US - Clove Cigarettes (Indonesia)

for training purposes only

selected issues (there are more!)

United States - Measures Affecting the Production and Sale of Clove Cigarettes (Indonesia)

"US - Clove Cigarettes"

Parties

Complainant:

Indonesia

Respondent:

United States

Third Parties:

- Brazil; Colombia; Dominican Republic; European Union; Guatemala; Mexico; Norway; Turkey

Timeline

Request for Consultations
07·04·2010

Panel Report Circulated
02·09·2011

AB Report Circulated
04·04·2012

Sources

- Panel Report (WT/DS406/R)
- Appellate Body Report (WT/DS406/AB/R)

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm

Family Smoking Prevention Tobacco Control Act of 2009 (FSPTCA)

Signed into law 22 June 2009

TBT Committee

November 2009

(STC was raised in Committee – US had not notified)

"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."

Panel Report 2.4-2.8; "House Report" refers to a report prepared by the House Energy and Commerce Committee

"... 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."

Panel Report 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").

US Exhibit 35, Henry Pane: (c) Detroit News/Dist. by United Feature Syndicate, Inc.

Smoking is the leading cause of preventable death in the United States, claiming over 400,000 lives each year.

Panel Report 2.8; The Food and Drug Administration ("FDA"), 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" on 23 December 2009.

An important way to reduce the death and disease caused by smoking is to prevent children and adolescents from starting to smoke

Panel Report 2.8; The Food and Drug Administration ("FDA"), 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" on 23 December 2009.

20 – 26 per cent of the US adult population smokes

12 – 19 per cent of the US youth population smokes

Panel Report 2.24, 7.333, 7.240

The vast majority of US smokers use regular and menthol: ¼ of the smoking population smokes menthol

Clove cigarette consumption accounts for 0.1 per cent of the US Market

From 2007 – 2009
virtually all clove cigarettes were
imported from Indonesia

(value: 16.2 – 7.5 USD million)

The vast majority of clove cigarettes consumed in the United States appears to come from Indonesia.

Produced by blending varieties of tobacco leaf (60%-80%) with ground cloves, clove buds, or clove oil (20%-40%)

imparting a distinguishing flavor

Indonesia is the predominate producer and importer of clove cigarettes to the US (0.1% market share in the US)

Smoked by youth

Panel Report 2.25-2.27, 7.157-7.171, 7.319, 7.387-7.391

Produced by blending varieties of tobacco leaf (90%) with menthol oil (1%)

imparting a distinguishing flavor

Menthol cigarettes have ≅ 25% market share in the US: “tens of millions … chemically and psychologically addicted [to menthol cigarettes]”

Smoked by youth

Panel Report 2.25-2.27, 7.157-7.171, 7.319, 7.387-7.391

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.

Panel Report 2.28

FCTC
WHO FRAMEWORK CONVENTION
ON TOBACCO CONTROL

“International efforts to curb smoking”: WHO Framework Convention on Tobacco Control

Panel Report 2.29-2.32

Administered by the World Health Organization ("WHO"), as part of the current international efforts to curb smoking.

FCTC
WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL

Aims to reduce demand and supply of tobacco.

Panel Report 2.29-2.32

FCTC
WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL

Negotiated in response to concerns about a globalized tobacco epidemic, exacerbated by increasing international trade in tobacco and foreign direct investment.

- The FCTC entered into force in 2005.
- There are 174 parties*
- The United States is a signatory but Indonesia is not.

* www.who.int/fctc/en/, visited 23 September 2011; Panel Report 2.29

II. FACTUAL ASPECTS

tobacco products") and 10 ("Regulation of tobacco products disclosures") of the FCTC.[64] 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".[65] 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".[66] 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".[67]

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".[68] 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).

VII. FINDINGS

A. INTRODUCTION

7.1 This dispute concerns Section 907(a)(1)(A)[75], 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.

Appellate Body:

… Moreover, we recognize the importance of Members' efforts in the World Health Organization on tobacco control. ..

What do you think?

If you were in **Indonesia's** position, how would you argue your case at the WTO using the TBT Agreement? What articles would you cite, and what arguments would you make?

If you were in the **United States'** position, how would defend your case at the WTO?

Is it a TBT measure?

Is there discrimination?

Is the measure more trade restrictive than necessary?

Was the relevance (or not) of international standards an issue in this dispute?

what is next?

DISPUTE SETTLEMENT: DISPUTE DS434

Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging

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Current status back to top

Panel established, but not yet composed on **28 September 2012**

Key facts back to top

Short title:	Australia — Tobacco Plain Packaging
Complainant:	Ukraine
Respondent:	Australia

See also:
The basics: how disputes are settled in WTO
Computer based training on dispute settlement
> Text of the Dispute

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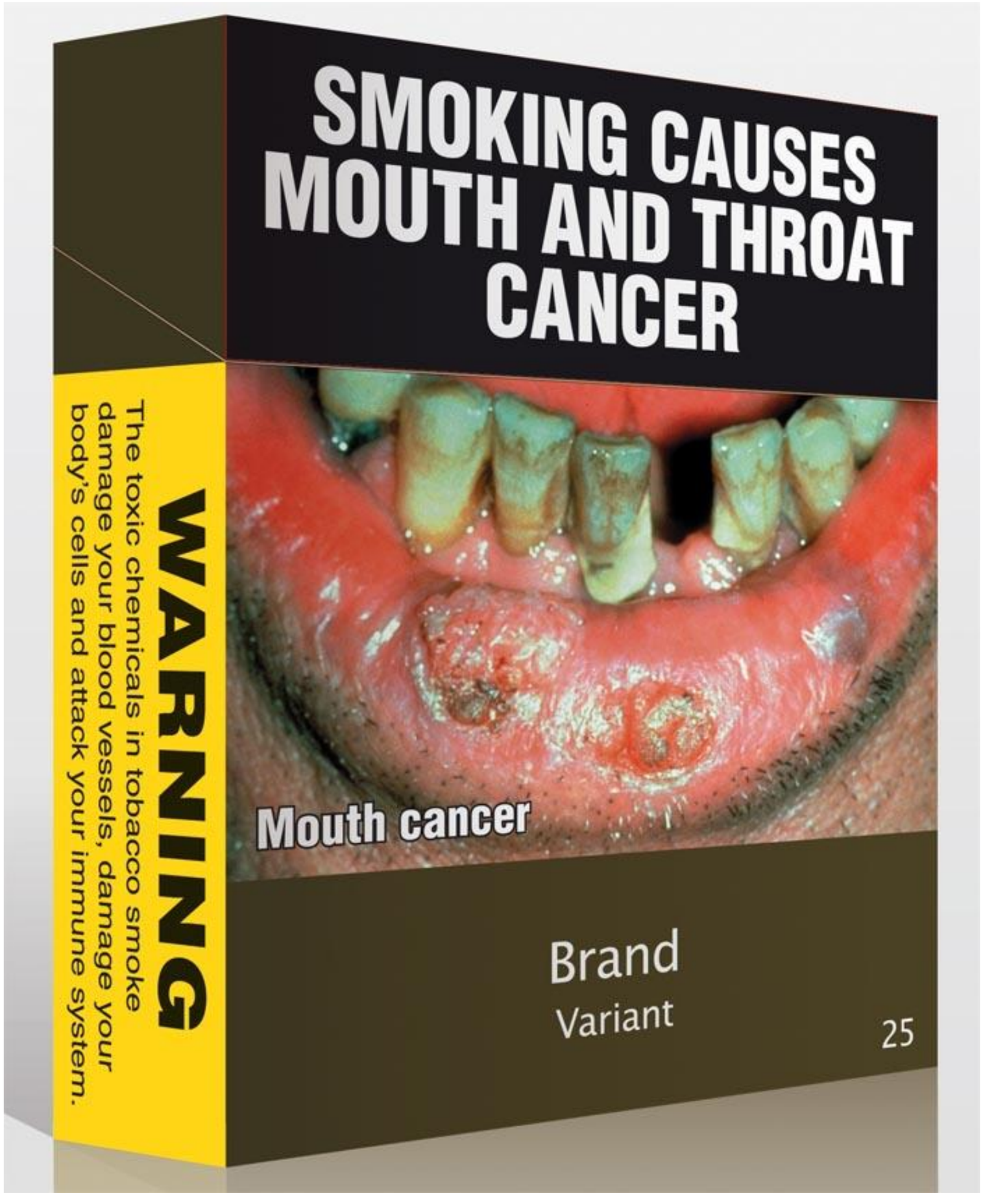
http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm



http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/content/plainpack-tobacco