

BEFORE THE

WORLD TRADE ORGANIZATION

**UNITED STATES – MEASURES AFFECTING THE PRODUCTION
AND SALE OF CLOVE CIGARETTES**
(WT/DS406)

NON-CONFIDENTIAL SUMMARY OF THE
FIRST SUBMISSION OF THE REPUBLIC OF INDONESIA

22 OCTOBER 2010

I. INTRODUCTION

1. The Republic of Indonesia (“Indonesia”) challenges Section 101 of the Family Smoking Prevention and Tobacco Control Act of 2009 (the “Act”).¹ In particular, Indonesia challenges the “special rule for cigarettes” in Section 101(b), which banned the production and sale of certain cigarettes it characterized as “flavored” (hereinafter the “Special Rule”).²

2. According to the legislative history of the Act, the Special Rule was meant to stop cigarette manufacturers from targeting underage smokers with flavors intended to increase the appeal of smoking.³ One type of flavored cigarette escaped the ban – menthol cigarettes.

3. Cigarettes may contain a variety of ingredients and flavors that are added to the tobacco or filter. There is, in short, “no logical difference,” according to Professor Michael Siegel of Boston University, “between menthol and the hundreds of other flavor additives put into cigarettes,”⁴ and that includes clove.

4. Clove cigarettes have been produced in Indonesia for over a century. It is estimated that as many as 6 million Indonesians are employed directly or indirectly in the manufacture of cigarettes and the growing of tobacco. The cigarette industry, including clove, accounts for approximately 1.66 percent of Indonesia’s total gross domestic product (“GDP”). Indonesia has exported clove cigarettes to the United States for well over 40 years.

5. Notwithstanding the importance of clove cigarettes to its economy and its people, Indonesia does not object to the United States regulating the production or sale of cigarettes within its borders. Nor does Indonesia object to reasonable measures designed to keep cigarettes, including clove cigarettes, out of the hands of minors. What Indonesia objects to is a measure, in this case the Special Rule, that imposes a complete ban on clove cigarettes from Indonesia, while little or no restrictions are placed on the production or sale of so-called regular cigarettes, in general, and menthol cigarettes, in particular.

6. Indonesia’s position might be different if there were sufficient evidence showing clove cigarettes to be more popular or appealing to minors than regular cigarettes; however, there is none. Clove cigarette usage by youth is practically non-existent. What there is evidence of is the popularity of menthol cigarettes in the United States as compared to all other cigarettes, including clove cigarettes. Menthol cigarettes currently represent over one quarter of all cigarettes smoked in the United States. Among underage smokers that number jumps to approximately 43 percent. By comparison, clove cigarettes currently account for less than 0.05

¹ Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-3121, 123 Stat. 1776 (codified in scattered sections of 21 U.S.C. and 15 U.S.C.) The Act became law in the United States 22 June 2009.

² 21 U.S.C.A. § 387g(a)(1)(A) (West 2010). The Special Rule took effect on 22 September 2009.

³ H.R. Rep. No. 111-58, Pt. 1, at 37 (2009).

⁴ Jacob Grier, “Asking the Wrong Questions,” The Washington Examiner, 22 July 2010, available at <http://www.washingtonexaminer.com/opinion/blogs/Examiner-Opinion-Zone/Asking-the-wrong-questions-about-menthol-99044454.html> (emphasis in original).

percent of the cigarettes consumed by adolescents and just 0.09 percent of all cigarettes consumed in the United States.

7. The challenged measure is, in short, discriminatory and a violation of Article 2.1 of the Agreement on Technical Barriers to Trade (“TBT Agreement”) in Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization (“WTO”). For largely the same reasons, the challenged measure also violates Article III.4 of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”). Furthermore, the challenged measure is more trade restrictive than necessary to achieve the stated goal of reducing youth smoking and is, therefore, in violation of Article 2.2 of the TBT Agreement.

8. In banning cigarettes with “characterizing flavors,” the Special Rule lacks the specificity required by the TBT Agreement. Most, if not all, cigarettes sold in the United States contain a variety of ingredients and flavors that are added to the tobacco or filter. Yet, neither the Act nor the Special Rule provide any definition of “characterizing flavor” or any performance-based standard by which different flavors qualify as “characterizing.” As such, the Special Rule is inconsistent with Article 2.8 of the TBT Agreement because it bans cigarettes solely on the basis of descriptive characteristics.

9. The United States also failed to live up to a number of its procedural obligations under Article 2 of the TBT Agreement. The United States failed to provide any scientific evidence or justification to Indonesia showing that the Special Rule is not more trade restrictive than necessary or is not an unnecessary obstacle to international trade. The United States failed to provide notification through the TBT Committee to any of its other trading partners regarding the scope and rationale for the Special Rule. In addition, the United States did not allow a reasonable interval of time to pass before implementing the Special Rule. Accordingly, the United States acted inconsistently with its obligations under Article 2.5, 2.9, 2.10, and 2.12 of the TBT Agreement.

10. The ban on clove cigarettes in the Special Rule created an unnecessary barrier to exports from Indonesia, a developing country Member. As Indonesian imports accounted for over 99 percent of the clove cigarettes sold in the United States before the ban, the United States was obliged to take account of the special and development and trade needs of Indonesia, a developing country Member of the WTO, when preparing and implementing the Special Rule. It did not do so. As such, the United States acted inconsistently with Article 12.3 of the TBT Agreement.

11. Because the United States has violated the GATT and the TBT Agreement, its actions are considered *prima facie* to constitute a case of nullification or impairment of Indonesia’s rights under these agreements. As such, there is a presumption that the United States’ actions have had an adverse impact on Indonesia in adopting and applying the Special Rule. The burden of proof, therefore, shifts to the United States to rebut the charge.

II. FACTUAL BACKGROUND

12. In 2007 the total U.S. market for cigarettes was approximately 360 billion cigarettes.⁵ Imports of clove cigarettes totaled 398.8 million or approximately 1/10th of one percent of the total U.S. market.⁶ According to the Tobacco Merchants Association, all natural clove cigarettes or “kreteks” sold in the United States are imported, with the vast majority coming from Indonesia.

13. The Act granted the Food and Drug Administration (“FDA”) broad authority to regulate tobacco products. Among other things, the Act provided FDA with the authority to regulate marketing and promotion of tobacco products and to set performance standards for tobacco products to protect the public health.

14. Of concern in this matter is Section 101(b) of the Act, which contains a “special rule for cigarettes.” The Special Rule states that, beginning three months after the date of enactment

a cigarette or any of its component parts (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 an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke.⁷

15. The ban on cigarettes with a “characterizing flavor” was allegedly included in the Act in order to eliminate the ability of cigarette manufacturers to target adolescents with flavors intended to increase the appeal of smoking.⁸ In the past, brands such as “Beach Breezer,” “Margarita Mixer,” “Kauai Kolada,” “Winter Mocha Mint,” “Cool Myst,” and “Midnight Berry” were designed primarily for this purpose.⁹

16. The prohibition on characterizing flavors other than menthol or tobacco established by the Special Rule went into effect on 22 September 2009. Since that time:

- clove cigarettes have been prohibited in the United States;
- Indonesia’s annual exports of clove cigarettes to the United States have gone from approximately \$15 million before the ban to zero; and

⁵ Economic Research Service, U.S. Department of Agriculture, “Tobacco Outlook” (2007).

⁶ Tobacco Manufacturers Association, “U.S. Tobacco Barometer Reports – Clove Cigarette Imports, 1999-2009”.

⁷ 21 U.S.C.A. § 387g(a)(a)(A) (West 2010).

⁸ H.R. Rep. No. 111-58 at 37.

⁹ However, those products had been voluntarily removed from the market in 2006 as a result of a consent agreement reached between the U.S. producer and a group of State Attorneys General. See Consent Agreement between R.J. Reynolds and Attorneys General, 11 October 2006, 4-7 available at <http://www.doj.mt.gov/news/releases2006/10112006agreement.pdf> (“Consent Agreement”).

- menthol- and tobacco-flavored (“regular”) cigarettes continue to be produced and sold in the United States;¹⁰
- the FDA has not published any regulations, or otherwise provided any guidance, on what constitutes a “characterizing flavor”;
- the United States has not provided notification to the TBT Committee of the scope and rationale of the Special Rule; and,
- despite the repeated requests of Indonesia, the United States has not identified any scientific evidence, sound or otherwise, in existence on or before 22 June 2009 that could possibly justify its disparate treatment of clove cigarettes and all other cigarettes, especially menthol cigarettes.

III. LEGAL ARGUMENT

A. The Special Rule Accords More Favorable Treatment To Certain Cigarettes Produced Or Sold In The United States Than It Does Cigarettes Imported From Indonesia

17. Both Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 obligate Members of the WTO to accord to imported products “treatment no less favorable than that accorded to like products of national origin.” In analyzing whether a measure is consistent with GATT 1994 or TBT obligations, panels have followed the Appellate Body’s guidance that the more specific of these agreements should be addressed first.¹¹ As described more fully below, the Special Rule is a technical regulation subject to the TBT Agreement.

1. The Special Rule is inconsistent with Article 2.1 of the TBT Agreement because the measure results in treatment that is “less favorable” to imported clove cigarettes than that accorded to a like domestic product

18. Article 2.1 of the TBT Agreement states that

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable

¹⁰ A comparison of U.S. government statistics approximating sales of domestically produced cigarettes and imported cigarettes shows that between August 2009 (the last full month prior to the ban) and October 2009 (the first full month following the ban) sales of domestically produced cigarettes actually increased after the Special Rule went into effect, while imports fell 18 percent. See Alcohol and Tobacco Tax and Trade Bureau, U.S. Department of the Treasury, “Statistical Report – Tobacco,” August 2009 and October 2009 (comparison of “removed taxable” and “imports” of cigarettes).

¹¹ Report of the Panel, *European Communities – Trade Description of Sardines*, WT/DS231/R, adopted 23 October 2002, paras. 7.14-19 (“*EC – Sardines*”); Report of the Panel, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, adopted 5 April 2001, paras. 8.15-17 (“*EC-Asbestos*”).

than that accorded to domestic like products of national origin and to like products originating in any other country.¹²

19. Indonesia respectfully submits that the Special Rule, both on its face and as applied, violates Article 2.1 of the TBT Agreement because it accords “less favorable” treatment to imports of clove cigarettes than it accords to a like domestic product – regular and menthol cigarettes.

20. The Special Rule constitutes a “technical regulation” subject to the TBT Agreement. The Appellate Body has interpreted “technical regulation” as encompassing documents that “regulate the ‘characteristics’ of products in a binding or compulsory fashion,” having the effect of “prescribing or imposing one or more ‘characteristics’”¹³ Product characteristics are in turn defined as “any objectively definable ‘features,’ ‘qualities,’ ‘attributes,’ or other ‘distinguishing mark’ of a product.”¹⁴ They may be “prescribed or imposed in either a positive or a negative form [– t]hat is, the document may provide, positively, that products must possess certain ‘characteristics’, or the document may require, negatively, that products must not possess certain characteristics”¹⁵ In sum, a technical regulation must: (1) lay down “product characteristics”; (2) make compliance with those characteristics mandatory; and (3) be applicable to an identifiable product or group of products.

21. The Special Rule meets all of these criteria since it (1) prohibits the addition of characterizing flavors -- except menthol; (2) compliance with the prohibition is mandatory; and (3) the rule applies to an identifiable group of products – certain flavored cigarettes, especially clove cigarettes. The Special Rule, therefore, constitutes a “technical regulation” within the meaning of the TBT Agreement.

22. Clove cigarettes are “like” domestically produced cigarettes in the United States, especially menthol cigarettes. The general approach used in these prior cases to determine “likeness” consists of an analysis that focuses on four basic factors: (1) the physical characteristics of the products; (2) end-uses; (3) consumer perceptions and behavior; and (4) tariff classification.¹⁶

23. Clove cigarettes and domestically produced cigarettes, including menthol cigarettes, have the same physical characteristics. Both cigarettes contain cured and blended tobacco in a paper wrapper with a filter. Both contain additional ingredients and flavorings that create the unique flavor of each brand. Flavorings such as brown sugar or vanilla are not dangerous and are added to virtually all cigarettes, even those that would be considered to have a “regular” tobacco flavor. As noted previously, there are, in fact, literally hundreds of ingredients used by tobacco companies to enhance the appeal of cigarettes and create the unique flavor of each

¹² TBT Agreement, Article 2.1.

¹³ Report of the Appellate Body, *EC – Asbestos*, WT/DS135/AB/R, adopted 5 April 2001, paras. 67-9.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*, para. 101.

brand. In this regard, cigarettes are no different than many other consumer products, such as mint-flavored toothpaste, that use flavorings to attract consumers. Clove cigarettes, like all cigarettes, contain a blend of tobacco and other ingredients (in this case, ground clove buds) to give them their unique flavor. Clove cigarettes are no different from cigarettes that contain a blend of tobacco, sugar, and vanilla, or of tobacco and menthol.

24. Clove cigarettes and domestically produced cigarettes are both “Class A” cigarettes for U.S. tax purposes, weighing less than three pounds per thousand. Moreover, both clove cigarettes and domestically produced cigarettes satisfy the U.S. government’s definition of a “cigarette”: “(1) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in paragraph (1).”¹⁷ Clove cigarettes and menthol cigarettes share even more specific properties in that they both contain tobacco and an added ingredient (*i.e.*, an herb or spice) with soothing properties. Both clove oil¹⁸ (known chemically as “eugenol”) and menthol are widely used in consumer products and are recognized as having an anesthetic effect.¹⁹

25. The end use of all cigarettes, including clove and menthol cigarettes, is the same -- that is, they are used to smoke tobacco.

26. Consumers perceive regular cigarettes, menthol cigarettes, and clove cigarettes as an “alternative means of performing particular functions in order to satisfy a particular want or demand”²⁰ (*i.e.*, an alternative means of smoking). Market data indicates that 79 percent of clove cigarette smokers do, in fact, smoke “regular” (those with a characterizing flavor of tobacco) and menthol cigarettes most frequently and use clove cigarettes as a “special occasion” cigarette. In short, all cigarettes are in a competitive relationship with one another for access to channels of distribution, shelf space, and market share.

27. Clove cigarettes and domestically produced cigarettes have the same international tariff classification at the 6-digit level, the most detailed level used among Members of the WTO.

28. Because clove cigarettes have the same physical characteristics, end-uses, consumer perceptions, and tariff classification as domestically produced cigarettes, generally, and menthol cigarettes, in particular, clove cigarettes are thus “like” these other cigarettes.

29. Since the Special Rule’s ban does not apply to cigarettes with a characterizing flavor of menthol or tobacco, and since clove cigarettes have been shown to be “like” those products, a

¹⁷ 26 U.S.C. § 5702(b).

¹⁸ See “All About Cloves,” available at <http://www.indepthinfo.com/cloves>.

¹⁹ See Deirdre Lawrence, FDA Center for Tobacco Products, “Menthol Sensory Properties and Possible Effects on Topography” (30-31 March 2009).

²⁰ See Appellate Body Report, *EC – Asbestos*, para 101 (interpreting the characteristics “like” products might share).

ban on clove cigarettes but not menthol- or tobacco-flavored cigarettes creates unequal conditions of competition in the U.S. market and is, accordingly, “less favorable” treatment.

30. The Special rule is also inconsistent with GATT Article III:4. Unlike TBT Article 2.1, Article III:4 does not require consideration of whether the Special Rule is a “technical regulation. Instead, a measure considered under Article III:4 must simply be a “law, regulation [or] requirement affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use” of an imported product. The Special Rule prohibits a cigarette in the United States from containing a characterizing flavor other than menthol or tobacco, which clearly affects the internal sale, offering for sale or use of imported clove cigarettes by banning them from the U.S. market altogether.

31. For the same reasons outlined above with respect to TBT Article 2.1, the Special Rule is inconsistent with GATT Article III:4. Clove cigarettes are like domestically produced cigarettes in that they share the same physical characteristics, end-uses, consumer perceptions, and tariff classification. The Special Rule accords clove cigarettes less favorable treatment than domestically produced menthol- or tobacco-flavored cigarettes in that clove cigarettes are banned, while menthol and “regular” cigarettes continue to be sold in the U.S. market.

B. The Special Rule Is More Trade Restrictive Than Necessary To Achieve The Level Of Protection Sought By The United States

32. The Special Rule is inconsistent with Article 2.2 of the TBT Agreement because it is more trade restrictive than necessary to protect human health and is thus an unnecessary obstacle to international trade.

33. Indonesia agrees that protection of human health through regulation of tobacco products is a legitimate health objective. Indonesia would also agree that reducing youth smoking is a legitimate objective. But a ban is the most trade restrictive measure that can be adopted and, therefore, must be subject to the highest level of justification.

34. In determining whether a violation of TBT Article 2.2 exists, the Panel must consider whether the ban on some flavors, but not all, contained in the Special Rule is likely to achieve the level of protection sought by the United States and whether less-trade restrictive measures are available that could also achieve that level of protection.

35. The Act itself is helpful in understanding the level of protection sought by the United States. As previously noted, one of the stated objectives of the Act is “to continue to permit the sale of tobacco products to adults in conjunction with measures to ensure they are not sold or accessible to underage purchasers.”²¹ Further, the standards set forth in the Act are intended to

²¹ The Act § 3(7).

restrict the advertising and promotional practices most likely to entice youth into tobacco use, while affording ample opportunity to market tobacco products to adults.²²

36. Even more revealing is what the Act does not intend to do. The Act and its supporters claim that additional government regulation is essential to stop young people from taking up smoking. However, while the FDA is given broad authority to regulate tobacco and set standards for cigarettes, the FDA is expressly prohibited by the Act from taking a number of actions that would likely be most effective at reducing the number of youth who begin smoking and become addicted. For example, the FDA is prohibited by the Act from banning cigarettes entirely, removing nicotine from cigarettes, raising the legal smoking age to 19, or requiring that cigarette sales be limited to adult-only stores.²³

37. Because the Act clearly contemplates continued use of cigarettes by adults, the level of protection sought is not the elimination of all risks associated with smoking. Further, the vast majority of cigarettes known to be smoked by youth are not banned by the Act at all. Based on results from the National Survey on Drug Use and Health, a U.S. government funded study, those youth smoke are overwhelmingly smoking “regular” cigarettes or menthol cigarettes, which are not banned by the Act. Thus, the level of protection sought is not zero access to cigarettes likely to be smoked by youth. By prohibiting the FDA from taking certain actions most likely to reduce youth smoking and dependence, the level of protection sought by the Act is not a dramatic reduction in the number of youth who smoke. Rather, what the Act describes as its desired level of protection is sufficient regulation to deter, but not prohibit, the use of tobacco products by adolescents.

38. A ban is the most trade-restrictive regulatory tool available and in certain circumstances may be the only option for achieving a health objective, for example where the level of protection needed is the *elimination* of risk. The United States could have decided that to prevent people from smoking it wanted to ban all cigarettes from its market entirely. But that was not the level of protection sought by the United States. The Special Rule does not allow for legitimate sales of clove cigarettes to adults and exempts from the ban the cigarettes most likely to be smoked by youth. Thus, the ban on clove cigarettes greatly exceeds the level of protection sought.

39. Panels have held that the question of whether a measure is “necessary” hinges on the degree to which the measure achieved the desired policy objective. In *US – Gambling* the Appellate Body confirmed that an assessment of the necessity of a measure involves a weighing and balancing of “the ‘relative importance’ of the interests or values furthered by the challenged measure,” along with other factors, which will usually include “the contribution of the measure

²² *Id.*, § 2(32).

²³ 21 U.S.C.A. § 387f(d)(3)(West 2010). See also John R. Polito, “Inconsistent Flavor of Campaign for Tobacco Free Kids,” whyquit.com, 13 October 2008.

to the realization of the ends pursued by it [and] the restrictive impact of the measure on international commerce."²⁴

40. TBT Art. 2.2 indicates that “necessity” is to be determined taking into account the risks associated with not taking the challenged measure. Thus, the Panel must consider whether banning clove cigarettes, but not menthol or regular cigarettes, contributes to a reduction in the level of smoking by adolescents. In making its decision, the Panel should evaluate the likely impact of not banning clove cigarettes. The facts clearly show that failure to ban clove cigarettes would not pose any significant risk to the stated objective of the Act or to the health of adolescents. Thus, a ban on clove cigarettes is not necessary to reduce youth smoking

41. Evidence shows that youth are overwhelmingly more likely to smoke cigarettes not banned by the Act than clove cigarettes. In fact, eighty-seven (87) percent of high school smokers smoke just three heavily marketed brands: “Marlboro,” “Camel,” and “Newport.”²⁵

42. According to the National Survey on Drug Use and Health:

- only .05% of cigarettes consumed by youth are clove cigarettes, while 43% are menthol and 57% are regular;
- of the youth who smoke, virtually all smoke regular or menthol cigarettes; and
- clove cigarette smokers smoke fewer cigarettes per day than menthol or regular cigarette smokers.

43. The above evidence shows that banning clove cigarettes, but not menthol and regular cigarettes or other flavored tobacco products, is unlikely to have any impact whatsoever on youth smoking. The ban on clove cigarettes is, thus, not “necessary.”

44. Panels and the Appellate Body have consistently endorsed the view expressed in *US – Section 337* “that a contracting party cannot justify a measure inconsistent with another GATT provision as ‘necessary’ ...if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it.”²⁶

45. Regulation, short of the Special Rule’s blanket ban on flavors, could have achieved the level of protection sought by the Act. The Act itself contains a number of new provisions applicable to menthol and regular cigarettes designed to reduce the ability of cigarette companies to engage in practices that target and attract youth. These measures could also have been applied to clove cigarettes:

²⁴ Report of the Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, para. 306.

²⁵ Steve Chapman, “Sweet Lies About Kids and Smoking,” 27 September 2009, available at www.townhall.com.

²⁶ Report of the Panel, *United States – Section 337 of the Tariff Act of 1930*, BISD 36S/345, adopted 7 November 1989, para. 5.26 (“*US – Section 337*”).

- banning all outdoor tobacco advertising within 1,000 feet of schools and playgrounds;
- banning all remaining tobacco-brand sponsorships of sports and entertainment events;
- banning free giveaways of any non-tobacco items with the purchase of a tobacco product;
- limiting to black-and-white text only advertising in publications with significant teen readership, as well as outdoor and point-of sale advertising except in adults-only facilities;
- restricting vending machines and self-service displays to adult-only facilities; and
- requiring retailers to verify age for all over-the-counter sales and providing for federal enforcement and penalties against retailers who sell to minors.²⁷

46. Ironically, the Act prohibits the FDA from taking several steps that would not be particularly trade-restrictive and would also significantly reduce youth smoking. These include raising the legal age to buy tobacco products to 19 and restricting the sales of cigarettes to adult-only locations.²⁸

47. From time to time tobacco companies did develop new products that health advocates alleged were designed and marketed to attract youth. When concerns about these products were raised, these products were voluntarily removed from the market by their manufacturers or distributors. The 2006 consent agreement between R.J. Reynolds and several State Attorneys General includes voluntary measures that are not trade-restrictive that could have been included in the Act, including a prohibition on the use of fruit-, candy-, or alcoholic beverage-related terms or images in the brand name, packaging, print advertising (other than in an adult-only facility), direct mail or email promotions, and web-based advertising.²⁹ Giving the FDA the authority to approve any new tobacco brands, labels, and packaging would give regulators the opportunity to ensure that any objectionable products do not come on the market, while allowing flavored products, such as clove cigarettes, to continue to be sold to adults.

48. Other countries have adopted measures that are not trade-restrictive in order to address youth smoking. Australia, for example, has banned almost all tobacco advertising and prohibited tobacco companies from sponsoring events. Certain Australian states have adopted additional measures including prohibiting free giveaways of promotion items in conjunction with the purchase of tobacco products, limiting the display of tobacco products, placing strict requirements on packaging, and requiring health warnings.³⁰ Singapore has significantly

²⁷ Staff of H. Comm. on Energy and Commerce, 111th Congress, Bill Summary H.R. 1256, 1 April 2009, available at http://energycommerce.house.gov/Press_111/20090401/hr1256_summary.pdf (“Bill Summary”).

²⁸ 21 U.S.C.A. § 387f(d)(3) (West 2010).

²⁹ See Consent Agreement.

³⁰ Tobacco in Australia: Facts & Issues, Chapter 11.3-11.4, available at www.tobaccoinaustralia.org/au, 27 August 2010.

increased fines for underage smoking and certain retailers are prevented from selling tobacco products to make them less available to youth.

49. Using the most trade-restrictive form of regulation (a ban) on clove cigarettes was not necessary to achieve the level of protection sought by the United States. Less-trade restrictive measures, including measures included in the Act, those adopted by Australia and Singapore, and regulations included in the *World Health Organization Framework Convention on Tobacco Control*, were available to address concerns about youth smoking and continue to allow the sale of clove cigarettes to adults, as contemplated by the objectives of the Act.

50. At the time the Act was adopted, there was no significant production of flavored cigarettes in the United States. Clove cigarettes, which have been sold in the U.S. market for over 40 years, were imported primarily from Indonesia. The two types of cigarettes that are produced in significant numbers in the United States and popular with adolescents, menthol and “regular” cigarettes, were exempted from the ban. The ban presents an insurmountable obstacle to Indonesia’s trade of clove cigarettes, costing Indonesia approximately \$15 million in exports annually and jeopardizing the jobs of some 6 million Indonesians who depend on the clove cigarette trade. We have already shown in the discussion above that the ban on flavored cigarettes was not “necessary.” Therefore, the ban on the use of some characterizing flavors in cigarettes, but not menthol and tobacco, is an unnecessary obstacle to international trade.

C. The Special Rule Is Not Condoned By Article XX Of GATT 1994 Because It Constitutes A Restriction On International Trade Masquerading As A Measure Necessary To Protect Human Health

51. Under certain circumstances, GATT Article XX allows Members to take actions that are inconsistent with their WTO obligations. Members may, for example, adopt certain measures to protect human health³¹ so long as they are not a “disguised restriction on trade” or “unjustifiable discrimination between countries.”³²

52. However, for the same reasons discussed with respect to TBT Article 2.2, the ban in the Special Rule, which applies to only some flavors but not all, is not justifiable and it is certainly not necessary to protect youth from smoking. Therefore, the exceptions provided for in Article XX are not available to the United States.

³¹ GATT Art. XX(b).

³² *Id.* (chapeau).

D. The United States’ Failure To Respond To Questions From Indonesia Seeking An Explanation Of The Justification For The Ban Imposed By The Special Rule, Which Were Submitted During Informal Bilateral Consultations And Through The TBT Committee, Violated Article 2.5 Of The TBT Agreement

53. TBT Article 2.5 requires that a WTO Member preparing, adopting or applying a technical regulation that will have a significant effect on the trade of another Member must explain the justification for that technical regulation. At various times Indonesia requested a justification, including the scientific basis for the Special Rule. For example, Indonesia submitted a series of questions to the United States in document G/TBT/W/323 through the auspices of the WTO’s TBT Committee. The United States never provided a complete response to any of Indonesia’s questions through the TBT Committee or elsewhere.

E. The Special Rule Is Inconsistent With Article 2.8 Of The TBT Agreement Because The Ban On Clove Cigarettes Is Based On Descriptive Characteristics

54. The TBT Agreement requires Members to provide a certain level of specificity in their technical regulations. Pursuant to Article 2.8, “[w]herever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.” As such, a Member’s technical regulations must require products to meet a certain performance level rather than merely specify how products must be made or what they must contain.

55. The Special Rule bans certain cigarettes solely in terms of descriptive characteristics. As described above, the Special Rule imposes a ban on cigarettes with a “characterizing flavor.” However, the Act provides no definition of “characterizing flavor” for purposes of the Special Rule. Moreover, the FDA has not provided further specification on what constitutes a “characterizing flavor” in either its guidance on the Special Rule or in the public notice announcing its enforcement of the Special Rule.³³

56. Neither the Act nor the Special Rule specifies the standards, performance or otherwise, by which certain ingredients, such as ground clove buds, added for purposes of flavor are to be deemed “characterizing,” while other ingredients also added for flavor, such as brown sugar, are not. The Act enumerates no performance-based standard for its ban other than the use of the general descriptor “characterizing flavor.” Therefore, by basing the ban on clove cigarettes in the Special Rule on descriptive characteristics, the United States has violated Article 2.8 of the TBT Agreement.

³³ FDA, Guidance for Industry and FDA Staff, General Questions and Answers on the Ban of Cigarettes that Contain Characterizing Flavors (2d ed., 23 December 2009), available at <http://www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/default.htm>; Enforcement of General Tobacco Standard Special Rule for Cigarettes, 74 Fed. Reg. 48,974 (25 September 2009).

F. The United States Violated Article 2.9 Of The TBT Agreement Because It Did Not Comply With The Requirements In Paragraphs 2.9.2 And 2.9.3 When Adopting A Technical Regulation That Has A Significant Effect On The Trade Of Indonesia

57. Article 2.9 of the TBT Agreement imposes various procedural requirements on Members before they adopt certain technical regulations. Before adopting the Special Rule the United States was required to follow the procedures in Article 2.9. The United States failed to follow several of the procedures mandated by Article 2.9. The United States failed to provide notification to the TBT Committee of the products covered by the Special Rule during the time period when amendments to the Act or the implementing regulations could have been introduced. Further, the United States acted inconsistently with its obligations under Article 2.9.3 when, as noted above in the discussion of Article 2.5, it failed to respond to Indonesia's questions outlined in document G/TBT/W/323 seeking explanation of particular aspects of the Special Rule.

58. For these reasons, Indonesia respectfully submits that the United States violated Article 2.9 of the TBT Agreement.

G. If The United States Believed There Was A Justification For Not Following The Procedures In Article 2.9, The United States Violated Article 2.10 Of The TBT Agreement Because It Did Not Provide The Secretariat With Notification Of The Measure And The Urgent Nature Of The Alleged Problem

59. Article 2.10 of the TBT Agreement provides Members with an exception to their obligation to follow the procedures in Article 2.9 before adopting a technical regulation “where urgent problems of safety, health, environmental protection or national security arise or threaten to arise.” In such cases, paragraph 2.10.1 requires Members to “notify immediately other Members through the Secretariat of the particular technical regulation and the products covered, with a brief indication of the objective and the rationale of the technical regulation, including the nature of the urgent problems.” If the United States believed that urgent problems necessitated the adoption of the Special Rule such that it was justified in not following the procedures in Article 2.9, it nonetheless violated Article 2.10 because it failed to provide any notification to the TBT Committee of the Act or the Special Rule.³⁴

³⁴ The TBT Information Management System, a searchable database containing all notifications related to the TBT Agreement, shows, as of the date of Indonesia's first written submission, no notifications submitted by the United States regarding the Act or Special Rule. Further, the Indonesian delegation has never received any notification submitted by the United States to the TBT Committee or the Secretariat regarding the Act or Special Rule.

H. The Special Rule Violates Article 2.12 Of The TBT Agreement Because The United States Failed To Allow A Reasonable Interval Between The Publication Of The Special Rule And Its Effective Date

60. Article 2.12 of the TBT Agreement requires Members to allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members to adapt. For purposes of implementing this article, the TBT Committee has stated that “the phrase ‘reasonable interval’ shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.”³⁵

61. The Act was signed on 22 June 2009³⁶ and the Special Rule went into effect 90 days later. A period of 90 days falls woefully short of the “reasonable interval” standard of six months recommended by the TBT Committee. Neither the Act itself nor any other statement by the United States indicates that having the Special Rule enter into force 90 days after signing was necessary to fulfill the objectives of the Act. Thus, by not allowing a reasonable interval of at least six months between the publication of the Act and its entry into force, the United States violated its obligations under Article 2.12 of the TBT Agreement.

I. The Special Rule Violates Article 12.3 Of The TBT Agreement Because The Ban Created An Unnecessary Barrier To Exports From A Developing Country

62. Article 12.3 of the TBT Agreement requires Members to take into account the special needs of developing country Members of the WTO so that technical regulations do not create unnecessary obstacles to exports from developing country Members.

63. The ban on clove cigarettes in the Special Rule was not necessary and completely eliminated exports of clove cigarettes from Indonesia, by far the most significant producer of clove cigarettes sold in the United States.³⁷ The United States ignored Indonesia’s repeated concerns and adopted a ban on clove cigarettes when less trade-restrictive approaches were available. Therefore, the United States violated Article 12.3 of the TBT Agreement in its preparation and application of the Special Rule.

J. The Special Rule Has Nullified Or Impaired Benefits Accruing Directly Or Indirectly To Indonesia

64. GATT Article XXIII:1(a) provides that a Member has a cause of action and establishes a *prima facie* case of nullification or impairment of benefits if it establishes “the failure of another

³⁵ TBT Committee, Decisions and Recommendations Adopted by the Committee Since 1 January 1995, G/TBT/1/Rev.8, 23 May 2002, at 30.

³⁶ Notice that the law was signed and published in the U.S. Federal Register, List of Public Laws, 74 Fed. Reg. iv (24 June 2009).

³⁷ See Section III.B. *supra*.

contracting party to carry out its obligations under this Agreement” In such cases it shall be up to the Member against whom the complaint has been brought to rebut the charge.³⁸

65. The United States’ violations of the TBT Agreement and GATT 1994 as demonstrated above creates a presumption of nullification and impairment. Indonesia respectfully submits, however, that even in the absence of such a presumption, there is compelling factual evidence that the tariff concession on clove cigarettes heretofore enjoyed by Indonesia has been nullified or impaired by the Special Rule.

IV. CONCLUSION

66. For the foregoing reasons, Indonesia respectfully requests that the Panel find that the Special Rule is inconsistent with the United States’ obligations under the TBT Agreement and GATT 1994. Indonesia further requests that the Panel recommend the United States bring its measures into conformity with its obligations under the TBT Agreement and GATT 1994.

³⁸ DSU, Art. 3.8.