

**CERTAIN NEW MEASURES BY UNITED STATES ADDRESSING
THE BAN ON CLOVE CIGARETTES**

Communication from Indonesia

The following communication, dated 17 August 2009, is being circulated at the request of the delegation of Indonesia.

1. Indonesia is concerned about the new measures applied by the Government of the United States regarding *Section of Family Smoking Prevention Tobacco Control Act*, and in particular whether this measure is in conformity with the principles of the World Trade Organization (“WTO”). We understand that the Government of the United States has recently signed the “*Family Smoking Prevention Tobacco Control Act of 2009*”, *Public Law 111-31 (“the act”)* on 22 June 2009, where on Section 907 of the Act, the United States applied bans for all flavoured cigarettes except menthol beginning 90 days after the Act is signed.

2. The Indonesian Government has repeatedly communicated our steadfast view that Sec. 907 of the Act is inconsistent with the general principles of the World Trade Organization (“WTO”) on non-discrimination as well as the WTO Agreement on the Technical Barriers to Trade.

3. The Act prohibits, among other things, the production or sale in the United States of cigarettes containing certain additives, including clove, but would continue to permit the production and sale of other cigarettes, including cigarettes containing menthol. While all clove cigarettes sold in the United States are imported (primarily from Indonesia), virtually all of the menthol cigarettes sold in the United States are produced domestically (imports are negligible).

4. There is no scientific or technical information indicating that clove cigarettes pose a greater health risk than menthol cigarettes and menthol cigarettes are consumed in much greater quantities. The Government of Indonesia maintains that these measures discriminate against imported clove cigarettes and are thus incompatible with the United States’ obligations under the above-mentioned agreements because they infringe, among other provisions:

- (a) Articles 2, 3, 5, and 7 of the Agreement on the Application of Sanitary and Phytosanitary Measures;
- (b) Articles 2 and 12 of the Agreement on Technical Barriers to Trade; and
- (c) Articles III and XXIII of the General Agreement on Tariffs and Trade 1994.

5. We are of the view that the TBT Agreement obligates the United States to ensure that, in respect of its technical regulations, products imported from the territory of any WTO Member shall be

accorded treatment no less favourable than that accorded to domestic like products and to like products originating in any other country. The TBT Agreement also obligates the United States to ensure that its technical regulations are not more trade-restrictive than necessary, thereby creating unnecessary obstacles to international trade. In that regard, the TBT Agreement requires that the United States take account of scientific and technical information, as well as the special development and trade needs of developing country Members, such as Indonesia. Similar obligations exist under the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and the General Agreement on Tariffs and Trade 1994.

6. The measure identified in this request has nullified or impair benefits accruing to Indonesia directly or indirectly under the cited agreements. Therefore, the Government of Indonesia request the Government of the United States to remove trade restrictive measures contained in the “Family Smoking Prevention and Tobacco Control Act of 2009”, Public Law 111-31 (“the Act”) and to bring into conformity to the fairness of the *General Agreement on Tariffs and Trade 1994*, the *Agreement on the Application of Sanitary and Phytosanitary Measures*, and as well as the *Agreement on Technical Barriers to Trade*.

7. Referring to *Section 907 of the Family Smoking Prevention and Tobacco Control Act*, the Government of Indonesia also requests the United States to address the following questions:

- (a) Section 907 prohibits a cigarette or any of its components from containing a natural or artificial flavour (other than tobacco or menthol) or an herb or spice. Why was menthol singled out as the only flavour, herb, or spice excluded from this provision.
- (b) We know that clove cigarettes are an important industry in Indonesia. Are clove cigarettes also produced domestically in the United States?
- (c) Section 907 further indicates that the prohibition on a natural or artificial flavour, herb or spices applies if it is “a characterizing flavour” of the tobacco product or the tobacco smoke. However, the bill does not define what elements of a cigarette constitute a “characterizing flavour”. How does FDA plan to interpret the concept of a “characterizing flavour”?
- (d) Cigarettes contain many ingredients other than tobacco. Under Section 907, how will it be possible to distinguish certain “ingredients” from “characterizing flavours”?
- (e) Menthol is an artificial flavour derived from mint, which is clearly an herb or spice. Does the United States believe that menthol cigarettes would fall under the provisions of Section 907 and would be prohibited absent the exception granted in the bill?
- (f) Physically, both clove and menthol cigarettes contain tobacco with an herbal flavour additive with soothing properties. The end use of both clove and menthol cigarettes is the same, *i.e.*, both are used to smoke tobacco. Does the United States believe that clove cigarettes and menthol cigarettes are like products?
- (g) A primary purpose of the bill, as stated in the bill’s finding, is to reduce the incidence of youth smoking. The findings further indicate that additional regulation of tobacco products and tobacco marketing is necessary to prevent under-age youth from obtaining cigarettes. However, the evidence available to us indicates that many more youth smoke menthol cigarettes than clove cigarettes. Are you aware of any data to the contrary that indicate clove cigarettes are used by youth in greater quantities than menthol cigarettes?

- (h) The WTO does allow members to take measures to protect human health, but these measures must be based on sound science. Are you aware of any scientific studies that show that clove cigarettes pose a greater health risk than menthol cigarettes?
 - (i) Several of the other flavoured cigarettes that would be prohibited by Section 907 (e.g., cherry, strawberry, chocolate) were created and marketed to appeal to youth. Clove cigarettes have been sold for decades and are not marketed to youth. Clove cigarettes are sold primarily through speciality tobacco shops. Are you aware of any specific advertising of clove cigarettes that has been viewed as targeting or appealing to youth?
 - (j) Flavoured cigarettes other than menthol are banned under Section 907. Menthol cigarettes will be subject to study and regulation by the FDA. Why is it necessary to ban other flavours but only necessary to study and regulate menthol cigarettes?
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