level of protection sought," the provisions of the law convey a much lower level of protection desired than the high level claimed by the United States.<sup>676</sup>

7.372 The United States acknowledges that if the measure at issue "goes beyond the chosen level of protection", a less trade restrictive measure may likewise fulfil the Member's legitimate objective.<sup>677</sup> However, in its view, Indonesia's understanding of the level of protection sought by the United States is erroneous.<sup>678</sup> Given the U.S. Government's long and frustrating experience in trying to limit youth smoking, the "high" level of protection sought by the United States is evidenced by the measure applied – a complete ban.<sup>679</sup> The level at which the United States considers appropriate to protect public health is to eliminate from the market, not simply restrict access to, those products that are disproportionately used by young people.<sup>680</sup>

7.373 As the party asserting that the ban on clove cigarettes "greatly exceeds the level of protection sought" by the United States, Indonesia carries the burden of providing us with evidence and argumentation on what is the level of protection sought by the United States, and why banning clove cigarettes greatly exceeds the level of protection sought.

7.374 Indonesia has not pointed us to any direct evidence regarding the "level of protection" sought by the United States. For example, there appears to be nothing in the text of the FSPTCA stating the level of protection that it seeks to achieve. In the absence of any direct evidence regarding the level of protection sought by the United States, we are somewhat hesitant to find that the ban on clove cigarettes greatly exceeds that level of protection.

7.375 In addition, insofar as Indonesia seeks to infer<sup>681</sup> the level of protection from the measure itself, it is not clear how the ban on clove cigarettes could be found to exceed (or fall short of meeting) this level of protection. If we were to infer the "level of protection" from the measure itself, the level of protection must necessarily be the level of protection reflected in the measure itself. It is then not clear how the measure could exceed (or fall short of meeting) that level of protection. In other words, where the level of protection is inferred from the measure itself, the measure will necessarily achieve exactly that level of protection. The Appellate Body seems to have alluded to this problem in the context of the *SPS Agreement*. In *Australia – Salmon*, the Appellate Body noted that:

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<sup>673</sup> Indonesia's first written submission, para. 85.

<sup>674</sup> Indonesia's first written submission, para. 84.

<sup>675</sup> Indonesia's first written submission, para. 85 (emphasis original).

<sup>676</sup> Indonesia's response to Panel question No. 58(c), para. 123; Indonesia's second written submission, para. 124.

<sup>677</sup> United States' response to Panel question No. 58(b), para. 134.

<sup>678</sup> United States' first written submission, paras. 255-257.

<sup>679</sup> United States' first written submission, para. 227.

<sup>680</sup> United States' response to Panel question No. 58(b), para. 135; United States' second written submission, para. 147.

<sup>681</sup> Indonesia's response to Panel question No. 58(d).



"To imply [i.e. infer] the appropriate level of protection from the existing SPS measure would be to assume that the measure always achieves the appropriate level of protection determined by the Member."<sup>682</sup>

7.376 Indeed, in the present case the United States argues that the "high" level of protection can be inferred from the measure applied – a complete ban.<sup>683</sup> According to the United States, the inference to be drawn from Section 907(a)(1)(A) itself is that the level of protection is "to eliminate from the market"<sup>684</sup> those products at issue.

7.377 We are not persuaded by Indonesia's argument that because "the vast majority of cigarettes known to be smoked by youth are not banned by the Act"<sup>685</sup>, the level of protection sought by the United States through the FSPTCA is relatively low, and banning clove cigarettes therefore exceeds that level of protection. While it is common ground between the parties that the ban on clove cigarettes (and the FSPTCA more generally) only seeks to *reduce* rather than *eliminate* youth smoking, it does not follow that banning certain types of cigarettes *ipso facto* exceeds the level of protection sought. We fail to see any contradiction in the idea that a Member may seek to *reduce* (rather than eliminate) certain risks by *banning* certain (but not all) products.

7.378 For these reasons, we conclude that Indonesia has not demonstrated that the ban on clove cigarettes exceeds the "level of protection" sought by the United States.

(iii) *Whether Indonesia has demonstrated that the ban on clove cigarettes makes no "material contribution" to the objective of reducing youth smoking*

#### Introduction

7.379 In *Korea – Various Measures on Beef*, the Appellate Body explained that determining whether a measure is "necessary" within the meaning of Article XX(d) of the GATT 1994 "involves in every case a process of weighing and balancing a series of factors which prominently include the *contribution* made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."<sup>686</sup> In *US – Gambling*, the Appellate Body stated that the weighing and balancing process inherent in the necessity analysis involves an assessment of other factors, which will usually include "the *contribution* of the measure to the realization of the ends pursued by it" and "the restrictive impact of the measure on international commerce".<sup>687</sup> In *Brazil – Retreaded Tyres*, the Appellate Body stated that "a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue."<sup>688</sup> We see nothing in the text, context or purpose of Article 2.2 of the *TBT Agreement* to suggest that a different standard should be applied in the context of examining whether a measure is "more trade-restrictive than necessary to fulfil a legitimate objective" for the purpose of that provision.

7.380 There are certain similarities between the facts of this case and those of *Brazil – Retreaded Tyres*. In both cases, the measure at issue was an import ban. In both cases, the objective of the measure was to protect human life and health. In that case, the Appellate Body explained that "when

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<sup>682</sup> Appellate Body Report, *Australia – Salmon*, para. 203.

<sup>683</sup> United States' first written submission, para. 227.

<sup>684</sup> United States' response to Panel question No. 58(b), para. 135; United States' second written submission, para. 172.

<sup>685</sup> Indonesia's first written submission, para. 84.

<sup>686</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 164.

<sup>687</sup> Appellate Body Report, *US – Gambling*, para. 306 (emphasis added).

<sup>688</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears to us that it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a *material contribution* to the achievement of its objective."<sup>689</sup> The Appellate Body distinguished a "material contribution" from a contribution that is "marginal or insignificant".<sup>690</sup> We will apply the same standard here, and examine whether banning clove cigarettes makes a material contribution to the objective of reducing youth smoking.

7.381 In this case, Indonesia argues that the ban on clove cigarettes makes no material contribution to the objective of reducing youth smoking.<sup>691</sup> It advances four lines of argument, supported by different categories of evidence. According to Indonesia: (i) clove cigarettes pose no greater health risk than other cigarettes<sup>692</sup>; (ii) youth do not smoke clove cigarettes in significant numbers<sup>693</sup>; (iii) other flavoured tobacco products popular with youth are not banned<sup>694</sup>; and (iv) the available scientific evidence shows that banning clove cigarettes will do little to deter youth from smoking.<sup>695</sup> We will examine these contentions in turn, recalling that Indonesia carries the burden of proof.

#### Whether clove cigarettes pose a greater health risk than other cigarettes

7.382 Indonesia submits that there is no scientific or technical information indicating that clove cigarettes pose a greater health risk than cigarettes not banned by the Act. In this regard, Indonesia asserts that the FDA's fact sheets state that flavoured cigarettes have same health risks and are as addictive as regular cigarettes. According to Indonesia, the FDA's conclusion is further confirmed by various scientific studies that have shown that the health effects of smoking clove cigarettes are the same as regular cigarettes.<sup>696</sup>

7.383 According to the United States, Indonesia's argument that clove cigarettes are no more dangerous than other types of cigarettes lacks any connection to the requirements of Article 2.2 of the *TBT Agreement* and also misses the point of Section 907(a)(1)(A).<sup>697</sup>

7.384 In our view, Indonesia's argument is misplaced. The reason is not that evidence relating to the health risk of a product inherently lacks any connection to the requirements of Article 2.2 of the *TBT Agreement*. Rather, the reason is that the measure at issue in this case does not ban clove and certain other flavoured cigarettes on the grounds that they are more toxic than other kinds of cigarettes. If the objective of the measure at issue was to ban the cigarettes that were "more harmful"<sup>698</sup>, more "dangerous"<sup>699</sup>, or more "toxic"<sup>700</sup> than regular cigarettes or menthol cigarettes<sup>701</sup>, then evidence showing that clove cigarettes are no more harmful, dangerous or toxic than other cigarettes would be highly relevant to the question of whether banning clove cigarettes could make a material contribution to fulfilling that objective. However, that is not the objective of Section 907(a)(1)(A).

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<sup>689</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150 (emphasis added).

<sup>690</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 150 and 210.

<sup>691</sup> Indonesia's first written submission, paras. 86-103.

<sup>692</sup> Indonesia's first written submission, paras. 90-91.

<sup>693</sup> Indonesia's first written submission, paras. 92-96.

<sup>694</sup> Indonesia's first written submission, paras. 97-98.

<sup>695</sup> Indonesia's first written submission, paras. 99-102.

<sup>696</sup> Indonesia's first written submission, paras. 90-91.

<sup>697</sup> United States' first written submission, para. 274.

<sup>698</sup> Indonesia's first written submission, paras. 6, 35.

<sup>699</sup> Indonesia's first written submission, para. 6.

<sup>700</sup> Indonesia's first written submission, para. 6.

<sup>701</sup> Indonesia's first written submission, paras. 90-91.

7.385 Accordingly, we do not consider that the evidence submitted by Indonesia relating to the health risks of clove cigarettes as compared with other types of cigarettes sheds much light on the question of whether the ban on clove cigarettes makes a material contribution to the objective of reducing youth smoking.

Whether youth smoke clove cigarettes in insignificant numbers

7.386 The parties have presented extensive arguments, mostly on the basis of survey evidence, regarding the number of youth who smoke clove cigarettes.<sup>702</sup>

7.387 In general, Indonesia asserts that an insignificant number of youth smoke clove cigarettes. In support of this assertion, Indonesia refers the Panel to various survey evidence. Indonesia asserts that according to the National Survey on Drug Use and Health ("NSDUH"): (i) only 0.05 per cent of cigarettes consumed by youth are clove cigarettes, while 43 per cent are menthol and 57 per cent are regular; (ii) of the youth who smoke, virtually all smoke regular or menthol cigarettes; (iii) clove cigarette smokers smoke fewer cigarettes per day than menthol or regular cigarette smokers; (iv) in 2007, only 0.1 per cent of youth smokers used clove cigarettes and by 2008 that number had fallen to zero.<sup>703</sup> On the basis of the Western Watts Survey, Indonesia asserts that two thirds of all current clove cigarette smokers reported smoking their first clove cigarette more than one year after trying their first cigarette while only 6 per cent reported clove as their first cigarette.<sup>704</sup> Indonesia also refers the Panel to a 2009 survey by another, *Monitoring the Future*, which surveyed a total of 46,097 eighth, tenth, and twelfth graders in 389 secondary schools across the United States and found that "the annual prevalence of kretek use was not very high in the first year of measurement (2001); after that use declined by roughly half in 8th and 10th grades by 2005, before the question was dropped from the 8th- and 10th-grade questionnaires".<sup>705</sup> Indonesia also refers the Panel to a telephone survey conducted 23-26 September 2010 by Opinion Research Corporation, in which 98 per cent of teens surveyed indicated they had never heard of a kretek.<sup>706</sup>

7.388 The United States submits that the survey data generated in the last decade refutes Indonesia's assertions, and shows that clove cigarettes are smoked by a significant number of young people. The United States criticizes the NSDUH survey presented by Indonesia, and provides different market data regarding the U.S. market for cigarettes. According to the United States, the 2002-2003 NSDUH data suggest that around 5-6 per cent of youth smokers smoke clove cigarettes. The United States considers that the most reliable survey is the National Youth Tobacco Survey ("NYTS"), which finds that, among smokers aged 12 to 21, approximately 11% use clove cigarettes. The United States notes that, according to a survey conducted in 2004, the consumption of flavoured cigarettes was highest among the categories of people aged 17 (22.8 per cent) and 18 to 19 (21.7 per cent), and lowest for smokers aged 40 to 54 (6.2 per cent) and 55 and older (0.8 per cent).<sup>707</sup>

7.389 In our view, the arguments of the parties show that the survey evidence before the Panel is susceptible to different interpretations. However, even if we accept Indonesia's numbers, these numbers do not show that an insignificant number of youth smoke clove cigarettes.

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<sup>702</sup> [insert reference to submissions and responses to questions]

<sup>703</sup> Indonesia's first written submission, paras. 93-94.

<sup>704</sup> Indonesia's first written submission, para. 95.

<sup>705</sup> Indonesia's first written submission, para. 95.

<sup>706</sup> Indonesia's first written submission, para. 96.

<sup>707</sup> United States' first written submission, para. 53.

7.390 To the contrary, Indonesia's own estimate, approximately 6,800 minors *regularly* smoked clove cigarettes.<sup>708</sup> In our view, that is hardly an insignificant number.

7.391 In addition, the NSDUH surveys relied upon by both parties actually show that even if "youth" is understood to mean only those under the age of 18, it is still the case that clove cigarettes were used disproportionately by "youth". The 2002 and 2003 NSDUH surveys contained the question, "[d]uring the past 30 days, have you smoked all or part of a clove cigarette?" Exhibit IND-73 sets forth the results of the 2002 and 2003 NSDUH surveys. It indicates that in 2002, 7.3 per cent of smokers under the age of 18 answered yes to this question, whereas only 2.5 per cent of smokers over the age of 18 answered yes to this question. It indicates that in 2003, 5.8 per cent of smokers under the age of 18 answered yes to this question, whereas only 2.2 per cent of smokers over the age of 18 answered yes to this question.

7.392 Accordingly, we do not consider that the survey data provided by Indonesia offer a sufficient basis for determining that the ban on clove cigarettes does not make a material contribution to the objective of reducing youth smoking.

Whether the United States' failure to ban other flavoured tobacco products most popular with youth demonstrates that banning clove cigarettes makes no "material contribution" to reducing youth smoking

7.393 Indonesia argues that because other flavoured tobacco products popular with youth, and in particular menthol cigarettes, are not banned by the FSPTCA, banning clove cigarettes cannot make a material contribution to the objective of reducing youth smoking. In this regard, Indonesia reiterates that by prohibiting only a "tiny sliver" of the cigarettes smoked by youth, the measure cannot make a "material contribution" to the objective of reducing youth smoking, and is therefore more trade-restrictive than necessary to fulfil this objective.<sup>709</sup>

7.394 We note that it is not in dispute that youth smoke menthol (and regular) cigarettes in far greater numbers than clove cigarettes. However, we do not consider that the failure to ban these cigarettes demonstrates that banning clove cigarettes makes no material contribution to reducing youth smoking.

7.395 First, assuming for the sake of argument that by prohibiting only a "tiny sliver" of the cigarettes smoked by youth the measure cannot make a material contribution to the objective of reducing youth smoking, it would seem to follow that the measure is *less* trade-restrictive than necessary to fulfil its objective. More specifically, it would mean that, in order to make a material contribution to the objective of reducing youth smoking, the United States would have to ban more types of cigarettes than it has. We fail to see how the ban on clove cigarettes can be found to be "more trade-restrictive than necessary" to fulfil its objective based on the conclusion that it is *less* trade-restrictive than necessary to fulfil its objective.

7.396 In addition, given that the other flavoured cigarettes banned by Section 907(a)(1)(A) also had a very small market share – indeed, apparently smaller than that enjoyed by clove cigarettes – accepting Indonesia's line of reasoning would lead to the conclusion that banning these other

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<sup>708</sup> According to Indonesia, "[s]omewhere between 2.2 and 2.5 million people under the age of 18 smoke cigarettes in the United States. Of that amount, approximately 1.1 million (or 43 percent) regularly smoke menthol cigarettes. This compares to only 6,800 minors that regularly smoke clove cigarettes." Indonesia's oral statement at the first substantive meeting of the Panel, para. 143.

<sup>709</sup> Indonesia's response to Panel question No. 2, para. 6; Indonesia's response to Panel question No. 58, para. 124; Indonesia's second written submission, paras. 2 and 125.

cigarettes would also fail to make a material contribution to the objective of reducing youth smoking. Indeed, Indonesia itself recognizes the logical implication of its argument.<sup>710</sup>

7.397 Moreover, we do not consider that an examination of whether a measure makes a "material contribution" to its objective can proceed by comparing that measure with a hypothetical measure that makes more of a contribution to the achievement of the objective. In *Brazil – Retreaded Tyres*, the Appellate Body judged whether the challenged measure made a material contribution on its own terms, not in comparison with alternative measures. In the Appellate Body's Article XX analysis, the comparison of the challenged measure to alternative ones is only done to confirm that the measure is "necessary," not to determine the extent to which the measure contributes to its objective. That is a separate inquiry, and one that takes place prior to comparison of the measure with alternatives.<sup>711</sup>

7.398 Finally, we see a difficulty with Indonesia's argument that "if it is not necessary to ban the tobacco products that are most widely used by adolescents, it cannot be necessary to ban clove cigarettes, which are rarely used"<sup>712</sup>, namely, that it assumes that the United States excluded menthol cigarettes and other tobacco products most popular with youth from the scope of the ban because the United States does not consider it necessary to ban such products in order to reduce youth smoking. There is no evidence before the Panel that the United States has ever made such an assessment. Rather, the United States submits that the reason menthol cigarettes were excluded from the scope of the ban was to avoid the potential negative consequences associated with banning products to which tens of millions of adults are chemically and psychologically addicted due to the potential but unknown consequences for the health of the individual users or the overall population.<sup>713</sup>

7.399 For these reasons, we do not consider that the United States' failure to ban other flavoured tobacco products most popular with youth, in particular menthol cigarettes, demonstrates that banning clove cigarettes makes no material contribution to reducing youth smoking.

Whether the available scientific evidence shows that banning clove cigarettes will do little to deter youth from smoking

7.400 This takes us to Indonesia's final line of argument, which is that there is no scientific evidence which shows that banning clove cigarettes will make a contribution to deter youth smoking. According to Indonesia, "[t]he most frequently cited justification for a ban on flavored cigarettes is that flavored cigarettes lure children into smoking by incorporating appealing flavors. A single line from a single study is most frequently used to support this assumption."<sup>714</sup>

7.401 Here we consider that the evidence before the Panel provides a solid basis for reaching a definite conclusion. The evidence before the Panel from health experts squarely contradicts Indonesia's assertion that there is no scientific evidence to support the United States ban on clove cigarettes. The United States has submitted a number of studies from qualified and respected sources, and all appear to advance the same view. Indeed, there appears to be a growing consensus, among those who have conducted research on the issue, in support of the United States' position on this particular question. This is not a case in which a Member is seeking to base a public health measure

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<sup>710</sup> Indonesia's response to Panel question No. 62, para. 130 (confirming that, in its view, "...so long as menthol, the most popular flavour with youth, is not banned, it is difficult to imagine how a ban on any other flavour, especially products not even on the market at the time the measure was adopted, could be considered "necessary.")

<sup>711</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 134-155, 156-175.

<sup>712</sup> Indonesia's first written submission, para. 98.

<sup>713</sup> United States' response to Panel question Nos. 60, 100.

<sup>714</sup> Indonesia's first written submission, para. 99.

on a minority view within the scientific community; this is a case in which the measure actually reflects at least the majority view, and potentially the unanimous view.<sup>715</sup>

7.402 For example, a 1985 study by the U.S. Center for Disease Control notes that:

"In addition to adverse health effects that may result from inhaled eugenol and pyrolyzed cloves, use of clove cigarettes may be changing the smoking patterns of American teenagers. Some researchers have suggested that eugenol, which is present in substantial quantities in clove cigarette smoke (4), anesthetizes the backs of smokers' throats and tracheas, permitting deeper inhalation and possibly encouraging smoking in persons who might otherwise be dissuaded by the harshness of regular cigarettes."<sup>716</sup>

7.403 A 1989 study published in the *The Western Journal of Medicine* states that:

"Aside from marketing surveys that are not circulated outside the industry, the most precise estimate of clove cigarette consumption for a defined population is that derived by Robinson and co-workers in an extensive survey of substance use among adolescents aged about 16 years in northern California under conditions of anonymity and isolation from school authorities. Their data are summarized in Table 1. In this study of almost 1,300 predominantly white tenth graders, 20% of the boys and 26% of the girls indicated that they had at least experimented with clove cigarettes, and about 1% of each smoked them on a daily or near-daily basis. Among adolescents who use one or more substances daily, about 12% smoked clove cigarettes.

In the absence of meaningful data beyond consumption patterns, we might expect that clove cigarettes would engage young smokers in the habit more easily than conventional cigarettes. The exotic appeal, strong aroma, and peer interest in the product would be factors, especially given the early image of clove cigarettes as a healthy alternative to conventional cigarettes. The clove cigarette is nearly ideal in design as a 'trainer' cigarette for capturing young people as smokers."<sup>717</sup>

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<sup>715</sup> At paragraph 591 of its Report in *US/Canada – Continued Suspension*, the Appellate Body clarified the standard of review applicable in the context of Article 5.1 of the *SPS Agreement*:

"The Appellate Body has observed that a WTO Member may properly base an SPS measure on *divergent or minority views*, as long as these views are from *qualified and respected sources*. This must be taken into account in defining a panel's standard of review. Accordingly, a panel reviewing the consistency of an SPS measure with Article 5.1 of the *SPS Agreement* must, first, identify the scientific basis upon which the SPS measure was adopted. This scientific basis need not reflect the *majority view within the scientific community* but may reflect divergent or minority views. Having identified the scientific basis underlying the SPS measure, the panel must then verify that the scientific basis comes from a *respected and qualified source*. Although the scientific basis need not represent the majority view within the scientific community, it must nevertheless have *the necessary scientific and methodological rigour to be considered reputable science*. ..." (emphasis added, footnotes omitted)

<sup>716</sup> CDC, "Epidemiologic Notes and Reports Illnesses Possibly Associated with Smoking Clove Cigarettes," *MMRW Weekly*, 34(21), 297-9 (May 31, 1985) (Exhibit US-37) p. 3 of 4.

<sup>717</sup> Guidotti et al, "Clove Cigarettes: the Basis for Concern Regarding Health Effects," *The Western Journal of Medicine* (August 1989) (Exhibit US-38) pp. 221, 225-226.

7.404 A 1992 study published in the same medical journal states that:

"Clove cigarettes are sweetly aromatic, and some numbing of the mouth occurs. The effect is to remove much of the unpleasantness of cigarette smoking for new smokers. They have been called 'trainer' cigarettes.

...

Of equal concern has been the potential for conditioning smoking behaviour among adolescents. Clove cigarettes are a less noxious smoking habit because of their acceptable taste and an aesthetic effect on mucous membranes that lessens discomfort. The habit has been associated with many social trends important among adolescent peer groups: new wave music, 'natural' and herbal products, athletic activity (surfing), exoticism (Indonesian names and brightly colored packages), and parental unawareness (until widespread publicity focused attention on the fad). As such, clove cigarettes may represent a dangerous potential for initiating previously inexperienced smokers to the habit."<sup>718</sup>

7.405 A 1991 study authored by the Committee on Substance Abuse of the American Academy of Pediatrics, and published in the journal *Pediatrics*, concludes that:

"Clove cigarettes should be suspected as a gateway drug because of their properties and the manner in which they are smoked. Because the eugenol in the clove cigarette acts as a topical anesthetic to the posterior oropharynx, it reduces the noxious elements of smoking. Thus it may facilitate the learning of smoking techniques, both regular inhalation and the deep inhalation toking technique used in marijuana smoking. In addition, the aroma and mystique of the use of clove cigarettes have made them very popular among those nondrug-using adolescents who are seeking to be accepted by and participate in the experiences of a drug-using peer group."<sup>719</sup>

7.406 A 2003 publication of the National Institute on Drug Abuse states that:

"Clove cigarettes are sometimes referred to as 'trainer cigarettes' and may serve as 'gateway' products that introduce young people to smoking. The Monitoring the Future (MTF) survey, conducted by the University of Michigan's Institute for Social Research and funded by NIDA, tracks 8th-, 10th-, and 12th-graders' drug use, including use of tobacco products. In 2002, prevalence of clove cigarette smoking in the past year was 2.6 percent for 8th-graders, 4.9 percent for 10th-graders, and 8.4 percent for 12th-graders."<sup>720</sup>

7.407 Another 2003 study, published in the journal *Pharmacology Biochemistry and Behavior*, states that:

"In fact, clove cigarettes are referred to as 'trainer cigarettes,' implying that the use of clove cigarettes may prove to be a gateway product to conventional cigarettes (American Academy of Pediatrics Committee on Substance Abuse, 1991; Guidotti

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<sup>718</sup> Guidotti & Laing, "Clove Cigarettes," *The Western Journal of Medicine* (August 1992) (Exhibit US-41) pp. 537, 538.

<sup>719</sup> Committee on Substance Abuse, "Hazards of Clove Cigarettes," *Pediatrics*, Vol 88, (1991) (Exhibit US-43) pp. 395-396 (citing, inter alia, Guidotti, et al, "Clove Cigarettes: the Basis for Concern Regarding Health Effects," *The Western Journal of Medicine* (August 1989)).

<sup>720</sup> Susan Farrer, "Alternative Cigarettes May Deliver More Nicotine Than Conventional Cigarettes," *National Institute on Drug Abuse (NIDA) Notes*, Vol. 18, No. 2 (August 2003) (Exhibit US-42).

and Laing, 1992). A significant proportion of young smokers in the United States use clove cigarettes. A 1999 national survey found that 1.9% of middle school students and 5.8% of high school students currently smoked clove cigarettes (CDCP, 2000)."<sup>721</sup>

7.408 A 2005 article published in the journal *Health Affairs* observes that:

"Internally, the appeal of flavored cigarettes has long been associated with specific consumer populations, particularly young and novice smokers. For example, Brown and Williamson's (B&W's) consumer research in 1984 revealed notable agreement among respondents that flavored cigarettes would be much more popular among young and inexperienced smokers.

[F]lavoured cigarettes can promote youth initiation and help young occasional smokers to become daily smokers by reducing or masking the natural harshness and taste of tobacco smoke and increasing the acceptability of a toxic product. ... in addition to promoting public awareness and taking action at the community level in response to youth-targeted products, policymakers should support legislation prohibiting manufacturers from adding these candylike flavors to tobacco products."<sup>722</sup>

7.409 A 2006 study published in the *American Journal of Public Health* states that:

"Recent studies show that the 3 flavored products are being used primarily by young people. In surveys conducted in 2004, as many as 20% of smokers 17 to 19 years old had used flavored cigarettes in the last 30 days, whereas only 6% of smokers older than 25 were found to have smoked one of the 3 flavored lines. Use was highest for 17-year-olds (19.6%) and 18- to 19-year-olds (20.2%) and lowest for smokers older than 40. ... These data raise significant concerns regarding the implications of these products for smoking among youths and young adults.

Although we agree that these products are indeed enticing to youths and at the very least are being marketed with them in mind, in this discussion we will focus on the tobacco industry's stated target population of adults, principally young adults, who serve as role models for youths. ... Targeting young adults may be perceived as doubly beneficial in that it both captures 18- to 24-year-olds and indirectly influences teens, who may seek to emulate their older peers.

Although much of the controversy over these flavored cigarettes has centered on their potential to encourage experimentation (while masking the taste of the tobacco) among nonsmokers, smoking initiation is not the only behavior they may influence. The products discussed here offer a variety of tempting tastes and smells that may

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<sup>721</sup> Malson, *et al.*, "Clove Cigarette Smoking: Biochemical, Physiological, and Subjective Effects," *Pharmacology Biochemistry and Behavior* 74(3): 739-45 (February, 2003) (Exhibit US-44) pp. 739-740 (citing American Academy of Pediatrics Committee on Substance Abuse. Hazards of clove cigarettes. *Pediatrics* 1991;88:5- 6; Guidotti TL, Laing L. Clove cigarettes. *West J Med* 1992;156:537- 8; Centers for Disease Control and Prevention (CDCP). Tobacco use among middle and high school students—United States, 1999. *Morb Mortal Weekly Rep* 2000;49:49 – 53.)

<sup>722</sup> Carrie M. Carpenter, *et al.*, "New Cigarette Brands with Flavors that Appeal to Youth: Tobacco Marketing Strategies," *Health Affairs*, Vol. 24, No. 6 (Nov./Dec. 2005) (Exhibit US-40) pp. 1603, 1608 (citing T.G. Sommers, "Topline: Alternate Cigarette Flavors," 18 January 1984, Bates no. 537004281–537004282, [tobaccodocuments.org/bw/163368.html](http://tobaccodocuments.org/bw/163368.html) (23 August 2005); Wayne and Connolly, "How Cigarette Design Can Affect Youth Initiation into Smoking.")



entice current and transitional smokers to continue smoking, derail quitting attempts, and lure those who have quit smoking to take it up again. These, too, are questions that need to be explored.

One provision of recently proposed legislation for the Food and Drug Administration regulation of tobacco calls for banning the use of flavoring other than menthol in cigarettes. Other policies that require plain or generic packaging of tobacco products could limit the appeal of these attractively packaged cigarettes by standardizing tobacco product packaging and design so it is the same from brand to brand. These policies would protect not only youths but also other susceptible target groups such as young adults."<sup>723</sup>

7.410 A 2006 publication of the American Lung Association raises the following concerns:

"[T]he limited data that exists on these new products shows that they are much more popular among younger smokers than older smokers. In 2005, researchers at the Roswell Park Cancer Institute in Buffalo, NY, released the results of several surveys conducted in 2004 that showed that 20 percent of smokers ages 17 to 19 had smoked flavored cigarettes in a 30-day period while only 6 percent of smokers over the age of 25 did. Also, 8.6 percent of ninth graders in Western New York State had tried flavored cigarettes in a 30-day period.

A report from R.J. Reynolds in 1985 stated: 'Sweetness can impart a different delivery taste dimension, which younger adult smokers may be receptive to, as evidenced by their taste wants in other product areas.' A Brown & Williamson report from 1972 suggested consideration of developing cola-flavored and apple-flavored cigarettes. The report also suggested a sweet-flavored cigarette and stated: 'It's a well-known fact that teenagers like sweet products. Honey might be considered.'

[T]he policy solution for candy-flavored cigarettes and other flavored tobacco products is quite simple. To reduce their appeal to children, most flavorings should be eliminated from cigarettes and other tobacco products.

Preliminary survey data show these products to be much more appealing to youth, which should serve as a strong warning to policymakers, since approximately 90 percent of smokers begin before they reach the age of 21."<sup>724</sup>

7.411 Another 2006 study, published in the *Journal of Agricultural and Food Chemistry*, observes that "eugenol, a spicy flavor compound present in clove cigarettes, can act as an anesthetic that numbs the throat, making smoke easier to inhale; hence, clove cigarettes have been referred to as trainer cigarettes".<sup>725</sup>

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<sup>723</sup> Jane Lewis and Olivia Wackowski, "Dealing with an Innovative Industry: A Look at Flavored Cigarettes Promoted by Mainstream Brands," *American Journal of Public Health*, Vol. 96, No. 2 (February 2006) (Exhibit US-33) pp. 244, 247-249.

<sup>724</sup> American Lung Association, Tobacco Policy Trend Alert, From Joe Camel to Kauai Kolada – the Marketing of Candy Flavored Cigarettes, at 1 (July 2005, updated May 2006), <http://slati.lungusa.org/reports/CandyFlavoredUpdatedAlert.pdf> (Exhibit US-35) pp. 2-4.

<sup>725</sup> Stanfill SB, Brown CR, Yan XJ, Watson CH, Ashley DL, "Quantification of Flavor-Related Compounds in the Unburned Contents of Bidi and Clove Cigarettes," *J. Agric. Food Chem.* 2006, 54, 8580-8588 (Exhibit US-46) p. 8581 (citing Guidotti, T. L.; Binder, S.; Stratton, J. W.; Schechter, F. G.; Jenkins, R. A. Clove cigarettes: development of the fad and evidence for health effects. In *Current Topics in Pulmonary Pharmacology and Toxicology*; Hollinger, M. A., Ed.; Elsevier: New York, 1987; Vol. 2, pp 1-23.)

7.412 A 2007 study, published in the journal *Food & Chemical Toxicology*, concludes that "inhalation of eugenol, a known analgesic, may numb the throat of the smoker, allowing an easier initiation into a lifetime of smoking", and observes that:

"Although the US consumption of kreteks dropped in the mid-1980s (Guidotti et al., 1987), recent data suggest that significant kretek use continues. A CDC survey found that 2.7% of high school students across the US smoke kreteks regularly (Allen et al., 2003). Other studies have placed lifetime kretek use as high as 8.9% (Tercyak and Audrain, 2002) and regular usage as high as 2.6% among middle and high school students (Tercyak and Audrain, 2002; Soldz et al., 2003). Among the alternative tobacco products, bidis (cut tobacco, often flavored, rolled in a tendu leaf as a cigarette), cigars, kreteks, and smokeless tobacco, kretek use is second only behind cigar use (Soldz et al., 2003)."<sup>726</sup>

7.413 One of the studies submitted by the United States is a 2007 report by a WHO Study Group entitled "The Scientific Basis of Tobacco Product Regulation".<sup>727</sup> The Study Group was comprised of eleven experts in the field, and was supported by a Secretariat.<sup>728</sup> It was established pursuant to the WHO FCTC. The Study Group recommends that "Regulations should be developed to prohibit manufacturing and marketing of candy-like and exotically flavoured tobacco products targeting young and novice smokers."<sup>729</sup> The Study Group explained that:

"In recent years, tobacco manufacturers have qualitatively changed this practice by introducing a range of flavoured, brand-specific tobacco products including cigarettes, cigars, smokeless tobacco, kreteks (cloves), bidis and waterpipe (hookah) tobacco. The recent production and promotion of flavoured tobacco products is a major public health concern. ... Flavours could entice youths to experiment with tobacco products by masking the natural harshness of smoke. ... Younger and inexperienced smokers are more inclined to try flavoured cigarettes since the enticing flavouring agents suppress the harsh and toxic properties of tobacco smoke, making it more appealing to novices in smoking."<sup>730</sup>

...

[P]ublished research suggests that candy-flavoured additives are a significant factor in attracting young and inexperienced smokers."<sup>731</sup>

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<sup>726</sup> Polzin, *et al.*, "Determination of eugenol, anethole, and coumarin in the mainstream cigarette smoke of Indonesian clove cigarettes," *Food & Chemical Toxicology* 45(10): 1948-53 (October 2007) (Exhibit US-45) (citing Allen, J.A., Vallone, D., Haviland, M.L., Heaton, C., Davis, K.C., Farrelly, M.C., Husten, C.G., Pechacek, T., 2003. Tobacco use among middle and high school students – United States, 2002. *MMWR* 52, 1096–1098; Tercyak, K.P., Audrain, J., 2002. Psychosocial correlates of alternate tobacco produce use during adolescence. *Prevent. Med.* 35, 193–198; Soldz, S., Huyser, D.J., Dorsey, E., 2003. Characteristics of users of cigars, bidis, and kreteks and the relationship to cigarette use. *Prevent. Med.* 37, 250–258.)

<sup>727</sup> World Health Organization, "The Scientific Basis of Tobacco Product Regulation," WHO Technical Report Series 945 (2007) (Exhibit US-113).

<sup>728</sup> World Health Organization, "The Scientific Basis of Tobacco Product Regulation," WHO Technical Report Series 945 (2007) (Exhibit US-113) pp. vii-viii.

<sup>729</sup> World Health Organization, "The Scientific Basis of Tobacco Product Regulation," WHO Technical Report Series 945 (2007) (Exhibit US-113) p. 18.

<sup>730</sup> World Health Organization, "The Scientific Basis of Tobacco Product Regulation," WHO Technical Report Series 945 (2007) (Exhibit US-113) p. 26.

<sup>731</sup> World Health Organization, "The Scientific Basis of Tobacco Product Regulation," WHO Technical Report Series 945 (2007) (Exhibit US-113) p. 100.

7.414 The WHO *Partial Guidelines* reinforce our understanding. As indicated above<sup>732</sup>, these Guidelines, "drawing on the *best available scientific evidence* and the experience of Parties"<sup>733</sup>, show a growing consensus within the international community to strengthen tobacco-control policies through regulation of the content of tobacco products, including additives that increase the attractiveness and palatability of cigarettes. In this regard, the WHO *Partial Guidelines* state that "[r]egulating ingredients aimed at reducing tobacco product attractiveness can contribute to reducing the prevalence of tobacco use and dependence among new and continuing users". They therefore recommend, among other things, that the "[p]arties should regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products".<sup>734</sup> Targeted ingredients include those that are used to increase palatability and among the ingredients that increase palatability listed in the WHO Partial Guidelines are masking agents, such as menthol as well as spices and herbs which include mint and may cover clove.

7.415 In our view, the evidence reviewed above basically speaks for itself: it is not correct, as Indonesia asserts, that the scientific basis for banning clove and/or other flavoured cigarettes consists of a "single line from a single study".<sup>735</sup> Rather, there is extensive scientific evidence supporting the conclusion that banning clove and other flavoured cigarettes could contribute to reducing youth smoking.

7.416 We note that the conclusion arising from the scientific evidence reviewed above is only further reinforced by Indonesia's counter evidence. We find it striking that Indonesia has apparently only been able to find one scientific expert who expresses a contradictory view, and then only in the form of a post to his own web blog (as opposed to peer-reviewed medical or scientific journal).<sup>736</sup>

### Conclusion

7.417 For these reasons, we conclude that Indonesia has failed to demonstrate that the ban on clove cigarettes makes no "material contribution" to the objective of reducing youth smoking. In our view, there is "a genuine relationship of ends and means" between the objective pursued and the measure at issue.<sup>737</sup>

(iv) *Whether Indonesia has demonstrated that there are less-trade restrictive alternative measures that would make an equivalent contribution to the achievement of the objective at the level of protection sought by the United States*

7.418 In *Brazil – Retreaded Tyres*, the Appellate Body explained that if a panel finds that the measure at issue makes a material contribution to the achievement of the objective, the next question is whether there exist alternative measures that are less trade-restrictive and that would provide an equivalent contribution:

"In order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must assess all the relevant factors,

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<sup>732</sup> See paras. 7.229-7.231 above.

<sup>733</sup> WHO *Partial Guidelines*, Section 1.1.

<sup>734</sup> The text of the draft Guidelines, which was adopted without change at the COP, is available online at [http://apps.who.int/gb/fctc/PDF/cop4/FCTC\\_COP4\\_28draft-en.pdf](http://apps.who.int/gb/fctc/PDF/cop4/FCTC_COP4_28draft-en.pdf).

<sup>735</sup> Indonesia's first written submission, para. 99.

<sup>736</sup> Indonesia's first written submission, para. 102; Indonesia's oral statement at the first substantive meeting of the Panel, para. 16 (quoting Dr. Michael Siegel's views expressed in the blog comment "FDA Commissioner Falsely Asserts that Flavored Cigarettes are a Gateway for Teen Smoking; Representative Waxman Also Makes the Same False Claim," Dr. Michael Siegel, available at [www.tobaccoanalysis.blogspot.com](http://www.tobaccoanalysis.blogspot.com), 24 June 2010, (Exhibit IND-37).)

<sup>737</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued. It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken."<sup>738</sup>

7.419 We see nothing in the text, context or purpose of Article 2.2 of the *TBT Agreement* to suggest that a different approach is called for in that provision.

7.420 In this case, Indonesia argues that even if it were the case that the ban on clove cigarettes made a contribution to the objective of youth smoking, less trade-restrictive measures were reasonably available to limit the availability of clove cigarettes to youth.<sup>739</sup> In this regard, Indonesia surveys: (i) the provisions of the FSPTCA that are applicable to menthol and regular cigarettes designed to reduce the ability of cigarette companies to engage in practices that target and attract youth<sup>740</sup>; (ii) the steps that the FSPTCA expressly prevents FDA from taking that would significantly reduce youth smoking and not be particularly trade-restrictive<sup>741</sup>; (iii) certain non-trade restrictive measures in a 2006 consent agreement between R.J. Reynolds and several State Attorneys General concerning new products that health advocates alleged were designed and marketed to attract youth<sup>742</sup>; (iv) non-trade restrictive measures adopted by certain other countries, including Australia and Singapore, to address youth smoking<sup>743</sup>; and (v) various measures set out in the *WHO Framework Convention on Tobacco Control* aimed at preventing cigarette sales to minors.<sup>744</sup>

7.421 In our view, Indonesia has failed to demonstrate that there are less-trade restrictive alternative measures that would make an equivalent contribution to the achievement of the objective at the level of protection sought by the United States.

7.422 First and foremost, we consider that Indonesia has not adequately identified the alternative measure(s) that the United States should have applied. Instead, Indonesia simply lists numerous different measures, mostly in bullet point form. More specifically, Indonesia submits that substituting the ban on clove cigarettes with the following less trade-restrictive measures<sup>745</sup> would make an equivalent contribution at the level of protection sought by the United States:

- banning all outdoor tobacco advertising within 1,000 feet of schools and playgrounds<sup>746</sup>;
- banning all remaining tobacco-brand sponsorships of sports and entertainment events<sup>747</sup>;
- banning free giveaways of any non-tobacco items with the purchase of a tobacco product<sup>748</sup>;

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<sup>738</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

<sup>739</sup> Indonesia's first written submission, paras. 104-111.

<sup>740</sup> Indonesia's first written submission, para. 106.

<sup>741</sup> Indonesia's first written submission, para. 107.

<sup>742</sup> Indonesia's first written submission, para. 108.

<sup>743</sup> Indonesia's first written submission, para. 109.

<sup>744</sup> Indonesia's first written submission, para. 110.

<sup>745</sup> Indonesia's first written submission, para. 106.

<sup>746</sup> Indonesia's first written submission, para. 106.

<sup>747</sup> Indonesia's first written submission, para. 106.

- limiting to black-and-white text only advertising in publications with significant teen readership, as well as outdoor and point-of sale advertising except in adults-only facilities<sup>749</sup>;
- restricting vending machines and self-service displays to adult-only facilities<sup>750</sup>;
- requiring retailers to verify age for all over-the-counter sales and providing for federal enforcement and penalties against retailers who sell to minors<sup>751</sup>;
- raising the legal age to buy tobacco products to 19<sup>752</sup>;
- restricting the sales of cigarettes to adult-only locations<sup>753</sup>;
- a prohibition on the use of fruit-, candy-, or alcoholic beverage-related terms or images in the brand name, packaging, print advertising (other than in an adult-only facility), direct mail or email promotions, and web-based advertising<sup>754</sup>;
- giving the FDA the authority to approve any new tobacco brands, labels, and packaging<sup>755</sup>;
- banning almost all tobacco advertising and prohibited tobacco companies from sponsoring events<sup>756</sup>;
- prohibiting free giveaways of promotion items in conjunction with the purchase of tobacco products<sup>757</sup>;
- limiting the display of tobacco products<sup>758</sup>;
- placing strict requirements on packaging<sup>759</sup>;
- requiring health warnings<sup>760</sup>;
- raising fines for underage smoking<sup>761</sup>;
- preventing certain retailers from selling tobacco products to make them less available to youth, including health-related stores, youth-centric stores such as arcades, and gas stations<sup>762</sup>;

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<sup>748</sup> Indonesia's first written submission, para. 106.

<sup>749</sup> Indonesia's first written submission, para. 106.

<sup>750</sup> Indonesia's first written submission, para. 106.

<sup>751</sup> Indonesia's first written submission, para. 106.

<sup>752</sup> Indonesia's first written submission, para. 107.

<sup>753</sup> Indonesia's first written submission, para. 107.

<sup>754</sup> Indonesia's first written submission, para. 108.

<sup>755</sup> Indonesia's first written submission, para. 108.

<sup>756</sup> Indonesia's first written submission, para. 109.

<sup>757</sup> Indonesia's first written submission, para. 109.

<sup>758</sup> Indonesia's first written submission, para. 109.

<sup>759</sup> Indonesia's first written submission, para. 109.

<sup>760</sup> Indonesia's first written submission, para. 109.

<sup>761</sup> Indonesia's first written submission, para. 109.

<sup>762</sup> Indonesia's first written submission, para. 109.

- revoking the licence of tobacco retailers caught selling to underage buyers on the first offense<sup>763</sup>;
- allowing cigarillos (mini-cigars) to be sold only in packs of 20 instead of 10 to price them out of reach of young buyers<sup>764</sup>;
- banning candy-flavoured cigarettes, but not clove cigarettes<sup>765</sup>;
- banning the sale of tobacco products in any manner by which they are directly accessible, such as store shelves<sup>766</sup>;
- prohibiting the manufacture and sale of sweets, snacks, toys or any other objects in the form of tobacco products that appeal to minors<sup>767</sup>;
- ensuring that tobacco vending machines under its jurisdiction are not accessible to minors and do not promote the sale of tobacco products to minors<sup>768</sup>;
- prohibiting the distribution of free tobacco products to the public and especially minors<sup>769</sup>; and/or
- prohibiting the sale of cigarettes individually or in small packets which increase the affordability of such products to minors.<sup>770</sup>

7.423 In our view, such a mere listing of two dozen possible alternative measures is insufficient to establish a prima facie case. It seems clear enough that each of these measures would be less trade-restrictive than the ban on clove cigarettes. The problem is that the mere listing of two dozen alternative measures without more does not show that such measures would make an equivalent contribution to the achievement of the objective at the level of protection sought by the United States. We further note that Indonesia does not specify whether it is any one of these measures, or some combination of these measures, or all of these measures, that would be the alternative measure(s).

7.424 In addition, each of the alternative measures suggested by Indonesia appears to involve a greater risk of non-fulfilment of the objective of reducing youth smoking, as compared with the outright ban currently in place. In analysing the existence of alternative measures, we are required by the terms of Article 2.2 to take into account "the risks that non-fulfilment would create". Thus, Article 2.2 suggests that if an alternative means of achieving the objective of reducing youth smoking would involve greater "risks of non-fulfilment", this may not be a legitimate alternative. This is consistent with the jurisprudence developed under Article XX(b) of the GATT 1994, pursuant to which the relevant question is, as explained above, whether there is one or more alternative measures that would make an "equivalent" contribution to the achievement of the objective at the level sought. In our view, where an alternative measure would entail a greater risk of non-fulfilment of the objective, it would be difficult to find that it would make an "equivalent" contribution to the achievement of the objective, at the level of protection sought.

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<sup>763</sup> Indonesia's first written submission, para. 109.

<sup>764</sup> Indonesia's first written submission, para. 109.

<sup>765</sup> Indonesia's first written submission, para. 109.

<sup>766</sup> Indonesia's first written submission, para. 110.

<sup>767</sup> Indonesia's first written submission, para. 110.

<sup>768</sup> Indonesia's first written submission, para. 110.

<sup>769</sup> Indonesia's first written submission, para. 110.

<sup>770</sup> Indonesia's first written submission, para. 110.

7.425 However, even if Indonesia's listing of alternative measures is sufficient to establish a prima facie case, we consider that the United States has rebutted it by pointing out that many of the alternative measures proposed by Indonesia are already in place in the United States.<sup>771</sup> In *Brazil – Retreaded Tyres*, the panel rejected a number of the alternative measures proposed by the complainant in that case on the grounds that the proposed alternatives were already partly in place. The Appellate Body upheld the panel's finding that "the possible alternative measures identified by the European Communities to avoid the generation of waste tyres could not 'apply as a substitute' for the Import Ban but are, rather, complementary measures that Brazil *already applies, at least in part*".<sup>772</sup>

7.426 In addition, we consider that Indonesia's reliance upon non-trade restrictive measures to address youth smoking allegedly adopted by certain other countries, including Australia and Singapore, is misplaced. For one thing, Indonesia has only provided some selective references to the practices of a few other countries, and has not made reference to other Members that have banned clove cigarettes. More importantly, however, is that it is not clear that the laws implemented to date by other countries should serve as some kind of benchmark for the United States or any other sovereign WTO Member, particularly where Indonesia has not established the objectives of these foreign measures and at what level those measures fulfil their respective objectives, and whether the objectives of the foreign measures are the same as the U.S. objective and that the foreign countries seek to achieve that objective at the same level the United States does.

7.427 Finally, while a ban on flavoured-cigarettes is not one of the various measures set out in the WHO *Framework Convention on Tobacco Control* itself, we recall that prohibiting the sale of flavoured cigarettes is actually one of the measures that has now been recommended in the WHO *Partial Guidelines*.

7.428 We therefore conclude that Indonesia has failed to demonstrate that the ban on clove cigarettes is "more trade restrictive than necessary" to fulfil its legitimate objective, taking into account the risks that non-fulfilment would create.

(e) Overall conclusion on Indonesia's claim under Article 2.2 of the *TBT Agreement*

7.429 We began by setting out a two-step analysis to structure our examination of Indonesia's claim under Article 2.2 of the *TBT Agreement*. The first step of our analysis was to consider whether the ban on clove cigarettes pursues a "legitimate objective". The second step of our analysis was to consider whether the ban on clove cigarettes is "more trade restrictive than necessary" to fulfil its legitimate objective of reducing youth smoking (taking into account the risks that non-fulfilment would create).

7.430 Under the first step of our analysis, we concluded that (i) Indonesia has demonstrated that the objective of the ban on clove cigarettes is to reduce youth smoking; and (ii) the objective of the ban on clove cigarettes is "legitimate". Thus, we concluded that the ban on clove cigarettes pursues a "legitimate objective" within the meaning of Article 2.2 of the *TBT Agreement*.

7.431 Under the second step of our analysis, we concluded that: (i) the jurisprudence developed under Article XX(b) of the GATT 1994 is relevant to the interpretation of the "more trade-restrictive than necessary" standard in Article 2.2 of the *TBT Agreement*; (ii) Indonesia has not demonstrated that the ban on clove cigarettes exceeds the "level of protection" sought by the United States; (iii) Indonesia has not demonstrated that the ban on clove cigarettes makes no "material contribution" to the objective of reducing youth smoking; and (iv) Indonesia has failed to demonstrate that there are

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<sup>771</sup> United States' first written submission, footnote 316; United States' second written submission, para. 165; United States' response to Panel question No. 109(c).

<sup>772</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 159 (emphasis added).

less-trade restrictive alternative measures that would make an equivalent contribution to the achievement of the objective at the level of protection sought by the United States. Thus, we concluded that Indonesia has failed to demonstrate that the ban on clove cigarettes is "more trade restrictive than necessary" to fulfil its legitimate objective, taking into account the risks that non-fulfilment would create.

7.432 For these reasons, we find that Indonesia has failed to demonstrate that the ban on clove cigarettes imposed by Section 907(a)(1)(A) is more trade-restrictive than necessary to fulfil the legitimate objective of reducing youth smoking, taking account of the risks non-fulfilment would create. Accordingly, we find that Indonesia has failed to demonstrate that Section 907(a)(1)(A) is inconsistent with Article 2.2 of the *TBT Agreement*.

G. WHETHER THE UNITED STATES HAS ACTED INCONSISTENTLY WITH ARTICLE 2.5 OF THE *TBT AGREEMENT*

1. Arguments of the parties

7.433 **Indonesia** claims that by failing to provide a "complete response" to Indonesia's questions contained in document G/TBT/W/323 concerning the justification for Section 907(a)(1)(A), the United States has not complied with its obligation under Article 2.5 of the *TBT Agreement*.<sup>773</sup> At first, Indonesia also includes in its claim of violation the alleged failure of the United States to refer to the terms of Articles 2.2, 2.3, and 2.4 of the *TBT Agreement* in its oral response to Indonesia at the TBT Committee meeting of 5-6 November 2009.<sup>774</sup> However, in response to a question from the Panel, Indonesia conceded that a Member is not required to articulate each article of the *TBT Agreement* by name in its response in order to satisfy the obligations under Article 2.5 of the *TBT Agreement*.<sup>775</sup> Thus, according to Indonesia, the only issue in dispute before the Panel is whether the United States provided an explanation in a timely manner as required pursuant to Article 2.5 of the *TBT Agreement*.<sup>776</sup>

7.434 According to Indonesia, on two occasions<sup>777</sup> after the FSPTCA was signed, but before Section 907(a)(1)(A) entered into force (on 22 September 2009), it requested the United States to answer questions contained in document G/TBT/W/323<sup>778</sup>, aimed at understanding why the

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<sup>773</sup> Indonesia's first written submission, para. 132.

<sup>774</sup> Indonesia's first written submission, para. 132.

<sup>775</sup> Indonesia's response to Panel question No. 68, para. 137.

<sup>776</sup> Indonesia's oral statement at the first substantive meeting of the Panel, para. 163; Indonesia's second written submission, para. 142.

<sup>777</sup> According to Indonesia the first occasion was on 20 August 2009, and the second on 27 August 2009.

<sup>778</sup> The questions were the following:

"Referring to Section 907 of the Family Smoking Prevention and Tobacco Control Act, the Government of Indonesia also requests the United States to address the following questions:

(a) Section 907 prohibits a cigarette or any of its components from containing a natural or artificial flavour (other than tobacco or menthol) or an herb or spice. Why was menthol singled out as the only flavour, herb, or spice excluded from this provision.

(b) We know that clove cigarettes are an important industry in Indonesia. Are clove cigarettes also produced domestically in the United States?

(c) Section 907 further indicates that the prohibition on a natural or artificial flavour, herb or spices applies if it is "a characterizing flavour" of the tobacco product or the tobacco smoke. However, the bill does not define what elements of a cigarette constitute a "characterizing flavour". How does FDA plan to interpret the concept of a "characterizing flavour"?

(d) Cigarettes contain many ingredients other than tobacco. Under Section 907, how will it be possible to distinguish certain "ingredients" from "characterizing flavours"?



United States, under the guise of protecting adolescents from smoking, would ban a type of cigarette adolescents rarely smoke (i.e., clove), and not ban a cigarette "they literally flock to in droves" (i.e., menthol).<sup>779</sup> Indonesia explains that its claim under Article 2.5 of the *TBT Agreement* is not that the United States failed to answer each and every question posed.<sup>780</sup> Indonesia argues that when the United States was asked to explain the "justification" for Section 907(a)(1)(A), the United States was required by Article 2.5 of the *TBT Agreement* to identify the scientific or other evidence supporting the adoption of the measure.<sup>781</sup> Indonesia contends that informing Indonesia that Section 907(a)(1)(A) is meant to protect public health, and particularly the health of young Americans, goes, at most, to the objective of the policy, but it sheds no light on the measure itself and provides no "scientific or technical information" concerning the risks that non-fulfilment of the objective would create.<sup>782</sup>

7.435 Indonesia submits that it never received a complete response from the United States, other than that it would not reverse the ban on clove cigarettes, and that it had identified several risks that clove cigarettes cause to human health.<sup>783</sup> Indonesia argues that the United States concedes that Indonesia asked the United States to "explain the justification" for Section 907(a)(1)(A) within the meaning of Article 2.5 of the *TBT Agreement*.<sup>784</sup>

7.436 Indonesia contends that it "can't be right" that a Member satisfies the obligation under Article 2.5 of the *TBT Agreement* by "simply directing a Member to read the measure for which explanation and justification is sought"<sup>785</sup>. According to Indonesia, if this were the case, Article 2.5 of

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(e) Menthol is an artificial flavour derived from mint, which is clearly an herb or spice. Does the United States believe that menthol cigarettes would fall under the provisions of Section 907 and would be prohibited absent the exception granted in the bill?

(f) Physically, both clove and menthol cigarettes contain tobacco with an herbal flavour additive with soothing properties. The end use of both clove and menthol cigarettes is the same, i.e., both are used to smoke tobacco. Does the United States believe that clove cigarettes and menthol cigarettes are like products?

(g) A primary purpose of the bill, as stated in the bill's finding, is to reduce the incidence of youth smoking. The findings further indicate that additional regulation of tobacco products and tobacco marketing is necessary to prevent under-age youth from obtaining cigarettes. However, the evidence available to us indicates that many more youth smoke menthol cigarettes than clove cigarettes. Are you aware of any data to the contrary that indicate clove cigarettes are used by youth in greater quantities than menthol cigarettes?

(h) The WTO does allow members to take measures to protect human health, but these measures must be based on sound science. Are you aware of any scientific studies that show that clove cigarettes pose a greater health risk than menthol cigarettes?

(i) Several of the other flavoured cigarettes that would be prohibited by Section 907 (e.g., cherry, strawberry, chocolate) were created and marketed to appeal to youth. Clove cigarettes have been sold for decades and are not marketed to youth. Clove cigarettes are sold primarily through speciality tobacco shops. Are you aware of any specific advertising of clove cigarettes that has been viewed as targeting or appealing to youth?

(j) Flavoured cigarettes other than menthol are banned under Section 907. Menthol cigarettes will be subject to study and regulation by the FDA. Why is it necessary to ban other flavours but only necessary to study and regulate menthol cigarettes?"

<sup>779</sup> Indonesia's first written submission, para. 130.

<sup>780</sup> Indonesia's oral statement at the first substantive meeting of the Panel, para. 165.

<sup>781</sup> Indonesia's oral statement at the first substantive meeting of the Panel, para. 169.

<sup>782</sup> Indonesia's oral statement at the first substantive meeting of the Panel, para. 168; Indonesia's second written submission, para. 145; Indonesia's response to Panel question No. 68, para. 138.

<sup>783</sup> Indonesia's first written submission, paras. 130-131.

<sup>784</sup> Indonesia's oral statement at the first substantive meeting of the Panel, para. 163.

<sup>785</sup> Indonesia's oral statement at the first substantive meeting of the Panel, para. 170.

the *TBT Agreement* would be largely without meaning.<sup>786</sup> Indonesia argues that the FSPTCA and its legislative history did not provide the scientific and other evidence that Indonesia sought.<sup>787</sup>

7.437 Indonesia argues that Section 907(a)(1)(A) has had a significant effect on its trade, because more than six million Indonesians depend on clove cigarette production, and that in 2008 alone it exported more than USD 15 million in clove cigarettes to the United States.<sup>788</sup> Indonesia submits that it was prejudiced by the failure of the United States to explain the justification for Section 907(a)(1)(A) because it undermined the ability of Indonesia to provide a fact-based rebuttal to any specific concerns related to clove cigarettes during the legislative process.<sup>789</sup> According to Indonesia, not knowing the scientific or technical justifications for the measure or the views of the United States concerning the risks of non-fulfilment of the measure, left Indonesia to guess what such concerns might be. Indonesia argues that the refusal of the United States to provide the information pursuant to Article 2.5 of the *TBT Agreement* gives the impression that no such information exists. Indonesia "suspects" that if the United States had information indicating that clove cigarettes were luring youth to smoke in significant numbers, the United States would have been more than willing to share it.<sup>790</sup>

7.438 The **United States** submits that Indonesia never invoked Article 2.5 of the *TBT Agreement*, nor requested an explanation of the justification for Section 907(a)(1)(A) in terms of the provisions of Articles 2.2 to 2.4.<sup>791</sup> For the United States, it is thus "not surprising" that in response to the request for an explanation by Indonesia, the United States did not refer to such provisions.<sup>792</sup> In addition, the United States submits that, contrary to Indonesia's contention, it has fully explained the justification for Section 907(a)(1)(A)<sup>793</sup>, and that Indonesia has failed to show that the United States acted inconsistently with the obligation of Article 2.5, first sentence, of the *TBT Agreement*.<sup>794</sup>

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<sup>786</sup> Indonesia's oral statement at the first substantive meeting of the Panel, para. 170; Indonesia's second written submission, para. 145.

<sup>787</sup> Indonesia's oral statement at the first substantive meeting of the Panel, para. 170.

<sup>788</sup> Indonesia's first written submission, para. 129.

<sup>789</sup> Indonesia's second written submission, para. 145; Indonesia's response to Panel question No. 70.

<sup>790</sup> Indonesia's response to Panel question No. 70, para. 143.

<sup>791</sup> United States' oral statement at the second substantive meeting of the Panel, para. 87.

<sup>792</sup> United States' oral statement at the second substantive meeting of the Panel, para. 87.

<sup>793</sup> United States' first written submission, paras. 282-283.

<sup>794</sup> United States' first written submission, para. 285. The minutes of the November 2009 TBT Committee meeting read as follows:

"The representative of the United States indicated that the United States was not going to reverse the ban on clove cigarettes given the high priority the Obama Administration placed on protecting the health of Americans, especially youth. U.S. health authorities support a ban on clove cigarettes to protect the public health. He noted that clove cigarettes were particularly appealing to youth and represented a 'starter product' that could lead to the use of regular cigarettes. In particular, he stressed that clove cigarettes made it easier for new smokers to start smoking by masking the harshness of cigarette smoke and, like other banned fruit flavours, could ease the transition to addiction. Evidence also indicated that clove cigarettes could pose a range of additional health risks over conventional cigarettes. With regard to the allegation of discrimination, the U.S. representative noted that substantial differences related to consumption, use patterns, and epidemiology existed between clove and menthol cigarettes, which made the two situations not comparable. He noted that the U.S. Food and Drug Administration (FDA) had established a Scientific Advisory Committee that would support additional studies of menthol cigarettes before deciding an appropriate public health action. His delegation was open to further discussing the issue with Indonesia, so that Indonesian regulators could better understand the scientific basis for the U.S. action."

TBT Committee, *Minutes of the Meeting 5-6 November 2009*, G/TBT/M/49, at para. 7 (December 2009). United States' first written submission, para. 281.

7.439 The United States argues that Article 2.5 of the *TBT Agreement* only requires a Member to explain its justification for a technical regulation when another Member inquires about the measure, and does not require the responding Member to answer "every specific detailed question" that it receives, including questions that do not relate to Articles 2.2, 2.3, or 2.4 of the *TBT Agreement*.<sup>795</sup> According to the United States, Indonesia is also incorrect in holding that Article 2.5 of the *TBT Agreement* requires importing Members to provide, essentially, "a full legal analysis" of each element and to provide the exporting Member with all the related scientific data.<sup>796</sup>

7.440 The United States submits that it has complied with Article 2.5 of the *TBT Agreement* by explaining to Indonesia the objectives and justification of Section 907(a)(1)(A) on at least three occasions. It recalls that in meeting its obligation, the United States first held a bilateral discussion with Indonesia in Geneva on 27 August 2009. The U.S. authorities met again with the Indonesian Ambassador to discuss Indonesia's concerns the week after that meeting among trade ministers in India. Finally, the delegations of the respective countries discussed the issue again at the November 2009 TBT Committee meeting.<sup>797</sup> According to the United States, the minutes of that meeting<sup>798</sup> contain the indication of the United States' representative that, given the high priority the Obama Administration placed on protecting the health of Americans (especially youth), the ban on clove cigarettes was not going to be reversed. As explained at the meeting, it argues, clove cigarettes are particularly appealing to youth and represent a "starter product" that could lead to the use of regular cigarettes. In particular, clove cigarettes make it easier for new smokers to start smoking. The United States also argues that, at that meeting, its representative explained that existing evidence indicates that clove cigarettes could pose a range of additional health risks over conventional cigarettes.<sup>799</sup>

7.441 Additionally, the United States asserts that the FSPTCA provides a full justification of the measure in the initial sections of the law, which is further supplemented in its legislative history.<sup>800</sup> According to the United States, the explanation of the FSPTCA, its purposes and legislative history are now and have been readily available.<sup>801</sup> The United States maintains that Indonesia is incorrect in arguing that Article 2.5 of the *TBT Agreement* would be rendered largely without meaning if the explanation provided in the text of the measure itself and the legislative history of Section 907(a)(1)(A) could be considered in evaluating whether a Member has met its obligation pursuant to Article 2.5 of the *TBT Agreement*.<sup>802</sup> The United States argues that the fact that much of the information Indonesia claims to need was "already readily available" – and "no doubt reviewed by Indonesia" – "certainly is relevant" to the claim of Indonesia.<sup>803</sup>

7.442 The United States contends that Indonesia is wrong when claiming that it has suffered prejudice.<sup>804</sup> According to the United States, Indonesia had ample opportunity, and, as far as the United States is aware, took full advantage of that, to express its views to the officials of the U.S. Government. The United States argues that the language of Section 907(a)(1)(A) was basically unchanged from when it was drafted in 2004, and it had been well-known for some time that part of its underlying aim was to eliminate those products that appeal to young people. The United States

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<sup>795</sup> United States' first written submission, para. 279. United States' oral statement at the second substantive meeting of the Panel, para. 87.

<sup>796</sup> United States' oral statement at the second substantive meeting of the Panel, para. 88.

<sup>797</sup> United States' first written submission, para. 280.

<sup>798</sup> TBT Committee, *Minutes of the Meeting 5-6 November 2009*, G/TBT/M/49, at para. 7 (December 2009).

<sup>799</sup> United States' first written submission, para. 281.

<sup>800</sup> United States' first written submission, paras. 282-283.

<sup>801</sup> United States' oral statement at the second substantive meeting of the Panel, para. 85.

<sup>802</sup> United States' oral statement at the second substantive meeting of the Panel, paras. 89-90.

<sup>803</sup> United States' oral statement at the second substantive meeting of the Panel, para. 90.

<sup>804</sup> United States' oral statement at the second substantive meeting of the Panel, para. 86.

contains that if Indonesia considered that there was a lack of scientific evidence supporting the ban, it had the opportunity to provide fact-based arguments on that issue.<sup>805</sup>

7.443 Thus, in the United States' view, Indonesia's Article 2.5 claim amounts to nothing more than an expression of Indonesia's dissatisfaction with the explanation provided by the United States.<sup>806</sup>

## 2. Analysis by the Panel

### (a) Introduction

7.444 The question before the Panel is therefore whether the United States has failed to explain the justification for Section 907(a)(1)(A) upon Indonesia's request, in terms of Articles 2.2, 2.3 and 2.4 of the *TBT Agreement*, as required by Article 2.5 of the *TBT Agreement*. According to Indonesia, the only issue in dispute before the Panel in this respect is whether the United States provided an explanation in a timely manner as required pursuant to Article 2.5 of the *TBT Agreement*.<sup>807</sup>

7.445 As with other provisions in the present dispute, we face an issue of first impression since there are no prior Appellate Body or panel reports that have interpreted Article 2.5 of the *TBT Agreement*. We shall therefore commence by examining the legal provision at issue to ascertain the applicable legal test.

### (b) The legal provision at issue

7.446 Article 2.5 of the *TBT Agreement* provides as follows:

"A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade."

7.447 We note that Article 2.5 contains two sentences: a first sentence regarding the explanation that Members are to provide, at the request of another Member, about the justification for their technical regulations; and a second sentence, which establishes a rebuttable presumption of compliance with the first sentence of Article 2.2 for those technical regulations that are prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in Article 2.2, and that are in accordance with relevant international standards. Indonesia's claim under Article 2.5 of the *TBT Agreement* is in respect only of the first sentence.

7.448 Article 2.5, first sentence, of the *TBT Agreement* thus obliges any Member preparing, adopting or applying a technical regulation that may have a significant effect on trade of other Members to explain, upon the request of another Member, the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4 of Article 2 of the *TBT Agreement*.

7.449 We observe that Article 2.5 of the *TBT Agreement*, first sentence, includes four elements that must be present: (i) the Member in question is "preparing, adopting or applying a technical

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<sup>805</sup> United States' oral statement at the second substantive meeting of the Panel, para. 91.

<sup>806</sup> United States' first written submission, para. 284.

<sup>807</sup> Indonesia's oral statement at the first substantive meeting of the Panel, para. 163; Indonesia's second written submission, para. 142.

regulation"; (ii) this measure "may have a significant effect on trade of other Members"; (iii) there is a "request of another Member"; and (iv) the Member in question is to "explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4" of Article 2.

7.450 Rather than following the order of appearance of those elements in the first sentence of Article 2.5 of the *TBT Agreement*, in our view, the threshold question to which we should respond is whether Indonesia actually *requested* the United States to explain the justification for Section 907(a)(1)(A) in terms of the provisions of paragraphs 2 to 4 *pursuant to* the first sentence of Article 2.5 of the *TBT Agreement*. Indeed, in the absence of such a request, the obligation to explain the justification for Section 907(a)(1)(A) would not be triggered.

(c) Whether Indonesia requested the United States to provide an explanation for Section 907(a)(1)(A) pursuant to Article 2.5, first sentence, of the *TBT Agreement*

7.451 We therefore proceed with our analysis by first examining whether Indonesia has requested the United States to provide an explanation of the justification for Section 907(a)(1)(A) pursuant to Article 2.5, first sentence, of the *TBT Agreement*.

7.452 Indonesia argues that it submitted questions to the United States on two occasions after the FSPTCA was signed, but before the Section 907(a)(1)(A) entered into force on 22 September 2009.<sup>808</sup> Indonesia alleges that the first time it requested an explanation of the justification for Section 907(a)(1)(A) was on 17 August 2009. On that date, Indonesia submitted a series of questions to the United States in document G/TBT/W/323, circulated on 20 August 2009, through the TBT Committee. The second occasion was during informal bilateral discussions held on 27 August 2009 in Geneva, where Indonesia submitted essentially the same questions to the United States that were contained in document G/TBT/W/323.<sup>809</sup> After Section 907(a)(1)(A) entered into force, Indonesia again expressed its concerns through its questions in document G/TBT/W/323 at the TBT Committee meeting of 5-6 November 2009.<sup>810</sup>

7.453 The United States responds that Indonesia never invoked Article 2.5 of the *TBT Agreement* nor requested an explanation of the justification for Section 907(a)(1)(A) in terms of the provisions of Articles 2.2 to 2.4.<sup>811</sup> At the same time, the United States maintains that it acted consistently with Article 2.5, explained the objectives and provided a justification for the measure's enactment.<sup>812</sup>

7.454 We note that the document G/TBT/W/323 to which Indonesia refers commences with a lengthy explanation of why Indonesia believes Section 907(a)(1)(A) is inconsistent with a number of provisions of the covered agreements. In this respect, we note that Indonesia refers to Articles 2, 3, 5, and 7 of the *SPS Agreement*, Articles 2 and 12 of the *TBT Agreement*, and Articles III and XXIII of the GATT 1994.

7.455 As the United States points out, there is no mention of Article 2.5 of the *TBT Agreement* in document G/TBT/W/323. There is also no request to the United States "to explain the justification for [Section 907(a)(1)(A)] in terms of Articles 2.2 to 2.4 of the *TBT Agreement*".

7.456 In the absence of any reference to Article 2.5 of the *TBT Agreement* or even to a request for justification for Section 907(a)(1)(A) "in terms of Articles 2.2 to 2.4 of the *TBT Agreement*", especially when coupled with specific, express references to numerous other provisions of other

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<sup>808</sup> Indonesia's first written submission, para. 130.

<sup>809</sup> Indonesia's first written submission, para. 130.

<sup>810</sup> Indonesia's first written submission, para. 131.

<sup>811</sup> United States' oral statement at the second substantive meeting of the Panel, para. 87.

<sup>812</sup> United States' first written submission, para. 280.

covered agreements such as the *SPS Agreement*, it is conceivable that the United States would not have understood that Indonesia's questions in document G/TBT/W/323 constituted a request pursuant to the first sentence of Article 2.5 of the *TBT Agreement*.

7.457 We shall nevertheless examine the substance of the questions themselves to ascertain whether the United States could have understood that they constituted a request pursuant to the first sentence of Article 2.5 of the *TBT Agreement*. In other words, we will consider whether Indonesia implicitly imposed the request pursuant to Article 2.5. We will do so by looking at whether the subject matter of the questions at issue pertain to issues regulated through paragraphs 2 to 4 of Article 2 of the *TBT Agreement*. Thus it may be useful to recall the wording of these paragraphs:

"2.2 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. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

2.3 Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."

7.458 Given the facts of the present dispute and the absence of any "relevant international standards", paragraph 4 would not appear to be of any relevance.<sup>813</sup> The same seems to be the case with paragraph 3 as it deals with the maintenance of a measure in the light of changed circumstances and objectives, and Indonesia is complaining about the alleged lack of an answer by the United States concerning a measure that had not yet entered into force (the first two occasions when questions were posed) or that had just entered into force (the third occasion mentioned by Indonesia). Accordingly, on the basis of the arguments and evidence provided by the parties, the only paragraph that would be relevant to an explanation by the United States of the justification for Section 907(a)(1)(A) would be paragraph 2.

7.459 We note that a number of questions posed by Indonesia appear to be unrelated to Article 2.2 of the *TBT Agreement*. For example, question (f) asks about "like products", which pertains to Article 2.1 of the *TBT Agreement*. We recall that Indonesia argues in document G/TBT/W/323 the inconsistency of Section 907(a)(1)(A) with a number of provisions of the *SPS Agreement* and the GATT 1994. The questions posed thus not only do not relate exclusively paragraphs 2 to 4 of Article 2 of the *TBT Agreement*, but relate to provisions in other covered agreements.

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<sup>813</sup> In response to a question from the Panel, both parties agreed that there is no relevant "international standard" within the meaning of the second sentence of Article 2.5 of the *TBT Agreement*. Indonesia's and United States' responses to Panel question No. 59.

7.460 Taking into account the fact that the questions at issue relate to various issues regulated by provisions of the covered agreements other than Article 2.2 of the *TBT Agreement*, together with the absence of any reference Article 2.5 of the *TBT Agreement* or even to a request for an explanation for the justification for Section 907(a)(1)(A) "in terms of Articles 2.2 to 2.4 of the *TBT Agreement*", we conclude that Indonesia did *not* make a request pursuant to the first sentence of Article 2.5 of the *TBT Agreement* through its questions in document G/TBT/W/323.

(d) Conclusion

7.461 The Panel therefore finds that Indonesia did not request the United States to explain the justification for Section 907(a)(1)(A) "in terms of Articles 2.2 to 2.4 of the *TBT Agreement*" through its questions in document G/TBT/W/323. Thus one of the necessary elements of Article 2.5 is missing.

7.462 We note that in addition to claiming that Indonesia did not invoke Article 2.5 of the *TBT Agreement*, the United States says that it complied with Article 2.5 and that it did provide the required information. Given our finding that the United States was not required to provide the explanation referred to in Article 2.5, it is not strictly speaking necessary for this Panel to consider whether the United States would have been in compliance had the request under Article 2.5 in fact been made by Indonesia. Having said that, we note that the United States did in fact provide an explanation<sup>814</sup> with respect to the enactment of Section 907(a)(1)(A) at the TBT Committee Meeting in November 2009 in response to Indonesia's request in document G/TBT/W/323.

7.463 Accordingly, we find that Indonesia has failed to demonstrate that the United States acted inconsistently with Article 2.5 of the *TBT Agreement*.

H. WHETHER THE UNITED STATES HAS ACTED INCONSISTENTLY WITH ARTICLE 2.8 OF THE *TBT AGREEMENT*

1. Arguments of the parties

7.464 **Indonesia** claims that Section 907(a)(1)(A) is inconsistent with Article 2.8 of the *TBT Agreement*. In particular, Indonesia argues that Article 2.8 of the *TBT Agreement* requires Members to provide "a certain level of specificity" in their technical regulations<sup>815</sup>, and that Section 907(a)(1)(A) "lacks the specificity required" by the *TBT Agreement*.<sup>816</sup>

7.465 Indonesia notes that the FSPTCA provides no definition of "characterizing flavour" for purposes of the ban, or any further explanation of what constitutes a "characterizing flavour" in either the FDA Guidance or in the public notice announcing its enforcement of Section 907(a)(1)(A).<sup>817</sup> Indonesia observes that many ingredients are used to create the taste and flavour of cigarettes, including in cigarettes that are not marketed as "flavoured".<sup>818</sup> The FSPTCA enumerates no performance-based standard for its ban other than the use of the general descriptor "characterizing flavour".<sup>819</sup> Indonesia explains that there is an established process for determining the thresholds at which flavours can be detected (set forth in "ASTM E679 - 04 "Standard Practice for Determination of Odor and Taste Thresholds By a Forced-Choice Ascending Concentration Series Method of Limits"), and argues that a "performance" standard could use this established method to determine the concentrations of flavours that reach a threshold where they are recognizable by taste and odour and

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<sup>814</sup> See footnote 794.

<sup>815</sup> Indonesia's first written submission, para. 134.

<sup>816</sup> Indonesia's first written submission, para. 10.

<sup>817</sup> Indonesia's first written submission, para. 135.

<sup>818</sup> Indonesia's first written submission, para. 135.

<sup>819</sup> Indonesia's first written submission, para. 136.

are, thus, "characterizing".<sup>820</sup> Indonesia argues that in the absence of a performance-based standard, it is impossible for manufacturers to know at what point the use of flavouring is considered to be "characterizing".<sup>821</sup> Since an established, performance-based standard for evaluating sensory thresholds regarding odour and taste exists, Indonesia considers that it is "appropriate" to expect that it be used.<sup>822</sup>

7.466 The **United States** notes that Indonesia's underlying argument regarding its claim under Article 2.8 of the *TBT Agreement* is that Section 907(a)(1)(A) is "vague"<sup>823</sup>. The United States submits that this argument is "both incorrect, and unrelated to the application of Article 2.8", and notes that the United States "fails to understand how such an argument is relevant" to this provision.<sup>824</sup> In the United States' view, Article 2.8 "does not obligate the Members to set requirements that are as specific as possible".<sup>825</sup> The United States further argues that it is "entirely specious" for Indonesia to imply that its producers do not know whether the measure bans their product.<sup>826</sup>

7.467 The United States does not dispute that Section 907(a)(1)(A) is structured in terms of "descriptive" characteristics, rather than in terms of "performance".<sup>827</sup> However, the United States notes that Indonesia carries the burden of establishing a breach of Article 2.8, and has not provided one example of how the measure could be written in terms of performance, nor provided one reason why it would be "appropriate", within the meaning of Article 2.8 of the *TBT Agreement*.<sup>828</sup> According to the United States, the standard referred to by Indonesia clarifies what concentration of an additive is needed to give the product a characterizing flavour of that additive, and thus would not be a performance standard – it is not a standard as to how a cigarette is to perform.<sup>829</sup>

## 2. Analysis by the Panel

### (a) Introduction

7.468 The main question before the Panel is whether the United States has acted inconsistently with Article 2.8 of the *TBT Agreement* by failing to specify Section 907(a)(1)(A) in terms of performance.

7.469 The United States does not dispute that Section 907(a)(1)(A) is specified in terms of "design or descriptive characteristics", and not in terms of "performance".<sup>830</sup> Rather, the arguments of the parties focus on two other issues. The first is whether, as Indonesia argues, Article 2.8 of the *TBT Agreement* obliges Members to provide "a certain level of specificity" in their technical regulations. The second is whether it would be "appropriate" to specify the ban on clove cigarettes in terms of performance, rather than design or descriptive characteristics.

7.470 The Panel will address these issues in turn. Before doing so, we shall set out the text of the legal provision at issue.

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<sup>820</sup> Indonesia's response to Panel question No. 64, para. 132; Indonesia's second written submission, para. 149.

<sup>821</sup> Indonesia's response to Panel question No. 65, para. 133; Indonesia's oral statement at the first substantive meeting of the Panel, para. 172. Indonesia's second written submission, para. 148.

<sup>822</sup> Indonesia's response to Panel question No. 65, para. 133.

<sup>823</sup> United States' oral statement at the second substantive meeting of the Panel, para. 99.

<sup>824</sup> United States' first written submission, para. 290.

<sup>825</sup> United States' oral statement at the second substantive meeting of the Panel, para. 99.

<sup>826</sup> United States' oral statement at the second substantive meeting of the Panel, para. 93.

<sup>827</sup> United States' first written submission, para. 288.

<sup>828</sup> United States' oral statement at the second substantive meeting of the Panel, paras. 94, 96.

<sup>829</sup> United States' oral statement at the second substantive meeting of the Panel, para. 97.

<sup>830</sup> United States' first written submission, paras. 288-290.



(b) The legal provision at issue

7.471 Article 2.8 of the *TBT Agreement* provides that:

"Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics."

7.472 Although this is not the first case in which a claim under Article 2.8 of the *TBT Agreement* has been raised, there is no substantial jurisprudence relating to Article 2.8 and no prior panel or Appellate Body report addresses the question of what legal test should be applied to establish a violation of Article 2.8.<sup>831</sup> Thus, the Panel is again confronted with issues of first impression.

(c) First issue: whether Article 2.8 obliges Members to provide "a certain level of specificity" in their technical regulations

7.473 Beginning with the first of the two issues identified above, it appears to us that Indonesia reads the requirement that Members specify technical regulations in terms of performance rather than design or descriptive characteristics as obliging Members to provide "a certain level of specificity" in their technical regulations.<sup>832</sup> In its first written submission, Indonesia summarizes its claim under Article 2.8 of the *TBT Agreement* as follows:

"In banning cigarettes with 'characterizing flavors,' [Section 907(a)(1)(A)] lacks the specificity required by the TBT Agreement. Most, if not all, cigarettes sold in the United States contain a variety of ingredients and flavors that are added to the tobacco or filter. Yet, neither the Act nor [Section 907(a)(1)(A)] provide any definition of 'characterizing flavor' or any performance-based standard by which different flavors qualify as 'characterizing.' As such, [Section 907(a)(1)(A)] is inconsistent with Article 2.8 of the TBT Agreement because it bans cigarettes solely on the basis of descriptive characteristics."<sup>833</sup>

7.474 In addressing this issue, we begin with the ordinary meaning of the terms of Article 2.8 of the *TBT Agreement*. When the sentence contained in Article 2.8 of the *TBT Agreement* is read as a whole, the ordinary meaning of this sentence is that it establishes one qualified (i.e., "[w]herever appropriate") obligation to specify technical regulations "*in terms of performance rather than design or descriptive characteristics*", as opposed to a second, additional obligation to "specify" those technical regulations. We consider that if the drafters had intended to establish two separate obligations, then it would be expected that Article 2.8 would have been drafted very differently, for example:

"Wherever appropriate, Members shall specify technical regulations based on product requirements, and shall do so in terms of performance rather than design or descriptive characteristics."

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<sup>831</sup> In *EC – Asbestos*, Canada claimed that the measure at issue in that dispute was inconsistent with Article 2.8 of the *TBT Agreement*. The panel found that the measure at issue was not a "technical regulation", and therefore did not examine Canada's claim under Article 2.8. The Appellate Body reversed the panel and found that the measure was a "technical regulation", but did not go further and examine Canada's claim under Article 2.8. The panel in *EC – Sardines* made a passing reference to Article 2.8 in the context of examining a claim under Article 2.4 of the *TBT Agreement*. Panel Report, *EC – Sardines*, para. 7.81.

<sup>832</sup> Indonesia's first written submission, paras. 10, 134.

<sup>833</sup> Indonesia's first written submission, para. 10.

7.475 Alternatively, Article 2.8 of the *TBT Agreement* could have been separated into two sentences in order to reflect two separate obligations, so as to read,

"Wherever appropriate, Members shall specify technical regulations based on product requirements. Members shall further ensure that such technical regulations are specified in terms of performance rather than design or descriptive characteristics."

7.476 The difficulty we have with Indonesia's reading of Article 2.8 of the *TBT Agreement* can be approached from a different angle, which is considering how this provision would read if the verb "specify" were replaced with a different verb, such as "set forth", "stipulate", or "formulate". Using "set forth" as an example, Article 2.8 would then read:

"Wherever appropriate, Members shall ~~specify~~ set forth technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics."

7.477 Under Indonesia's reading of the sentence structure of Article 2.8 of the *TBT Agreement*, replacing the verb "specify" with "set forth" would oblige Members to "set forth technical regulations". Along the same lines, if the verb "specify" were replaced with the essentially synonymous verb "formulate", then under Indonesia's reading of this sentence, this would oblige Members to "formulate technical regulations".

7.478 The Panel notes that the Spanish and French versions of Article 2.8 of the *TBT Agreement* each have the same sentence structure as the English version of this provision.<sup>834</sup> Accordingly, the foregoing considerations apply equally with respect to those versions of the text of Article 2.8.

7.479 In our view, the context of Article 2.8 of the *TBT Agreement* does not support Indonesia's argument that this provision obliges Members to provide "a certain level of specificity" in their technical regulations. Indeed, Indonesia's interpretation of Article 2.8 would give rise to an odd result in the light of the definition of "technical regulation" set forth in Annex 1.1 of the *TBT Agreement*. We recall that the obligations in Article 2 of the *TBT Agreement* only apply to measures that meet the definition of "technical regulation" set forth in Annex 1.1 of the *TBT Agreement*. As explained above, there are several elements that must be satisfied in order for a measure to be characterized as a "technical regulation".<sup>835</sup> Among these is the requirement that the measure must "lay down" product characteristics with which compliance is mandatory. We recall that the Appellate Body has interpreted the term "lays down" to mean "set forth, stipulate or provide".<sup>836</sup> Another element of the definition is that the measure "must apply to an identifiable product or group of products".<sup>837</sup> We also recall that the Appellate Body has explained that this is so because "[o]therwise, enforcement of the regulation will, in practical terms, be impossible".<sup>838</sup>

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<sup>834</sup> The Spanish and French versions of Article 2.8 read as follows:

"En todos los casos en que sea procedente, los reglamentos técnicos basados en prescripciones para los productos serán definidos por los Miembros en función de las propiedades de uso y empleo de los productos más bien que en función de su diseño o de sus características descriptivas."

"Dans tous les cas où cela sera approprié, les Membres définiront les règlements techniques basés sur les prescriptions relatives au produit en fonction des propriétés d'emploi du produit plutôt que de sa conception ou de ses caractéristiques descriptives."

<sup>835</sup> See Section VII.C.

<sup>836</sup> Appellate Body Report, *EC – Asbestos*, para. 67.

<sup>837</sup> Appellate Body Report, *EC – Asbestos*, para. 70.

<sup>838</sup> Appellate Body Report, *EC – Asbestos*, para. 70.

7.480 Accordingly, we are of the view that, in order to reach the question of whether a measure is consistent with Article 2.8 of the *TBT Agreement*, a complaining party must first demonstrate, and a panel must first find, that the measure at issue "lays down" one or more product characteristics, and that the measure applies "to an identifiable product or group of products". Thus, in light of the architecture of the *TBT Agreement*, we have difficulty in accepting that a measure that has been found to meet the definition of a "technical regulation" under Annex 1.1 could then be found to be inconsistent with Article 2.8 on the ground that it does not satisfy the alleged obligation to "specify" product characteristics.<sup>839</sup> Under such an analysis, a panel would first have to find that a measure does "lay down" (i.e., "set forth, stipulate or provide") product requirements that apply "to an identifiable product or group of products", and then a panel would seemingly have to conclude that the measure fails to give particulars or details<sup>840</sup> on these very same matters.

7.481 In our view, the object and purpose of Article 2.8 of the *TBT Agreement* does not support the conclusion that this provision obliges Members to provide "a certain level of specificity" in their technical regulations. In this regard, the Panel sees nothing in Article 2.8 to suggest that the purpose of this provision is to ensure that a "clear distinction between the banned and the allowed product" is drawn.<sup>841</sup> Rather, the object and purpose of Article 2.8 is to avoid the creation of unnecessary obstacles to trade by requiring that product requirements be laid down in functional terms wherever appropriate. For example, an ISO/IEC Directive explains that:

"Whenever possible, requirements shall be expressed in terms of performance rather than design or descriptive characteristics. This approach leaves maximum freedom to technical development. Primarily those characteristics shall be included that are suitable for worldwide (universal) acceptance."<sup>842</sup>

7.482 Along the same lines, a Decision taken by the TBT Committee in 2000 reflects the understanding of WTO Members that:

"In order to serve the interests of the WTO membership in facilitating international trade and preventing unnecessary trade barriers, international standards need to be relevant and to effectively respond to regulatory and market needs, as well as scientific and technological developments in various countries. They should not distort the global market, have adverse effects on fair competition, or stifle innovation and technological development. In addition, they should not give preference to the characteristics or requirements of specific countries or regions when different needs or interests exist in other countries or regions. Whenever possible, international standards should be performance based rather than based on design or descriptive characteristics."<sup>843</sup>

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<sup>839</sup> Indonesia's first written submission, para. 134.

<sup>840</sup> The ordinary meaning of "specify" is "[s]peak or treat of a matter etc. in detail; give details or particulars". *Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2946. See also *Oxford English Dictionary Online*, accessed on 30 April 2011, defining "specify" to mean, among other things, "[t]o speak or make relation of some matter fully or in detail"; *Webster's Online Dictionary*, accessed on 30 April 2011, defining "specify" to mean, among other things, "to name or state explicitly or in detail".

<sup>841</sup> Indonesia's oral statement at the first substantive meeting of the Panel, para. 172.

<sup>842</sup> ISO/IEC Directives, Part 2: Rules for the structure and drafting of International Standards, Fifth edition, 2004, available online at:

[http://www.iso.org/iso/standards\\_development/processes\\_and\\_procedures/drafting\\_standards.htm](http://www.iso.org/iso/standards_development/processes_and_procedures/drafting_standards.htm)

<sup>843</sup> G/TBT/9, Committee on Technical Barriers to Trade, Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, 13 November 2000, Annex 4, para. 10.

7.483 Finally, we observe that Indonesia has not provided the Panel with any legal arguments to support its interpretation of Article 2.8. In response to a question from the Panel asking Indonesia to explain the legal basis for its view that Article 2.8 of the *TBT Agreement* requires Members to provide "a certain level of specificity"<sup>844</sup> in their technical regulations, Indonesia provides a response that could even be understood as acknowledging that Article 2.8 embodies *no* such requirement. In its response, Indonesia refers the Panel to the definition of a "technical regulation" in Annex 1.1 of the *TBT Agreement* and then explains that:

"[A] measure that is a technical regulation sets forth the characteristics of the products it regulates and ipso facto provides a certain level of specificity. All Article 2.8 does is mandate, wherever appropriate, the form in which the product characteristics must be described, inter alia, 'in terms of performance rather than design or descriptive characteristics'."<sup>845</sup>

7.484 We therefore conclude that Article 2.8 of the *TBT Agreement* does not oblige Members to provide "a certain level of specificity"<sup>846</sup> in their technical regulations. It thus follows that the "level of specificity" reflected in Section 907(a)(1)(A) is not relevant to the question of whether this measure is consistent with Article 2.8. Accordingly, we do not need to consider whether the FSPTCA provides a definition of "characterizing flavour" for purposes of the ban, and/or whether the FDA has provided further specification on what constitutes a "characterizing flavour".<sup>847</sup> Insofar as Indonesia's claim under Article 2.8 rests on the argument that Section 907(a)(1)(A) "lacks the specificity required"<sup>848</sup>, then the Panel concludes that Indonesia's claim and argument are misplaced.

(d) Second issue: whether it would be "appropriate" to specify the ban on clove cigarettes in terms of performance, rather than on design or descriptive characteristics

7.485 The Panel now turns to the second main issue in dispute, which is whether it would be "appropriate" to specify the ban on clove cigarettes in terms of "performance", rather than in terms of "design or descriptive characteristics". We recall that Article 2.8 of the *TBT Agreement* sets forth a qualified obligation to specify technical regulations in terms of "performance", rather than in terms of "design or descriptive" characteristics. The obligation is qualified by the words that introduce this sentence, i.e., "[w]herever appropriate...". The Panel will begin by setting out its interpretation of the terms "wherever appropriate" in the context of Article 2.8. The Panel will then consider the question of whether Indonesia has demonstrated that it would be "appropriate" to specify the technical regulation at issue in terms of "performance".

7.486 While there is no jurisprudence relating to the terms "[w]herever appropriate" in the context of Article 2.8 of the *TBT Agreement*, the Panel is mindful that the term "appropriate" appears in numerous other provisions found in the WTO Agreements and that there is substantial and broadly consistent jurisprudence relating to the ordinary meaning of this term.<sup>849</sup> Panels and the Appellate Body have relied upon ordinary dictionary definitions, and given the term "appropriate" its ordinary meaning. For example, the Panel in *Mexico – Telecoms* observed that:

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<sup>844</sup> Indonesia's first written submission, para. 134.

<sup>845</sup> Indonesia's response to Panel question No. 66, para. 136 (emphasis original).

<sup>846</sup> Indonesia's first written submission, para. 134.

<sup>847</sup> Indonesia's first written submission, para. 135.

<sup>848</sup> Indonesia's first written submission, para. 10.

<sup>849</sup> The word "appropriate" has been interpreted in a number of prior panel reports, including but not limited to the following: Panel Report, *Mexico – Telecoms*, paras. 7.265, 7.367-7.368; Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.240-7.241; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.191 and 7.365; Panel Report, *EC – Sardines*, para. 7.116; Panel Report, *US – Steel Plate*, para. 7.72; Panel Report, *Australia – Salmon*, paras. 8.57 and 8.71.

"The word 'appropriate', in its general dictionary sense, means 'specially suitable, proper'. This suggests that 'appropriate measures' are those that are suitable for achieving their purpose."<sup>850</sup>

7.487 Along the same lines, the Panel in *EC – Tube or Pipe Fittings* considered that:

"The ordinary meaning of the term 'appropriate' refers to something which is 'especially suitable or fitting'. 'Suitable', in turn, is defined as 'fitted for or appropriate to a purpose, occasion...' or 'adapted to a use or purpose'. 'Fitting' is defined as 'of a kind appropriate to the situation'. ... The term is consistent with an intent not to prejudge what the circumstances might be in the context of a given case. It is necessary for such appropriateness to be judged on a case by case basis ... There is an element of flexibility, in that there are no predetermined rigid factors, indices, levels or requirements."<sup>851</sup>

7.488 More recently, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body relied on the same dictionary definitions in the context of interpreting the term "appropriate amounts" in Article 19.3 of the *SCM Agreement*:

"Beginning with the term "appropriate amounts", we note that relevant dictionary definitions of the term "appropriate" include "proper", "fitting" and "specially suitable (for, to)".<sup>852</sup> These definitions suggest that what is "appropriate" is not an autonomous or absolute standard, but rather something that must be assessed by reference or in relation to something else."<sup>853</sup>

7.489 We would also observe that in *EC – Sardines*, the Appellate Body agreed with the panel that the term "inappropriate" in the context of Article 2.4<sup>854</sup> of the *TBT Agreement* "refers to something which is not 'specially suitable', 'proper', or 'fitting'", and that the question of appropriateness relates more to the nature of the means employed".<sup>855</sup>

7.490 With regard to the burden of proof, we consider that where a claim under Article 2.8 of the *TBT Agreement* is made, it is the complaining party that carries the burden of demonstrating that it would be "appropriate" (i.e., "proper", "fitting", and "suitable") to specify a particular technical regulation in terms of "performance", rather than in terms of design or descriptive characteristics. This approach is consistent with the general principles governing the burden of proof in WTO dispute settlement proceedings.<sup>856</sup> It is also consistent with the Appellate Body's analysis of the terms "except

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<sup>850</sup> Panel Report, *Mexico – Telecoms*, para. 7.265 (citing *The Shorter Oxford English Dictionary*, 3<sup>rd</sup> edition, (Clarendon Press, 1990), p. 94).

<sup>851</sup> Panel Report, *EC – Tube or Pipe Fittings*, para. 7.240 (citing *Webster's New Encyclopaedic Dictionary* (1994) and *The New Shorter Oxford English Dictionary* (1993)).

<sup>852</sup> (footnote original) *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 106.

<sup>853</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 552.

<sup>854</sup> Article 2.4 of the *TBT Agreement* reads:

"Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations *except when* such international standards or relevant parts would be an ineffective or *inappropriate* means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems." (emphasis added)

<sup>855</sup> Appellate Body Report, *EC – Sardines*, para. 285.

<sup>856</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323 at 335.

when ... inappropriate", in the context of the obligation in Article 2.4 of the *TBT Agreement*, in *EC – Sardines*.<sup>857</sup> We do not understand Indonesia to suggest otherwise.<sup>858</sup>

7.491 Based on the foregoing, we consider that the relevant question before us is whether Indonesia has demonstrated that it would be "proper", "fitting", and "suitable" to formulate the technical regulation in Section 907(a)(1)(A) in terms of "performance".

7.492 Indonesia seeks to discharge its burden by asserting that there is an established process for determining the thresholds at which flavours can be detected, set forth in "ASTM E679 - 04 "Standard Practice for Determination of Odor and Taste Thresholds By a Forced-Choice Ascending Concentration Series Method of Limits".<sup>859</sup> Indonesia argues that a "performance" standard could use this established method to determine the concentrations of flavours that reach a threshold where they are recognizable by taste and odour and are, thus, "characterizing".<sup>860</sup>

7.493 The Panel agrees with the United States that the standard referred to by Indonesia does not demonstrate that the technical regulation set forth Section 907(a)(1)(A) could be written in terms of "performance", let alone that it would be "appropriate" to do so.<sup>861</sup> Leaving aside the question of whether the standard referred to could be applied to cigarettes<sup>862</sup>, it merely purports to provide a particular means of testing for flavour levels. We agree with the United States that an example of a performance requirement would be a technical regulation for chairs, for example, that set a requirement that the chair must support a person of at least 130 kilograms, rather than in terms of the components of the chair (*i.e.*, if made of wood then the wood must be of a certain thickness and the nails must be of a certain length). We also agree with the United States that, rather than transforming the standard in Section 907(a)(1)(A) from one based on "design or descriptive" characteristics to one based on "performance", reliance on this standard referred to would simply provide a particular means of testing whether that standard is met. We further agree with the United States that providing a test of when the standard of the measure written in descriptive terms is met does not mean that it is possible to put the requirement in the fundamentally different terms of performance, nor why it would be "appropriate" to do so. The standard Indonesia refers to would not be a "performance" standard within the meaning of Article 2.8 of the *TBT Agreement* – simply put, it is not a standard as to how a cigarette is to perform (*i.e.*, function<sup>863</sup>).

7.494 The Panel takes note of Indonesia's clarification that it:

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<sup>857</sup> In *EC – Sardines*, the Appellate Body found that the complaining party carries the burden of demonstrating that the "international standard" in question was an "appropriate" means to fulfil the legitimate objectives pursued by the responding Member. Appellate Body Report, *EC – Sardines*, paras. 269-282.

While the obligations in Articles 2.8 and 2.4 of the *TBT Agreement* are obviously different from one another, an element that is common to both provisions is that the two obligation are qualified in essentially the same way: the obligation in Article 2.8 is qualified by the terms "[w]herever appropriate", and the obligation in Article 2.4 is qualified by the terms "except when ... inappropriate". These terms are interchangeable with one another, with the only difference being that the first is formulated in positive terms, while the second is formulated in negative terms. Thus, the introductory words to Article 2.8 could be changed to read "[e]xcept when inappropriate, ..." without altering the meaning of the obligation set out therein.

<sup>858</sup> In its response to Panel question No. 4, Indonesia agrees that it carries the burden of proof in respect of all of its claims under the *TBT Agreement*, including its claim under Article 2.8.

<sup>859</sup> <http://www.astm.org/Standards/E679.htm> (Exhibit IND-70).

<sup>860</sup> Indonesia's response to Panel question No. 64, para. 132; Indonesia's second written submission, para. 149.

<sup>861</sup> United States' response to Panel question No. 111, paras. 113-116.

<sup>862</sup> United States' response to Panel question No. 111, para. 114; Indonesia's comments on the United States' response to Panel question No. 111, para. 72.

<sup>863</sup> The Panel notes that the Spanish and French versions of Article 2.8 use the terms "*en función de las propiedades de uso y empleo de los productos*" and "*en fonction des propriétés d'emploi du produit*".

"... does not propose simply to test whether the standard in [Section 907(a)(1)(A)] has been met, as the United States claims .... Indonesia is proposing that the U.S. government could require cigarette manufacturers to use the testing method articulated in ASTM E679 to identify the specific threshold at which a specific flavor used in a cigarette become recognizable in a cigarette and, thus, 'characterizing.' For example if vanilla were identifiable in the taste or aroma of cigarette smoke at a level of 'X,' then [Section 907(a)(1)(A)] would ban cigarettes containing vanilla in levels greater than 'X'. This would be completely consistent with the definition of a 'performance requirement' articulated by the United States ... since it would indicate clearly to manufacturers how a cigarette must perform with respect to flavor in order to be allowed in the U.S. market."<sup>864</sup>

7.495 However, in the Panel's view, this response is simply a reiteration of Indonesia's argument that Article 2.8 of the *TBT Agreement* requires Members to provide "a certain level of specificity" in their technical regulations<sup>865</sup>, and that Section 907(a)(1)(A) "lacks the specificity required" by the *TBT Agreement*.<sup>866</sup> For the reasons already set forth above, the Panel does not agree with this interpretation of Article 2.8.

7.496 We further observe that, insofar as Indonesia is arguing that (i) there is a relevant international standard in existence (i.e., ASTM E679 - 04 "Standard Practice for Determination of Odor and Taste Thresholds By a Forced-Choice Ascending Concentration Series Method of Limits") and that (ii) the United States should have used this relevant international standard as a basis for its technical regulation, its argument actually appears to relate to Article 2.4 of the *TBT Agreement*.<sup>867</sup> In this regard, Indonesia's claim and argument under Article 2.8 of the *TBT Agreement* once again seems misplaced. In making this observation, we are obviously not expressing any view on whether the United States has acted consistently with Article 2.4 given that Indonesia has made no such claim.

7.497 For these reasons, the Panel concludes that Indonesia has not demonstrated that it would be "appropriate" to formulate the technical regulation in Section 907(a)(1)(A) in terms of "performance".

(e) Conclusion

7.498 For these reasons, the Panel finds that Indonesia has failed to demonstrate that Section 907(a)(1)(A) is inconsistent with Article 2.8 of the *TBT Agreement*.

I. WHETHER THE UNITED STATES HAS ACTED INCONSISTENTLY WITH ARTICLE 2.10 OF THE *TBT AGREEMENT*

1. Arguments of the parties

7.499 **Indonesia** claims that, if the United States believed there was a justification for not following the procedures in Article 2.9, the United States violated Article 2.10 of the *TBT Agreement* because it

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<sup>864</sup> Indonesia's comments on the United States' response to Panel question No. 111, para. 73.

<sup>865</sup> Indonesia's first written submission, para. 134.

<sup>866</sup> Indonesia's first written submission, para. 10.

<sup>867</sup> Article 2.4 of the *TBT Agreement* reads:

"Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."

did not provide the Secretariat with the notification of the measure and the urgent nature of the alleged problem.<sup>868</sup> Indonesia argues that the United States concedes that none of the urgent circumstances listed under Article 2.10 of the *TBT Agreement* surrounded the adoption of Section 907(a)(1)(A).<sup>869</sup>

7.500 The **United States** has not put forward any arguments to contest Indonesia's claim under Article 2.10 of the *TBT Agreement*. In response to a question from the Panel, the United States confirmed that it did not notify Section 907(a)(1)(A) to the WTO Secretariat pursuant to Article 2.10.1 of the *TBT Agreement*.<sup>870</sup>

## 2. Analysis by the Panel

### (a) Introduction

7.501 As explained in Section VII.B above, we understand that Indonesia only claims a violation of Article 2.10 of the *TBT Agreement* to the extent that the United States would invoke this provision as a defence to the alleged violation of Article 2.9 of the *TBT Agreement*.<sup>871</sup> To our understanding, the United States has not done so.

7.502 We note that the obligations under Article 2.10 of the *TBT Agreement* are only applicable when a Member *omitted* the steps enumerated in Article 2.9 of the *TBT Agreement* because "urgent problems of safety, health, environmental protection or national security arise or threaten to arise". In our view, the fact that Article 2.10 of the *TBT Agreement* only applies when a Member is departing from the general obligations established in Article 2.9 of the *TBT Agreement* entails that these two provisions have two distinct and separate scopes. Indeed, we see no situation in which a WTO Member's actions would fall within the scope of both obligations at the same time. Either the Member in question follows the general requirements under Article 2.9 of the *TBT Agreement*, or it decides to omit those requirements owing to any of the listed "urgent problems" described in Article 2.10 of the *TBT Agreement*.

7.503 Bearing in mind our mandate to make an objective assessment of the matter before us pursuant to Article 11 of the DSU and the impact that findings under Article 2.10 of the *TBT Agreement* would have on the applicability of the relevant obligations under Article 2.9 of the *TBT Agreement*, we will examine whether the conditions of urgency described in Article 2.10 are present in this dispute. If we find that these conditions are not present, we will continue and examine Indonesia's claims under Articles 2.9.2 and 2.9.3 of the *TBT Agreement*.

### (b) The legal provision at issue

7.504 Article 2.10 of the *TBT Agreement* reads as follows:

"Subject to the provisions in the lead-in to paragraph 9, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 9 as it finds necessary, provided that the Member, upon adoption of a technical regulation, shall:

2.10.1 notify immediately other Members through the Secretariat of the particular technical regulation and the products covered, with a brief indication of the

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<sup>868</sup> Indonesia's first written submission, para. 142.

<sup>869</sup> Indonesia's second written submission, para. 151.

<sup>870</sup> United States' response to Panel question No. 71, para. 150.

<sup>871</sup> WT/DS406/2, p. 2; Indonesia's first written submission, para. 142.



objective and the rationale of the technical regulation, including the nature of the urgent problems;

2.10.2 upon request, provide other Members with copies of the technical regulation;

2.10.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account."

7.505 Accordingly, Article 2.10 of the *TBT Agreement* allows WTO Members to omit the requirements imposed by Article 2.9 of the *TBT Agreement* with respect to proposed technical regulations, where certain urgent problems arise or threaten to arise. We understand Indonesia's claim to be restricted to an alleged failure to comply with the notification requirement under Article 2.10.1 of the *TBT Agreement*, and not to the other obligations embodied in Articles 2.10.2 and 2.10.3 of the *TBT Agreement*.<sup>872</sup>

7.506 A threshold matter to establish the application of the notification obligation imposed by Article 2.10.1 of the *TBT Agreement* is therefore whether urgent problems of safety, health, environmental protection or national security arise or threaten to arise in respect of the adoption of Section 907(a)(1)(A). Indonesia claims that the United States has conceded that none of the urgent circumstances listed under Article 2.10 of the *TBT Agreement* surrounded the adoption of Section 907(a)(1)(A).<sup>873</sup> We note, however, that the United States has kept silent in this respect and, in response to a question from the Panel, simply confirmed that it had not notified Section 907(a)(1)(A) to other Members through the WTO Secretariat pursuant to Article 2.10.1 of the *TBT Agreement*.<sup>874</sup>

(c) Conclusion

7.507 In 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), we can only conclude that these urgent circumstances were not present and that, accordingly, Article 2.10 of the *TBT Agreement* would not be applicable to this dispute. The Panel therefore refrains from further examining Indonesia's claim under Article 2.10 of the *TBT Agreement* and will proceed to examine Indonesia's claims under Articles 2.9.2 and 2.9.3 of the *TBT Agreement*.

J. WHETHER THE UNITED STATES HAS ACTED INCONSISTENTLY WITH ARTICLES 2.9.2 AND 2.9.3 OF THE *TBT AGREEMENT*

1. Arguments of the parties

7.508 **Indonesia** claims that the United States failed to comply with its obligations under Articles 2.9.2 and 2.9.3 of the *TBT Agreement*.<sup>875</sup> It argues that, before adopting Section 907(a)(1)(A), the United States was required to follow the procedures set out in Article 2.9 of the *TBT Agreement*.<sup>876</sup> It considers that those procedures were triggered because: (i) there are no relevant international standards for flavourings in cigarettes; and (ii) Section 907(a)(1)(A) has had a significant effect on the trade of Indonesia.<sup>877</sup>

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<sup>872</sup> Indonesia's first written submission, para. 142.

<sup>873</sup> Indonesia's second written submission, para. 151.

<sup>874</sup> United States' response to Panel question No. 71, para. 150.

<sup>875</sup> Indonesia's first written submission, para. 140.

<sup>876</sup> Indonesia's first written submission, para. 139.

<sup>877</sup> Indonesia's first written submission, para. 139.

7.509 In its interpretation of the term "significant effect on trade" under Article 2.9.2 of the *TBT Agreement*, Indonesia relies on a recommendation adopted by the TBT Committee concerning this provision. This recommendation establishes that Members should consider factors, such as "the value or other importance of imports in respect of the importing and/or exporting Members concerned, whether from other Members individually or collectively, the potential growth of such imports, and difficulties for producers in other Members to comply with proposed technical regulations".<sup>878</sup> Indonesia notes that the recommendation adopted by the TBT Committee also provides that "[t]he concept of a significant effect on trade of other Members should include both import-enhancing and import-reducing effects on the trade of other Members, as long as such effects are significant".<sup>879</sup>

7.510 Indonesia submits that given that virtually all clove cigarettes sold in the United States were imported from Indonesia, the United States was well aware of the significant effect that Section 907(a)(1)(A) could have on Indonesia's trade.<sup>880</sup> Thus, Indonesia argues, the United States was obliged to follow the procedures in Article 2.9 before adopting Section 907(a)(1)(A)<sup>881</sup>, in particular the obligations set forth in Articles 2.9.2 and 2.9.3 of the *TBT Agreement*.<sup>882</sup>

7.511 Indonesia notes that according to the TBT Committee recommendation, a notification under Article 2.9.2 "should be made when a draft with the complete text of a proposed regulation or procedures for assessment of conformity is available and when amendments can still be introduced and taken into account".<sup>883</sup> Indonesia claims that the United States failed to provide a notification to the TBT Committee of the products covered by Section 907(a)(1)(A) during the time period when amendments to the FSPTCA or the implementing regulations could have been introduced (i.e., either during the period after the FSPTCA was introduced and before its passage by the U.S. Congress, or when the FDA published its request for comments on the implementation of the FSPTCA<sup>884</sup>).<sup>885</sup>

7.512 Regarding Article 2.9.3, Indonesia claims that the United States acted inconsistently with its obligations under this provision by failing to respond to Indonesia's questions regarding particular aspects of Section 907(a)(1)(A).<sup>886</sup>

7.513 According to the **United States**, the term "significant effect on trade" under Article 2.9 of the *TBT Agreement* does not require that a large amount of trade be affected before Article 2.9 is triggered. Instead, the United States contends that the term "significant effect" encompasses all non *de minimis* effects on trade.<sup>887</sup>

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<sup>878</sup> Indonesia's response to Panel question No. 69, referring to TBT Committee, Decisions and Recommendations Adopted by the TBT Committee since 1 January 1995, G/TBT/1/Rev.9, 8 September 2008, p. 20.

<sup>879</sup> Indonesia's response to Panel question No. 69, referring to TBT Committee, Decisions and Recommendations Adopted by the TBT Committee since 1 January 1995, G/TBT/1/Rev.9, 8 September 2008, p. 20.

<sup>880</sup> Indonesia's first written submission, para. 139.

<sup>881</sup> Indonesia's first written submission, para. 139.

<sup>882</sup> Indonesia's first written submission, para. 140.

<sup>883</sup> Indonesia's first written submission, para. 140, referring to TBT Committee, Decisions and Recommendations Adopted by the TBT Committee since 1 January 1995, G/TBT/1/Rev.8, 23 May 2002, p. 15.

<sup>884</sup> Exhibit IND-42.

<sup>885</sup> Indonesia's first written submission, para. 140.

<sup>886</sup> Indonesia's first written submission, para. 140. Indonesia's questions were circulated to WTO Members through document G/TBT/W/323.

<sup>887</sup> United States' response to Panel question No. 69.

7.514 In response to a question from the Panel, the United States explains that it did not notify Section 907(a)(1)(A) to the WTO Secretariat pursuant to Article 2.9.2 of the *TBT Agreement*.<sup>888</sup>

7.515 The United States contends, however, that all relevant information relating to Section 907(a)(1)(A) has always been publicly available, and that Indonesia did in fact provide input in the legislative process.<sup>889</sup>

7.516 The United States further argues that it is a leader in supporting transparency among the WTO membership. It submits that it has notified 589 measures to the TBT Committee since the creation of the WTO (80 measures, in 2010 alone). This, according to the United States, is in contrast to Indonesia which appears to have notified 46 measures in total and only 14 measures in 2010. Finally, according to the United States, Indonesia has recently failed to notify to the TBT Committee a number of implemented measures.<sup>890</sup>

## 2. Analysis by the Panel

### (a) Introduction

7.517 The question before the Panel is whether the United States has acted inconsistently with its obligations under Articles 2.9.2 and 2.9.3 of the *TBT Agreement*.<sup>891</sup> In particular: (i) whether the United States failed to notify the product coverage, the objective and the rationale of draft Section 907(a)(1)(A), as required by Article 2.9.2 of the *TBT Agreement*; and (ii) whether the United States failed to provide particulars or copies of draft Section 907(a)(1)(A), in accordance with Article 2.9.3 of the *TBT Agreement*.

7.518 We note that, in its Panel Request, Indonesia brought claims under Articles 2.9.1, 2.9.2, 2.9.3 and 2.9.4 of the *TBT Agreement*, but subsequently only presented arguments and evidence with respect to its claims under Articles 2.9.2 and 2.9.3. We therefore understand that Indonesia decided not to pursue its claims under Articles 2.9.1 and 2.9.4 of the *TBT Agreement* and we will thus not examine them.<sup>892</sup>

7.519 We have decided to address both claims under the same section of this Report, following the structure of the argumentation put forward by the parties and that of the provision itself.

### (b) The legal provisions at issue

7.520 Article 2.9 of the *TBT Agreement* reads as follows:

"Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:

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<sup>888</sup> United States' response to Panel question No. 71.

<sup>889</sup> United States' first written submission, para. 294.

<sup>890</sup> United States' first written submission, para. 295.

<sup>891</sup> Indonesia's first written submission, para. 140.

<sup>892</sup> We note that the panel in *India – Additional Import Duties* found that the United States had abandoned its claim under Article III:4 of the GATT 1994, which appeared in its panel request, because the United States had made no reference, either explicitly or implicitly, to this claim in its submissions. Panel Report, *India – Additional Import Duties*, paras. 7.402-7.405. See also the findings of the panel in *Egypt – Steel Rebar*, whereby Turkey was found to have abandoned its claim under Article X:3 of the GATT 1994, which also appeared in its panel request but had not been argued by Turkey in any of its submissions. Panel Report, *Egypt – Steel Rebar*, para. 7.30.

- 2.9.1 ...
- 2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
- 2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;
- 2.9.4 ..."

7.521 We note that, pursuant to its introductory paragraph, Article 2.9 would only apply where: (i) no relevant international standard exists or the technical content of a proposed technical regulation is not in accordance with the technical content of the relevant international standard; and (ii) a technical regulation may have a significant effect on trade of other Members.

(c) Conditions for the application of Article 2.9 of the *TBT Agreement*

7.522 Accordingly, before embarking on an analysis of whether the United States has failed to comply with the relevant obligations under Articles 2.9.2 and 2.9.3 of the *TBT Agreement*, we shall examine whether the conditions for the application of the obligations embodied in those provisions are present in this case. We shall first examine whether a relevant international standard on flavourings in cigarettes exists and, if so, whether Section 907(a)(1)(A) is in accordance with the technical content of such an international standard. We will then examine whether Section 907(a)(1)(A) may have a significant effect on trade of other Members, in particular, on Indonesia's trade.

(i) *First condition: absence of a relevant international standard, or a proposed technical regulation not in accordance with a relevant international standard*

7.523 As explained above, the first condition for the application of the obligations set out in Article 2.9 is either the absence of a relevant international standard; or if this were to exist, the lack of concordance between the technical content of a proposed technical regulation with the technical content of that relevant international standard.

7.524 Indonesia submits that there are no relevant international standards for flavourings in cigarettes. In response to a question from the Panel, Indonesia clarifies that the existing standards for cigarettes maintained by the International Organization for Standardization ("ISO") do not make distinctions among flavours of cigarettes.<sup>893</sup> The United States agrees that there are no relevant international standards applicable in the present case.<sup>894</sup>

7.525 In light of the above, we find that the first condition set out in Article 2.9 of the *TBT Agreement* for the application of the obligations therein is fulfilled.

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<sup>893</sup> Indonesia's first written submission, para. 132 (Exhibit IND-40); Indonesia's response to Panel question No. 59.

<sup>894</sup> United States' response to Panel question No. 59.

(ii) *Second condition: whether the technical regulation may have a significant effect on trade of other Members*

7.526 The second condition imposed by Article 2.9 of the *TBT Agreement* is that the technical regulation "may have a significant effect on trade of other Members".

7.527 In this respect, Indonesia argues that Section 907(a)(1)(A) has had a significant effect on its trade with the United States because approximately 6 million Indonesians depend directly and indirectly on the production of cigarettes and the growing of tobacco.<sup>895</sup> Indonesia further submits that, in 2008, its exports of clove cigarettes to the United States amounted to approximately USD 15 million.<sup>896</sup>

7.528 The United States has not contested that Section 907(a)(1)(A) has a significant impact on Indonesia's trade.

7.529 We observe that the wording of this second condition for the applicability of Article 2.9 is that the technical regulation "may have a significant effect on trade of other Members" as opposed to "will have a significant effect" or "has a significant effect". "May" is used to express a possibility as opposed to a certainty.<sup>897</sup> We therefore interpret these terms to mean that Article 2.9 of the *TBT Agreement* does not require proving actual trade effects. Rather, this condition encompasses situations in which a technical regulation *may* have a significant effect on trade of other Members.

7.530 We further observe that Article 2.9 of the *TBT Agreement* refers to a "significant" effect. Significant means "sufficiently great or important to be worthy of attention; noteworthy".<sup>898</sup> We thus agree with the United States that a "significant effect" encompasses all non *de minimis* effects on trade.<sup>899</sup> In this respect, we observe that Indonesia presented evidence before this Panel that shows that the effect of Section 907(a)(1)(A) is substantial and noteworthy on its clove cigarettes trade with the United States. In particular, the data provided by Indonesia shows that the vast majority of clove cigarettes imported into the United States come from Indonesia.<sup>900</sup> Indonesia has also shown that the value of such imports amounted to approximately USD 15 million in 2008.<sup>901</sup> We also observe that Indonesia has argued that it has exported clove cigarettes to the United States for more than 40 years.<sup>902</sup>

7.531 Since Section 907(a)(1)(A) prohibits the importation of clove cigarettes into the United States, we can only conclude that the impact of Section 907(a)(1)(A) on Indonesia's trade is significant within the terms of Article 2.9 of the *TBT Agreement*. Accordingly, we find that the

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<sup>895</sup> Indonesia's first written submission, para. 129; Indonesia's oral statement at the first substantive meeting, para. 4; Indonesia's response to Panel question No. 69.

<sup>896</sup> Indonesia's first written submission, paras. 29 and 40.

<sup>897</sup> Oxford English Dictionary Online, accessed on 30 April 2011. See also *Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. I, p. 1725, defining "may" to mean, among other things, "have the possibility, opportunity, or suitable conditions to; be likely to"; *Webster's Online Dictionary*, accessed on 30 April 2011, defining "may" to mean, among other things, "used to indicate possibility or probability".

<sup>898</sup> Oxford English Dictionary Online, accessed on 30 April 2011. See also *Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. II, p. 2835, defining "significant" to mean, among other things, "[i]mportant, notable; consequential"; *Webster's Online Dictionary*, accessed on 30 April 2011, defining "significant" to mean, among other things, "of a noticeably or measurably large amount".

<sup>899</sup> United States' response to Panel question No. 69.

<sup>900</sup> Indonesia's first written submission, paras. 18 and 139; Indonesia's response to Panel question No. 48; United States' first written submission, para. 35.

<sup>901</sup> Exhibits IND-68, IND-102; US-100, US-134.

<sup>902</sup> Indonesia's first written submission, para. 5.

second condition for the application of the obligations in Articles 2.9.2 and 2.9.3 of the *TBT Agreement* is also fulfilled.

7.532 We now turn to examine Indonesia's claims under Articles 2.9.2 and 2.9.3 of the *TBT Agreement*.

(d) Article 2.9.2: Obligation to notify the proposed technical regulation

7.533 We recall that Article 2.9.2 of the *TBT Agreement* obliges Members to notify other Members through the WTO Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications must take place at an early appropriate stage, when amendments can still be introduced and comments taken into account.

7.534 The obligation in Article 2.9.2 was described by the Appellate Body in *EC – Asbestos* as requiring "identification of the product coverage of a technical regulation".<sup>903</sup>

7.535 We note that Article 2.9.2, unlike Article 2.9.3, does not link the obligation to notify to the request of a Member.

7.536 We also note that Article 2.9.2 of the *TBT Agreement* applies to "proposed" technical regulations. Along the same lines, the French version of Article 2.9.2 of the *TBT Agreement* uses the terms "le règlement technique *projeté*", and the Spanish version of Article 2.9.2 of the *TBT Agreement* uses the terms "el reglamento técnico *en proyecto*". "To propose" can be defined as "to put forward [a technical regulation] for consideration by others".<sup>904</sup> Article 2.9.2 of the *TBT Agreement* therefore applies to what we would refer to as legal instruments falling within the definition of a technical regulation that would still be in "draft" form, i.e., not yet adopted or in force. The language of the second sentence of Article 2.9.2 of the *TBT Agreement* reinforces this conclusion as it indicates that the notification must take place "at an early appropriate stage, when amendments can still be introduced and comments taken into account". Therefore, since the provision foresees the possibility of amendments and comments, the technical regulation at issue cannot have been enacted or adopted before the notification takes place. In our view, Article 2.9.2 (as it is also the case with Article 5.6.2 for conformity assessment procedures) is at the core of the *TBT Agreement's* transparency provisions: the very purpose of the notification is to provide opportunity for comment before the proposed measure enters into force, when there is time for changes to be made before "it is too late".

7.537 We find further guidance and support for our interpretation in a recommendation from the TBT Committee regarding the timing of notifications:

"When implementing the provisions of Articles 2.9.2, 3.2 (in relation to Article 2.9.2), 5.6.2 and 7.2 (in relation to Article 5.6.2), a notification should be

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<sup>903</sup> In *EC – Asbestos* the Appellate Body found that:

"A 'technical regulation' must, of course, be applicable to an identifiable product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. This consideration also underlies the formal obligation, in Article 2.9.2 of the *TBT Agreement*, for Members to notify other Members, through the WTO Secretariat, 'of the products to be covered' by a proposed 'technical regulation'. (emphasis added) Clearly, compliance with this obligation requires identification of the product coverage of a technical regulation. ...."

Appellate Body Report, *EC – Asbestos*, para. 70.

<sup>904</sup> *Oxford English Dictionary Online*, accessed on 30 April 2011. See also *Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. II, p. 2371, defining "proposed" to mean, among other things, "put forward for consideration or action"; *Webster's Online Dictionary*, accessed on 30 April 2011, defining "proposed" to mean, among other things, "to set forth for acceptance or rejection".

made when a draft with the complete text of a proposed technical regulation or procedures for assessment of conformity is available and when amendments can still be introduced and taken into account."<sup>905</sup>

7.538 We shall therefore examine whether the United States notified the product coverage, as well as the objective and rationale of Section 907(a)(1)(A) at an early appropriate stage, i.e., when it was in draft form, before its adoption, when amendments could still be introduced and comments taken into account.

7.539 As explained above, Indonesia claims that the United States failed to notify Indonesia through the WTO Secretariat of the product coverage of Section 907(a)(1)(A). As support for its allegation, Indonesia points the Panel to "[t]he TBT Information Management System, a searchable database containing all notifications related to the TBT Agreement, [that] shows, as of the date of [Indonesia's first written] submission, no notifications submitted by the United States regarding [Section 907(a)(1)(A)]".<sup>906 907</sup>

7.540 The United States has not rebutted Indonesia's assertion. To the contrary, in response to a question from the Panel, the United States acknowledges not notifying Section 907(a)(1)(A) through the WTO Secretariat.<sup>908</sup> In its defence, the United States argues that all relevant information has always been publicly available, that Indonesia did in fact provide input in the legislative process<sup>909</sup>, and that the United States is a "leader in supporting transparency among the WTO membership".<sup>910</sup>

7.541 In our view, regardless of the merits of the United States' arguments, the obligation set out in Article 2.9.2 of the *TBT Agreement* is straightforward: WTO Members must notify other Members through the WTO Secretariat of the product coverage, the objective and the rationale of their proposed technical regulations, at an early appropriate stage. The United States has failed to do so in respect of Section 907(a)(1)(A).

7.542 Accordingly, in the absence of a notification to WTO Members through the Secretariat of 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 early appropriate stage, i.e., when amendments and comments were still possible, the Panel finds that the United States has failed to comply with its obligations under Article 2.9.2 of the *TBT Agreement*.

(e) Article 2.9.3: Obligation to provide particulars or copies of the proposed technical regulation

7.543 We recall that Article 2.9.3 of the *TBT Agreement* obliges Members, upon request from another Member, to provide particulars or copies of a proposed technical regulation. This provision also requires that, whenever necessary, the regulating Member identify the parts that in substance deviate from relevant international standards. This last obligation would have no bearing in the present case because, as we explained above<sup>911</sup>, there are no relevant international standards on flavourings of cigarettes.

7.544 Indonesia claims that the United States acted inconsistently with Article 2.9.3 of the *TBT Agreement* by failing to respond to Indonesia's questions seeking explanation of particular

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<sup>905</sup> G/TBT/1/Rev.9, p. 16.

<sup>906</sup> Indonesia's first written submission is dated 20 October 2010.

<sup>907</sup> Indonesia's first written submission, footnote 160.

<sup>908</sup> United States' response to Panel question No. 71.

<sup>909</sup> United States' first written submission, para. 294; Exhibit US-81.

<sup>910</sup> United States' first written submission, para. 295.

<sup>911</sup> See paras. 7.523-7.525.

aspects of Section 907(a)(1)(A) outlined in document G/TBT/W/323.<sup>912</sup> The United States does not directly respond to Indonesia's claim under Article 2.9.3 of the *TBT Agreement*.<sup>913</sup>

7.545 We note that, unlike the case of Article 2.9.2 of the *TBT Agreement*, the obligation to provide particulars or copies of a proposed technical regulation imposed by Article 2.9.3 of the *TBT Agreement* is only triggered by the request of a Member. However, as is the case with Article 2.9.2 of the *TBT Agreement*, such an obligation is limited to "proposed technical regulations", i.e., technical regulations which are still in draft form and thus, as explained above, amendments can still be introduced and comments taken into account.

7.546 Therefore, in order for the United States to have been obliged under Article 2.9.3 of the *TBT Agreement* to provide particulars or copies of Section 907(a)(1)(A) to Indonesia, Indonesia must have requested the United States to do so when Section 907(a)(1)(A) was still in draft form.

7.547 As explained, Indonesia claims that its request pursuant to Article 2.9.3 of the *TBT Agreement* was embodied in its questions posed to the United States through the TBT Committee and recorded in document G/TBT/W/323. We note that Indonesia's communication was dated 17 August 2009<sup>914</sup>, i.e., almost two months after the enactment of Section 907(a)(1)(A), on 20 June 2009. The questions posed by Indonesia to the United States in document G/TBT/W/323 could thus *not* relate to a "proposed" technical regulation, but rather to a technical regulation which was already enacted. Therefore, even if Indonesia's questions in document G/TBT/W/323 were to be considered as a request for particulars within the terms of Article 2.9.3 of the *TBT Agreement*, those questions did not regard a proposed technical regulation.

7.548 We note that Indonesia has not provided this Panel with any further evidence that could prove that it had requested the United States to provide particulars or copies of Section 907(a)(1)(A) when it was still in draft form.

7.549 Accordingly, we find that, by failing to demonstrate that it had requested the United States to provide particulars or copies of Section 907(a)(1)(A) while it was still in draft form, Indonesia has failed to demonstrate that the United States acted inconsistently with Article 2.9.3 of the *TBT Agreement*.

(f) Conclusion

7.550 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, i.e., when amendments and comments were still possible, the Panel finds that the United States has failed to comply with its obligations under Article 2.9.2 of the *TBT Agreement*.

7.551 Further, for the reasons set forth above, we find that Indonesia has failed to demonstrate that the United States acted inconsistently with Article 2.9.3 of the *TBT Agreement*.

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<sup>912</sup> Indonesia's first written submission, para. 140. Indonesia's questions were circulated to WTO Members through document G/TBT/W/323 on 20 August 2009.

<sup>913</sup> The United States addresses Indonesia's argument regarding the failure to respond to the questions in document G/TBT/W/323 in the context of Indonesia's claim under Article 2.5 of the *TBT Agreement*. In that context, the United States argues that it had numerous exchanges on this issue with Indonesia. In particular, the United States points to a bilateral discussion with Indonesia in Geneva on 27 August 2009, a discussion between the U.S. Trade Representative Ronald Kirk and an Indonesia representative at a WTO Ministerial in India, and a deliberation at the TBT Committee meeting of November 2009. United States' first written submission, para. 280.

<sup>914</sup> We note that Indonesia's questions were circulated to WTO Members through document G/TBT/W/323 on 20 August 2009.



K. WHETHER THE UNITED STATES HAS ACTED INCONSISTENTLY WITH ARTICLE 2.12 OF THE  
*TBT AGREEMENT*

1. Arguments of the parties

7.552 **Indonesia** claims that 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 violated its obligations under Article 2.12 of the *TBT Agreement*.<sup>915</sup> Indonesia is of the view that the right incorporated in Article 2.12 of the *TBT Agreement* should be extended, in particular, in favour of developing countries.<sup>916</sup>

7.553 In its first submission, Indonesia refers to a decision of the TBT Committee according to which the term "reasonable interval" in Article 2.12 of the *TBT Agreement* "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".<sup>917</sup> Later, Indonesia explains that the TBT Committee took note of the Doha Ministerial Decision on Implementation-related Issues and Concerns of 14 November 2001 ("the Doha Ministerial Decision")<sup>918</sup>, and defined a "reasonable interval" as at least six months.<sup>919</sup> Indonesia argues that this interpretation of the reasonable period is legally binding on Members, given that this Ministerial Decision is an interpretative decision under Article IX:2 of the *WTO Agreement*.<sup>920</sup> Indonesia notes that the FSPTCA was signed on 22 June 2009 and Section 907(a)(1)(A) entered into effect 90 days later. Indonesia submits that this period of 90 days falls short of the "reasonable interval" standard of six months recommended by the TBT Committee.<sup>921</sup>

7.554 According to Indonesia, the "reasonable interval" standard contained in Article 2.12 of the *TBT Agreement* is specifically designed to give producers in other Members, and in particular those in developing countries like Indonesia, adequate time to adapt to new technical regulations adopted by other Members. Indonesia contends that the United States failed to meet this standard.<sup>922</sup>

7.555 According to Indonesia, the United States has failed to prove that the shorter interval applied was justified under any of the urgent circumstances identified in Article 2.10 of the *TBT Agreement* or that the reasonable interval of 6 months would have rendered the objectives of the measure ineffective.<sup>923</sup>

7.556 The **United States** contends that Indonesia has failed to show that the United States has acted inconsistently with Article 2.12.<sup>924</sup> For the United States, Indonesia's argument expressing that the 90-day period allowed by the United States was not reasonable, under Article 2.12, is in error.<sup>925</sup> In

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<sup>915</sup> Indonesia's first written submission, para. 145.

<sup>916</sup> Indonesia's oral statement at the first substantive meeting of the Panel, para. 176.

<sup>917</sup> TBT Committee, Decisions and Recommendations Adopted by the Committee since 1 January 1995, G/TBT/1/Rev.8, 23 May 2002, p. 30. We note that Indonesia referred to the old version of a compilation of TBT decisions and recommendations. The up-to-date version is document G/TBT/1/Rev.9, p. 20.

<sup>918</sup> Doha Ministerial Decision on Implementation-Related Issues and Concerns of 14 November 2001, WT/MIN(01)/17, para. 5.2.

<sup>919</sup> Indonesia's second written submission, para. 151; Indonesia's response to Panel question No. 6, paras. 18, 25, 29.

<sup>920</sup> Indonesia's second written submission, para. 151; Indonesia's response to Panel question No. 6, paras. 18, 30.

<sup>921</sup> Indonesia's first written submission, para. 145.

<sup>922</sup> Indonesia's first written submission, para. 145.

<sup>923</sup> Indonesia's response to Panel question No. 6, para. 25.

<sup>924</sup> United States' first written submission, para. 304.

<sup>925</sup> United States' first written submission, para. 296.

respect of Indonesia's reliance upon a TBT Committee decision, the United States contends that TBT Committee decisions are not part of the covered agreements and do not result in mandatory obligations on Members.<sup>926</sup> The United States acknowledges that the TBT Committee decision referenced by Indonesia provides relevant context.

7.557 In response to Indonesia's reliance upon the Doha Ministerial Decision, the United States argues that it is not an interpretation of the *WTO Agreement* within the meaning of Article IX:2 of the *WTO Agreement*.<sup>927</sup> According to the United States, the Doha Ministerial Decision may, at most, be considered as "supplementary means of interpretation" under Article 32 of the VCLT.<sup>928</sup> The United States thus argues that the Doha Ministerial Decision cannot be considered as a binding interpretation of Article 2.12 of the *TBT Agreement*.<sup>929</sup>

7.558 According to the United States, given the fact that neither the TBT Committee decision nor the Doha Ministerial decision binds the WTO membership, and given the qualified nature of their language, a panel's determination of whether a particular delay is "reasonable" must be considered on a case by case basis. The United States supports its conclusion with the dictionary definition of the term "reasonable," which is "in accordance with reason; not irrational or absurd."<sup>930</sup> Thus, to determine whether a particular interval is reasonable, the Panel must weigh whether the interval provided is within reason or whether it is irrational or absurd, a determination that depends on all of the facts and circumstances surrounding the enactment of the measure.<sup>931</sup>

7.559 In the view of the United States, Indonesia has not demonstrated why in the case at hand the "reasonable interval" should be not less than six months. For to the United States, Indonesia fails to explain why delaying the effective date for six months would be consistent with the objectives of the measure.<sup>932</sup> In this regard, the United States recalls that the language of the Doha Ministerial Decision envisages that the "reasonable interval" shall, in normal circumstances, be not less than six months. For the United States, this means that the "reasonable interval" may be less than six months.<sup>933</sup>

7.560 The United States further argues that Indonesia has adduced no evidence to suggest that the difference between a 90 day period and a six-month period had any impact on the ability of Indonesian producers "to adapt their products or methods of production to the requirements of the importing Member." According to the United States, Indonesian producers have been and are able to market tobacco flavoured and menthol-flavoured cigarettes in the United States' market. However, as far as the United States is aware, Indonesian producers, even 16 months after the enactment of the FSPTCA, have not adjusted their product lines to produce tobacco or menthol-flavoured cigarettes. Thus, in its view, whether the United States waited three months or six months after the measure's enactment to allow it to enter into force appears not to have affected Indonesian producers in any way.<sup>934</sup>

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<sup>926</sup> United States' first written submission, paras. 298-299; United States' response to Panel question No. 7, paras. 6, 8.

<sup>927</sup> United States' response to Panel question No. 6, para. 5.

<sup>928</sup> United States' response to Panel question No. 6, para. 3; United States' oral statement at the second substantive meeting of the Panel, para. 103.

<sup>929</sup> United States' response to Panel question No. 6, para. 5.

<sup>930</sup> *New Oxford English Dictionary*, vol. 2, at 2496 (1993) (Exhibit US-82); United States' response to Panel question No. 6, para. 4.

<sup>931</sup> United States' first written submission, para. 301.

<sup>932</sup> United States' first written submission, para. 302; United States' oral statement at the second substantive meeting of the Panel, paras. 102 and 104.

<sup>933</sup> United States' oral statement at the second substantive meeting of the Panel, para. 104.

<sup>934</sup> United States' first written submission, para. 303.

## 2. Analysis by the Panel

### (a) Introduction

7.561 We recall that the FSPTCA was enacted as law in the United States on 22 June 2009. The measure at issue in this dispute, Section 907(a)(1)(A), entered into force three months after the date of enactment of the FSPTCA. The question before the Panel therefore is whether the United States has acted inconsistently with its obligations under Article 2.12 of the *TBT Agreement* 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 main issue is whether, as Indonesia claims, Article 2.12 of the *TBT Agreement* 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).

7.562 As with other provisions in the present dispute, we face an issue of first impression since there are no prior Appellate Body or panel reports that have interpreted Article 2.12 of the *TBT Agreement*. We shall therefore commence by examining the legal provision at issue to ascertain the applicable legal test.

### (b) The legal provision at issue

7.563 Article 2.12 of the *TBT Agreement* reads as follows:

"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."

7.564 We note that this provision begins with the exclusion from the obligation to allow a reasonable interval of "those urgent circumstances referred to in paragraph 10". We understand this to mean that the obligation to allow a reasonable interval between the publication of technical regulations and their entry into force would not apply in the event that "urgent problems of safety, health, environmental protection or national security arise or threaten to arise".<sup>935</sup>

7.565 We recall that, in response to a question by the Panel, the United States has confirmed that it did not notify Section 907(a)(1)(A) to the WTO Secretariat pursuant to Article 2.10.1 of the *TBT Agreement*.<sup>936</sup> As discussed in our findings under Indonesia's claim of violation of Article 2.10 of the *TBT Agreement*, the Panel considers that the circumstances of urgency foreseen in this provision were not present in this case. Hence, the obligation in Article 2.12 of the *TBT Agreement* applies to the present dispute and thus the United States was obliged to allow a reasonable interval between the publication and the entry into force of Section 907(a)(1)(A).

7.566 Consequently, except in urgent circumstances as described above, Article 2.12 obliges ("shall") Members to allow a "reasonable interval" between the publication of technical regulations and their entry into force. Article 2.12 also explains the reason why such an interval is needed: "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".

7.567 We shall therefore examine whether the interval allowed by the United States between the publication and the entry into force of Section 907(a)(1)(A) was "reasonable" within the meaning of

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<sup>935</sup> Article 2.10 of the *TBT Agreement*.

<sup>936</sup> United States' response to Panel question No. 71, para. 150.

Article 2.12 of the *TBT Agreement*. We note that, in this respect, both parties agree that for the purposes of Article 2.12, the date of "publication" of Section 907(a)(1)(A) is 22 June 2009 (i.e., the date the FSPTCA became law), and that the date of "entry into force" is 22 September 2009 (i.e., the date that Section 907(a)(1)(A) took effect).<sup>937</sup> Both parties referred to the actual interval allowed by the United States as a 90-day period or a three-month period.<sup>938</sup> The Panel is therefore called upon to decide whether the 90-day or three-month period between the publication and the entry into force of Section 907(a)(1)(A) constitutes a reasonable interval within the terms of Article 2.12 of the *TBT Agreement*.

7.568 Concerning the interpretation of "reasonable interval", Indonesia has drawn the Panel's attention to a decision of the TBT Committee<sup>939</sup> taken at its meeting of 15 March 2002, which takes note of paragraph 5.2 of the Doha Ministerial Decision.<sup>940</sup> This paragraph provides as follows:

"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."

7.569 We note that the parties disagree in respect of the interpretative value of the Doha Ministerial Decision. Indonesia argues that the interpretation in the Doha Ministerial Decision of the reasonable interval is legally binding on WTO Members because this Ministerial Decision is an interpretative decision under Article IX:2 of the *WTO Agreement*.<sup>941</sup>

7.570 The United States, on the contrary, is of the view that the Doha Ministerial Decision is not an interpretation within the meaning of Article IX:2 of the *WTO Agreement* because it does not purport to set forth an interpretation of the *WTO Agreement*.<sup>942</sup> According to the United States, nothing in the text of the Doha Ministerial Decision makes reference to Article IX.2 of the *WTO Agreement*, nor indicates that the procedures set out in this provision for adopting such interpretations were followed.<sup>943</sup> According to the United States, the Doha Ministerial Decision may, at most, be considered as "supplementary means of interpretation" under Article 32 of the VCLT.<sup>944</sup>

7.571 We note that the *WTO Agreement* is categorical on who has the authority to issue authoritative and thus binding interpretations of the provisions of the covered agreements. Indeed, Article IX:2 of the *WTO Agreement* stipulates that:

"The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade

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<sup>937</sup> In response to Panel question No. 72, the United States explained that:

"The U.S. Congress passed the Tobacco Control Act on June 11, 2009. The President signed the Act into U.S. [law] on June 22, 2009. The Act, as signed by the President, was publicly available (published on the U.S. government website for legislation) as of June 22, 2009. September 22, 2009 is the day that section 907(a)(1)(A) took effect."

<sup>938</sup> Indonesia's first written submission, para. 145; Indonesia's response to Panel question No. 2, para. 7, and No. 3, para. 10; Indonesia's second written submission, para. 151; United States' first written submission, paras. 296, 298 and 302;

<sup>939</sup> See footnote 917 above.

<sup>940</sup> See footnote 918 above.

<sup>941</sup> Indonesia's second written submission, para. 151; Indonesia's response to Panel question No. 6, paras. 18 and 30.

<sup>942</sup> United States' response to Panel question No. 6, para. 5.

<sup>943</sup> United States' response to Panel question No. 6, para. 5.

<sup>944</sup> United States' response to Panel question No. 6, para. 3; United States' oral statement at the second substantive meeting of the Panel, para. 103.

Agreements. ... The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members..."

7.572 Therefore, the Ministerial Conference (and the General Council) has the exclusive authority to adopt interpretations of the covered agreements.<sup>945</sup> The Doha Ministerial Decision at issue was indeed adopted by consensus by the Ministerial Conference.<sup>946</sup>

7.573 We note that the first preambular recital of the Doha Ministerial Decision indicates that the Ministerial Conference had decided on the matters addressed therein "having regard to", *inter alia*, Article IX of the *WTO Agreement*. We observe that the Decision does not specify the paragraph of Article IX the Ministerial Conference had regard to, but refers generally to that provision as a whole. We nevertheless note that, from the various paragraphs of Article IX of the *WTO Agreement*, only paragraph 2 refers to interpretation.

7.574 However, the United States argues that the Doha Ministerial Decision is not an Article IX:2 authoritative interpretation because the procedural requirements described therein were not followed. As pointed out by the United States, Article IX:2 of the *WTO Agreement* envisages a preliminary requirement which applies in relation to the WTO Agreements incorporated in Annex 1 (including, the *TBT Agreement*). Specifically, when adopting an authoritative interpretation under Article IX:2 of the *WTO Agreement*, the Ministerial Conference (and the General Council) shall act "on the basis of a recommendation by the Council overseeing the functioning of that Agreement". In this respect, as the United States suggests, 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*; i.e., no recommendation was preliminarily issued by the Council for Trade in Goods, or the TBT Committee.<sup>947</sup> Indonesia disagrees and points out that the Doha Ministerial Decision was adopted in response to the problems raised by developing countries concerning the implementation of the WTO Agreements.<sup>948</sup> Indonesia thus submits that, based on paragraph 12 of the Doha Ministerial Declaration<sup>949</sup> and the preamble of the Doha Ministerial Decision, it is clear that the interpretation was reached on the basis of discussions carried out within the General Council and the WTO subsidiary bodies.<sup>950</sup>

7.575 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* given that all WTO Members meeting in a Ministerial Conference agreed on an interpretation of a provision of the WTO Agreements. We note that the purpose of Article IX:2 of the *WTO Agreement* is to allow the Members to clarify the meaning of WTO provisions. In our view, paragraph 5.2 of the Doha Ministerial Decision meets this purpose, as it provides an interpretation of certain terms contained in WTO rules, in particular, of the phrase "reasonable interval" in Article 2.12 of the *TBT Agreement*. This view is reinforced by the actual wording of paragraph 5.2 of the Doha Ministerial Decision which provides an interpretation of the phrase "reasonable interval" using the term "shall be understood to mean ...". The use of "shall" and not, for example, of "should" or "may" appears to suggest that the intention of the Ministerial

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<sup>945</sup> We note that the Appellate Body in *Japan – Alcoholic Beverages II* clarified that the adoption by the DSB of a panel report does not amount to a definitive interpretation of the GATT 1994. According to the Appellate Body, this position is confirmed by the circumstance that the *WTO Agreement* contemplates in Article IX:2 an "exclusive authority" for taking binding interpretations of WTO obligations, which "does not exist by implication or by inadvertence elsewhere". Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13; Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 19-20.

<sup>946</sup> The Doha Ministerial Conference was held from 9 to 14 November 2001.

<sup>947</sup> United States' response to Panel question No. 6, para. 5.

<sup>948</sup> Indonesia's response to Panel question No. 6, para. 27.

<sup>949</sup> Doha Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, para. 12.

<sup>950</sup> Indonesia's response to Panel question No. 6, para. 27.

Conference, and thus the highest level organ of the WTO where all Members meet, was that paragraph 5.2 is binding.<sup>951</sup>

7.576 Although the parties disagree on the categorization of paragraph 5.2 of the Doha Ministerial Decision as an authoritative interpretation under Article IX:2 of the *WTO Agreement*, this Panel deems that it must be guided by it 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. Furthermore, the Panel is of the view that paragraph 5.2 of the Doha Ministerial Decision could be considered as a subsequent agreement of the parties within the meaning of Article 31(3)(a) of the VCLT<sup>952</sup>, on the interpretation of "reasonable interval" within Article 2.12 of the *TBT Agreement*.<sup>953</sup>

7.577 We therefore turn to the text of paragraph 5.2 of the Doha Ministerial Decision itself to ascertain whether it would aid this Panel in its task of deciding whether the three-month interval allowed by the United States between the publication and the entry into force of Section 907(a)(1)(A) constitutes a reasonable interval within the scope of Article 2.12.

7.578 We recall that paragraph 5.2 of the Doha Ministerial Decision provides that "the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued". The Panel observes

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<sup>951</sup> We note that the panel in *US – Lead and Bismuth II* found that "a Declaration lacks the mandatory authority of a Decision", being a mere "Declaration" and not a "Decision" of the Ministers. According to this panel, the simple recognition of the need for an action, as in a Ministerial Declaration, does not mandate that action, while "[i]n a Ministerial Decision, by contrast, Ministers 'decide' that certain action shall be taken". Panel Report, *US – Lead and Bismuth II*, para. 6.17. In *US – FSC*, the Appellate Body explained that GATT "decisions" within the meaning of Article XVI:1 of the *WTO Agreement* provide "guidance" to the WTO. Appellate Body Report, *US – FSC*, para. 115.

<sup>952</sup> Article 31(3)(a) of the VCLT reads as follows: "3. 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 ...". The Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, made reference to the commentary on the Draft Articles on the Law of Treaties of the International Law Commission (the "ILC"), which describes a subsequent agreement "as a further authentic element of interpretation to be taken into consideration together with the context". The Appellate Body concluded that, by making reference to "authentic interpretation", "the ILC reads Article 31(3)(a) [of the VCLT] as referring to agreements bearing specifically upon the interpretation of a treaty". Report of the International Law Commission on the Work of its 18th Session, Geneva, 4 May-19 July 1966" (1966) II *Yearbook of the International Law Commission* 172, at 221, para. 14; Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 390.

<sup>953</sup> We note that the United States has put forward the argument that the Doha Ministerial Decision may, at most, be considered as "supplementary means of interpretation" under Article 32 of the VCLT (United States' response to Panel question No. 6, para. 3; United States' oral statement at the second substantive meeting of the Panel, para. 103.). Article 32 of the VCLT reads as follows:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable."

We note that Article 32 of the VCLT allows a treaty interpreter to have recourse to supplementary means of interpretation if after applying Article 31 of the VCLT, the meaning of the term remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. We observe that, in the event that the Doha Ministerial Decision could not amount to a subsequent agreement, *quod non*, we could still use it to confirm our interpretation of the concept of reasonable interval within the terms of Article 2.12 of the *TBT Agreement*, or even determine the meaning of that concept if the term remains ambiguous or obscure.

that the period of no less than six months is qualified by the term "normally" which thus appears to limit the obligation to those instances that are "under normal or usual conditions; as a rule".<sup>954</sup>

7.579 The United States argues that by qualifying the obligation with the term "normally", a Member is not expected to provide a six-month delay in all instances, precisely where delaying the entry into force would undermine the measure's ability to fulfil the legitimate objective.<sup>955</sup> The United States further contends that, given the fact that the Doha Ministerial Decision does not bind the WTO membership, and given the qualified nature of its language, a panel's determination of whether a particular delay is "reasonable" must be considered on a case-by-case basis.<sup>956</sup> The United States further supports its conclusion by the dictionary definition of the term "reasonable," which is "in accordance with reason; not irrational or absurd."<sup>957</sup> Thus, it argues, to determine whether a particular interval is reasonable, the Panel must weigh whether the interval provided is within reason or whether it is irrational or absurd, a determination that depends on all of the facts and circumstances surrounding the enactment of the measure.<sup>958</sup>

7.580 We agree that the inclusion of the term "normally" before defining the six-month length of the reasonable interval qualifies the length of such an interval. The Panel has considered whether "normally" could be understood to mean "in any case other than in urgency circumstances", and has concluded that as a matter of textual analysis this cannot be the case. As explained above, the first sentence of Article 2.12 of the *TBT Agreement* already provides that it applies "[e]xcept in those urgent circumstances referred to in paragraph 10". Accordingly, if we were to read the word "normally" in paragraph 5.2 of the Doha Ministerial Decision as meaning "except in urgent circumstances", we would effectively be reading the latter terms out of the first sentence out of the text of Article 2.12 of the *TBT Agreement*, or the word "normally" out of the text of paragraph 5.2 of the Doha Ministerial Decision. It is therefore our view that the six-month guideline does not apply across the board to all non-urgent cases, and that there may be non-urgent cases where it would be reasonable to have a shorter interval while in others, such an interval should be of more than six months.

7.581 We also agree with the United States that an examination of whether an interval for the purposes of Article 2.12 of the *TBT Agreement* is reasonable is to be done on a case-by-case basis. We are therefore to examine the circumstances of the adoption of Section 907(a)(1)(A) in order to decide whether the obligation to provide for a "reasonable interval" between the publication and the entry into force of Section 907(a)(1)(A) foreseen in Article 2.12 of the *TBT Agreement* was satisfied by the United States. In particular, we will consider whether taking into account the circumstances of this case, the three-month period provided by the United States between the publication and the entry into force of Section 907(a)(1)(A) was sufficient to constitute a reasonable interval in terms of Article 2.12 of the *TBT Agreement* or whether the United States should have allowed at least 6 months between both instances. However, for the reasons already explained above, while our examination must be informed by the specific facts and circumstances of this case, we shall be guided by the general rule set forth in the Doha Ministerial Decision.

7.582 The text of Article 2.12 of the *TBT Agreement* provides us with some indications as to what must be examined in a particular case. Indeed, 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

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<sup>954</sup> *Oxford English Dictionary Online*, accessed on 25 May 2011.

<sup>955</sup> United States' first written submission, para. 300.

<sup>956</sup> United States' first written submission, para. 301.

<sup>957</sup> *New Oxford English Dictionary*, vol. 2, at 2496 (1993) (Exhibit US-82).

<sup>958</sup> United States' first written submission, para. 301.

importing Member. Therefore, the Panel may examine whether the three-month period allowed by the United States between the publication and the entry into force of Section 907(a)(1)(A) permitted Indonesia the time for its producers to adapt their products or methods of production to the requirements of the importing Member.

7.583 The United States argues that Indonesia has adduced no evidence to suggest that the difference between a three-month period and a six-month period had any impact on the ability of Indonesian producers "to adapt their products or methods of production to the requirements of the importing Member." According to the United States, Indonesian producers have been and are able to market tobacco-flavoured and menthol-flavoured cigarettes in the United States' market. However, as far as the United States is aware, Indonesian producers, even 16 months after the enactment of the FSPTCA, have not adjusted their product lines to produce tobacco or menthol-flavoured cigarettes. Thus, it argues, whether the United States waited three months or six months after the measure's enactment to allow it to enter into force appears not to have affected Indonesian producers in any way.<sup>959</sup>

7.584 In considering whether Indonesia has had sufficient time to prepare itself for the ban on clove cigarettes, the Panel notes that Indonesia has participated in the U.S. legislative process that resulted in the adoption of Section 907(a)(1)(A) and was thus aware that the ban on clove cigarettes was coming. In this respect, Indonesia tells us that it communicated its concerns to the White House and the Office of the U.S. Trade Representative ("USTR") on multiple occasions.<sup>960</sup> For example, on 15 May 2009 during Ministerial-level bilateral meetings in Washington DC, Indonesia communicated to USTR its concerns about the discrimination against clove cigarettes contained in the Act. When the United States House of Representatives first considered the legislation in July of 2008<sup>961</sup>, then-Secretary of Health and Human Services Mike Leavitt sent a letter to the Ranking Member of the House Energy and Commerce Committee, Congressman Joe Barton, expressing concerns with the legislation as drafted. Among the concerns raised by Secretary Levitt was that:

"Our trading partners believe that by banning the sale of clove cigarettes but not prohibiting the sale of menthol cigarettes, the bill raises questions under U.S. international trade obligations. The government of Indonesia has repeatedly objected to the bill on the grounds that this disparate treatment is unjustified and incompatible with WTO trade rules. Accordingly, I would recommend that the Committee further review the relevant language in this light to ensure the bill is consistent with US trade obligations."<sup>962</sup>

7.585 It may be arguable that through its active participation in the legislative process, Indonesia would have had sufficient notice of the impending adoption of Section 907(a)(1)(A) so as to prepare its industry for the ban. In that scenario, the fact that the interval allowed by the United States was of three months instead of six would not have significant consequences. This can be however approached from a different angle, i.e., that of the expectations raised by the Doha Implementation

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<sup>959</sup> United States' first written submission, para. 303.

<sup>960</sup> See Letter from H.E. Mari Pangestu, Trade Minister of Indonesia, to Ambassador Ron Kirk, United States Trade Representative, 3 July 2009; Letter from H.E. Sudjadnan Parnohadiningrat, Ambassador of Indonesia to the United States, to United States Senate Majority Leader Harry Reid, 8 April 2009; and Letter from H.E. Mari Pangestu, Trade Minister of Indonesia, to Ambassador Susan C. Schwab, 28 August 2007 (Exhibit IND-15).

<sup>961</sup> This means more than a year before the adoption of the FSPTCA, which was signed on 22 June 2009.

<sup>962</sup> Letter from Secretary of HHS Mike Leavitt to Congressman Joe Barton, 21 July 2008 (Exhibit IND-16) p. 2. Indonesia's first written submission, para. 24. We review Indonesia's participation during the U.S. legislative process and the responses of key figures in the U.S. government to that participation in greater detail below, in the context of examining Indonesia's claim under Article 12.3 of the *TBT Agreement*.



Decision itself. Indeed, as discussed above, all Members, meeting as a Ministerial Conference agreed that the reasonable interval would normally, i.e., by rule, be of at least six months. Indonesia, in spite of its participation in the legislative process, could reasonably have expected that it would have at least six months to adjust its industry. Furthermore, Indonesia's active participation in the legislative process strongly suggests that it considered that there was at least some possibility of having clove cigarettes excluded from the scope of the ban.

7.586 The text of paragraph 5.2 of the Doha Ministerial Decision also provides us with useful guidance on what circumstances to examine. We recall that the Doha Ministerial Decision indicates that the reasonable interval shall be understood as normally no less than six months, "except when this would be ineffective in fulfilling the legitimate objectives pursued".

7.587 In this respect, Indonesia argues 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 fulfil the objectives of the Act".<sup>963</sup> It further argues that the United States concedes that Section 907(a)(1)(A) did not address an "urgent problem" within the meaning of Article 2.10 of the *TBT Agreement*.<sup>964</sup>

7.588 The United States argues that the FSPTCA "directly addresses a serious problem – youth smoking" and that "Congress intended to limit this behaviour as much as practicable".<sup>965</sup>

7.589 We recall the long legislative history of the FSPTCA. We further recall our findings that, in the absence of any evidence or argument that urgent problems of, *inter alia*, health, arose or threatened to arise upon adoption of Section 907(a)(1)(A), these urgent circumstances were not present.<sup>966</sup>

7.590 We also note that it is not in dispute that clove cigarettes had already been sold in the United States for approximately 40 years at the time of the ban, and had a flat market share for at least the 10 years preceding the ban. In addition, the other flavoured cigarettes banned by Section 907(a)(1)(A) had been introduced into the U.S. market a number of years prior to the ban, and had no sizeable market share at the time of the ban.

7.591 The United States argues that Indonesia has failed to meet its burden of demonstrating that the three-month period provided by the United States is not reasonable because it failed to explain why delaying the effective date for six months would be consistent with the objectives of the measure.<sup>967</sup> We disagree. We recall the Appellate Body's findings in *US – Wool Shirts and Blouses* whereby "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."<sup>968</sup> We also recall that "a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."<sup>969</sup>

7.592 We consider that Indonesia has 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

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<sup>963</sup> Indonesia's first written submission, para. 145.

<sup>964</sup> Indonesia's second written submission, para. 151.

<sup>965</sup> United States' first written submission, para. 302.

<sup>966</sup> See Section VII.I.2(c).

<sup>967</sup> United States' first written submission, para. 302.

<sup>968</sup> Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14.

<sup>969</sup> Appellate Body Report on *EC – Hormones*, para. 104. This was confirmed by the Appellate Body in its Reports *Japan – Agricultural Products II*, paras. 98 and 136 and *Japan – Apples*, para. 159.

fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective. The onus was thus on the United States to demonstrate why the interval between the publication and the entry into force of Section 907(a)(1)(A) should be considered to be outside the rule and thus why it must have been less than the "normal" "no less than six months". The United States has advanced no argumentation nor presented evidence in this regard.

7.593 Thus, we are not persuaded that delaying the ban by six months, rather than the three-month period provided for in Section 907(a)(1)(A) would have been ineffective in fulfilling the objective pursued by the United States. The United States has not explained the Panel 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. The United States has also not explained why six months was ineffective when the government of the United States has not deemed necessary to notify Section 907(a)(1)(A) as an urgent measure pursuant to Article 2.10 of the *TBT Agreement*.

7.594 We are not saying that the burden of proof in a claim under Article 2.12 of the *TBT Agreement* is on the respondent.<sup>970</sup> The burden of proof is on Indonesia. We are saying that Indonesia has 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 and that the United States has not rebutted that presumption.

(c) Conclusion

7.595 The Panel finds 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*.

L. WHETHER THE UNITED STATES HAS ACTED INCONSISTENTLY WITH ARTICLE 12.3 OF THE *TBT AGREEMENT*

1. Arguments of the parties

7.596 **Indonesia** claims that Section 907(a)(1)(A) violates Article 12.3 of the *TBT Agreement* because the ban on clove cigarettes created an unnecessary barrier to exports from a developing country. Indonesia submits that it has already demonstrated in the context of its claim under Article 2.2 of the *TBT Agreement* that the ban on clove cigarettes created an unnecessary barrier to exports from Indonesia.<sup>971</sup> Indonesia argues that because the sale of clove cigarettes in the United States consisted primarily of imports from Indonesia, the United States was obliged to take account of the special development and trade needs of Indonesia, a developing country Member.<sup>972</sup> As many as six million Indonesians are employed directly or indirectly in the manufacture of cigarettes and the growing of tobacco.<sup>973</sup> Indonesia asserts that it expressed its concerns to the United States about the effect the ban would have on its trade on several occasions through bilateral discussions in August 2009, Indonesia's questions concerning the justification for Section 907(a)(1)(A) circulated in document G/TBT/W/32, and statements at the TBT Committee meeting in November 2009.<sup>974</sup> Indonesia asserts that the United States disregarded Indonesia's repeated concerns and never provided any justification for the measure or explained to Indonesia on

<sup>970</sup> See, Appellate Body Report, *EC – Sardines*, paras. 274, 275 and 282.

<sup>971</sup> Indonesia's first written submission, para. 147.

<sup>972</sup> Indonesia's first written submission, para. 147.

<sup>973</sup> Indonesia's first written submission, para. 5; Indonesia's response to Panel question No. 114, paras. 68-70.

<sup>974</sup> Indonesia's first written submission, para. 147; Indonesia's response to Panel question No. 76, para. 151; Indonesia's second written submission, para. 154.

how it had complied with its obligations under Article 2.5 of the *TBT Agreement* in light of the significant effect that Section 907(a)(1)(A) would have on Indonesia's trade and development.<sup>975</sup>

7.597 Indonesia submits that the United States cannot be held to have complied with its obligation under Article 12.3 of the *TBT Agreement* merely by allowing Indonesia to comment on Section 907(a)(1)(A), and merely by listening to those comments.<sup>976</sup> Indonesia submits that Article 2.9.4 of the *TBT Agreement* already guarantees this right, and the United States' interpretation of Article 12.3 would therefore read that provision out of existence.<sup>977</sup> In Indonesia's view, Article 12.3 requires Members to "do something".<sup>978</sup> Indonesia submits that the United States cannot point to anywhere in the Act or its legislative history where the Congress even said the word "developing country".<sup>979</sup>

7.598 Indonesia submits that the Panel should exercise great caution before transposing any aspects of the reasoning of the panel in *EC – Approval and Marketing of Biotech Products* to the interpretation of Article 12.3 of the *TBT Agreement*, given that, in Indonesia's view, Article 12.3 of the *TBT Agreement* differs from Article 10.1 of the *SPS Agreement* in that the former does "prescribe a specific result to be achieved".<sup>980</sup> Nonetheless, Indonesia believes several aspects of the panel report in *EC – Approval and Marketing of Biotech Products* provide useful insights and instruction for purposes of Article 12.3 of the *TBT Agreement* and the present dispute.<sup>981</sup> Among other things, Indonesia appears to agree with that panel's interpretation of the terms "take account of", and recalls that panel's statement that "take account of" implies to "consider along with other factors before reaching a decision".<sup>982</sup>

7.599 Indonesia clarifies that it is not its position that the last part of Article 12.3 of the *TBT Agreement* sets forth a stand-alone legal prohibition on the creation of unnecessary obstacles to exports from developing country Members.<sup>983</sup> Indonesia submits that although a developing country invoking Article 12.3 of the *TBT Agreement* does not have to prove that it communicated its special development, financial and trade needs to the developed country enacting a technical regulation in order to trigger the protection of this provision<sup>984</sup>, it did in fact do so on several occasions<sup>985</sup>. Indonesia submits that it is not necessary for the Panel to speculate on what type of evidence would be sufficient to establish that a Member implementing a technical regulation complied with the obligation to "take account of" the special needs of developing countries; rather, it is clear what the

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<sup>975</sup> Indonesia's first written submission, para. 147.

<sup>976</sup> Indonesia's oral statement at the first substantive meeting of the Panel, paras. 184-186.

<sup>977</sup> Indonesia's oral statement at the first substantive meeting of the Panel, para. 185; Indonesia's second written submission, paras. 156-157; Indonesia's comments on the United States' response to Panel question No. 112, para. 74.

<sup>978</sup> Indonesia's oral statement at the first substantive meeting of the Panel, paras. 184, 186.

<sup>979</sup> Indonesia's oral statement at the first substantive meeting of the Panel, para. 187.

<sup>980</sup> Indonesia's response to Panel question No. 73, para. 145; Indonesia's second written submission, para. 153.

<sup>981</sup> Indonesia's response to Panel question No. 73, para. 146.

<sup>982</sup> Indonesia's second written submission, footnote 276 (citing Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1620).

<sup>983</sup> Indonesia's response to Panel question No. 74, para. 147.

<sup>984</sup> Indonesia's response to Panel question No. 75, para. 148-150; Indonesia's second written submission, para. 153.

<sup>985</sup> Indonesia's response to Panel question No. 76, para. 151; Indonesia's second written submission, para. 154.

United States did, and the only question is whether those actions satisfied the requirements of Article 12.3.<sup>986</sup>

7.600 In response to the United States questioning whether Indonesia is a "developing country", Indonesia notes that the World Bank classifies Indonesia as a developing country, Indonesia's status as a developing country member of the WTO was recognized in *Indonesia – Autos*, and Indonesia is also a member of the G-33 developing countries in the WTO.<sup>987</sup>

7.601 Indonesia submits that there is nothing in the wording of Article 12.3 of the *TBT Agreement* that implies that the needs of developing countries have to be "unique" to developing countries; rather, this provision identifies "development, financial and trade needs" as the "special" needs of developing countries that must be taken into account.<sup>988</sup>

7.602 The **United States** submits that Indonesia has failed to demonstrate that the United States acted inconsistent with Article 12.3 of the *TBT Agreement*. The United States argues that in order to establish a violation of Article 12.3, the complaining party must demonstrate the following: (a) that it is a developing country; (b) that the other Member did not take account of its special development, financial or trade needs during the preparation and application of a technical regulation; and (c) that the Member did not take account of these needs with a view to ensuring that the technical regulation does not create unnecessary obstacles to export.<sup>989</sup>

7.603 The United States submits that even assuming *arguendo* that Indonesia is a developing country, Indonesia has not demonstrated that the United States failed to take account of one or more special needs of Indonesia in the enactment of the law. To the contrary, in the five years between the initial bill being introduced for consideration in the House of Representatives in 2004, and the law being enacted in 2009, Indonesia had ample opportunity to make its views known to both Congress and the Executive Branch and, in fact, did make its views known. The United States recalls that Indonesia had numerous communications with both Congress and the Executive Branch, making the United States well aware of Indonesia's position. The United States submits that by allowing Indonesia an opportunity to comment on previous iterations of the legislation, as well as the version that was actually enacted into U.S. law, the United States complied with its obligations under Article 12.3.<sup>990</sup>

7.604 The United States further argues that Article 12.3 does not require the developed country Member to accept every recommendation presented by the developing country Member, and the fact that Congress decided to value the public health over the interests of cigarette manufactures, both domestic and foreign, does not mean that the United States has acted inconsistently with Article 12.3.<sup>991</sup>

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<sup>986</sup> Indonesia's response to Panel question No. 77, para. 152-153; Indonesia's second written submission, para. 155.

<sup>987</sup> Indonesia's second written submission, footnote 277.

<sup>988</sup> Indonesia's response to Panel question No. 113, paras. 66-67.

<sup>989</sup> United States' first written submission, para. 307.

<sup>990</sup> United States' first written submission, para. 308; United States' oral statement at the second substantive meeting of the Panel, para. 109.

<sup>991</sup> United States' first written submission, para. 309; United States' response to Panel question No. 77, para. 158; United States' oral statement at the second substantive meeting of the Panel, para. 109; United States' response to Panel question No. 112, para. 118.

7.605 The United States submits that Indonesia has failed to establish that Section 907 (a)(1)(A) creates an unnecessary obstacle to export, for the reasons discussed in the context of the claim under Article 2.2 of the TBT Agreement.<sup>992</sup>

7.606 The United States submits that based on the similarities between the provisions, Article 10.1 of the *SPS Agreement* provides relevant context for the interpretation of Article 12.3 of the *TBT Agreement*, and that past WTO reports examining the meaning of Article 10.1, such as the panel report in *EC – Approval and Marketing of Biotech Products*, may be instructive to the Panel in this dispute.<sup>993</sup>

7.607 In addition, the United States argues that Indonesia has failed to identify any "special development, financial [or] trade needs" unique to a developing country that it had, and that the United States failed to take into account.<sup>994</sup> Insofar as Indonesia is arguing that the measure risks unemployment, a risk of unemployment cannot be a "special need" given that every government is concerned about the unemployment rate of its citizens.<sup>995</sup> In addition, Indonesia has provided no reliable evidence that Section 907(a)(1)(A) has had any impact on employment in Indonesia, much less the "severe adverse impact" that Indonesia repeatedly refers to.<sup>996</sup> In the United States' view, Indonesia's interpretation of Article 12.3 would read the term "special" out of the text.<sup>997</sup>

7.608 As to the legal standard at issue, the United States submits that it is not sufficient for Indonesia to simply say that "something" more than what the United States has done is required without explaining what that "something" more is exactly.<sup>998</sup>

7.609 Finally, the United States' view does not render Article 12.3 of the *TBT Agreement* redundant of Article 2.9.4 of the *TBT Agreement* as Indonesia claims. Article 2.9.4 could, in some instances, provide a mechanism for a dialogue on the "special needs" referenced in Article 12.3. The obligation of Article 2.9.4 is only one of a set of obligations contained in Article 2.9. If the conditions contained in the Article 2.9 chapeau are satisfied, then the transparency mechanisms described in Article 2.9 are triggered. Article 12.3 is not so conditioned and does not specify a particular mechanism to facilitate the communications. In this regard, Article 12.3 is a broader obligation than the one provided in Article 2.9.4. The fact that in certain circumstances, Article 12.3 could be satisfied by satisfying Article 2.9.4 does not mean that Article 12.3 is inutile.<sup>999</sup>

## 2. Analysis by the Panel

### (a) Introduction

7.610 The question before the Panel is whether the United States 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, a developing country Member.

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<sup>992</sup> United States' first written submission, para. 310.

<sup>993</sup> United States' response to Panel question No. 74, para. 152; United States' oral statement at the second substantive meeting of the Panel, para. 109.

<sup>994</sup> United States' response to Panel question Nos. 75 and 77, paras. 155 and 157.

<sup>995</sup> United States' oral statement at the second substantive meeting of the Panel, para. 107.

<sup>996</sup> United States' oral statement at the second substantive meeting of the Panel, para. 108; United States' comments on Indonesia's response to Panel question No. 114, para. 78.

<sup>997</sup> United States' comments on Indonesia's response to Panel question No. 113, para. 73.

<sup>998</sup> United States' oral statement at the second substantive meeting of the Panel, para. 106; United States' response to Panel question No. 112, para. 118.

<sup>999</sup> United States' oral statement at the second substantive meeting of the Panel, para. 110; United States' response to Panel question No. 112, para. 117; United States' comments on Indonesia's response to Panel question No. 113, para. 75.

(b) The legal provision at issue

7.611 We note that Article 12 of the *TBT Agreement* is entitled "Special and Differential Treatment of Developing Country Members". Article 12.3 of the *TBT Agreement* provides that:

"Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members."

7.612 In *EC – Approval and Marketing of Biotech Products*, the panel observed that "Article 12.3 requires that in preparing and applying technical regulations, standards and conformity assessment procedures, Members take account of the special needs of developing country Members."<sup>1000</sup> That Panel also noted that "Article 12.3 is a specific application of the obligation in Article 12.2 to take account of developing country needs in the implementation of the *TBT Agreement* at the national level."<sup>1001</sup>

7.613 Beyond this, there is no substantial jurisprudence relating to Article 12.3 of the *TBT Agreement* and no prior panel or Appellate Body report addresses the question of what legal test should be applied to establish a violation of Article 12.3.

(c) Scope of the obligation in Article 12.3 of the *TBT Agreement*

7.614 The Panel observes that certain elements of Indonesia's Panel Request and subsequent submissions suggest that, in Indonesia's view, the relevant question under Article 12.3 of the *TBT Agreement* is whether a challenged measure "created an unnecessary obstacle to exports from developing country Members".<sup>1002</sup> To the extent that Indonesia is arguing that Article 12.3 embodies a prohibition against creating unnecessary obstacles to exports from developing countries, the Panel is unable to agree. We read Article 12.3 as establishing an obligation to "take account of" the special development, financial and trade needs of developing country Members. We read the last part of the sentence in Article 12.3 as providing guidance on *how* and *why* the Member preparing or applying the technical regulation should "take account of" these special needs – namely, "with a view to" ensuring that technical regulations do not create unnecessary obstacles to exports from developing country Members.

7.615 In our view, this interpretation flows naturally from the plain language of the text of Article 12.3 of the *TBT Agreement*. We find it difficult to read a provision structured in terms of Article 12.3 – i.e., structured in terms of "Members shall take into account ..., with a view to ..." – to mean that words following "with a view ..." would establish an additional obligation, or a separate

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<sup>1000</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47, subpara. 75.

<sup>1001</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47, subpara. 77.

<sup>1002</sup> We note that Indonesia's Panel Request states that the measure at issue, i.e. Section 907(a)(1)(A), is inconsistent with "TBT Article 12.3 because the ban created an unnecessary barrier to exports from developing countries". WT/DS406/2, p. 2. Throughout its first written submission, Indonesia asserts that Section 907(a)(1)(A) is inconsistent with Article 12.3 because it creates an unnecessary barrier to exports from Indonesia. Indonesia's first written submission, para. 12, Section V.I 8 (entitled "The Special Rule Violates Article 12.3 of the TBT Agreement because the Ban Created an Unnecessary Barrier to Exports from a Developing Country"), and para. 147.

However, elsewhere Indonesia seems to agree that the relevant question under Article 12.3 is whether the Member concerned did or did not "take account of" the needs of developing country Members. See e.g. Indonesia's response to Panel question No. 74, para. 147.

element of a claim. The Spanish and French versions of Article 12.3 are drafted in the same way<sup>1003</sup>, thereby reinforcing the view that the first part of Article 12.3 establishes an obligation to "take account of" the special development, financial and trade needs of developing country Members, whereas the last part of the sentence in Article 12.3 simply provides guidance on *how* and *why* the Member preparing or applying the technical regulation should "take account of" these special needs.

7.616 We find further support for our interpretation of Article 12.3 of the *TBT Agreement* by reading this provision in the context of Article 2.2 of the *TBT Agreement*. The latter provision, which clearly prohibits Members from adopting technical regulations that create unnecessary obstacles to trade, is worded and structured differently from the obligation in Article 12.3. In addition, it is not clear what object or purpose would be served by duplicating the obligation, already found in Article 2.2, in Article 12.3. Any measure captured by an obligation under Article 12.3 to ensure that technical regulations "do not create unnecessary obstacles to exports from developing country Members" would already be captured and subsumed within the obligation under Article 2.2 to ensure that technical regulations do not create "unnecessary obstacle to international trade" (as defined in the second sentence of that provision). Accordingly, if such an obligation were to be read in to Article 12.3, it would appear to be redundant and inutile in the light of Article 2.2.

7.617 For these reasons, we do not read Article 12.3 of the *TBT Agreement* as establishing an obligation against creating "unnecessary obstacles to exports from developing country Members". Contrary to certain arguments from Indonesia, this provision does not, in our view, "prescribe a specific result to be achieved".<sup>1004</sup> Rather, we read Article 12.3 as an obligation to "take account of" the special needs of developing countries. This means that the focus and scope of the enquiry under Article 12.3 of the *TBT Agreement* differs significantly from that of Article 2.2 of the *TBT Agreement*, and finding that a measure is consistent (or inconsistent) with Article 2.2 does not answer the question of whether that measure is inconsistent with Article 12.3. Thus, where a panel finds that a Member has adopted a technical regulation that *is* more trade-restrictive than necessary to fulfil a legitimate objective under Article 2.2, this finding does not prove that the Member did *not* take account of developing country needs in the preparation and application of that measure. Conversely, where a panel finds that a Member has adopted a technical regulation that is *not* more trade-restrictive than necessary to fulfil a legitimate objective, this does not prove that the Member took account of developing country needs in the preparation and application of that measure.

7.618 Of course, even if the Panel were to assume *arguendo* that Article 12.3 prohibits the adoption of technical regulations that create unnecessary obstacles to exports from developing countries, the Panel has already found that Section 907(a)(1)(A) is not more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create<sup>1005</sup>. If Article 12.3

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<sup>1003</sup> The Spanish and French versions of Article 12.3 read as follows:

"Los Miembros, cuando preparen o apliquen reglamentos técnicos, normas y procedimientos para la evaluación de la conformidad, tendrán en cuenta las necesidades especiales que en materia de desarrollo, finanzas y comercio tengan los países en desarrollo Miembros, con el fin de asegurarse de que dichos reglamentos técnicos, normas y procedimientos para la determinación de la conformidad no creen obstáculos innecesarios para las exportaciones de los países en desarrollo Miembros."

"Dans l'élaboration et l'application des règlements techniques, des normes et des procédures d'évaluation de la conformité, les Membres tiendront compte des besoins spéciaux du développement, des finances et du commerce des pays en développement Membres, pour faire en sorte que ces règlements techniques, normes et procédures d'évaluation de la conformité ne créent pas d'obstacles non nécessaires aux exportations des pays en développement Membres."

<sup>1004</sup> Indonesia's second written submission, para. 153.

<sup>1005</sup> See Section VII.F.2(e) above.

called for the same analysis as Article 2.2, then that finding would apply equally in the context of Article 12.3.

7.619 We shall therefore continue our analysis of the elements that must be demonstrated by Indonesia in order to prove a violation by the United States of Article 12.3 of the *TBT Agreement* by failing to take account of the special needs of Indonesia as a developing country.

(d) Elements of the obligation in Article 12.3 of the *TBT Agreement*

7.620 We understand the wording of Article 12.3 of the *TBT Agreement* to require that three elements must be demonstrated in order to establish a violation of the obligation set forth in that provision. In particular, the Panel considers that Indonesia must demonstrate that:

- (a) Indonesia is a "developing country";
- (b) Indonesia has "special development, financial and trade needs" that are affected by Section 907(a)(1)(A); and
- (c) the United States failed to "take account of" Indonesia's special financial, development and trade needs.

(i) *First element: whether Indonesia is a "developing country"*

7.621 As we explained above, the first element that must be demonstrated is that Indonesia is a "developing country".

7.622 In its first written submission, the United States asserts in general that Indonesia has not met its burden of proof on any of the elements under Article 12.3 of the *TBT Agreement*, but that the United States will assume *arguendo* that Indonesia is a developing country in responding to the claim under Article 12.3.<sup>1006</sup>

7.623 Indonesia states that it is a developing country<sup>1007</sup> and argues, *inter alia*, that the World Bank classifies it as a developing country and that its status as a developing country Member of the WTO was recognized in *Indonesia – Autos*.<sup>1008</sup>

7.624 The Panel is of the view that the foregoing is more than sufficient to conclude that Indonesia is a "developing country". We therefore find that the first element of a claim under Article 12.3 of the *TBT Agreement* is satisfied.

(ii) *Second element: whether Indonesia has "special development, financial and trade needs" that are affected by Section 907(a)(1)(A)*

7.625 The next question before the Panel is whether Indonesia has "special development, financial and trade needs" that are affected by Section 907(a)(1)(A).

7.626 The United States submits that Indonesia has never identified any needs "that are unique to a developing country (as opposed to a developed one)".<sup>1009</sup> Indonesia responds that there is nothing in the wording of Article 12.3 of the *TBT Agreement* that implies that the needs of developing countries

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<sup>1006</sup> United States' first written submission, para. 308.

<sup>1007</sup> Indonesia's first written submission, paras. 12, 147; Indonesia's orals statement at the first substantive meeting of the Panel, paras. 20, 22, 178; Indonesia's second written submission, paras. 90, 154.

<sup>1008</sup> Indonesia's second written submission, footnote 277 (citing Exhibit IND-89).

<sup>1009</sup> United States' response to Panel question Nos. 74 and 77, paras. 154 and 157.



have to be unique to developing countries; rather, this provision identifies "development, financial and trade needs" as the special needs of developing countries that must be taken into account.<sup>1010</sup> In the United States' view, Indonesia's interpretation of Article 12.3 would read the term "special" out of the text.<sup>1011</sup>

7.627 We begin by observing that the meaning of the expression "special development, financial and trade needs" is not entirely clear. Indeed, the expression appears to be deliberately vague. The Panel notes that similar expressions are found in other WTO Agreements and instruments. For example, in *EC – Tariff Preferences*, the Appellate Body elaborated upon the meaning of the phrase "development, financial, and trade needs" in the context of paragraph 3(c) of the Enabling Clause.<sup>1012</sup> In *Brazil – Aircraft*, the panel had to consider the phrase "development needs" in the context of Article 27.4 of the *SCM Agreement*.<sup>1013</sup> That panel made the interesting observation that "an examination of whether export subsidies are inconsistent with a developing country Member's development needs is an inquiry of a peculiarly economic and political nature, and notably ill-suited to review by a panel whose function is fundamentally legal".<sup>1014</sup>

7.628 Whatever the exact meaning of the terms "special development, financial and trade needs", the Panel considers that Indonesia satisfies the requirement of being a developing country that has "special development, financial and trade needs" affected by the ban on clove cigarettes. In this regard, the Panel notes that Indonesia explained "the importance of clove cigarettes to its economy and its people".<sup>1015</sup> More specifically, clove cigarettes have been produced in Indonesia for over a century; it is estimated that as many as 6 million Indonesians are employed directly or indirectly in the manufacture of cigarettes and the growing of tobacco; the cigarette industry, including clove, accounts for approximately 1.66 per cent of Indonesia's total gross domestic product ("GDP"); and Indonesia has exported clove cigarettes to the United States for well over 40 years.<sup>1016</sup> It is also not in dispute that, as a result of the ban, U.S. imports of clove cigarettes produced in Indonesia have declined from approximately \$15 million in 2008 to zero in 2010.<sup>1017</sup>

7.629 We consider that the above is sufficient to conclude that Indonesia has "special development, financial and trade needs" that are affected by technical regulation at issue. We therefore find that the second element of a claim under Article 12.3 of the *TBT Agreement* is satisfied.

(iii) *Third element: whether the United States failed to "take account of" Indonesia's special financial, development and trade needs*

7.630 This takes the Panel to the third and final element that must be demonstrated to establish a violation of Article 12.3 of the *TBT Agreement*, which is whether the United States failed to "take account of" these special financial, development and trade needs. We will begin by providing some general observations on the obligation, in Article 12.3, to "take account of" a developing country's special needs. We will then review the evidence before the Panel in order to determine whether the United States failed to take account of Indonesia's special needs in connection with Section 907(a)(1)(A).

7.631 We note that there is no jurisprudence examining the nature of the obligation in Article 12.3 of the *TBT Agreement* to "take account of" the special needs of developing countries. However, the

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<sup>1010</sup> Indonesia's response to Panel question No. 113, paras. 66-67.

<sup>1011</sup> United States' comments on Indonesia's response to Panel question No. 113, para. 73.

<sup>1012</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 159.

<sup>1013</sup> Panel Report, *Brazil – Aircraft*, para. 7.89.

<sup>1014</sup> Panel Report, *Brazil – Aircraft*, para. 7.89.

<sup>1015</sup> Indonesia's first written submission, para. 6.

<sup>1016</sup> Indonesia's first written submission, para. 5.

<sup>1017</sup> Indonesia's first written submission, para. 40.

panel in *EC – Approval and Marketing of Biotech Products* examined a claim brought by Argentina under Article 10.1 of the *SPS Agreement*, which the panel described as the "equivalent provision" to Article 12.3 of the *TBT Agreement*.<sup>1018</sup> Article 10.1 reads as follows:

"In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members." (emphasis added)

7.632 The panel in *EC – Approval and Marketing of Biotech Products*, which rejected Argentina's claim under Article 10.1 of the *SPS Agreement*, observed with respect to the meaning of the terms "take account of" that:

"... The dictionary defines the expression 'take account of' as 'consider along with other factors before reaching a decision'.<sup>1019</sup> Consistent with this, Article 10.1 does not prescribe a specific result to be achieved. Notably, Article 10.1 does not provide that the importing Member must invariably accord special and differential treatment in a case where a measure has led, or may lead, to a decrease, or a slower increase, in developing country exports".<sup>1020</sup>

7.633 That panel also found that it is the complaining party that carries the burden of proving that the Member adopting the technical regulation did not "take account of" developing country Members' needs.<sup>1021</sup>

7.634 We agree with that panel's interpretation of the obligation to "take account of" developing country Members' needs, and we agree with the panel that it is the complaining party, in this case Indonesia, that carries the burden of proof.<sup>1022</sup>

7.635 The evidence before the Panel on this issue consists of a series of letters between key figures in the Indonesian and United States governments. We will briefly review this record, moving in chronological order.

7.636 A letter dated 28 August 2007 from the Trade Minister of Indonesia to the United States Trade Representative records that:

"This draft Act contains a provision, which, if enacted as currently drafted, will unjustifiably discriminate against Indonesia's cigarette exports in favor of competing, domestically produced U.S. cigarette products. *We understand that Senator Kennedy, who has been supportive of addressing our concerns with appropriate legislative language, has written to you about this matter.*"<sup>1023</sup>

7.637 A letter dated 21 July 2008 from the Secretary of Health and Human Services to the Ranking Member of the Committee on Energy and Commerce explains that:

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<sup>1018</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, fn 1330.

<sup>1019</sup> (footnote original) *The Concise Oxford Dictionary*, 10th edn., J. Pearsall (ed.) (Clarendon Press, 1999), p. 8.

<sup>1020</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1620.

<sup>1021</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.1622 and 7.1625.

<sup>1022</sup> The Panel takes note of Colombia's view that, while Indonesia carries the burden of proof on this element of its claim, it is important to bear in mind that obligations of Members under Article 12.3 of the *TBT Agreement*, are only verifiable through information available to the Member bound to comply with such provision. Colombia's third-party oral statement, para. 40.

<sup>1023</sup> Letter from H.E. Mari Pangestu, Trade Minister of Indonesia, to Ambassador Susan C. Schwab, United States Trade Representative, 28 August 2007 (Exhibit IND-15) p. 7 of 9 (emphasis added).

"There is a further issue regarding the bill that I would like to bring to your attention. Our trading partners believe that by banning the sale of clove cigarettes but not prohibiting the sale of menthol cigarettes, the bill raises questions under U.S. international trade obligations. The government of Indonesia has repeatedly objected to the bill on the ground that this disparate treatment is unjustified and incompatible with WTO trade rules. Accordingly, *I would recommend that the Committee [on Energy and Commerce] further review the relevant language in this light to ensure that the bill is consistent with U.S. trade obligations.*"<sup>1024</sup>

7.638 The record continues with a letter dated 25 July 2008, in which the Chairman of the Committee on Energy and Commerce writes to the Chairman of the Committee on Ways and Means:

*"You have also expressed concerns about the provision in the bill that prohibits the use of clove to create a characterizing flavor in cigarettes. I acknowledge your concerns and understand that the Committee on Ways and Means has jurisdiction over import bans because of the effects on trade and on customs revenues."*<sup>1025</sup>

7.639 On 30 July 2008 the Executive Office of the President of the United States issued a Statement of Administration Policy on H.R. 1108 (The Family Smoking Prevention and Tobacco Control Act). This statement indicated that "the Administration has serious concerns with H.R. 1108"<sup>1026</sup>, and stated that:

*"Additionally, our trading partners may argue that by banning the sale of clove cigarettes but not prohibiting the sale of menthol cigarettes, the bill raises questions under U.S. international trade obligations."*<sup>1027</sup>

7.640 A letter dated 16 March 2009 from the Chairman of the Committee on Ways and Means to the Chairman of the Committee on Energy and Commerce notes that:

*"The Committee has taken note that H.R. 1256 includes a prohibition against the use of clove to create a characterizing flavor in cigarettes. The Committee on Ways and Means believes this provision to be within its jurisdiction because most clove-flavored cigarettes currently sold in the United States are imported. I understand that you recognize our jurisdictional interest in this question, given its effects on trade and on customs revenues. The Committee on Ways and Means has agreed to forego action on this bill and will not oppose its consideration, based on our understanding that you agree, as the bill moves through the legislative process, you*

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<sup>1024</sup> Letter from Mike Leavitt, Secretary of Health and Human Services, to Joe Barton, Ranking Member of the House of Representatives Committee on Energy and Commerce, 21 July 2008 (Exhibit IND-16) p. 2 of 3 (emphasis added).

<sup>1025</sup> Letter from John Dingell, Chairman of the House of Representatives Committee on Energy and Commerce, to Charles B. Rangel, Chairman of the House of Representatives Committee on Ways and Means, 25 July 2008 (Exhibit IND-18) p. 2 of 2 (emphasis added).

<sup>1026</sup> Executive Office of the President, Office of Management and Budget, Statement of Administration Policy, H.R. 1108 – The Family Smoking Prevention and Tobacco Control Act, 30 July 2008 (Exhibit IND-17) p. 1 of 2.

<sup>1027</sup> Executive Office of the President, Office of Management and Budget, Statement of Administration Policy, H.R. 1108 – The Family Smoking Prevention and Tobacco Control Act, 30 July 2008 (Exhibit IND-17) p. 2 of 2 (emphasis added).

will continue to discuss with the Committee on Ways and Means *the concerns raised with respect to the clove provision.*"<sup>1028</sup>

7.641 That same day, the Chairman of the Committee on Energy and Commerce responded:

*"You have expressed concerns about the provision of the bill that prohibits the use of clove to create a characterizing flavor in cigarettes. I acknowledge your concerns and understand that the Committee on Ways and Means has jurisdiction over import bans because of the effects on import trade and on customs revenues. ... As the bill moves through the legislative process, we will continue to discuss with the Committee on Ways and Means the concerns raised with respect to the clove provision. Per your request, I will include copies of our exchange of letters on these matters in the Congressional Record."*<sup>1029</sup>

7.642 A letter dated 8 April 2009 from the Ambassador of Indonesia to the U.S. Senate Majority Leader once again noted:

*"... that Chairman Kennedy's mark of the bill in 2007 included appropriate language that treated clove and menthol cigarettes with parity – consistent with the United States' longstanding trade obligations. We urge you to contact Senator Kennedy's office to encourage him to re-insert such language in the bill in the Senate."*<sup>1030</sup>

7.643 The evidence before the Panel is no doubt fragmented and incomplete. However, several inescapable conclusions emerge from this record, such as it is.

7.644 In the first place, Indonesia was able to communicate its concerns to key figures in the U.S. Government on multiple occasions, over a period of several years. These communications consisted of numerous written communications as well as high-level meetings with U.S. officials.

7.645 The evidence shows that Indonesia's concerns were subsequently raised on a number of occasions, by key officials within the U.S. Government. In fact, the exchanges among key U.S. officials presented by the parties show that the United States actively took account of Indonesia's concerns. In other words, the evidence demonstrates that Indonesia's concerns were "taken into account" by the United States.

7.646 In addition, to "take account of" the special financial, development and trade needs of a developing country does not necessarily mean that the Member preparing or applying a technical regulation must agree with or accept the developing country's position and desired outcome. In our opinion, the fact that the United States ultimately decided not to exclude clove cigarettes from the scope of the ban in Section 907(a)(1)(A) does not mean that the United States did not take account of Indonesia's special financial, development and trade needs.

7.647 Finally, in its communications, Indonesia made clear that its desired outcome was for the United States to exclude clove cigarettes from the scope of Section 907(a)(1)(A). However, we have

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<sup>1028</sup> Letter from Charles B. Rangel, Chairman of the House of Representatives Committee on Ways and Means, to Henry Waxman, Chairman of the House of Representatives Committee on Energy and Commerce, 16 March 2009 (Exhibit US-67) pp. 28-29 of 52 (emphasis added).

<sup>1029</sup> Letter from Henry Waxman, Chairman of the House of Representatives Committee on Energy and Commerce, to Charles B. Rangel, Chairman of the House of Representatives Committee on Ways and Means, 16 March 2009 (Exhibit US-67) p. 30 of 52 (emphasis added).

<sup>1030</sup> Letter from H.E. Sudjudnan Parnohadiningrat, Ambassador of Indonesia to the United States, to Harry Reid, United States Senate Majority Leader, 8 April 2009 (Exhibit IND-15) p. 5 of 9.

found that banning clove cigarettes makes a material contribution to the legitimate objective of reducing youth smoking in the United States. Considering that the measure is a ban on cigarettes with characterizing flavours for reasons of public health, the Panel fails to see how it could be possible, under WTO rules, to exclude from the ban cigarettes with characterizing flavours from developing countries. Indeed, a requirement to exclude a product that is harmful to human health from a ban, solely on the grounds that the product is produced and exported by a developing country, would limit Members' ability to regulate for public health purposes.

7.648 In the light of the foregoing, we find that Indonesia has not demonstrated that the United States failed to "take account of" Indonesia's special financial, trade and development needs.

(e) Conclusion

7.649 The Panel therefore finds that, by failing to demonstrate that the United States did not take account of the special development, financial and trade needs of Indonesia, in the preparation and application of Section 907(a)(1)(A), Indonesia has failed to demonstrate that the United States acted inconsistently with Article 12.3 of the *TBT Agreement*.

## VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 As described in greater detail above, the Panel *finds* that:

- (a) Section 907(a)(1)(A) is a "technical regulation" within the meaning of Annex 1.1 of the *TBT Agreement*;
- (b) Section 907(a)(1)(A) is inconsistent with Article 2.1 of the *TBT Agreement* because it accords to imported clove cigarettes treatment less favourable than that it accords to like menthol cigarettes of national origin;
- (c) by failing to demonstrate that the ban on clove cigarettes imposed by Section 907(a)(1)(A) is more trade-restrictive than necessary to fulfil the legitimate objective of reducing youth smoking, taking account of the risks non-fulfilment would create, Indonesia has failed to demonstrate that Section 907(a)(1)(A) is inconsistent with Article 2.2 of the *TBT Agreement*;
- (d) by failing to request the United States to explain the justification for Section 907(a)(1)(A) "in terms of Articles 2.2 to 2.4 of the *TBT Agreement*" through its questions in document G/TBT/W/323, Indonesia has failed to demonstrate that the United States acted inconsistently with Article 2.5 of the *TBT Agreement*;
- (e) by failing to demonstrate that it would be "appropriate" to formulate the technical regulation in Section 907(a)(1)(A) in terms of "performance", Indonesia has failed to demonstrate that Section 907(a)(1)(A) is inconsistent with Article 2.8 of the *TBT Agreement*;
- (f) 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 early appropriate stage, i.e., when amendments and comments were still possible, the United States has acted inconsistently with Article 2.9.2 of the *TBT Agreement*;
- (g) by failing to demonstrate that it had requested the United States to provide particulars or copies of Section 907(a)(1)(A) while it was still in draft form, Indonesia has failed

to demonstrate that the United States acted inconsistently with Article 2.9.3 of the *TBT Agreement*;

- (h) 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 has acted inconsistently with Article 2.12 of the *TBT Agreement*;
- (i) by failing to demonstrate that the United States did not take account of the special development, financial and trade needs of Indonesia, in the preparation and application of Section 907(a)(1)(A), Indonesia has failed to demonstrate that the United States acted inconsistently with Article 12.3 of the *TBT Agreement*.

8.2 In the absence of any evidence or argument on the existence of urgent problems of health that arose or threatened to arise for the United States at the time of adopting Section 907(a)(1)(A), the Panel *declines to rule* on Indonesia's claim under Article 2.10 of the *TBT Agreement*.

8.3 Having found that Section 907(a)(1)(A) is inconsistent with Article 2.1 of the *TBT Agreement*, the Panel also *declines to rule* on Indonesia's claim under Article III:4 of the GATT 1994.

8.4 Having declined to rule on Indonesia's alternative claim under Article III:4 of the GATT 1994, the Panel further *declines to rule* on whether Section 907(a)(1)(A) is justified under Article XX(b) of the GATT 1994.

8.5 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that the United States has nullified or impaired benefits accruing to Indonesia under the *TBT Agreement*, to the extent that the United States has acted inconsistently with Articles 2.1, 2.9.2 and 2.12 of the *TBT Agreement*.

8.6 Pursuant to Article 19.1 of the DSU, having found that the United States has acted inconsistently with its obligations under Articles 2.1, 2.9.2 and 2.12 of the *TBT Agreement*, we recommend that the Dispute Settlement Body request the United States to bring Section 907(a)(1)(A) into conformity with its obligations under the *TBT Agreement*.

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