

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

Request for the Establishment of a Panel by Indonesia

The following communication, dated 9 June 2010, from the delegation of Indonesia to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 7 April 2010, the Republic of Indonesia requested consultations with the United States pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 11 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement"), and Article 14 of the *Agreement on Technical Barriers to Trade* ("TBT Agreement") with respect to the measure adopted by the United States banning flavored cigarettes, including clove cigarettes. The Republic of Indonesia and the United States agreed to hold those consultations on 13 May 2010. Unfortunately, consultations did not resolve the dispute.

The measure that was the subject of consultations is reflected in Section 907 of the *Family Smoking Prevention and Tobacco Control Act*<sup>1</sup> ("the Act"), which 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. Indonesia believes that the measure discriminate 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 virtually all of the menthol cigarettes sold in the United States are produced domestically (imports are negligible). Indonesia also believes that the measure creates 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.

The Government of Indonesia maintains that banning clove cigarettes in the United States while exempting menthol cigarettes from the ban is inconsistent with the following provisions of GATT 1994:

- Article III: 4 of the GATT 1994 because the measure provides treatment to an imported product, clove cigarettes, that is "less favorable" than that accorded to a like domestic product, menthol cigarettes.
- 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

<sup>1</sup> Public Law 111-31.

disguised restriction on trade, and is more trade restrictive than necessary to achieve a legitimate objective, if one were to exist.

Indonesia also considers the measure to be inconsistent with the following provisions of the TBT Agreement:

- TBT Article 2.1 because the measure results in treatment that is "less favorable" to imported clove cigarettes than that accorded to a like domestic product, menthol cigarettes.
- 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.
- TBT Article 2.5 because the United States did not respond to questions from Indonesia seeking an explanation and justification for the ban submitted during bilateral discussions held 27 August 2009 and through the TBT Committee on 20 August 2009 (G/TBT/W/323).
- TBT Article 2.8 because the ban on characterizing flavors is based on descriptive characteristics.
- TBT Article 2.9 because the United States did not comply with the requirements of Articles 2.9.1, 2.9.2, 2.9.3, and 2.9.4 when adopting a technical regulation that has a significant effect on the trade of Indonesia.
- TBT Article 2.10 because in the event the United States believed there was a justification for not following the procedures in Article 2.9, it did not provide the Secretariat with notification of the measure and the urgent nature of the problem.
- TBT Article 2.12 because the effective date was less than six months from the enactment of the ban.
- TBT Article 12.3 because the ban created an unnecessary barrier to exports from developing countries.

Should the United States assert that the flavored cigarette ban is an SPS measure, then it is Indonesia's view that the measure is inconsistent with Articles 2, 3, 5, and 7 of the SPS Agreement.

Additionally, the measure identified in this request has nullified or impaired benefits accruing to Indonesia directly or indirectly under the cited agreements.

Therefore, the Government of Indonesia respectfully requests that pursuant to Article 6 of the DSU, the Dispute Settlement Body establish a panel to examine the matter, with standard terms of reference, as set out in Article 7.1 of the DSU.

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