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Legal Analysis of Tobacco Dispute Between Indonesia vs United States Under WTO Relating to National Treatment Principles

Sinta Dewi¹

This article discusses the disputes between Indonesia vs United States under the WTO relating to the application of United States National Regulation on the Family Smoking Protection and Tobacco Act, 2009 in prohibiting the production or sale of clove cigarettes. Currently, WTO is to rule on Disputes and the Panel has been established to settle the disputes. The main objectives of this article to analyze national treatment principles under the WTO agreement and General Exception under Article XX WTO as one of the basic legal claims submitted by Indonesia. This article will study and analyze how far the WTO obligations will be applied in that case. The Article organized as follows, first, discuss the national treatment obligation and general exception under the WTO Rule, second, analyzing the similar cases under the GATT and WTO Dispute Settlement. Finally, the article will be analyzing the Tobacco disputes.

Keywords: tobacco dispute, Indonesia, United States, national treatment principle, WTO dispute settlement

I. Introduction

International trade is the exchange of goods and services across national border due to the differences of resources between countries such as natural resources, climate, population, human resources, labor specifications and technology. These differences has initiate the countries to interact with each other and become involved in the transaction process.

International trade is also being driven by economic globalization which has two main forces, the first is technology and the second is the trade liberalization². The liberal trade policies have been influenced by Adam Smith theory on economic liberty and market economy. According to his view, free trade will increase competition on the domestic market and will enhance productivity and at the end will generate a higher standard of

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² Peter Van den Bossche, *The Law and Policy of the World Trade Organization*, Cambridge University Press, New York 2005, p 4-5.

living.³ Although the Smith's theory has been responded by anti-trade policies, the case for free trade is now based on a firm footing that free trade promotes a mutually profitable division of labor and enhances the potential real national product and increases higher standards of living.⁴

One of the important facet of international trade is marked with the role of General Agreement on Tariffs and Trade (GATT) in 1947 and later was replaced by the World Trade Organisation (WTO) in 1994. The main objectives of the establishment of WTO is to promote international trade through export and import and the member states agreed to eliminate the trade barrier either by the use of tariff and non-tariff. As for tariff barrier, the contracting states agreed to gradually lower tariff rate therefore trade will be taxed at lower rate and eventually will increase the trade flows.⁵

The WTO statistical data report has shown that developed countries has cut 40% of the tariff since 1995 for industrial products from an average of 6.3% to 3.8%. Furthermore, 40 countries agreed to eliminate import duties and other charges.⁶ On the other hand, non-tariff barrier is still hindering international trade because contracting states still apply non-tariff barrier in order to protect domestic industry. There are three catagories of non-tariff barrier.⁷

- a) Health, safety and environment include exports bans, SPS requirement, standards and conformance requirements;
- b) Trade policy includes policy measures including public export assistance, export taxes, import license, import quotas, production subsidies, stat trading and import monopolies, tax concession, and trade remedies (such as anti-dumping, safeguard and countervailing measures);
- c) Administrative measures include custom clearance delay, lack of transparency.

In order to create a fair trade, WTO has been built on one core principle of non-discrimination. The two most important non-discrimination principles are Most Favoured Nations (MFN) and National Treatment.⁸ The National Treatment Principle is stipulated in Article III which is enti-

³ Stefan Zleptnig, *Non- Economic Objevtives in WTO Law*, Nijhoff International Trade Law Series, Martinus NijhoffPublishers, Leiden, 2010, p 17-21.

⁴ Ibid, p 19.

⁵ Daniel A. Summer, *Tariff and Non Tariff Barrier to Trade*, Paper, University of California, Davies, page 2.

⁶ http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm2_e.htm, retrieve 29 January, 2011.

⁷ "Inventory of Regional Non Tariff Barrier: Synthesis Report by Austral Pty, Ltd," 2004, page 9-10. See also Peter Van den Bossche, *op.cit*, page 441-442.

⁸ Simon Lester and Bryan Mercurio, *World Trade Law: Text and Materials and Commentary*, Hart Publishing, Oxford and Porland, Oregon, 2008, page 273.

titled "National Treatment on Internal Taxation and Regulations."⁹ The term National Treatment refers to the equal treatment to be provided to foreign goods as that given to the domestic products and with respect to trade in goods; and national treatment means once imported product have cleared customs and the applicable tariff or duty has been collected, they must be treated the same as national product. The main objective of national treatment principles is to protect competitive relationship between domestic and foreign product and in the long run will create the predictability of the international trade.¹⁰ According to Jackson, international trades are confronted with regulations that appear to be neutral but in fact affect imported product and perceived as disguised discrimination¹¹ and the most common disguised discrimination takes place through the applications of regulation and product standards. This form of discrimination is very difficult to measure even under international trade rules because there are always reasonable arguments such as public health, environment, and safety which is permissible under article XX on General Exceptions as one of the non-economic objectives in WTO Law.¹²

National Treatment Principles also apply to products even tariff are not bound as specified in Brazilian International Taxes Case.¹³ The Panel concluded that GATT contracting party was bound by Article III regardless of whether the contracting party had undertaken tariff commitments in respect of the goods concerned.¹⁴

National Treatment Principles are stipulated in article III GATT 1994 and the intention of the drafter was clearly to treat the imported products in the same way as domestic products once they have been cleared through customs¹⁵ as in Japan Alcoholic Beverages Cases. The Appellate Body stated that the broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures that

⁹ Art III GATT, 1994.

¹⁰ Mitsuo Matsushita, Thomas J. Schoenbaum & Petros C. Mavroidis, *The World Trade Organization: Law, Practice and Policy*, The Oxford University Press, New York, 2006, page 234.

¹¹ See John H. Jackson, William J. Davies and Alan O. Sykes, Jr, *Legal Problems of International Economic Relations*, West Publishing Co, St Paul, Minnesota, USA, 1995, page 522, see also *Italian Agriculture Machinery Case*, GATT Panel Report, adopted on October 23, 1958 & the Supp. BISD 60 (1959).

¹² Stefan Zleptnig, *Op.Cit*, page 85.

¹³ Working Party Report, *Brazilian Internal Taxes*, GATT/CP.3/42 (First Report), adopted 30 June 1949, BISD II/181; GATT/CP.5/37 (Second Report), adopted on 13 December 1950, BISD II/186.

¹⁴ *Ibid*.

¹⁵ See *Italy v France in Agriculture Machinery Case*, 1958.

will protect domestic industry.¹⁶

Besides General Exception under Article XX, Article III also provides several exceptions that specified under article III:8, such as government procurement that permits government agencies to purchase for governmental purposes and not for commercial resale¹⁷ and subsidies for domestic producers. This exception is permitted because WTO members recognize the role of government procurement in national policy.

Another exception stipulated in Article III:8(b) which allows the payment of subsidies exclusively to domestic producers as an exception to the national treatment rule, under the condition that the subsidy does not violate other provisions of Article III and of the Agreement on Subsidies and Countervailing Measures. The reason for this exception is that subsidies are recognized to be an effective policy tool and are basically within the latitude of domestic policy authorities. However, because subsidies may have a negative effect on trade, the Agreement on Subsidies and Countervailing Measures imposes strict disciplines on their use.¹⁸

In Practice, however, there are still many hurdles in applying National Treatment Principles, for example, the tobacco disputes between Indonesia and United States. The Tobacco disputes began in 2009 when United States regulated the Family Smoking Prevention and Tobacco Control Act¹⁹ (FSPTCA) 2009. Section 907 of the Act prohibited the production or sale in the United States of all cigarettes with a "characterizing flavor" other than menthol or tobacco beginning 90 days after the Act was signed including Indonesia clove cigarettes. Indonesia believes that such measure discriminates against imported clove cigarettes based on the fact that the clove cigarettes that were sold in the United States were imported (primarily from Indonesia), while all of the menthol cigarettes sold in the United States are produced domestically (imports are negligible).

Indonesia also believes that such measure creates an unnecessary obstacle to trade in that the United States has made available to it less trade-restrictive means to accomplish the objectives of the Act. According to the United States written submission, the Purpose of the Act is to minimize the harmful effects of tobacco products and particularly by reducing youth smoking and authorizing the FDA to issue additional regulations on to-

¹⁶ See *Japan v EC in Alcoholic Beverages Case*, GATT Panel Report, Adopted on November 10, 1987, 34 Supp. BISD 83 (1988). See also Peter Van den Bossche, *op.cit*, page 328-329.

¹⁷ Rudiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr (Ed), *WTO-Technical Barriers and SPS Measures*, Leiden, 2007, page 40.

¹⁸ Agreement on Subsidies and Countervailing Duties.

¹⁹ Public Law 111-31.

bacco products as appropriate for the protection of the public health²⁰.

II. Background of The Family Smoking Prevention and Tobacco Act, 2009

The Family Smoking Prevention and Tobacco Control Act, 2009 (FSPTCA) was signed by President Obama in 2009 which gives the U.S. Food and Drug Administration the authority to regulate the manufacturing, marketing and sale of tobacco products²¹. The Law has ended the special protection that tobacco industry had enjoyed and the beginning era of tobacco industry regulation in the US.

The FSPTCA consists of three titles. Title I promulgates the authority to regulate tobacco to the FDA by amending the Federal Food, Drug and Cosmetic Act of 1938. The provisions of Title I (Authority of the Food and Drug Administration) are codified in Title 21 (Food and Drugs), Chapter 9 (Federal Food, Drug and Cosmetic Act), and Subchapter IX (Tobacco Products) of the United States Code Annotated. Title II relates to the labeling of cigarette and smokeless tobacco packages, as well as requiring tobacco product manufacturers to disclose information about the composition of their products. The provisions of Title II (Tobacco Product Warnings; Constituent and Smoke Constituent Disclosure) amends the Federal Cigarette Labeling and Advertising Act and are codified in Title 15 (Commerce and Trade), Chapter 36 (Cigarette Labeling and Advertising) of the United States Code Annotated. Title III relates to the trade of illicit tobacco products within and outside the United States. The provisions of Title III (Prevention of Illicit Trade in Tobacco Products) are also codified in the Federal Food, Drug and Cosmetic Act in Title 21 (Food and Drugs), Chapter 9 (Federal Food, Drug and Cosmetic Act), and Subchapter IX (Tobacco Products) of the United States Code.²²

Section 907 of FSPCTA on special Rules stated that three months after the date of enactment of the ACT, a cigarette or any of its components (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 a herb or spice, including strawberry,

²⁰ See FSPTCA sec. 917. Exhibit US-7.

²¹ <http://www.tobacco-facts.net/2009/06/the-family-smoking-prevention-and-tobacco-control-act>, diakses pada tanggal 12 desember, 2010.

²² Roseann B. Termini and Angela Bertugli, "Protection of Public Health Long Time in Coming: The Impact of the Family Smoking Prevention and Tobacco Control Act," Paper, 2009, Page 12-13.

grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry or coffee²³.

The Law also restricts tobacco marketing and sales to youth including specific restriction on youth access and marketing. The Law also grants the FDA the authority to take additional actions in the future to protect public health. As a result, clove cigarettes produced in Indonesia may no longer be imported into the US.

For Indonesia, the Act will cause an injury because over six million tobacco farmers depend directly or indirectly on clove cigarette industry. In Indonesia perspectives, the US government has discriminated Indonesia's clove cigarette which is banned in the US market while menthol cigarettes sold in the US are produced domestically. Indonesia government believes that such measures create an unnecessary obstacle to trade in that the United States has available to it less trade-restrictive means to accomplish the objectives of the Act.²⁴

From Indonesia point of view, the US government has not respond to share any studies that demonstrated the reason clove cigarette should be banned while menthol cigarette still allowed sold in US market and Indonesia believed that the Act and its implementation by the US was inconsistent with certain WTO provisions including the Agreement on Technical Barriers to Trade.²⁵

III. Legal Issues

Indonesia government considers that the measures inconsistent with several fundamental principles of the WTO²⁶ :

- a. Against the national treatment principles under 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.
- b. Article XX of GATT 1994 because there is no scientific or technical information indicating that clove cigarettes pose a greater health risk than menthol cigarettes and, as a result, the measure results in arbitrary and unjustifiable discrimination, a disguised restriction on trade, and is more trade restrictive than necessary to achieve a legitimate objective,

²³ Section 907 the Family Smoking Prevention and Tobacco Act, 2009.

²⁴ http://www.wto.org/english/news_e/news10_e/dsb_22jun10_e.htm

²⁵ Ibid

²⁶ United States - Measures Affecting The Production and Sale of Clove Cigarettes http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm, retrieve, 20 January, 2011.

if one were to exist.

- c. Technical Barrier to Trade Agreement (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.
- d. TBT Article 2.2 because there is no scientific or technical information indicating that clove cigarettes pose a greater health risk than menthol cigarettes or that youth smoke clove cigarettes in greater numbers than menthol. As a result, the measure is more trade restrictive than necessary and constitutes an unnecessary obstacle to international trade.

IV. Discussion

1. The Determination of injury under National Treatment Principles

a) Article III :4 GATT

The determination of injury of National Treatment Principles set in article III GATT:1994 that prohibits discrimination between imported and domestic like product. Therefore , a key factor to determined the injury whether products are "like" or not .

The determination of "like product" under GATT rules is not defined and GATT does not give any guidance regarding the characteristic of the like product and it must me concluded on the GATT and WTO disputes report . According to the panel report under WTO rule there are three different approaches of national treatment principles under article III: 2, first sentences, article III: 2, second sentences and article III: 4.

- Under article III:2 , first sentences has been construed narrowly as in the Japan – Alcoholic Beverages case , the Panel in making the determination of like product base on the physical characteristic . The physical test that was taken by the Panel relied the tariff distinction base on the difference of color, raw materials, presence of additives. The Appellate body confirm the narrowness of the criteria applied by the panel .
- Article III: 2 Second sentences apply different approach and refer the like product to directly competitive or substitutable product as in the Dominican Republic Cigarette Case, 2005 . This approaches is more broad that in article III:2 First sentences the panel concluded that the like product not only established on the the likeness

- of physical characteristic , common end and tariff clasification, but also should refer to a directly competitive or substitutable product
- Under Article III : 4 the term like product determined also broader compare to article III:2. First sentences as in Asbestos case between European Communities vs Canada. The panel refer the term "like product" in four general criteria : (1) the properties, nature and quality of the products; (2) their end user; (3) consumer's tastes and habits; and (4) tariff classification of the products .

In Tobacco dispute case, Indonesia argue that the United States has discriminated Indonesia clove cigarettes and violated national treatment obligations under article III; 4 GATT; 1994. In order to prove that the US has violated national treatment obligation, Indonesia has to prove several key elements. There must be :

- 1) The law, regulation or requirement which is already proven;
- 2) That law has affecting the internal sale. Offering for sale, purchase, transportation, distribution ;

In earlier case, Panel has taken the broad interpretation of the term affecting internal sale or purchase as in Italian Agricultural Machinery case. In the opinion of the Panel that affecting means not only apply to the laws or regulation which directly governed the conditions of sale and purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products of the internal market . In the tobacco case, Indonesia government have to argue and supported with the data that the FCTPCA has affecting the sale of clove cigarettes from Indonesia in the United States market and the Laws has undermined the conditions of competition and decrease the import of clove cigarettes following the adoption of a measures .

- 3) The measures less favorable treatment to the imported product; Another legal factor under article III:4 that has to be proven is the "less favourable treatment". Less favorable treatment is the most important aspect that has to be proven. According to Panel reports the terminology "less favorable treatment" means that the Contracting parties have to maintain the effective equality of opportunities for imported product and have been carried over to WTO jurisdiction as in the case of Korean-Beef, Japan-Alcohol

and US- Section 211 .

4) To like domestic product.

As the physical characteristic test has been consistently followed in all panel report , Indonesia could defend that clove cigarettes physically same with menthol in the term of nature and quality, end uses and consumer tastes because both cigarettes are very appeal to children therefore from the flavoured and consumer tastes both cigarettes is “ like product”. According to National Survey on Drug Uses and Health Menthol cigarettes are especially popular among young smokers. According to report 62 percent of middle-school students who smoke begin with menthol cigarettes, whose minty taste can mask the harshness of tobacco. About 75 percent of African American smokers use menthol brands, and tobacco companies heavily advertise menthol products in black communities and media .

Many African American smokers view menthol cigarettes as “soothing” and “smooth,” and less harsh and dangerous than regular cigarettes, according to a 2008 study by the Centers for Disease Control and Prevention. But there is no evidence that menthol cigarettes are less lethal than regular cigarettes. Although African Americans smoke fewer cigarettes compared with white smokers, they have higher rates of lung cancer, stroke and other tobacco-related diseases .

b) Article XX (b)

Indonesia also have to prove that the US have violated article XX GATT:1994 on General Exception specifically article XX (b). The nature article XX GATT is to allows WTO Members to take a measures which are inconsistent with GATT Provision or as an exception of the GATT and WTO general obligations such as from MFN and National Treatment Principles . However in the introductory clause (chapeau) of the article XX stated that the measures should not be applied arbitrary or unjustifiable and discriminate import product as concluded by Appellate Bodies in the US Shrimp Case that Article XX from paragraph (a) to (j) is a limited and conditional exception from the substantive obligations and has to be applied in good faith as one of general principles of international law . An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights to the other Members and, as well, a violation of

the treaty obligation of the Member so acting. The Appellate Bodies added that to interpret the language of the chapeau has to be in accordance with the general principles of international law . In order to win the case, the US also has to prove that the measures in regulating the tobacco has to be in accordance with the chapeau as a guiding requirement of article XX. One of legal issues in this case is how far the US government can present a legal argument with a reliable data relating the reason why menthol cigarettes is treated differently with clove cigarettes.

The US also has to prove that the measures were within the scope of article XX (b) . Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalization however the measures to be covered by Article XX (b) had to be “ necessary” as in Thailand- Cigarettes Case . The term “ necessary” can be applied only if there were no alternative measure can be taken and in this case, Panel held that Thailand Government can take other alternative measures that could equally have achieved the health policy objectives . Another legal issues that come up in interpreted Article XX (b) is whatever the contracting parties can submit a scientific evidence to support the measures as invoked in EC – Asbestos Case .

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²⁷ Mitsuo Matsushita, *op.cit*, page 236.

²⁸ Peter Van den Bossche, *op.cit*, page 324.

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In Tobacco dispute case, Indonesia argue that the United States has discriminated Indonesia clove cigarettes and violated national treatment obligations under article III; 4 GATT; 1994. In order to prove that the US has violated national treatment obligation, Indonesia has to prove several key elements. There must be ³⁴:

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²⁹ Mitsuo Matsushita, Loc. Cit.

³⁰ Robert A. Hudec, Like Product : The Differences in Meaning in GATT Article I and III, Paper, 2000, page 18.

³¹ [http://www.worldtradelaw.net/reports/wtoab/dr-cigarettes\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/dr-cigarettes(ab).pdf), Dominican Republic Cigarette Case, 2005, Retrieve, 27 January, 2011.

³² Mitsuo Matsushita, Op.Cit, page, 240.

³³ Asbestos case, See also Mitsuo Matsushita, Ibid.

³⁴ Simon Lester, Op.cit, page 299-321.

ported products of the internal market³⁵. In the tobacco case, Indonesia government have to argue and supported with the data that the FCT-PCA has affecting the sale of clove cigarettes from Indonesia in the United States market and the Laws has undermined the conditions of competition and decrease the import of clove cigarettes following the adoption of a measures³⁶.

- 3) The measures less favorable treatment to the imported product;
Another legal factor under article III:4 that has to be proven is the “less favourable treatment”. Less favorable treatment is the most important aspect that has to be proven. According to Panel reports the terminology “less favorable treatment” means that the Contracting parties have to maintain the effective equality of opportunities for imported product and have been carried over to WTO jurisdiction as in the case of Korean-Beef, Japan-Alcohol and US- Section 211³⁷.

- 4) To like domestic product.

As the physical characteristic test has been consistently followed in all panel report³⁸, Indonesia could defend that clove cigarettes physically same with menthol in the term of nature and quality, end uses and consumer tastes because both cigarettes are very appeal to children therefore from the flavoured and consumer tastes both cigarettes is “like product”. According to National Survey on Drug Uses and Health Menthol cigarettes are especially popular among young smokers. According to report 62 percent of middle-school students who smoke begin with menthol cigarettes, whose minty taste can mask the harshness of tobacco. About 75 percent of African American smokers use menthol brands, and tobacco companies heavily advertise menthol products in black communities and media³⁹.

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³⁵ Report adopted on 23 October 1958, page 3, <http://www.worldtradelaw.net/reports/gattpanels/italianmachinery.pdf>, retrieve, 4 January, 2011

³⁶ See also Simon Lester, Op.Cit, page 300,

³⁷ Simon Lester, Op.Cit, page 301, see also Panel report on Korea Measures Affecting the Importation of Fresh Chilled and Frozen Beef, Adopted, 2001.

³⁸ Mitsuo Matsushita, Op.Cit, page, 237.

³⁹ Washington Post, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/30/AR2010033003742.html>, Retieve 1 february, 2011.

compared with white smokers, they have higher rates of lung cancer, stroke and other tobacco-related diseases⁴⁰.

b) Article XX (b)

Indonesia also have to prove that the US have violated article XX GATT:1994 on General Exception specifically article XX (b). The nature article XX GATT is to allows WTO Members to take a measures which are inconsistent with GATT Provision or as an exception of the GATT and WTO general obligations such as from MFN and National Treatment Principles . However in the introductory clause (chapeau) of the article XX stated that the measures should not be applied arbitrary or unjustifiable and discriminate import product ⁴¹ as concluded by Appellate Bodies in the US Shrimp Case that Article XX from paragraph (a) to (j) is a limited and conditional exception from the substantive obligations ⁴² and has to be applied in good faith as one of general principles of international law⁴³ . An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights to the other Members and, as well, a violation of the treaty obligation of the Member so acting. The Appellate Bodies added that to interpret the language of the chapeau has to be in accordance with the general principles of international law⁴⁴. In order to win the case, the US also has to prove that the measures in regulating the tobacco has to be in accordance with the chapeau as a guiding requirement of article XX. One of legal issues in this case is how far the US government can present a legal argument with a reliable data relating the reason why menthol cigarettes is treated differently with clove cigarettes.

The US also has to prove that the measures were within the scope of article XX (b) ⁴⁵. Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalization however the measures to be covered by Article XX (b) had to be “necessary” as in Thailand- Cigarettes Case⁴⁶. The term “necessary” can be applied only if

⁴⁰ Ibid

⁴¹ Article XX 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 Member of measures: (emphasis added).

⁴² See United States- Import Prohibition of Certain Shrimp and Shrimp Products, Report of Appellate Body, AB- 1984-4. Paragraph. 157.

⁴³ Ibid, Paragraph, 158.

⁴⁴ Ibid.

⁴⁵ necessary to protect human, animal or plant life or health;

⁴⁶ See , Thailand – Restriction on Importation of and Internal Taxes on Cigarettes, Report of the

there were no alternative measure can be taken and in this case, Panel held that Thailand Government can take other alternative measures that could equally have achieved the health policy objectives⁴⁷. Another legal issues that come up in interpreted Article XX (b) is whether the contracting parties can submit a scientific evidence to support the measures as invoked in EC – Asbestos Case⁴⁸.

V. Conclusion

The Tobacco case begin when United States enforcing the Family Smoking Prevention and Tobacco Control Act, 2009 (FSPTCA). This regulation banning cigarettes that have artificial or natural flavor (except menthol) to be marketed in United States domestic market. For Indonesia standpoint the measures is classified a form of discriminate against Indonesia clove cigarettes where menthol cigarettes while all of the menthol cigarettes still allowed sold in the United States that are produced domestically and violated national treatment obligation as one of the basic principles of WTO that stipulated under Article III :4 GATT. Although, United States has submitted the defence that the measures is to minimize the harmful effect of tobacco products and particularly by reducing youth smoking and included the term of protect public and has comply with Article XX (b) General Exception to protect human or health but Indonesia still consider that the measures has been apply arbitrary and unjustifiable discriminate.

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- Panel adopted on 7 November 1990, paragraph 73.
- ⁴⁷ See Stefan Zleptnig, *Op.Cit*, page 153.
- ⁴⁸ See European Communities- Measures Affecting Asbestos, Report of Appellate Body 2000, Paragraph 73.

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