

Case Study:  
*US – Clove Cigarettes*

Kyiv, Ukraine

25-26 February 2015

# The Measure

- United States bans the importation and sale of flavoured cigarettes, including **clove cigarettes**
- The law excludes **menthol cigarettes** from the scope of the ban
- The purpose of the law is to ban flavoured cigarettes on the grounds that they **appeal to youth**

# The Products

## ➤ **clove cigarettes**

- made in **Indonesia**

- approximately **0.1%** of market share in US

## ➤ **menthol cigarettes**

- Used by **25%** of US smokers

- Mostly made in the United States

# The Panel

- Annex 1
- Article 2.1 (discussed on appeal)
- Article 2.2
- Article 12.3
- Article 2.8
- Article 2.9.2
- Article 2.12 (discussed on appeal)

# Annex 1

- The United States does not dispute that the ban is a “technical regulation” subject to the TBT Agreement

# Article 2.2

“2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.”

## Article 12.3

“12.3 Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, **take account of** the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create **unnecessary obstacles to exports from developing country Members.**”

# Article 2.8

“2.8       Wherever appropriate, Members shall specify technical regulations based on product requirements **in terms of performance** rather than design or descriptive characteristics.”



# Article 2.9.2

“2.9 Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall: [...]

[...]

2.9.2 **notify** other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place **at an early appropriate stage**, when amendments can still be introduced and comments taken into account”

# The Appellate Body

- Article 2.1
- Article 2.12

# Article 2.1

“2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment **no less favourable** than that accorded to **like products** of national origin and to like products originating in any other country.”

# Legal Test under Article 2.1

- “like products”:
  - Are the products in a **competitive relationship**?
- “less favourable treatment”:
  - Does the measure have **a detrimental impact on the group of imported products** as compared with the group of domestic like products?
  - If so, does that stem exclusively from a **legitimate regulatory distinction**?

# Application of Article 2.1

- “like products”:
  - Are the products in a **competitive relationship**?  
YES
- “less favourable treatment”:
  - Does the measure have **a detrimental impact on the group of imported products** as compared with the group of domestic like products? YES
  - If so, does that stem exclusively from a **legitimate regulatory distinction**? NO

# Article 2.12

“2.12 Except in those urgent circumstances referred to in paragraph 10, Members shall 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, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

# The Article 22.6 Arbitration

- Has the United States complied?
- Would compliance take the form of banning menthol, not allowing clove cigarettes?
- Replacement product argument?
- Parties settle, no decision is issued