

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

Request for Consultations by Indonesia

The following communication, dated 7 April 2010, from the delegation of Indonesia to the delegation of the United States and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the United States pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Article XXII of the General Agreement on Tariffs and Trade 1994, Article 11 of the Agreement on the Application of Sanitary and Phytosanitary Measures, and Article 14 of the Agreement on Technical Barriers to Trade with respect to the measure applied by the Government of the United States regarding the ban of clove cigarettes.

The President signed the "*Family Smoking Prevention Tobacco Control Act of 2009*" *Public Law 111-31 ("the Act")*, on 22 June 2009. In Section 907 of the Act, the United States applied a ban on all flavoured cigarettes except menthol beginning 90 days after the Act is signed. 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.

The Government of Indonesia 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 including, but not limited to the WTO Agreement on Technical Barriers to Trade. On 20 August 2009, Indonesia submitted document G/TBT/W/323 to the Committee on Technical Barriers to Trade (TBT) – WTO that addressed some questions concerning the measure at issue, however as per today, we have not received any formal response.

The Government of Indonesia maintains that the ban on the sale of clove cigarettes in the United States is inconsistent with various US obligations under the WTO rules and principles, including:

- (a) Discrimination under Article III:4 of the GATT 1994 between clove cigarettes and menthol cigarettes which are deemed to be "like products": Indonesia sees that these measures discriminate against imported clove cigarettes where clove cigarettes sold in the United States are imported (primarily from Indonesia), while virtually all of the

menthol cigarettes sold in the United States are produced domestically (imports are negligible).

- (b) Article XX of GATT 1994 provides that any measures taken shall only be applied to the extent necessary to protect human, animal or plant life or health. The measures shall not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.
- (c) The TBT Agreement Article 2 obligates the United States to, *inter alia*, ensure that technical regulations accord imported products treatment that is no less favourable than that afforded to like products of national origin. Article 2 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. Article 2 also sets out additional commitments for the preparation, adoption, and application of technical regulations. In that regard, the TBT Agreement requires that the United States take account of scientific and technical information in adopting regulations.
- (d) Article 12 of the TBT Agreement obligates the United States to take into account the special development and trade needs of developing country Members, such as Indonesia and to ensure that technical regulations to not create unnecessary barriers to exports from developing countries.
- (e) The SPS Agreement Articles 2, 3, 5, and 7 provides detailed obligations on the adoption of sanitary and phytosanitary measures necessary to protect human, animal, or plant life or health.

The measure identified in this request has nullified or impaired benefits accruing to Indonesia directly or indirectly under the cited agreements within the meaning of Article XXIII:1(a) of the GATT 1994. Therefore, the Government of Indonesia requests the Government of the United States to remove the discriminatory measure contained in the Act to bring it into conformity with the fairness of the General Agreement on Tariffs and Trade 1994, the Agreement on the Application of Sanitary and Phytosanitary Measures as well as the Agreement on Technical Barriers to Trade.

For the measure referred to above, this request also covers any amendments, replacements, extensions, implementing measures or other related measures. Indonesia reserve its rights to raise additional matters during the course of these consultations and in any future request for panel proceedings.

We look forward to receiving your reply to the present request and to setting a mutually convenient date for consultations.
