

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

(DS406)

**EXECUTIVE SUMMARY OF THE
FIRST WRITTEN SUBMISSION OF
THE UNITED STATES OF AMERICA**

November 23, 2010

I. INTRODUCTION

1. Indonesia challenges the particular line drawn by Section 907(a)(1)(A) of the *Family Smoking Prevention and Tobacco Control Act*, which prohibits all cigarettes with a characterizing flavor (including clove flavor), but not tobacco or menthol, which tens of millions of Americans smoke every day. This line between these types of cigarettes was *not* drawn based on the national origin of products. The line was *not* drawn based on protectionism (the entire law targets U.S. cigarette companies after all). Instead, the line *was* drawn to protect the public health based on evidence that certain products presented a unique risk to youth and the negative consequences of banning them were slight or non-existent. The evidence establishes that clove and other-flavored cigarettes such as cherry, chocolate or cola are especially appealing to young people. The decision to ban clove cigarettes and the other flavored cigarettes was done to protect the public health. WTO Members never intended that a measure of this sort would run afoul of the WTO obligations, and this measure is entirely consistent with those rules.

2. As to the claims in this case, the Republic of Indonesia (“Indonesia”) has failed to satisfy its evidentiary burden. With regard to national treatment, cloves cigarettes are not like products with cigarettes generally and menthol cigarettes specifically. Moreover, Indonesia has not provided evidence that the difference in treatment provided clove cigarettes and the non-banned products is less favorable based on origin. As such, the United States has acted consistently with its national treatment obligations. Equally clear is the fact that Indonesia has failed to satisfy its burden under Article 2.2 of the Agreement on Technical Barriers to Trade (“TBT Agreement”). In fact, it has not adduced any evidence whatsoever that a reasonably available alternative measure fulfills the U.S. legitimate objective at the level that the United States considers appropriate and that is significantly less trade restrictive. Similarly, Indonesia has fallen short of its burden of proving any of their other TBT claims as well.

II. LEGAL ARGUMENT

A. Section 907(a)(1)(A) Is Not Inconsistent With the National Treatment Provisions Contained in the GATT 1994 or the TBT Agreement

3. Indonesia argues that Section 907(a)(1)(A) is inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement based on a flawed analysis and insufficient evidence that Section 907(a)(1)(A) accords less favorable treatment to cigarettes imported from Indonesia than to cigarettes produced in the United States. Indonesia’s argument boils down to the proposition that GATT 1994 Article III:4 precludes the United States from banning a specific class of cigarettes including clove cigarettes unless it also bans domestically produced cigarettes sold in the United States, without exception. However, Indonesia does not demonstrate that clove cigarettes are “like” domestically produced cigarettes (in particular tobacco and menthol cigarettes). Second, Indonesia fails to show that Section 907(a)(1)(A) accords less favorable treatment to clove cigarettes based on their national origin.

B. Section 907(a)(1)(A) Is Not Inconsistent With GATT Article III:4

4. Indonesia proposes that domestic cigarettes and clove cigarettes are “like” products with

respect to Section 907(a)(1)(A). However, the analysis below will demonstrate that clove cigarettes are not in a competitive relationship with tobacco or menthol cigarettes and are not substitutable or interchangeable among retailers or consumers. Additionally, a “likeness” determination – in addition to focusing on the competitive relationship of the products – will need carefully to parse the significance of traits that are generally shared among all cigarettes and traits that are significant with respect to the public health provision at issue.

5. Physical Composition. The physical composition of clove cigarettes is different than tobacco and menthol cigarettes. Clove buds are dried flower buds harvested from clove trees. They impart a sweet and spicy flavor and aroma. Clove is a prominent ingredient in a clove cigarette. Clove cigarettes typically contain 60% tobacco and 40% clove buds and cocoa. Tobacco and menthol cigarettes do not contain significant quantities of food ingredient. In addition, unlike other cigarettes, clove cigarettes contain significant quantities of eugenol, which creates an anesthetic and numbing effect reportedly appealing to new smokers. Clove cigarettes also contain a special, proprietary “sauce” that is credited with some of their appeal. The makers of clove cigarettes introduce these physically different flavoring additives for the purpose of differentiating clove cigarettes from other cigarettes, and they have succeeded in doing so. In short, clove cigarettes taste different from other cigarettes. Clove cigarettes also contain the harmful chemical coumarin, which is no longer found in most cigarettes, and a range of other flavor compounds not commonly found in tobacco or menthol cigarettes. In contrast to clove, which comprises nearly half of clove cigarettes by weight, menthol comprises less than 1% of a menthol cigarette. In addition, menthol cigarettes do not tend to contain coumarin or an array of other flavoring compounds typically found in clove cigarettes.

6. End-Uses. Cigarettes have at least two end-uses in the United States, which clove, menthol and tobacco cigarettes serve in differing degrees. Cigarettes serve the end-use of satisfying an addiction to nicotine. Notably, evidence shows that of the some 46 million Americans who regularly smoke, the vast majority smoke tobacco or menthol cigarettes. Cigarettes also serve the end-use of creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke. Evidence suggests that clove cigarettes and other cigarettes with characterizing flavors, in particular, serve this end use in the United States, primarily among youths.

7. Consumer Tastes and Habits. The Appellate Body has emphasized that where, as here, physical properties of the products are very different, an examination of evidence relating to consumers’ tastes and habits is indispensable to determining “likeness.” The heart of this analysis is whether products are “interchangeable” or “substitutable” in the view of consumers, demonstrating a competitive relationship.

8. Unlike cases where panels have found that consumers perceive and use products as interchangeable and substitutable, in this case, consumers clearly differentiate between products. Indonesia has presented no evidence to demonstrate that clove cigarettes seek to compete with tobacco or menthol cigarettes, or that consumers view them as substitutable. Clove cigarettes are marketed, sold and used as a “special occasion” tobacco product while tobacco and menthol cigarettes are marketed, sold and used as a daily, regular cigarette. Clove cigarettes are smoked

overwhelmingly by young people, who tend to be novice smokers. Tobacco and menthol cigarettes are used regularly by a large population of young people, but especially by adults, who smoke them regularly. Clove cigarettes were not competing for the “regular use” market. Indonesia asserts, but has provided no evidence to demonstrate, that clove cigarettes compete with tobacco or menthol cigarettes for access to channels of distribution, shelf space or market share. Existing evidence with respect to consumer tastes and habits suggests that clove cigarettes are used “like” the other flavors prohibited under Section 907(a)(1)(A). Clove cigarettes – like chocolate or “Midnight Madness” or “Mandalay Lime” – are chosen almost exclusively by youths, experimentally or for “special occasions.” As such, they have the effect of making tobacco seem appealing, especially to new users. Indonesia presents unreliable data to suggest that clove cigarettes have a pattern of use similar to tobacco or menthol cigarettes, just on a smaller scale. Moreover – and revealingly – Indonesia does not dispute the key fact that clove cigarettes are smoked by an insignificant fraction of adults.

9. International Tariff Classification. The United States submits that the fiscal treatment of two different products should have very little weight in the “like product” analysis when the domestic measure under consideration is adopted not for fiscal purposes, but in order to protect human health.

10. Conclusion on Like Product. Indonesia has failed to meet its burden to prove that clove cigarettes are “like” tobacco and menthol cigarettes. As noted, the “four factors” applied above are considered by panels to the extent that they aid in a determination of likeness. In this case, the factors provide a framework to arrive at the crucial conclusions that (1) clove cigarettes are not in a competitive relationship with tobacco or menthol cigarettes, and (2) clove cigarettes are not interchangeable or substitutable with tobacco or menthol cigarettes. They are not like products.

11. Less favorable treatment based on origin. A measure violates the provisions of GATT III:4 if it accords less favorable treatment to an imported product than to a like domestic product based on national origin. Even aside from the fact that clove cigarettes are not like products to tobacco and menthol cigarettes, Indonesia has not met its burden to demonstrate that clove cigarettes are accorded less favorable treatment based on their national origin. Article III does not forbid Members from making regulatory distinctions between different products that may fall within a single “like product” class for Article III purposes. Rather, Article III forbids Members from according less favorable treatment – on a *de jure* or *de facto* basis – to imported products as compared to domestic products.

12. No *de jure* discrimination. The ban on cigarettes with characterizing flavors other than tobacco or menthol applies equally to all cigarettes sold in the United States, regardless of where they are produced. In this case, the measure at issue is facially neutral, and it is Indonesia’s burden to prove that, as applied, the measure discriminates between Indonesian and domestic cigarettes based on origin and accords less favorable treatment to imported products as compared to domestic products.

13. No *de facto* discrimination. Indonesia has not met its burden to prove *de facto* discrimination. First, Indonesia does not clarify *which* products it claims are subject to different

treatment. In its First Written Submission, Indonesia argues that clove cigarettes are “like” domestically produced cigarettes, without exception. It therefore would appear to be Indonesia’s position that a U.S. ban on cigarettes with a characterizing flavor that includes clove would discriminate based on origin, unless the United States also banned *every* domestically produced cigarette, flavored or otherwise.

14. Second, Indonesia’s insistence that Section 907(a)(1)(A) violates GATT Article III:4 because it draws a distinction between clove cigarettes and, apparently, any domestic cigarette is inconsistent with the Appellate Body interpretation of “less favorable treatment” – even if were to be determined that clove cigarettes and all domestic cigarettes are “like” products. The Appellate Body recognizes that a Member may draw distinctions between products determined to be “like” without affording protection to domestic production or according less favorable treatment to imported products.

15. Measures that do not treat products differently based on origin, and for which the effects resulting from the measure are not a result of the origin of the product, are not measures that afford protection to domestic production. The application of Section 907(a)(1)(A) is entirely consistent with the object and purpose of the FSPTCA and the approach of the United States to tobacco regulation, in general. An Indonesian product is adversely effected under Section 907(a)(1)(A) not as a result of origin-based discrimination, but because U.S. health authorities legitimately determined that clove cigarettes fall into a category of cigarettes that should be banned from the U.S. market for the protection of the public health. Section 907(a)(1)(A) distinguishes among cigarettes as appropriate for the public health, and not based on the national origin of the products.

16. Section 907(a)(1)(A) also does not afford protection to domestic production. Section 907(a)(1)(A) applies to a wide range of U.S.-made cigarettes that were headed for the U.S. market. The U.S. tobacco industry spent over a decade and untold amounts of money to develop, research and market “exotic” flavored cigarettes for the U.S. market and now can sell none of these products to their intended consumers. In addition, Section 907(a)(1)(A) is part of a broader statute which imposes a range of restrictions on all cigarettes sold in the United States, nearly all of which – 97% – are U.S.-produced. Article III:4 protects Members from discrimination based on origin – but does not protect foreign products from all adverse effects of a measure which, in pursuit of a legitimate objective, has an adverse impact upon a foreign product.

C. Section 907(a)(1)(A) Is Not Inconsistent With TBT Article 2.1

17. The United States would note that certain textual and contextual differences should be taken into account in the Panel’s analysis of “likeness” and “less favourable treatment” under Article 2.1 of the TBT Agreement. One such difference that the Panel should consider is the language in the Preamble of the TBT Agreement stating that “no country should be prevented from taking measures necessary [...] for the protection of human [...] life or health.” It also should be noted that Article 2.1 states, in relevant part, that “Members shall require that *in respect of technical regulations*, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin” (emphasis added). Thus, the obligation

in Article 2.1 applies “in respect” of a technical regulation. A like product analysis under the TBT Agreement need be careful to distinguish between characteristics that make a product or group of products identifiable for purposes of the regulation, and characteristics that demonstrate a competitive relationship or substitutability in the marketplace.

E. Section 907(a)(1)(A) Is Not Inconsistent with TBT Article 2.2

18. Indonesia argues that Section 907(a)(1)(A) is more trade-restrictive than necessary to meet a legitimate objective and therefore is inconsistent with Article 2.2 of the TBT Agreement. Indonesia’s arguments should be rejected.

19. As a general matter, Section 907(a)(1)(A) fulfills the legitimate objective of protecting the public health. Specifically, the legitimate objective of Section 907(a)(1)(A) is to reduce youth smoking as appropriate for the protection of the public health, taking into account the negative consequences resulting from banning products that tens of millions of adults are chemically and psychologically dependent on. Such negative consequences may include the unknown, but possibly negative, impact on the health of adult smokers and the U.S. health care system generally, as well as an expansion of the already existing black market for cigarettes in the United States. To not take the risk of such considerations, which are still being studied by FDA and others, into account could lead to the undermining, not improvement, of public health in the United States.

20. In light of the importance of public health, the United States has chose a high level of protection. Given the U.S. Government’s long and frustrating experience in trying to limit youth smoking, this high level of protection is evidenced by the measure applied – a ban. As explained below, Section 907(a)(1)(A) unquestionably fulfills this legitimate objective at the level the United States considers appropriate. Finally, Indonesia has failed to establish that any alternative measure fulfills the U.S. legitimate objective at the level it considers appropriate and is also significantly less trade-restrictive than Section 907(a)(1)(A). As such, Indonesia has failed to satisfy its burden to establish a breach of Article 2.2.

21. The measure is generally intended to fulfill the objective of protecting the public health. Specifically, the first part of the measure, the ban, is intended to fulfill the objective of reducing the rate of young people becoming smokers by eliminating certain products from the market place that have particular appeal to young people. The second part of the measure, the limited exception to the ban, is intended to ensure that a ban that reduces youth smoking be appropriate for the protection of the public health even when taking into account the risk of negative consequences for adult smokers, the U.S. health care system, and society more generally from eliminating products from the market that tens of millions of adults are addicted to.

22. The legitimate objective is the protection of human health, which is explicitly listed as a legitimate objective in Article 2.2. Further, Article 2.2’s list of legitimate objectives is non-exhaustive, as confirmed by the inclusion of the term “*inter alia*,” a point confirmed by the *EC – Sardines* panel that found two objectives not listed in Article 2.2 to be legitimate. The measure seeks to reduce youth smoking as appropriate for the protection of the public health, taking into

account the risk of negative consequences (including negatively impacting the health of addicted, adult smokers, protecting the integrity of the domestic health care system, and limiting the expansion of an unregulated, and illegal black market).

23. Section 907(a)(1)(A) fulfills the legitimate objective of protecting the public health by reducing youth smoking while avoiding the negative consequences that could result from prohibiting products that tens of millions of adults are addicted to by only prohibiting those products that serve as “starter” or “trainer” cigarettes for young smokers, and which are not regularly used by adult smokers. This is seen by the evidence that flavored cigarettes – except for menthol – are disproportionately smoked by novice young smokers (both minors and young adults), rather than already addicted, older adult smokers.

24. A Member is entitled to ensure that its measures satisfy the Member’s level of protection, which the Member may set at whatever level it deems appropriate. Although smoking rates of young people, as well as the population at large, had been in decline for a number of years, Congress has found that the number of smokers, particularly young smokers, remains “unacceptably high.” Section 907(a)(1)(A) represents a comprehensive restriction on the sale of these products that appeal to youths but have negligible regular use by adult smokers, and was a necessary step in order to further reduce youth smoking given that previous efforts of advertising restrictions and the like had, in Congress’s own words, “failed.” Accordingly, the seriousness of the problem of youth smoking is evidenced by the type of measure Congress employed – a ban. Section 907(a)(1)(A)’s prohibition of flavored cigarettes that are only used as “trainer” products while exempting those products that are not uniquely attractive to youth, fulfills the legitimate objective of protecting the public health at the level the United States considers appropriate.

25. Article 2.2 of the TBT Agreement provides that technical regulations shall not be “more trade-restrictive than necessary” to fulfill a legitimate objective. A measure that fulfills its legitimate objective at the level the Member finds appropriate is not, as a matter of law, more trade-restrictive than necessary unless the complaining Member proves that an alternative measure exists that is reasonably available, also fulfills the respondent Member’s legitimate objective at the level the importing Member finds appropriate and is significantly less trade restrictive than the challenged measure. Indonesia has not put forth any evidence that even one of the numerous measures it has culled from various sources satisfies this standard, and, therefore, has not satisfied its burden of establishing a *prima facie* case of inconsistency.

26. Indonesia argues that the Panel should import the meaning of the term “necessary,” as used in Article XX of the GATT 1994 and as understood by the Appellate Body and previous panels, to control the TBT Article 2.2 “more trade restrictive than necessary” test. Such an approach is without basis and is unwarranted. The proper interpretation of this test flows from the text of Article 2.2 itself and any relevant context in accordance with Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. The term “necessary” in Article XX is being used in a different sense to cover a different set of circumstances. Accordingly, it would not be appropriate to apply the same interpretive approach panels and the Appellate Body have undertaken in connection with the word “necessary” as it appears in Article XX of the GATT 1994.

27. In paragraphs 106-111, Indonesia simply lists a number of different restrictions drawn from other parts of the FSPTCA, the 2006 RJ Reynolds Consent Agreement, the laws of Singapore and Australia, and the *Framework Convention on Tobacco Control*. Indonesia briefly references these restrictions without providing any evidence that any of these restrictions fulfill the U.S. objective at the level of protection it finds appropriate or that they are significantly less trade restrictive than Section 907(a)(1)(A). A complaining party does not discharge its burden of establishing a *prima facie* case by simply making reference to alternative measures – it must adduce by way of sufficient evidence a presumption of inconsistency with each part of the legal standard.

F. Indonesia Has Not Shown That the United States Acted Inconsistently With Other TBT Articles

28. Article 2.5. Indonesia contends that the United States has acted inconsistently with TBT Article 2.5 by not providing “a complete response” to Indonesia’s questions regarding Section 907(a)(1)(A) that provides “scientific evidence” and “refers to the terms of TBT Articles 2.2, 2.3, and 2.4.” Indonesia misunderstands the obligation. In the instant dispute, the United States acted consistently with Article 2.5 and has explained the objectives of its measure and provided its justification for the measure’s enactment. In fact, the United States and Indonesia have had numerous exchanges on this issue. For example, the United States agreed to make special arrangements to have a bilateral discussion with Indonesia in Geneva on August 27, 2009. The very next week, the U.S. Trade Representative, Ambassador Ronald Kirk, discussed Indonesia’s concerns while at a WTO Ministerial in India. This exchange was then itself followed by a discussion of the issue at the November 2009 TBT Committee meeting by the delegations of the respective countries.

29. Article 2.8. Indonesia contends that TBT Article 2.8 provides that “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.” Indonesia concludes that “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.” Indonesia’s argument is in error.

30. Indonesia’s argument ignores the key limitation in Article 2.8 – namely, that the obligation to specify technical regulations on performance characteristics only applies where it is “appropriate” to do so. As discussed above, Congress chose to structure Section 907(a)(1)(A) in terms of descriptive terms given that it is the additives, flavors, herbs, and spices that created the risk that Section 907(a)(1)(A) is intended to address. As such, it was “appropriate” for Congress to structure Section 907(a)(1)(A) in terms of descriptive characteristics. Moreover, it is Indonesia’s burden to establish a breach of Article 2.8. Yet, Indonesia does not even put forth a rationale why it is not “appropriate” to structure Section 907(a)(1)(A) in terms of descriptive characteristics.

31. Article 2.9. Indonesia contends that the United States has acted inconsistently with TBT Article 2.9 by not notifying Section 907(a)(1)(A). It is Indonesia’s burden to prove each element of its claim.

32. Article 2.12. Indonesia also argues that the United States acted inconsistently with TBT Article 2.12 because it only provided a three month delay between publication of the FSPTCA and its entry of force. Again, Indonesia’s argument is in error. Indonesia’s argument that the 90 day period provided by the United States was not reasonable is based on a TBT Committee decision. Indonesia’s citation to the TBT Committee decision does not establish that the United States breached TBT Article 2.12 for numerous reasons. Given the fact that the TBT Committee decision does not bind the WTO membership, and given the qualified nature of its language, a panel’s determination of whether a particular delay is “reasonable” must be considered on a case by case basis. In this instance, Indonesia has failed to meet its burden of demonstrating that the 90 day period provided by the United States is not reasonable.

33. Article 12.3. Finally, Indonesia argues that Section 907(a)(1)(A) is inconsistent with TBT Article 12.3. In order to establish a violation of Article 12.3, the complaining party must demonstrate the following: (1) that it is a developing country; (2) that the other Member did not take account of its special development, financial or trade needs during the preparation and application of a technical regulation; and (3) that the Member did not take account of these needs *with a view* to ensuring that the technical regulation does not create unnecessary obstacles to export.

34. Here, Indonesia has failed to meet its burden to prove any of these elements. Assuming *arguendo* that Indonesia is a developing country, Indonesia has not demonstrated that the United States failed to take account of one or more special needs of Indonesia in the enactment of the FSPTCA. To the contrary, in the five years between the initial bill being introduced for consideration in the House of Representatives in 2004, and the law being enacted in 2009, Indonesia had ample opportunity to make its views known to both Congress and the Executive Branch and, in fact, did make its views known. Indonesia had numerous communications with both Congress and the Executive Branch, making the United States well aware of Indonesia’s position. By allowing Indonesia an opportunity to comment on previous iterations of the legislation, as well as the version that was actually enacted into U.S. law, the United States complied with its obligations under Article 12.3.

G. Section 907(a)(1)(A) Is Justified Under Article XX

35. Indonesia has failed to establish that Section 907(a)(1)(A) breaches U.S. obligations under GATT Article III:4. Should the Panel reach the issue of GATT exceptions, the application of Section 907(a)(1)(A) would be justified under GATT Article XX(b). To justify a measure under Article XX(b), the Appellate Body has previously explained that the responding party must demonstrate that the measure: (1) falls under the scope of the Article XX(b) exception; and (2) satisfies the requirements of the Article XX chapeau.

36. Past panels have indicated that two elements must be met for a measure to fall under the scope of the Article XX(b) exception: (1) the policy in respect of the measure for which the

provision is invoked must fall within the range of policies designed to protect human, animal or plant life or health; and (2) the inconsistent measure for which the exception is invoked must be necessary to fulfill the policy objective.

37. Section 907(a)(1)(A) was enacted in order to protect human life and health from the risk posed by smoking. Further, Section 907(a)(1)(A) was necessary to ensure that products that are predominantly used as “starter” products by youth, leading to years of addiction, health problems, and possibly death, cannot be sold in the United States at all. With regard to the latter point, the United States believes the Panel should reach the same conclusion if it follows the method used by past panels to determine whether a measure is necessary under one of the Article XX exceptions. When faced with the question of whether a measure is necessary, other panels have engaged in “a process of weighing and balancing a series of factors,” which include (1) the importance of the interests or values at stake; (2) the contribution made by the measure to its objective; and (3) the trade restrictiveness of the measure. All three of these factors weigh in favor of a determination that Section 907(a)(1)(A) was necessary to protect human life and health from the risks posed by smoking, particularly youth smoking.

38. First, one factor panels generally examine to determine whether a measure is necessary is the importance of the interests or values at stake. If the interest at stake is of fundamental importance, past panels have been more inclined to determine that a measure is necessary to achieve its stated objective. Such is the case here. The United States is applying Section 907(a)(1)(A) for the protection of the life and health of its population, particularly the protection of its youth.

39. Second, to determine whether a measure is necessary to achieve a certain objective, panels have weighed the measure’s contribution to the achievement of that objective. A contribution exists when there is a genuine relationship of the ends and means between the objective pursued and the measure at issue. As before, if a panel finds a genuine relationship between the measure and the policy goal it intends to pursue, panels are more inclined to consider the measure in question necessary. Section 907(a)(1)(A) is directly contributing to the protection of human life and health by ensuring that products that present a unique risk to youths cannot be sold on the market.

40. Third, to decide whether a measure is necessary to achieve its stated objective, panels have considered the measure’s trade restrictiveness. The more restrictive a measure is, the more carefully it may need to be reviewed to determine whether it is necessary to achieve a particular objective. However, a restrictive measure may still be considered necessary based on the context of the situation in which the Article XX(b) defense is invoked. The context here, as explained above, is that youth smoking rates remained unacceptably high at the time of the FSPTCA’s enactment and Congress found it appropriate to apply more severe restrictions than had been applied up to this date.

41. To justify a measure under GATT 1994 Article XX(b), the Appellate Body has explained

that the responding party must also show that the measure meets the requirements of the Article XX chapeau. To meet the requirements of the chapeau, past Appellate Body reports have explained that the responding party must demonstrate that its measure (1) is not a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or (2) a disguised restriction on international trade.

42. Previous Appellate Body reports have explained that a measure will be considered to be applied in a manner that results in arbitrary or unjustifiable discrimination if three conditions are met: (1) the application of the measure results in discrimination; (2) the discrimination is arbitrary or unjustifiable in character; and (3) the discrimination occurs between countries where the same conditions prevail. In the instant dispute, these conditions are not met.

43. First, there is no differential treatment at all, and therefore cannot be any “discrimination,” arbitrary, unjustified, or otherwise. As discussed above, the measure at issue is facially neutral measure that applies equally to all cigarette products, regardless of origin.

44. However, even if Section 907(a)(1)(A) is found to “discriminate,” such conduct could not be considered “arbitrary” or “unjustified.” If a responding party provides a rationale for the measure that is not capricious, random, or indefensible, the measure will not run afoul of this element of the chapeau. Here, that is clearly the case. As the United States has explained in great detail, the line Congress drew in deciding what products would be banned and what products would not was without question not an arbitrary or capricious one. Rather, it was one grounded in the evidence and tailored to address a specific public health risk. As such, Section 907(a)(1)(A) does not amount to an arbitrary or unjustified act of discrimination.

45. The final requirement for a measure to be justified under the chapeau and GATT Article XX(b) is that it must not be a disguised restriction on international trade. An examination of a measure’s purpose to determine whether it has “protectionist objectives” is relevant to this issue. If a measure’s purpose is protectionist in nature, it will likely be considered a disguised restriction on trade and will not meet the requirements of the chapeau. In this instance, the evidence demonstrates that Section 907(a)(1)(A) is not a disguised restriction on trade.

46. Accordingly, Section 907(a)(1)(A) meets the requirements of the chapeau and is justified under GATT Article XX(b).