

Up in smoke

Indonesia may challenge the new US law at the WTO on the following grounds. Canada may face similar challenges if it bans clove-flavored cigarettes.

1) GATT I Violation

Assuming other countries export menthol cigarettes and flavored cigars or smokeless tobacco products into US, Indonesia can bring a MFN violation claim against the US. Indonesia has to show the clove-flavored cigarettes are like products with unaffected products imported from other countries. It may claim, under *Spain-unroasted coffee*, cigarettes are cigarettes. All cigarettes are intended for smoking and “organoleptic differences” are not sufficient to justify different treatments. The US may counter under *Japan-SPF lumber* that the clove-flavored and menthol cigarettes are not like products, because research shows different teen consumer perceptions. Indonesia may argue the research only compares the preference between teen and adult consumers and fails to prove teen consumers prefer clove-flavored cigarettes to other cigarettes. Indonesia may also argue the menthol cigarettes become popular with teen smokers. The US can provide evidence showing sweet-flavored cigarettes have a significant higher market share in teen smokers than other types of cigarettes. Therefore, the preferences of teen smokers differ. Conceivably, it is easier for the US to demonstrate the prohibited cigarettes and flavored cigars or smokeless tobacco products are different products, because of different properties, consumer composition and perceptions.

Next, Indonesia has to prove the U.S. law creates a de facto discrimination against it. It may argue, under *Spain-unroasted coffee*, the ban only affects its importation and impairs its benefit. The US can argue it does not discriminate among countries (*Japan-SPF lumber*). The ban has legitimate purpose as to address teen smoking problem and is applied even-handedly among countries and domestic industries.

The US can defend its law under GATT XX (b). It can show the clove-flavored cigarettes induce teenage to smoke and significantly increase the health risk related to smoking in the population. Indonesia may attack the scientific basis for this finding. However, it will lose because the health risk of smoking is widely accepted. Even absent insufficient scientific evidence, the US can justify its measure under precautionary principle, provided it will assess risk systematically later (*EC-Asbestos*). Also, as the law is to protect human health, the test for “necessary” is looser (*Korea-beef*). US may further argue no alternatives are available to halt the risk and it also satisfies the Chapeau standard of XX. Therefore, the ban is justified under XX(b). Indonesia may counter that the US did not ban menthol cigarettes, which are popular with teen smokers and impose similar risk, signaling health is not the primary motive(*Korea-beef*).

Up in Smoke – Model 2

The US should respond it addresses the problems according to their priorities. Sweet-flavored cigarettes impose a severer risk than other cigarettes.

2) GATT XI: 1 violation

Indonesia may also challenge the US law on the ground that no prohibitions or restrictions can be imposed except in certain circumstances. Here, no exception under XI:2 applies (*Canada-Ice cream and Yogurt*). But US can claim the general exception under XX(b).

3) GATT III violation

Indonesia may bring a National Treatment violation claim under GATT III: 4. Concededly, the US law affects the sale of the clove-flavored cigarettes and falls under GATT III: 4 (*Italy-agricultural machinery*). The US can claim the clove-flavored cigarettes are not like products with other domestic products. The US can also claim GATT XX (b) exception.

4) Non-violation nullification and impairment

Indonesia may claim non-violation nullification and impairment as its last resort. It may argue the US law injures its reasonable expectation under *German-Sardines and EEC-oilseeds*. The panel will examine whether the US has created such expectation and caused the “detrimental reliance” of Indonesia.

This essay has 600 words. [*The student’s other essay had 1145 words, so that the total essays comined came in within the word limit*].