WTO DISPUTE ANALYSIS*

Centre for WTO Studies
Indian Institute of Foreign Trade
New Delhi

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Report of the Appellate Body

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

(WT/DS406/AB/R)
(Circulated on 4 April 2012)

Parties:

Appellant:	United States (US)
Appellee:	Indonesia
Third Participants:	Brazil, Colombia, Dominican Republic, European Union, Guatemala, Mexico, Norway and Turkey

Appellate Body Division:

Oshima (Presiding Member), Ramirez-Hernandez (Member), Van den Bossche (Member),

I. BACKGROUND

This appeal concerns issues of law and legal interpretations developed in the Panel Report *United States – Measures affecting the Production and Sale of Clove Cigarettes*[1] ("Panel Report") and challenged by the United States. The Panel was established, on a complaint by Indonesia, for consideration of a US measure that prohibited cigarettes with characterising flavours, other than tobacco or menthol. Before the Panel, Indonesia had claimed that the US actions were inconsistent with its substantive and procedural obligations under the *Agreement on Technical Barriers to Trade* ("*TBT Agreement*") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

In particular, Indonesia claimed that Section 907(a)(1)(A) of the United States Federal Food, Drug and Cosmetic Act ("FFDCA"), as amended by the Family Smoking Prevention and Tobacco Control Act ("FSPTCA"), was inconsistent with Articles 2.1, 2.2, 2.5, 2.8, 2.9, 2.10, 2.12, and 12.3 of the *TBT Agreement*. Alternatively, Indonesia claimed that Section 907(a)(1)(A) was inconsistent with Article III:4 of the GATT 1994 and could not be justified under Article XX(b). Under Section 907(a)(1)(A), beginning

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**This issue can also be accessed online at http://wtocentre.iift.ac.in/DisputeAnalysis.asp . Queries and comments are most welcome and may be directed to disputes_cws@iift.ac.in.

[1] WT/DS406/R, 2 September 2011

three months after the enactment of the FSPTCA— that is, as from 22 September 2009:

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

The specific objective of the provision, as well as the FSTPCA in general, was articulated in a report prepared by the House Energy and Commerce Committee (the "House Report"). According to the House Report, the objectives of the FSTPCA were to provide the Secretary with 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 used tobacco products. Consistent with the overall intent of FSTPCA, the House Report stated that Section 907(a)(1)(A) was intended to prohibit the manufacture and sale of cigarettes with certain 'characterizing flavours' that appeal to youth. (Paras 77 - 79)

Section 907(a)(1)(A) applied to all flavoured tobacco products that met the definition of cigarettes in Section 33(1) of the Federal Cigarette Labeling and Advertising Act and the Panel identified the products at issue in the dispute as being clove cigarettes and menthol cigarettes. (Paras 80 - 81)

The Panel found that Section 907(a)(1)(A) was inconsistent with Article 2.1 of the *TBT Agreement* because it accorded to imported clove cigarettes less favourable treatment than that accorded to like menthol cigarettes of national origin. Having found that Section 907(a)(1)(A) was inconsistent with Article 2.1 of the *TBT Agreement*, the Panel declined to rule on Indonesia's alternative claim under Article III:4 of the GATT 1994 and on the United States' related defence under Article XX(b) of the GATT 1994.

Further, the Panel found that the US acted inconsistently with Article 2.9.2 of the *TBT Agreement* by failing to follow the notification requirement in the Agreement and Article 2.12 of the *TBT Agreement* by not allowing an interval of no less than six months between the publication and the entry into force of Section 907(a)(1)(A). Conversely, the Panel rejected Indonesia's claims under Articles 2.2, 2.5, 2.8, 2.9.3, 2.10 and 12.3 of the *TBT Agreement*.

Notice of Appeal was filed by the US on January 5, 2012 claiming that the Panel erred in certain of its findings

II. KEY ISSUES AND APPELLATE BODY FINDINGS

A. Article 2.1 of the TBT Agreement

1. Introduction

The Panel had found that Section 907(a)(1)(A) of the FFDCA was a 'technical regulation' within the meaning of Annex 1.1 of the *TBT Agreement*, and that it was inconsistent with Article 2.1 of the *TBT Agreement* because it accorded to imported clove cigarettes *less favourable treatment* than that accorded to like menthol cigarettes of national origin. In particular, the Panel had also found that clove cigarettes and menthol cigarettes were 'like products' for the purpose of Article 2.1 of the *TBT Agreement*.

Before examining the specific issues raised by the US with respect to Article 2.1 of the *TBT Agreement*, the Appellate Body observed that Article 2.1 of the *TBT Agreement* contains a national treatment and a most favoured nation treatment obligation. In this dispute, the Appellate Body was called upon to clarify

the meaning of the national treatment obligation. For a violation of the national treatment obligation in Article 2.1 to be established, three elements must be satisfied:

(i) the measure at issue must be a technical regulation;
(ii) the imported and domestic products at issue must be like products; and
(iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products. (Para 87)

The Appellate Body further noted that the preamble of the *TBT Agreement* was part of the context of Article 2.1 and also shed light on the object and purpose of the Agreement. The Appellate Body found guidance for the interpretation of Article 2.1, in particular, in the second, fifth, and sixth recitals of the preamble of the *TBT Agreement*:

(i) The second recital indicated that the *TBT Agreement* expands on pre-existing GATT disciplines and emphasizes that the two Agreements should be interpreted in a coherent and consistent manner. (Para 91)

(ii) The fifth recital reflected the trade liberalization objective of the *TBT Agreement* by expressing the "desire" that technical regulations, technical standards, and conformity assessment procedures do not create unnecessary obstacles to international trade. The fifth recital was reflected in those TBT provisions that aim at reducing obstacles to international trade and that limit Members' right to regulate, for instance, by prohibiting discrimination against imported products (Article 2.1) or requiring that technical regulations be no more trade restrictive than necessary to fulfil a legitimate objective (Article 2.2). (Paras 92-93)

(iii) The objective of avoiding the creation of unnecessary obstacles to international trade through technical regulations, standards, and conformity assessment procedures was, however, qualified in the sixth recital by the explicit recognition of Members' right to regulate in order to pursue certain legitimate objectives. The sixth recital "recognizes" Members' right to regulate versus the "desire" to avoid creating unnecessary obstacles to international trade, expressed in the fifth recital suggests that Members have a right to use technical regulations in pursuit of their legitimate objectives, provided they do so in an even handed manner and in a manner that is otherwise in accordance with the provisions of the *TBT Agreement*. (Paras 94-95)

Also, the Appellate Body noted that the language of the national treatment obligation of Article 2.1 of the *TBT Agreement* closely resembled the language of Article III:4 of the GATT 1994 and was built around the same core terms, namely, "like products" and "treatment no less favourable". Further, the technical regulations were in principle subject not only to Article 2.1 of the *TBT Agreement*, but also to the national treatment obligation of Article III:4 of the GATT 1994, as "laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use" of products. The Appellate Body thus noted:

> "We consider that, in interpreting Article 2.1 of the *TBT Agreement*, a panel should focus on the text of Article 2.1, read in the context of the *TBT Agreement*, including its preamble, and also consider other contextual elements, such as Article III:4 of the GATT 1994." (Para 100)

Finally, the Appellate Body observed that the *TBT Agreement* did not contain among its provisions a general exceptions clause and this may be contrasted with the GATT 1994, which contains a general exceptions clause in Article XX.

2. Whether the Panel erred in finding that clove cigarettes and menthol cigarettes were "like products" within the meaning of Article 2.1 of the *TBT Agreement*?

The US claimed before the Appellate Body that the Panel had erred in its interpretation and application of 'likeness' criteria of end-use and consumer tastes and habits. The US did not appeal the Panel's findings concerning the products' physical characteristics and tariff classification. The Appellate Body dealt with the issue under the following broad headings:

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

(***Key Question***: *Can the determination of likeness be based on competition oriented perspective?)*

The Appellate Body agreed with the Panel that the interpretations of the term 'like products' in Article 2.1 of the *TBT Agreement* should start with the text of the provision in the light of the context provided by Article 2.1 itself, by other provisions of the TBT, and by the *TBT Agreement* as a whole. The Appellate Body also agreed that the relevant context included the fact that Article 2.1 applied to technical regulations, which are documents laying down the characteristics of the products.

The Appellate Body was however not persuaded that "these contextual elements and the object and purpose of the *TBT Agreement* suggest that the interpretation of the concept of "like products" in Article 2.1 of the *TBT Agreement* cannot be approached from a competition oriented perspective", due to the following reasons (Para 109):

a. The balance that the preamble of the *TBT Agreement* strikes between, on the one hand, the pursuit of trade liberalization and, on the other hand, Members' right to regulate, is not, in principle, different from the balance that exists between the national treatment obligation of Article III and the general exceptions provided under Article XX of the GATT 1994. While in the GATT 1994 this balance is expressed by the national treatment rule in Article III:4 as qualified by the exceptions in Article XX, in the *TBT Agreement*, this balance is to be found in Article 2.1 itself, read in the light of its context and of its object and purpose. (Para 109)

b. The Panel was of the view that the absence of a provision like Article III:1 of the GATT 1994 in the *TBT Agreement* would prevent the transposition of the GATT competition oriented approach to likeness to Article 2.1 of the *TBT Agreement*. Article III:1 provides that internal fiscal and regulatory measures "should not be applied to imported or domestic products so as to afford protection to domestic production". In this respect, the Appellate Body noted that:

> "…in ***EC – Asbestos***[2], the Appellate Body considered that the "general principle" articulated in Article III:1 of the GATT 1994 "seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, *between the domestic and imported products involved*, 'so as to afford protection to domestic production'". However, the Appellate Body did not base its conclusion that "likeness" in Article III:4 is about the "nature and extent of a competitive relationship between and among products" exclusively on the "general principle" expressed in Article III:1. Rather, the Appellate Body further clarified that "the word 'like' in Article III:4 is to be interpreted to apply to products that are in … a competitive relationship", because it is "products that are in a competitive relationship in the marketplace [that] could be affected through treatment of *imports* 'less favourable' than the treatment accorded to *domestic* products"." (Para 110)

[2]Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, adopted 5 April 2001, Para. 98, 99. (original emphasis)

c. The Appellate Body agreed that the very concept of "treatment no less favourable", which is expressed in the same words in Article III:4 of the GATT 1994 and in Article 2.1 of the *TBT Agreement*, informed the determination of likeness, suggesting that likeness was about the "nature and extent of a competitive relationship between and among products". Indeed, the concept of "treatment no less favourable" linked the products to the marketplace, because it was only in the marketplace that it could be determined how the measure treated like imported and domestic products. (Para 111)

d. In the light of the above, the Appellate Body disagreed with the Panel that the text and context of the *TBT Agreement* supported an interpretation of the concept of 'likeness' in Article 2.1 of the *TBT Agreement* that focused on the legitimate objectives and purposes of the technical regulation, rather than on the competitive relationship between and among the products. (Para 112)

The Appellate Body further noted that:

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

e. More importantly, the Appellate Body concluded that it did not consider that the concept of 'like products' in Article 2.1 of the *TBT Agreement* lent itself to distinctions between products that are based on the regulatory objectives of a measure. If products that were in a sufficiently strong competitive relationship to be considered 'like', were excluded from the group of like products on the basis of a measure's regulatory purposes, such products would not be compared in order to ascertain whether less favourable treatment had been accorded to imported products. This would inevitably distort the less favourable treatment comparison, as it would refer to a "marketplace" that would include some like products, but not others. (Para 116)

f. Nevertheless, the Appellate Body clarified that in concluding that the determination of likeness should not be based on the regulatory purposes of technical regulations, it was not suggesting that the regulatory concerns underlying technical regulations may not play a role in determination of whether or not the products were like. The Appellate Body recalled that in ***EC – Asbestos***, it was found that regulatory concerns and consideration may play a role in applying certain of the likeness criteria, i.e. physical characteristics and consumer preferences, and thus in the determination of likeness under Article III:4 of the GATT 1994. For instance, the Appellate Body in ***EC – Asbestos***, had found that in examining whether products are like, panels must evaluate all relevant evidence, including evidence relating to health risk associated with a product. (Paras 117 -118)

g. Thus, the Appellate Body found that determination of likeness under Article 2.1 of the *TBT Agreement*, as well as under Article III:4 of the GATT 1994, is a determination about the nature and extent of a competitive relationship between and among the products at issue. To the extent that they are relevant to the examination of certain "likeness" criteria and are reflected in

the products' competitive relationship, regulatory concerns underlying technical regulations may play a role in the determination of likeness. (Para 120)

End – Uses

(***Key Question***: *Does an evaluation of end-use include a determination of a product's capacity to perform?)*

In examining the end-uses of clove and menthol cigarettes, the Panel found that both clove and menthol cigarettes had the same end-use , that is, "to be smoked", and disagreed with the US that the end-uses of a cigarette included "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". The US claimed that a panel, when conducting an end-use analysis, must consider the different uses of the products and not just the use that was a "common denominator" of the products in question. Menthol cigarettes, the US submitted, were used to "satisfy the nicotine addictions of millions of smokers in the US", whereas clove cigarettes were primarily used "for experimentation and special social settings" and generally were not smoked to satisfy nicotine addiction in the US market. (Paras 122 - 123)

Indonesia responded that the Panel did not err in finding that the end-use of clove and menthol was "to be smoked". In Indonesia's view, even assuming the *arguendo* that the end-uses put forward by the US were pertinent ones, the US presented no evidence showing that clove and menthol cigarettes were not both *capable* of performing the end-uses of satisfying a nicotine addiction and creating a pleasurable experience. (Para 124)

The Appellate Body noted that end-uses describe the possible functions of a product, while consumer tastes and habits reflect the consumers' appreciation of these functions. It also noted that in ***EC – Asbestos***[3], the Appellate Body had described end-uses as "the extent to which products are *capable* of performing the same, or similar, functions" and consumer tastes and habits as "the extent to which consumers are willing to use the products to perform these functions". That a product was not principally used to perform a certain function did not exclude that it may nevertheless be *capable* of performing that function. (Para 125)

The Appellate Body also noted that it was not correct to characterize "satisfying an addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke" *as consumer tastes and habits* and *not end-uses*. To the extent that they described possible functions of the products, rather than the consumers' appreciation of these functions, they represented, in fact, different end-uses of the products at issue, rather than consumer tastes and habits. Consumer tastes and habits should indicate to what extent consumers are willing to substitute clove cigarettes and menthol cigarettes to "satisfy an addiction to nicotine" and/or to "create a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke". (Para 127)

The Appellate Body observed that an analysis of end-use should be comprehensive and specific enough to provide meaningful guidance as to whether the products in question are like products. It was not disputed that both clove and menthol cigarettes were "to be smoked". Nevertheless, "to be smoked" did not exhaustively describe the functions of the cigarettes and hence, the same does not provide sufficient guidance as whether such products are like products within the meaning of Article 2.1 of the *TBT Agreement* and hence the Panel had not performed an analysis of the end-uses of clove and menthol cigarette that was sufficiently comprehensive and specific to provide significant indications as to the likeness of these products. (Paras 129 -130)

[3]Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, adopted 5 April 2001, Para. 117.

The Appellate Body agreed with the US that there were more specific permutations and functions of 'smoking', which were relevant to the end-uses of the cigarettes such as satisfying nicotine addiction and creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke. However, since both clove and menthol cigarettes were *capable* of performing a social/experimentation function as well as the function of satisfying a nicotine addiction, the Appellate Body concluded that though it disagreed with the Panel that the end-use was simply "to be smoked", based on the Panel's findings, it could be concluded that both clove and menthol cigarettes shared the same end-uses. Thus, the more specific products' end-uses put forward by the US also supported the Panel's overall finding that clove and menthol cigarettes were like products. (Paras 131 -132)

Consumer Tastes and Habits

(***Key Question***: *Should the evaluation of degree of substitutability among products be based on tastes of main consumers or all relevant consumers?*)

In addressing consumer tastes and habits, the Panel had stated that the legitimate objective of Section 907(a)(1)(A) of the FFDCA, namely, reducing youth smoking, delimited the scope of consumers whose tastes and habits should be examined. Accordingly the Panel considered it appropriate to examine the substitutability of clove and menthol cigarettes from the perspective of the relevant group of consumers, which included young smoker and those ready to become smokers (potential consumers).

The US claimed that the Panel erred in considering the tastes and habits of only young smokers and potential young smokers, and not of current adult smokers. The US noted that Section 907(a)(1)(A) made regulatory distinctions among cigarettes based not only on their appeal to young and potential smokers, but also on their use by current adult smokers.

The Appellate Body concluded that the Panel was wrong in confining its analysis of consumer tastes and habits to those consumers (young and potential smokers) that were the concern of the objective of the regulation (to reduce youth smoking). The Appellate Body stated that:

> "In an analysis of likeness based on products' competitive relationship, it is the market that defines the scope of consumers whose preferences are relevant. The proportion of youth and adults smoking different types of cigarettes may vary, but clove, menthol, and regular cigarettes are smoked by both young and adult smokers. To evaluate the degree of substitutability among these products, the Panel should have assessed the tastes and habits of all relevant consumers of the products at issue, not only of the main consumers of clove and menthol cigarettes, particularly where it is clear that an important proportion of menthol cigarette smokers are adult consumers." (Para 137)

(***Key Question***: *In a 'like product' analysis, is it necessary to show that the products are substitutable for all consumers or that they compete in the entire market?*)

Having determined that the Panel was wrong in confining its analysis of consumer tastes and habits to young and potential young smokers, the Appellate Body then considered whether the Panel's failure to evaluate the tastes and habits of current adult consumers of menthol cigarettes undermined the proposition that there was a sufficient degree of substitutability between clove and menthol cigarettes to support an overall finding of likeness under Article 2.1 of the *TBT Agreement*. In this regard, the Appellate Body noted that in order to determine whether products were like under Article 2.1 of the *TBT Agreement*, it was not necessary to demonstrate that the products were substitutable for all consumers or that they actually competed in the entire market. According to the Appellate Body even if the products were highly substitutable for some consumers but not for others, this may also support a finding that the products were

'like'. The Appellate Body relied on a previous finding in ***Philippines – Distilled Spirits***[4], where the Appellate Body had found in context of Article III:2, second sentence of GATT, that there was no requirement that the competition be assessed in relation to the market segment that was most representative of the 'market as a whole' since Article III did not protect just some or most instances, but rather all instances of direct competition. The Appellate Body in the present dispute found this interpretation in ***Philippines – Distilled Spirits*** relating to "directly competitive or substitutable products" to be relevant to the concept of "likeness" in Article III:4 of GATT 1994 and 2.1 of the *TBT Agreement*, since likeness under these provisions is determined on the basis of the competitive relationship between and among the products. (Para 143)

Further, the Appellate Body noted that the Panel had found that from the perspective of young and potential young smokers, clove-flavoured cigarettes and menthol-flavoured cigarettes are similar for purposes of starting to smoke. On the basis of this, the Appellate Body concluded that:

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

Additionally, the US had also claimed that the Panel had acted inconsistently with Article 11 of the DSU when it reached the conclusion that clove cigarettes and menthol cigarettes were perceived similarly by the consumers at issue in this case, and that it disregarded critical evidence on how consumers actually used and perceived the products at issue in the relevant market. The Appellate Body observed that Article 11 of the DSU required a panel to make an objective assessment of the matter before it, including an objective assessment of the facts of the case. It however, recalled that not every error allegedly committed by a panel amounted to a violation of Article 11 of the DSU. A participant claiming that a panel ignored certain evidence must explain why that evidence was so material to its case that the panel's failure to address such evidence had a bearing on the objectivity of the panel's factual assessment. The Appellate Body noted that the fact that the Panel did not rely on evidence demonstrating that clove cigarettes were disproportionally smoked by youth while menthol cigarettes were smoked by both youth and adults, did not have material consequences for the Panel's finding on consumer tastes and habits. Thus, the Panel's error did not amount to a violation of Article 11 of the DSU, considering that the evidence that the Panel did not engage with does not have material consequences for the Panel's finding that consumer tastes and habits indicate that clove and menthol cigarettes are sufficiently substitutable in certain segments of the market, and did not, therefore, undermine the Panel's finding that clove and menthol cigarettes were like products under Article 2.1 of the *TBT Agreement*. (Paras 146-155)

3. Whether the Panel erred in finding that Section 907(a)(1)(A) accords to imported clove cigarettes *less favourable treatment* than that accorded to domestic menthol cigarettes within the meaning of Article 2.1 of the *TBT Agreement*?

The US appealed the Panel's finding that it had acted inconsistently with Article 2.1 of the *TBT Agreement* by according to clove cigarettes imported from Indonesia a less favourable treatment than that accorded to domestic like products. Having concluded that clove and menthol cigarettes were like products within the meaning of Article 2.1 of the *TBT Agreement*, the Panel undertook a four-step analysis to determine whether Section 907(a)(1)(A) of the FFDCA accords to clove cigarettes imported from Indonesia less favourable treatment than that accorded to like domestic products:

[4] Appellate Body Report, *Philippines – Distilled Spirits*, WT/DS396/AB/R, adopted 20 January, 2012, Para 220

(i) First, the Panel determined the products to be compared in its analysis and found that Article 2.1 called for a comparison between treatment accorded to, on the one hand, clove cigarettes imported from Indonesia, and, on the other hand, domestic menthol cigarettes.
(ii) Second, the Panel determined that under Section 907(a)(1)(A) clove and menthol cigarettes were treated differently, in that clove cigarettes are banned while menthol cigarettes are excluded from the ban.
(iii) Third, the Panel found that such difference in treatment modified the conditions of competition to the detriment of the imported products, insofar as imported clove cigarettes were banned while domestic menthol cigarettes were allowed to remain in the market.
(iv) Fourth and finally, the Panel rejected the United States' argument that such detrimental impact could be "explained by factors or circumstances unrelated to the foreign origin of the products", because Section 907(a)(1)(A) imposed costs on foreign producers, notably producers in Indonesia, while at the same time imposing no costs on any US entity. (Para 162)

Indonesia claimed that the Panel had properly identified the products to be compared in its less favourable treatment analysis, did not err in establishing the appropriate timeframe for its comparison and acted in accordance with Article 11 of the DSU in performing its analysis.

The main findings of the Appellate Body can be summarized as below:

a. "Treatment no less favourable" under Article 2.1 of the *TBT Agreement*

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

(***Key Question***: *Does Article 2.1 of the TBT Agreement prohibit a priori any obstacle to international trade?)*

Further, the context provided by Article 2.2 suggested that "obstacles to international trade" may be permitted insofar as they were not found to be "unnecessary", that is, "more trade - restrictive than necessary to fulfil a legitimate objective". This supported a reading that Article 2.1 did not operate to prohibit *a priori* any obstacle to international trade. Indeed, if *any* obstacle to international trade would be sufficient to establish a violation of Article 2.1, Article 2.2 would be deprived of its *effet utile*. According to the Appellate Body, this interpretation of Article 2.1 is buttressed by the sixth recital of the preamble of the *TBT Agreement* which expressly acknowledges that Members may take measures necessary for, inter alia, the protection of human life or health, provided that such measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade" and are "otherwise in accordance with the provisions of this Agreement". (Paras 170-172)

Finally, Appellate Body noted that the object and purpose of the *TBT Agreement* was to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members' right to regulate. Accordingly, the context and object and purpose of the *TBT Agreement* weighed in favour of reading the "treatment no less favourable" requirement of Article 2.1 as prohibiting both *de jure* and

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

The Appellate Body also found it useful to consider the context provided by other covered agreements. In particular, it noted that the non-discrimination obligation of Article 2.1 of the *TBT Agreement* was expressed in the same terms as that of Article III:4 of the GATT 1994. The Appellate Body noted that beginning with GATT panel in ***US – Section 337 Tariff Act***, the term "treatment no less favourable" in Article III:4 was interpreted as requiring "effective equality of opportunities for imported products". Subsequent GATT and WTO panels followed a similar approach, and found violations of Article III:4 in cases where regulatory distinctions in enforcement procedures, distribution channels, statutory content requirements, and allocation of import licenses resulted in alteration of the competitive opportunities in the market of the regulating Member to the detriment of imported products vis-à-vis domestic like products. (Para 176)

In ***Korea – Various Measures on Beef***[5] the Appellate Body had agreed that the analysis of less favourable treatment under Article III:4 focused on the "conditions of competition" between imported and domestic like products. Subsequently, in ***EC – Asbestos***, the Appellate Body explained that imports will be treated less favourably than domestic like products when regulatory distinctions disadvantage the group of imported products vis-à-vis the group of domestic like products. The Appellate Body stated that while previous findings in context of Article III:4 of GATTT 1994 was instructive in assessing the meaning of "treatment no less favourable", provided that specific context in which the terms appears in Article 2.1 of the *TBT Agreement* is taken into account. The Appellate Body concluded:

> "Similarly to Article III:4 of the GATT 1994, Article 2.1 of the *TBT Agreement* requires WTO Members to accord to the group of imported products treatment no less favourable than that accorded to the group of like domestic products. Article 2.1 prescribes such treatment specifically in respect of technical regulations. For this reason, a panel examining a claim of violation under Article 2.1 should seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products vis-à-vis the group of like domestic products.
>
> However, as noted earlier, the context and object and purpose of the *TBT Agreement* weigh in favour of interpreting the "treatment no less favourable" requirement of Article 2.1 as not prohibiting detrimental impact on imports that stems exclusively from a legitimate regulatory distinction. Rather, for the aforementioned reasons, the "treatment no less favourable" requirement of Article 2.1 only prohibits *de jure* and *de facto* discrimination against the group of imported products.
>
> Accordingly, where the technical regulation at issue does not *de jure* discriminate against imports, the existence of a detrimental impact on competitive opportunities for the group of imported vis-à-vis the group of domestic like products is not dispositive of less favourable treatment under Article 2.1. Instead, a panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products." (Paras 180 - 182)

b. Product Scope of the "treatment no less favourable" comparison

On appeal, US claimed that the Panel erred in *a priori* limiting its less favourable treatment comparison to one imported product (Indonesian clove cigarettes) and one domestic like product (menthol cigarettes). Referring to the Appellate Body Report in ***EC – Asbestos*** and the panel report in ***US – Tuna II (Mexico)***,

[5] Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS161/AB/R, adopted 10 January 2001

the US argues that Article 2.1 required the Panel to compare the treatment accorded to all imported and domestic like products as a group. For the US, a proper comparison would have demonstrated that Section 907(a)(1)(A) does not alter the conditions of competition between imported and domestic like products as a group.

The Appellate Body noted that the national treatment obligation of Article 2.1 called for a comparison of treatment accorded to, on the one hand, the group of products imported from the complaining Member and, on the other hand, the treatment accorded to the group of like domestic products. In determining what the scope of like imported and domestic products was, a panel was not limited to those products specifically identified by the complaining Member. Rather, a *panel must have objectively assessed, based on the nature and extent of their competitive relationship, what were the domestic products that were like the products imported from the complaining Member.* Once the universe of imported and domestic like products had been identified, the treatment accorded to all like products imported from the complaining Member must be compared to that accorded to all like domestic products. The "treatment no less favourable" standard of Article 2.1 does not prohibit regulatory distinctions between products found to be like, provided that the group of like products imported from the complaining Member is treated no less favourably than the group of domestic like products. (Pars 186 - 200)

Thus, in the light of the above, the Appellate Body concluded the following:

(i) The Panel did not err in finding that a determination of Indonesia's claims under Article 2.1 required an examination of whether Section 907(a)(1)(A) accords to the group of products imported *from Indonesia* less favourable treatment than that accorded to the group of like products of US origin. (Para 196)
(ii) In determining the group of products imported from Indonesia whose treatment needed to be compared with the treatment accorded to like domestic products, the Panel had found that it was uncontested that the "vast majority" of cigarettes that were imported from Indonesia into the US were clove cigarettes. The Panel had also observed that only "a small percentage of non-clove cigarettes" were imported from Indonesia into the United States. Accordingly, the Panel did not err in finding that the group of products imported from Indonesia essentially consisted of clove cigarettes. (197)
(iii) US's challenge focused exclusively on the Panel's exclusion of domestically produced flavoured cigarette from the less favourable treatment stage of the Panel's analysis. Because Article 2.1 expressly limited the scope of the less favourable treatment comparison to imported and domestic like products, in the absence of specific findings by the Panel that domestically produced flavoured cigarettes other than menthol are like clove cigarettes, the Appellate Body could not determine whether the Panel had erred in failing to include domestically produced flavoured cigarettes in its less favourable treatment comparison. Even assuming, for the sake of argument, that the Panel had found that domestic flavoured cigarettes are like clove cigarettes imported from Indonesia, the Appellate Body considered it safe to assume that, given their relatively low share in the US market, the inclusion of domestically produced flavoured cigarettes in the comparison would not have altered the Panel's ultimate conclusion that the group of like domestic products essentially consisted of domestic menthol cigarettes. (Paras 199-200)

c. Temporal Scope of the "treatment no less favourable" comparison

(***Key Question***: *Can a Panel take into consideration, evidence pre-dating the establishment of the Panel, when evaluating if there was a less favourable treatment under Article 2.1 of the TBT Agreement?)*

US argued that, to the extent that the Panel's exclusion of domestic flavoured cigarettes other than menthol cigarettes from its analysis stemmed from its finding that those products were not on the market

at the time when the ban came into effect, the same constituted a legal error. In particular, the US claimed that the Panel erred in *a priori* excluding from its analysis evidence concerning the effects of Section 907(a)(1)(A) of the FFDCA on domestic like products prior to the entry into force of the ban on flavoured cigarettes and acted inconsistently with Article 11 of the DSU in ignoring the evidence produced by the US. Further, the US argued that Article 2.1 of the *TBT Agreement* did not establish a rigid temporal limitation in relation to the evidence that a panel may consider in performing a less favourable treatment analysis. For this reason, the US submitted that the Panel should have taken into account evidence demonstrating that there were domestically produced flavoured cigarettes on the market "in the years closely preceding the effective date of the ban".

Indonesia in its response stated that the US appeal of the relevant timeframe for the Panel's analysis was irrelevant, because the Panel properly compared only the treatment accorded to the products found to be *like* in this dispute—imported clove and domestic menthol cigarettes—both of which were on the market before the ban went into effect.

The Appellate Body concluded the following on the issue:

(i) It agreed with the parties that Article 2.1 did not establish a rigid temporal limitation on the evidence that the Panel could review in assessing Indonesia's claim under Article 2.1. Thus,

> "Nothing in Article 2.1 enjoins panels from taking into account evidence pre-dating the establishment of a panel to the extent that such evidence informs the panel's assessment of the consistency of the measure at that point in time. This is particularly so in the case of a *de facto* discrimination claim, where a panel must base its determination on the totality of facts and circumstances before it, including the design, architecture, revealing structure, operation, and application of the technical regulation at issue. Therefore, evidence that Section 907(a)(1)(A) had "chilling" regulatory effects on domestic producers of flavoured cigarettes prior to the entry into force of the ban on those cigarettes could be relevant in the Panel's assessment of Indonesia's claim under Article 2.1." (Para 206)

(ii) In the present dispute, the Panel did not explain why it did not include domestic flavoured cigarettes other than menthol cigarettes in the group of like domestic products. The Panel's statement that, "*at the time of the ban*, there were no domestic cigarettes with characterizing flavours other than menthol" on the US market, was not the basis for the Panel's exclusion of domestic flavoured cigarettes from the less favourable treatment analysis. (Para 207).

(iii) The US also claimed that the Panel acted inconsistently with Article 11 of the DSU in disregarding evidence demonstrating that, *at the time of the ban*, domestic flavoured cigarettes other than menthol cigarettes were marketed in the US. The Appellate Body, however, noted that it appeared that the Panel did not disregard the evidence that, according to US, demonstrated the presence of domestically produced flavoured cigarettes other than menthol cigarettes on the US market at the time of the ban. Rather, the Panel reviewed that evidence but was ultimately not persuaded by it. In determining the weight to be attributed to the evidence before it, the Panel did not act inconsistently with Article 11 of the DSU. In particular, the Panel did not exceed its authority under Article 11 of DSU merely by attributing to the evidence a weight and significance different from that attributed to it by the US. (Paras 208 - 212)

d. Detrimental Impact on Imported Products

The US argued that even if the Appellate Body were to agree with the comparison undertaken by the Panel in its less favourable treatment analysis, the Panel nonetheless erred in finding that the detrimental

effect on competitive opportunities for imported clove cigarettes was not "explained by factors unrelated to the foreign origin of those products". The Appellate Body stated that:

> "…the existence of a detrimental impact on competitive opportunities in the relevant market for the group of imported products vis-à-vis the group of domestic like products is not sufficient to establish a violation of the national treatment obligation contained in Article 2.1 of the *TBT Agreement*. Where the technical regulation at issue does not *de jure* discriminate against imports, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflects discrimination against the group of imported products." (Para 215)

Before the Panel, the US had argued that the exemption of menthol cigarettes from the ban on flavoured cigarettes was unrelated to the origin of the products, because it addressed two distinct objective the need of treating 'millions' of menthol cigarette addicts with withdrawal symptoms and the other relating to the risk of development of a black market and smuggling to supply the needs of menthol cigarette smokers. According to the Panel, the potential impact on the health care system and the potential development of a black market and smuggling of menthol cigarettes did not constitute legitimate objectives because it seemed to the Panel that the effect of banning cigarettes with characterizing flavours other than menthol was to impose costs on producers in other Members, notably producers in Indonesia, while at the same time imposing no costs on any US entity.

At the outset, the Appellate Body agreed with US that the Panel did not clearly articulate reasons for concluding the above. Nonetheless, the Appellate Body was not persuaded that the Panel erred in ultimately finding that Section 907(a)(1)(A) was inconsistent with Article 2.1. According to the Appellate Body, the design, architecture, revealing structure, operation, and application of Section 907(a)(1)(A) strongly suggested that the detrimental impact on competitive opportunities for clove cigarettes reflected discrimination against the group of like products imported from Indonesia. The products that were prohibited under Section 907(a)(1)(A) consisted primarily of clove cigarettes imported from Indonesia, while the like products that were actually permitted under this measure consist primarily of domestically produced menthol cigarettes. (Paras 221-224)

Moreover, the Appellate Body was not persuaded that the detrimental impact of Section 907(a)(1)(A) on competitive opportunities for imported clove cigarettes did stem from a legitimate regulatory distinction. It recalled that the stated objective of Section 907(a)(1)(A) was to reduce youth smoking. One of the particular characteristics of flavoured cigarettes that made them appealing to young people was the flavouring that masks the harshness of the tobacco, thus making them more pleasant to start smoking than regular cigarettes. To the extent that *this particular characteristic was present in both clove and menthol cigarettes, menthol cigarettes had the same product characteristic that, from the perspective of the stated objective of Section 907(a)(1)(A), justified the prohibition of clove cigarettes*. (Para 224)

Lastly, the United States argued that the Panel acted inconsistently with Article 11 of the DSU because it found that Section 907(a)(1)(A) avoided costs on any US entity, in the absence of any basis in the Panel record that would have allowed it to reach such conclusion. In this regard, the Appellate Body noted that:

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

imposed on producers in Indonesia with the costs imposed on US producers, to the exclusion of government entities such as the FDA.

It seems to us that the United States' claim is concerned with the Panel's less favourable treatment comparison, rather than with the alleged absence of evidence in the Panel record justifying the lack of costs on any US entity. We note that the United States argues that the Panel erred, under Article 2.1 of the *TBT Agreement*, in limiting the scope of its less favourable treatment analysis to the effects of Section 907(a)(1)(A) on all domestic cigarettes at the time the measure entered into force, to the exclusion of flavoured cigarettes that were produced in the United States before the ban came into force. In our view, the United States' argument that the Panel erred in not considering the impact of Section 907(a)(1)(A) on US producers before the entry into force of the ban also implies that the Panel was wrong in stating that the measure imposed no costs on any US producers. We thus consider that the claim by the United States that the Panel violated Article 11 of the DSU because it found that Section 907(a)(1)(A) imposed "no costs on any US entity" is subsidiary to its claim that the Panel erred in concluding that Section 907(a)(1)(A) accords less favourable treatment to imported clove cigarettes than to like menthol cigarettes of national origin within the meaning of Article 2.1 of the *TBT Agreement*." (Paras 230-231)

Thus, in the light of above, the Appellate Body did not consider that the Panel had acted inconsistently with Article 11 of the DSU in finding that Section 907(a)(1)(A) accorded imported clove cigarettes less favourable treatment than that accorded to domestic menthol cigarettes, within the meaning of Article 2.1 of the *TBT Agreement.*

B. Articles 2.12 of the TBT Agreement: "reasonable interval"

Whether the Panel erred in finding that, by failing to allow an interval of not less than six months between the publication and the entry into force of Section 907(a)(1)(A) of the FFDCA, the United States acted inconsistently with Article 2.12 of the *TBT Agreement*?

The US appealed the Panel's finding that, by failing to allow a period of not less than six months between the publication and the entry into force of Section 907(a)(1)(A) of the FFDCA, the US acted inconsistently with Article 2.12 of the *TBT Agreement*. Before the Panel, Indonesia had argued that paragraph 5.2 of the *Doha Ministerial Decision on Implementation-Related Issues and Concerns*[6] ("the Doha Ministerial Decision")—which defined the term "reasonable interval" in Article 2.12 of the *TBT Agreement* as at least six months—constituted a legally binding interpretation pursuant to Article IX:2 of the *WTO Agreement*. Thus, according to Indonesia, by not allowing a reasonable interval of at least six months between the publication and the entry into force of Section 907(a)(1)(A), the US had acted inconsistently with its obligations under Article 2.12 of the *TBT Agreement*.

The Appellate Body made the following findings on this issue:

a. Interpretative Value of Paragraph 5.2 of the Doha Ministerial Decision

Paragraph 5.2 of the Doha Ministerial Decision provides:

> "Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase *'reasonable interval*' shall be understood to mean *normally a period of not less than 6 months*, except when this would be ineffective in fulfilling the legitimate objectives pursued."

[6]Decision of 14 November 2001, WT/MIN(01)/17, Para. 5.2.

The Appellate Body noted that in paragraph 7.575 of its Report, the Panel had identified certain features of the Doha Ministerial Decision that *suggested* that Members intended to adopt a "binding" interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*. The Panel's statement in paragraph 7.575 was, by its own terms, tentative. Moreover, the Panel's statement was not followed by any "finding" that paragraph 5.2 constitutes an interpretation adopted pursuant to Article IX:2 of the *WTO Agreement*. Thus, the Appellate Body did not agree with Indonesia that the Panel *found* that paragraph 5.2 of the Doha Ministerial Decision "is a binding interpretation as per Article IX:2 of the *WTO Agreement*". (Para 246)

Despite the conclusion that the Panel did not formally determine whether paragraph 5.2 of the Doha Ministerial Decision constituted a multilateral interpretation under Article IX:2 of the *WTO Agreement*, the Appellate Body did consider, nevertheless, whether paragraph 5.2, in fact, had that legal status. The Appellate Body observed / concluded the following in this respect:

(i) The Appellate Body noted that in ***EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)***[7], the Appellate Body had opined that multilateral interpretations adopted pursuant to Article IX:2 of the WTO Agreement were "meant to clarify the meaning of existing obligations, not to modify their content". The Appellate Body noted that Article IX:2 of the *WTO Agreement* established two specific requirements that apply to the adoption of multilateral interpretations of the Multilateral Trade Agreements contained in Annex 1 to the *WTO Agreement*:

a. decision by the Ministerial Conference or the General Council to adopt such interpretations shall be taken by a three-fourths majority of Members; and

b. such interpretations shall be taken on the basis of a recommendation by the Council overseeing the functioning of the relevant Agreement.

(***Key Question***: *Can a Panel dispense with any of the specific requirement mentioned in Article IX:2 of the WTO Agreement?)*

The Appellate Body thus considered whether the decision to adopt paragraphs 5.2 conformed to these specific decision making procedures. With regard to the first requirement, the Panel had observed that the Ministerial Conference decided on the matters addressed in the Doha ministerial decision by *consensus* and the same was not raised in the appeal. With regard to the second requirement, the Panel had noted that it *appeared* that when adopting the Doha Ministerial Decision, the Ministerial Conference did not comply with the preliminary requirement under Article IX:2 of the *WTO Agreement* to exercise its authority on the basis of a recommendation from the Council for Trade in Goods.

The Appellate Body did not agree with the Panel to the extent that it suggested that the absence of a recommendation from the Council for Trade in Goods was insufficient to conclude that paragraph 5.2 of the Doha Ministerial Decision was not an authoritative interpretation under Article IX:2 of the WTO Agreement. While Article IX:2 of the WTO Agreement conferred upon the Ministerial Conference and the General Council the exclusive authority to adopt multilateral interpretations of the WTO Agreement, this authority must have been exercised within the defined parameters of Article IX:2. According to the Appellate Body, the view expressed by the Panel did not respect a specific decision-making procedure established by Article IX:2 of the WTO Agreement.(Para 253)

[7] Appellate Body Report, *EC Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 - US)*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008

Further, the Appellate Body found that although the Panel's reasoning may be read as suggesting that the Ministerial Conference could dispense with a specific requirement established by Article IX:2 of the WTO Agreement, the terms of Article IX:2 did not suggest that compliance with this requirement was dispensable. Thus, an interpretation of a Multilateral Trade Agreement contained in Annex 1 to the WTO Agreement must be adopted on the basis of a recommendation from the relevant Council overseeing the functioning of that Agreement. (Para 255)

(ii) In the light of the finding that paragraph 5.2 of the Doha Ministerial Decision did not qualify as a multilateral interpretation within the meaning of Article IX:2 of the *WTO Agreement*, the Appellate Body addressed whether, as the Panel had found, paragraph 5.2 "could be considered as a subsequent agreement of the parties within the meaning of Article 31(3)(a) of the *Vienna Convention on the Law of Treaties (Vienna Convention)*, on the interpretation of 'reasonable interval' in Article 2.12 of the *TBT Agreement*". The Appellate Body recalled that in ***EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)***, the Appellate Body stated that "multilateral interpretations were meant to clarify the meaning of existing obligations", and that "multilateral interpretations adopted pursuant to Article IX:2 of the *WTO Agreement* were *most akin* to subsequent agreements within the meaning of Article 31(3)(a) of the *Vienna Convention*". (Paras 256-259)

Based on the text of Article 31(3)(a) of the *Vienna Convention*, the Appellate Body considered that a decision adopted by Members may qualify as a "subsequent agreement between the parties" regarding the interpretation of a covered agreement or the application of its provisions if:

a. the decision was, in a temporal sense, adopted subsequent to the relevant covered agreement; and

b. the terms and content of the decision expressed an agreement between Members on the interpretation or application of a provision of WTO law.

With regard to the <u>first</u> element, the Appellate Body noted that the Doha Ministerial Decision was adopted by consensus on 14 November 2001 on the occasion of the Fourth Ministerial Conference of the WTO, subsequent to the relevant WTO agreement at issue, the *TBT Agreement*. With regard to the <u>second element</u>, the key question to be answered was whether paragraph 5.2 of the Doha Ministerial Decision expressed an *agreement* between Members on the *interpretation* or *application* of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*. (Paras 262 – 263)

(iii) On this <u>second</u> element, the Appellate Body found useful guidance in the Appellate Body reports in ***EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)***. The Appellate Body observed that the International Law Commission (the "ILC") described a subsequent agreement within the meaning of Article 31(3)(a) of the *Vienna Convention* as "a further *authentic element of interpretation* to be taken into account together with the context". According to the Appellate Body, "by referring to 'authentic interpretation', the ILC read Article 31(3)(a) as referring to *agreements bearing specifically upon the interpretation of the treaty.*" Thus, the Appellate Body considered whether paragraph 5.2 bore specifically upon the interpretation of Article 2.12 of the *TBT Agreement*. (Paras 265)

In the light of the terms and content of paragraph 5.2, the Appellate Body concluded that it was unable to discern a function of paragraph 5.2 *other than* to interpret the term "reasonable interval" in Article 2.12 of the *TBT Agreement*. Thus paragraph 5.2 *bore specifically* upon the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*.

The Appellate Body also observed that, in its commentaries on the *Draft articles on the Law of Treaties*, the ILC had stated that a subsequent agreement between the parties within the meaning of Article 31(3)(a) "must be read into the treaty for purposes of its interpretation". While the terms of paragraph 5.2 must be "read into" Article 2.12 for the purpose of interpreting that provision, this did not mean that the terms of paragraph 5.2 replaced or overrode the terms contained in Article 2.12. Rather, the terms of paragraph 5.2 of the Doha Ministerial Decision constituted an interpretative clarification to be taken into account in the interpretation of Article 2.12 of the *TBT Agreement*. (Para 269)

The Appellate Body also concluded that the qualification of an obligation with the adverb 'normally' in paragraph 5.2, did not necessarily alter the characterization of that obligation as constituting a 'rule'. Rather, it considered that the use of the term "normally" in paragraph 5.2 indicated that the rule establishing that foreign producers required a minimum of "not less than 6 months" to adapt to the requirements of a technical regulation admitted of derogation under certain circumstances. (Para 273)

Thus, according to the Appellate Body, while Article 2.12 of the *TBT Agreement* imposed an obligation on importing Members to provide a "reasonable interval" of not less than six months between the publication and entry into force of a technical regulation, an importing Member may depart from this obligation if this interval "would be ineffective to fulfil the legitimate objectives pursued" by the technical regulation. (Para 275)

b. Panel's finding that the US had acted inconsistently with Article 2.12 of the *TBT Agreement*.

(***Key Question***: *How relevant is the overarching logic of a provision and the function it is designed to serve, when determining the burden of proof in respect of that particular provision?)*

The Appellate Body noted that in accordance with the general rules on burden of proof reflected in ***US – Wool Shirts and Blouses***, under Article 2.12 of the *TBT Agreement*, it was for the complaining Member to establish that the responding Member had not allowed an interval of not less than six months between the publication and the entry into force of the technical regulation at issue. If the complaining Member establishes this *prima facie* case of inconsistency, it was for the responding Member to rebut the *prima facie* case of inconsistency with Article 2.12. (Para 281)

According to the Appellate Body, the text of Article 2.12 of the *TBT Agreement* read in the light of paragraph 5.2 of the Doha Ministerial Decision provided an indication of the nature of evidence that is required to rebut a *prima facie* case of inconsistency with that provision. In order to rebut a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement*, a responding Member that had allowed an interval of less than six months between the publication and entry into force of its technical regulation must have submitted evidence and argument sufficient to establish *either*:

(i) that the "urgent circumstances" referred to in Article 2.10 of the *TBT Agreement* surrounded the adoption of the technical regulation at issue;

(ii) that producers of the complaining Member could have adapted to the requirements of the technical regulation at issue within the shorter interval that it allowed; *or*

(iii) that a period of "not less than" six months would be ineffective to fulfill the legitimate objectives of its technical regulation. (Para 283)

The Appellate Body however also noted that manner in which the burden of proof is allocated under Article 2.12 of the *TBT Agreement* must be informed by an interpretation that properly canvasses the text, context, and object and purpose of Article 2.12. In its view, the burden of proof in respect of a particular

provision of the covered agreements could not be understood in isolation from the overarching logic of that provision, and the function which it is designed to serve. (Para 286)

The Appellate Body thus concluded that:

> "The rule in Article 2.12, as clarified by paragraph 5.2 of the Doha Ministerial Decision, is expressly designed to allow producers in the complaining Member, and in particular in a complaining developing country Member, sufficient time to adapt their products or production methods to the requirements of the responding Member's technical regulation. Thus, it seems to us that, where a responding Member seeks to deviate from this rule, which, by its own terms, singles out producers in the complaining Member as the beneficiaries of a "reasonable interval" between the publication and the entry into force of a technical regulation, the responding Member must shoulder the burden of establishing a *prima facie* case that the conditions under which derogations from the rule are permitted are extant. Thus, *we disagree with the Panel* that it was for Indonesia to establish a *prima facie* case that a period of at least six months between the publication of Section 907(a)(1)(A) and its entry into force would not render the fulfilment of the objective pursued by Section 907(a)(1)(A) ineffective. Instead, we consider that, under Article 2.12 of the *TBT Agreement*, as clarified by paragraph 5.2 of the Doha Ministerial Decision, the burden rests upon the responding Member to make a *prima facie* case that an interval of not less than six months "would be ineffective to fulfil the legitimate objectives pursued" by its technical regulation." (Para 289)

Thus, while the Appellate Body disagreed with the Panel that it was for Indonesia to establish a *prima facie* case that an interval of at least six months between the publication of the FSPTCA and the entry into force of Section 907(a)(1)(A) would not render the fulfillment of the objective pursued by Section 907(a)(1)(A) ineffective, it nevertheless shared the Panel's view that the US failed to establish that an interval of at least six months between publication and entry into force would be ineffective in fulfilling the legitimate objective pursued by Section 907(a)(1)(A). Accordingly, it agreed with the Panel that the United States failed to rebut the *prima facie* case of inconsistency that Indonesia established under Article 2.12 of the *TBT Agreement*. (Para 296)

III. DISPUTE NOTES ON SELECT ISSUES

- Sources of International Law: The Appellate Body in its analyses has mainly relied on treaty text (viz. TBT Agreement and GATT 1994) and the previous relevant Working Party / Panel / Appellate Body Reports. The Appellate Body has also relied on the *Vienna Convention* to refer to the customary rules of interpretation as codified in Articles 31 and 32 for interpretation of certain issues.

- Like Product under Article 2.1 of the TBT Agreement: The Appellate Body in ***US – Clove Cigarettes***, has emphatically ruled that the determination of likeness under Article 2.1 of the TBT Agreement is essentially a determination about the nature and extent of competitive relationship between and among the products at issue. Technical regulations may play a role in the determination of likeness, but only to the extent they are reflected in the products' competitive relationship.

  This approach reflects a clear trend on part of the Appellate Body to base its like product determination, across different provisions, on the competitive relationship of the products. Starting with the Appellate Body ruling in ***EC Asbestos***, where it was found that an analysis of likeness under Article III:2 GATT was fundamentally a determination of the nature and scope of competitive relationship, this reasoning was recently extended to a likeness determination under Article III:4 of GATT in the ***Philippines - Distilled Spirits***. With the Appellate Body report in ***US – Clove Cigarettes***, this approach has now been extended to a likeness determination under the TBT

Agreement as well.

- Treatment no less favourable under Article 2.1 of the *TBT Agreement*
  The Appellate Body has concluded that the 'treatment no less favourable' standard under Article 2.1 of the *TBT Agreement* is different from that in GATT 1994. While the 'treatment no less favourable' standard of Article III:4 of the GATT 1994 prohibits WTO Members from modifying the conditions of competition in the marketplace to *the detriment of the group of imported products* vis-à-vis the group of like products, the context and object and purpose of the *TBT Agreement* leads to a different conclusion.

  The context and object and purpose of the *TBT Agreement* weigh in favour of interpreting the "treatment no less favourable" requirement of Article 2.1 as not prohibiting detrimental impact on imports that stems exclusively from a legitimate regulatory distinction. Rather, the "treatment no less favourable" requirement of Article 2.1 only prohibits *de jure* and *de facto* discrimination against the group of imported products.

- Burden of Proof under Article 2.12 of the *TBT Agreement*
  The Appellate Body has concluded that the general rules on burden of proof reflected in ***US – Wool Shirts and Blouses***, can be deviated from, in respect of a particular provision of the covered agreement in light of the overarching logic of the provision and the function which it is designed to serve. Thus in context of Article 2.12 of the *TBT Agreement*, as clarified by Para 5.2 of the Doha Ministerial declaration, the Appellate Body concluded that the burden was on the responding Member who deviated from the rule listed in Article 2.12 to establish a *prima facie* case that the conditions under which derogations from the rule were permitted are extant.

- Reliance on Doha Ministerial Decision for interpretation of Article 2.12 of the *TBT Agreement*
  This dispute presents one of the rare instances when a Decision of the Ministerial Conference has been made subject to Dispute Settlement. The Appellate Body concluded that though paragraph 5.2 of the *Doha Ministerial Decision* did not qualify as a multilateral interpretation within the meaning of Article IX:2 of the WTO Agreement, it could however be considered as a *subsequent agreement* of the parties within the meaning of Article 31(3)(a) of the *Vienna Convention*. Having concluded the same, the Appellate Body found that paragraph 5.2 of the Doha Ministerial Decision *bore specifically* upon the interpretation of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*. The Appellate Body, through its determination, has thus ensured that Ministerial Decisions are not disregarded in the future as well.