

UP IN SMOKE

As the sole exporter of clove cigarettes to the US, Indonesia will challenge the import prohibition as a violation of Article III:4. Indonesia will assert that clove-flavored cigarettes and menthol cigarettes are like products, and since no such ban is imposed on the domestic sale of menthol cigarettes, Indonesian cigarettes are thus accorded treatment less favorable than that accorded to like products of national origin. This analysis will turn on the likeness of clove and menthol cigarettes. Using the criteria articulated in *Japan-Alcoholic Beverages* to determine whether imported and domestic products are “like” products within the stringent limits of Art. III:2, Indonesia can make a strong case: Both products have the same end-uses, and since both share the same risks of addiction, with evidence suggesting that menthol cigarettes are even more difficult to quit, it can be argued that both types of cigarettes share the same properties and qualities. Although the difference in flavor may appear to work against a finding of likeness, the increase in popularity of menthol cigarettes among teen smokers suggests that consumers’ tastes disregard distinctions in flavor.

The measure also raises an MFN problem under Article I:1. Although the measure appears to be origin neutral, Indonesia will allege *de facto* discrimination, assuming “like products” (other non-fruit flavored tobacco products) from other countries may still export to the US, while, as the sole exporter of clove-cigarettes, the measure deprives Indonesia of the same advantage. (See *Canada-Automotive Industry* ¶ 78).

Indonesia will also assert that the Act is impermissible under Article XI, as it is a prohibition on importation and fails to fall into any of the three exceptions under XI(2).

Furthermore, the ban cannot be justified as an exception to the aforementioned articles as a measure “necessary to protect human...life or health” under Article XX(b). Although the public health objectives of the Act can be perceived as vital to important common interests, suggesting that the adoption of a broad definition of “necessary” is appropriate, (see *Korea-Beef*), Indonesia will argue that there are WTO-consistent alternative measures available that can likewise reduce smoking.

The prohibition on the import of clove cigarettes would also fail the second tier of analysis required for it to be justified as an exception under GATT. Indonesia can argue

that the measure is a disguised restriction on trade in contravention of the “chapeau” of article XX. (See *US-Shrimp* ¶147). Because the US has not taken any steps toward restricting the domestic sale of menthol cigarettes, flavored cigars, nor smokeless tobacco products, which pose the same health threat as clove-cigarettes, Indonesia can assert that the prohibition is an arbitrary measure intended to impede trade.

441 Words

[400-500 words recommended range]