

US – CLOVE CIGARETTES¹

(DS406)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Indonesia	TBT Arts. 2.1 and 2.12 Doha Ministerial Decision on Implementation-Related Issues and Concerns, para. 5.2	Establishment of Panel	20 July 2010
			Circulation of Panel Report	2 September 2011
Respondent	United States	DSU Art. 11	Circulation of AB Report	4 April 2012
			Adoption	24 April 2012

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** Section 907(a)(1)(A) of the Federal Food, Drug, and Cosmetic Act (“Section 907(a)(1)(A)”), a tobacco control measure adopted by the United States.
- **Product at issue:** Clove cigarettes from Indonesia.

2. SUMMARY OF KEY PANEL/AB FINDINGS²

- **TBT Art. 2.1 (no less favourable treatment):** The Appellate Body upheld, although for different reasons, the Panel’s finding that clove cigarettes imported from Indonesia and menthol cigarettes produced in the United States were “like products” within the meaning of Art. 2.1. The Appellate Body disagreed with the Panel that the concept of “like products” in Art. 2.1 should be interpreted based on the regulatory purpose of the technical regulation at issue. Instead, the Appellate Body considered that the determination of whether products are “like” within the meaning of Art. 2.1 is a determination about the competitive relationship between the products, based on an analysis of the traditional “likeness” criteria of physical characteristics, end use, consumer tastes and habits, and tariff classification.

The Appellate Body upheld, although for different reasons, the Panel’s finding that, by banning clove cigarettes while exempting menthol cigarettes from the ban, Section 907(a)(1)(A) accorded less favourable treatment to imported clove cigarettes than it accorded to “like” domestic menthol cigarettes. The Appellate Body interpreted “treatment no less favourable” in Art. 2.1 as not prohibiting a detrimental impact on imports when such impact stems exclusively from a legitimate regulatory distinction. The Appellate Body found that 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.

- **TBT Art. 2.12, and Doha Ministerial Decision on Implementation-Related Issues and Concerns, para. 5.2 (reasonable interval between publication of technical regulations and their entry into force):** The Appellate Body upheld, although for different reasons, the Panel’s 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), the United States acted inconsistently with Art. 2.12. The Appellate Body upheld the Panel’s finding that para. 5.2 constitutes a “subsequent agreement between the parties” within the meaning of Art. 31(3)(a) of the VCLT, on the interpretation of the term “reasonable interval” in Art. 2.12. Moreover, the Appellate Body found that “reasonable interval” should normally be interpreted to mean at least six months.

3. OTHER ISSUES

- **Requirements of panel request – identification of like products (DSU Art. 6.2):** The Panel found that, when the complainant has specified the products in its panel request and the claim at issue pertains to a WTO obligation that requires a comparison of particular products, such identification becomes an integral part of the panel’s terms of reference, and cannot be “cured” through argumentation.

¹ United States – Measures Affecting the Production and Sale of Clove Cigarettes

² Other issues addressed: (i) TBT Art. 2.2 (more trade-restrictive than necessary); (ii) TBT Art.2.5 (request for explanation of justification); (iii) TBT Art. 2.8 (technical regulations to be specified in terms of performance where appropriate); (iv) TBT Arts. 2.9.2, 2.9.3, and 2.10 (notification requirements); and (v) TBT Art. 12.3 (unnecessary barrier to exports from a developing country). These Panel findings were not appealed.