
**THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT
(FSPTCA) ON THE CLOVE CIGARETTE DISPUTE BETWEEN INDONESIA AND
THE UNITED STATES: A WTO-TBT AGREEMENT ANALYSIS**

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Abstract: This article examines the dispute over clove cigarette imports between Indonesia and the United States arising from the implementation of the Family Smoking Prevention and Tobacco Control Act (FSPTCA). The purpose of this study is to assess whether the measure is consistent with the United States' obligations under the World Trade Organization (WTO), particularly Article 2.1 of the Technical Barriers to Trade Agreement (TBT Agreement) concerning the principle of non-discrimination. Employing a normative legal analysis, the study reviews the findings of the WTO Panel and Appellate Body in United States – Measures Affecting the Production and Sale of Clove Cigarettes. The analysis demonstrates that the ban on imported clove cigarettes, combined with the exemption granted to domestically produced menthol cigarettes, resulted in less favorable treatment of like imported products and thus constituted a violation of Article 2.1 of the TBT Agreement. The implications of this dispute reinforce the role of the WTO in maintaining a balance between Members' regulatory autonomy in pursuing legitimate public health objectives and their obligations to ensure fair treatment in international trade.

Keywords: World Trade Organization; Clove Cigarettes; Family Smoking Prevention and Tobacco Control Act



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INTRODUCTION

From a historical perspective, the evolution of international economic relations can be traced back to the onset of industrial tensions associated with major structural changes in England in the late eighteenth century.¹ Numerous technological inventions spurred a rapid

¹ Anisa Septianingrum, (2018), *Revolusi Industri: Sebab dan Dampaknya*, Anak Hebat Indonesia.

increase in large-scale production and the development of the factory system, which in turn broadened merchants' horizons and stimulated aspirations to expand their commercial reach worldwide. European countries most notably England actively engaged in exploration and the diffusion of industrial products, collectively paving the way for colonization and deepening economic ties among nations.² Beyond the immediate impact of technological discoveries, the global spread of these manufactured goods was further facilitated by the rise of capitalism at the international level.

The rapid advancement Of European countries in industry, investment, and international trade generated a range of questions in scholarly debates and gave rise to prominent theoretical contributions in international economics. David Ricardo, renowned for his theory of comparative advantage, demonstrated how trade can shape international policy, emphasizing efficiency and the institutional arrangements underpinning trade agreements.³ Subsequent global wars brought the world economy into deep depression, culminating in the Bretton Woods Conference in 1944, which sought to restore global economic stability and assist war-affected countries through the establishment of the International Monetary Fund (IMF) and the World Bank. Ideological and geopolitical tensions between rival blocs further radicalized the trajectory of international economic development, leading to the creation of the General Agreement on Tariffs and Trade (GATT), which aimed to reduce trade barriers among states. Following the dissolution of the Soviet Union in the 1990s, many countries opened their economies to international trade, and in 1995 the World Trade Organization (WTO) was established as the central institution overseeing global trade liberalization.⁴

Multinational enterprises (MNEs) subsequently emerged as key actors in the international economy, with operations distributed across numerous countries. The largest MNEs are headquartered primarily in the United States, followed by China, Japan, the United Kingdom, Germany, South Korea, and other economies. Advances in information and communication technologies have also brought profound changes by facilitating the digital economy and enabling cross-border trade in

² Anthony Hopkins & P.J. Cain – British Imperialism, 1688–2000, e book Published on 14 January 2014, London.

³ Bagus P. Yudhia Kurniawan, (2021), Evolusi Pemikiran Keunggulan Komparatif Menuju Keunggulan Kompetitif: Sejarah Pemikiran, Kontroversi, dan Peluang Riset, Inovbiz E-Journal Polbeng.

⁴ World Bank – Globalization and Post–Cold War Trade Integration Report , (2014), accessed 10 December 2025

goods and services. Although globalization has contributed to economic growth, challenges such as persistent income gaps between developed and developing countries and the implementation of protectionist measures have added complexity to contemporary international economic relations. The United States, China, India, Russia, and several Latin American countries, for example, have introduced additional regulations and increasingly defensive or restrictive policies toward foreign exporters.

The trade conflict over clove cigarettes reflects these broader dynamics in the international economy. As interdependence among states has deepened through trade and international investment, trade disputes have become more visible. A well-known example is the trade relationship between the United States and Japan, characterized by tensions over trade imbalances. The United States has frequently criticized Japan's market as being closed to foreign companies, while Japan has argued that foreign firms have not made sufficient efforts to enter its market. This situation is not unique to Japan. Many countries including the United States, Canada, South Korea, India, China, and members of the European Union⁵ have faced complaints regarding protectionist practices and arbitrary state intervention in trade.⁶ Pressures to restrict free trade have intensified as governments seek to shield particular sectors and social groups from the adverse effects of international competition.

These developments are closely linked to the rise of multinational enterprises, which operate production and marketing facilities in multiple jurisdictions. According to the UNCTAD World Investment Report 2023, there are more than 80,000 multinational enterprises worldwide, operating over 800,000 foreign affiliates. Together they account for more than one-third of international trade, employ around 75 million workers through overseas subsidiaries, and play a central role in global foreign direct investment (FDI) flows, which reached USD 1.3 trillion in 2022. The Fortune Global 500 (2024) reports that the combined revenues of the world's largest companies amount to USD 41 trillion, highlighting that the economic scale of many MNEs is comparable to, or even exceeds, the gross domestic product of numerous sovereign states. MNEs have thus evolved into economic giants in terms of sales, assets, and employment,

⁵ Fara Mutia, Sutiarnoto & Vita Cita Emia Tarigan. (2024). Persiapan Pemerintah Indonesia Dalam Menghadapi Embargo Kelapa Sawit Sebagai Dampak Penerapan European Union Deforestation Free Regulation (EUDR). *Sriwijaya Journal of Private Law*.

⁶ Markusen, J. R., Melvin, J. R., Maskus, K. E., & Kaempfer, W. H. (1995). *International trade: Theory and evidence* (MPRA Paper No. 21989). University Library of Munich.

exerting significant influence on both home and host economies. At the same time, their role remains controversial. Some observers accuse MNEs of relocating jobs from high-wage to low-wage countries, while others view relocation as a rational response to differences in business and regulatory environments. Academics, analysts in international economic institutions, and macroeconomic policymakers often grouped as mainstream economists-tend to see MNEs as channels for the efficient allocation of global capital, even though their effects on domestic labor markets and national economies remain contested.

The tobacco industry is one of the sectors with deep historical roots in Indonesia and constitutes a point of intersection between local culture and the dynamics of global trade.⁷ In the context of Indonesia–United States relations, the tobacco industry embodies tensions among economic interests, public health regulation, and international trade policy. Both countries have long-standing traditions of tobacco consumption, yet differences in product types, business strategies, and public policies have significantly shaped the direction of their bilateral relations from the twentieth century to the present.

In Indonesia, the tobacco industry began to develop during the colonial period, when clove cigarettes (*kretek*) a blend of tobacco and cloves emerged as a distinct product. This type of cigarette was first created in the late nineteenth century by Haji Jamhari in Kudus, Central Java.⁸ Since then, *kretek* has evolved into both a cultural symbol and a crucial source of income for millions of Indonesians. Domestic companies such as Gudang Garam, Djarum, and Sampoerna have grown into major industrial players, dominating the national market and gradually expanding into international markets. In its early stages, production was predominantly traditional and labor-intensive, relying on manual work particularly by women who rolled cigarettes by hand in factories across Java.

In the United States, by contrast, the tobacco industry developed with a different profile. The dominant product has been white (non-clove) cigarettes, mass-produced by large firms such as Philip Morris, R.J. Reynolds, and Lorillard.⁹ The United States became one of the world's largest exporters of tobacco products and related technologies, supported by a vast domestic market throughout the twentieth

⁷ Nichter, Mimi & Nichter, Mark (2015) "Market Lives: Tobacco and Globalization in Indonesia." Accessed 10 December 2025.

⁸ Wikipedia Foundation. (2024a, October 4). *Family smoking prevention and tobacco control act*. Wikipedia.

⁹ U.S. National Cancer Institute (NCI), Tobacco Control Monograph No. 19 (2016) "The Role of the Tobacco Industry in Tobacco Addiction."

century.¹⁰ However, in the latter half of that century, rising awareness of the health risks associated with smoking led to a series of public health regulations, including advertising bans, mandatory health warnings on cigarette packages, and age restrictions on purchase.

Economic interaction between the Indonesian and U.S. tobacco industries intensified as both countries engaged in trade in tobacco products. The United States imported oriental tobacco from Indonesia, while Indonesia imported cigarette-manufacturing technologies and raw materials from the United States. This relationship became more complex as regulatory approaches to different types of cigarettes diverged. Kretek, Indonesia's signature product, did not gain acceptance in the U.S. market. It was widely perceived as sweet and aromatic in ways that might appeal to adolescents and children, and therefore considered particularly problematic from a public health perspective.

A major controversy emerged in 2009 when the U.S. government, through the *Family Smoking Prevention and Tobacco Control Act* (FSPTCA), prohibited the sale of all flavored cigarettes except menthol within its territory.¹¹ This ban effectively blocked the entry of Indonesian kretek into the U.S. market while allowing menthol cigarettes produced by U.S. companies to remain available. The Indonesian government regarded this policy as discriminatory and inconsistent with the principles of free trade. As a result, Indonesia brought the case to the World Trade Organization in 2010.¹²

During the WTO proceedings, Indonesia argued that banning kretek while permitting menthol cigarettes produced by U.S. firms amounted to protectionism in violation of international trade rules. Because both menthol cigarettes and kretek are flavored tobacco products, Indonesia maintained that the differential treatment was unjustified. After a protracted legal process, the WTO ruled in 2012 that the United States had breached its trade obligations and found in favor of Indonesia.¹³ This decision marked a significant milestone in the history of Indonesia's tobacco industry. It was the first time that a local cigarette product received formal recognition as a legitimate commodity in

¹⁰ World Bank Tobacco Economics Report (2021), accessed 10 December 2025

¹¹ *DS406: United States — Measures Affecting the Production and Sale of Clove Cigarettes*. WTO. (2010).

¹² Moodie, M. (2024, January 22). *Philip Morris buys Sampoerna in US\$5.2 billion deal – 15/03/05*. Moodie Davitt Report.

¹³ United States, *Measures Affecting the Production and Sale of Clove Cigarettes (DS406)*, accessed 10 December 2025.

global trade and, at the same time, demonstrated Indonesia's capacity to challenge regulatory imbalances in the international system.

At the same time, despite tensions in the trade dimension, industrial relations between Indonesia and the United States have also been shaped by foreign direct investment. A key event was Philip Morris International's acquisition in 2005 of a majority stake in PT HM Sampoerna, previously a family-owned company.¹⁴ This transaction marked a new chapter in Indonesia's tobacco industry, as a major domestic firm was integrated into the global network of a multinational tobacco corporation. Following the acquisition, Sampoerna expanded rapidly by combining local taste preferences with global production efficiencies.¹⁵ It became the market leader in Indonesia with a market share of around 30 percent, a sales volume of 107.7 billion cigarettes in 2022, and revenues of approximately IDR 110 trillion.¹⁶ Several Sampoerna brands emerged as leading products domestically and served as the basis for exports to other Asian markets.¹⁷

The entry of Philip Morris has had complex implications. On the one hand, foreign investment has brought capital, technology, and higher production standards, thereby enhancing the competitiveness of Indonesia's tobacco industry at both regional and global levels. On the other hand, concerns have arisen regarding foreign dominance over a strategic national industry and the potential reorientation of production priorities toward profit maximization at the expense of local social and cultural interests. Critics also note that multinational companies may exploit regulatory loopholes in developing countries to market products that have become less acceptable in advanced economies due to health concerns.

From a socio-economic perspective, the tobacco industry remains a critical pillar of Indonesia's economy. It is estimated that more than six million people depend directly or indirectly on this sector,¹⁸ ranging from tobacco farmers and factory workers to packers and small-scale retailers. Despite mounting criticism of smoking from a public health standpoint, the industry continues to provide essential livelihoods, especially in tobacco- and clove-producing regions. The growing presence of foreign firms, including those from the United States, has

¹⁴ *Indonesia - en*. PMI Indonesia - EN | Philip Morris International. (2020, July 1).

¹⁵ World Bank 2011; CSIS 2014; PMI Annual Report 2008.

¹⁶ Laporan Tahunan HM Sampoerna (HMSP).

¹⁷ *Ibid.*

¹⁸ Kemenperin: Industri Hasil Tembakau tercatat serap 5,98 Juta Tenaga kerja. (n.d.-a).

introduced new dynamics that require prudent government regulation to safeguard national interests.

Overall, the industrial history of tobacco in Indonesia–United States relations reflects a dynamic and often contentious interaction. From trade cooperation and legal disputes at the WTO to business alliances through corporate acquisitions, this relationship illustrates how a culturally embedded product like cigarettes can become a site of economic and diplomatic contestation. As a leading producer of kretek, Indonesia must continue to strengthen its position in both domestic and international markets while remaining attentive to public health concerns and the long-term sustainability of the industry.

The Indonesia and U.S. tobacco relationship also offers an important lesson on how developing countries can assert their trade rights in the global arena. Indonesia's success in challenging discriminatory treatment of kretek demonstrates that economic diplomacy, when supported by robust strategy and clear evidence, can yield tangible results. Looking ahead, bilateral cooperation could be redirected toward the development of less harmful alternative products, enhanced corporate social responsibility, and fair and transparent trade practices for both parties.

In principle, protectionism is neither explicitly prohibited nor comprehensively regulated under GATT, implying that states retain sovereign authority to shape their own industrial and economic policies.¹⁹ The U.S. Food and Drug Administration (FDA), as a key federal agency, holds the mandate to design and implement regulatory innovations.²⁰ In 2009, the FDA adopted measures governing the production, distribution, and marketing of tobacco products within the United States. These regulations have had direct implications for Indonesia, particularly through the FSPTCA, which in Section 907(a)(1)(A) provides that:²¹

“A cigarette or any of its components shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol) that is a characterizing flavor of the tobacco product or tobacco smoke.”

In practice, this provision prohibits flavored cigarettes while granting specific exemptions for menthol and tobacco products whose production is predominantly domestic to the United States. Public

¹⁹ WTO Secretariat, 2015, *Understanding the WTO*, bagian “Rules and Exceptions”.

²⁰ U.S. Food and Drug Administration (FDA) – Official Website, accessed 10 December 2025.

²¹ U.S. Food and Drug Administration. (2009). *Family Smoking Prevention and Tobacco Control Act overview*. U.S. Department of Health and Human Services.

discourse generally recognizes several types of cigarettes worldwide, namely:²²

1. Conventional cigarettes, the most common type, consisting of tobacco rolled in paper, typically with a filter at one end;
2. Light and ultra-light cigarettes, which are marketed as having lower tar and nicotine levels than conventional cigarettes;
3. Menthol cigarettes, containing menthol to provide a cooling sensation when inhaled;
4. Flavored cigarettes, which incorporate additional flavorings such as vanilla, cherry, or chocolate;
5. Clove cigarettes (kretek), popular in Indonesia, made from a blend of tobacco and cloves that produces a distinctive aroma;
6. Roll-your-own cigarettes, for which users purchase loose tobacco and papers separately and roll their own; and
7. Electronic cigarettes (e-cigarettes), which use electronic devices to heat liquid nicotine and generate vapor rather than smoke from combusted tobacco.

Indonesia, as the largest producer of clove cigarettes, is widely known for its kretek deeply intertwined with national cultural identity. As one of the world's largest kretek producers, Indonesia exports these products to various countries in Southeast Asia, followed by markets in the Middle East and South Asia, Europe, and even the United States. The trade policy adopted by the U.S. government therefore poses a major challenge. The FSPTCA restricts the importation of tobacco products containing certain additives, such as clove, which is a key component of kretek. This regulation has negatively affected Indonesia's kretek exports to the United States because clove is classified as an additive that heightens potential health risks, while menthol and tobacco have been exempted from the ban.

Growing dependence on international economic interactions has thus intensified global debates over trade policy. Several key questions arise in relation to GATT and the FSPTCA, including: What are the effects of the FSPTCA on Indonesian kretek from the perspective of GATT and the Agreement on Technical Barriers to Trade (TBT)? How has the FSPTCA affected Indonesia's kretek exports, and how has the dispute been resolved through the WTO dispute settlement mechanism? Against this background, the present study seeks to analyze the impact of the FSPTCA on Indonesia's kretek exports within the framework of GATT and the TBT Agreement, and to examine the role of the WTO dispute

²² TypesOf.com. (2025). 'Types of Cigarettes', available at: <www.typesof.com/types-of-cigarettes/>, (accessed 4 May 2025).

settlement system in protecting the trade rights of developing countries in the international trading system.

METHODS.

This study employs a normative legal research method to examine the consistency of the Family Smoking Prevention and Tobacco Control Act (FSPTCA) with the obligations of the United States under the World Trade Organization (WTO), particularly Article 2.1 of the Technical Barriers to Trade Agreement (TBT Agreement). The analysis focuses on the principle of non-discrimination and the concept of "less favorable treatment" as developed in WTO jurisprudence. This approach enables a focused legal assessment of the balance between regulatory autonomy and trade obligations under the TBT Agreement.

RESULT DAN DISCUSSION

Effects of the FSPTCA on Indonesian Clove Cigarettes under GATT and the TBT Agreement

As outlined in the background, in 2009 the United States enacted the Family Smoking Prevention and Tobacco Control Act (FSPTCA), which prohibits the sale of flavoured cigarettes, including clove cigarettes, while exempting menthol and tobacco flavoured products. Indonesia, as the principal exporter of clove cigarettes, challenged this measure at the WTO in 2010 on the grounds that it discriminated against imported clove cigarettes and favoured domestically produced menthol cigarettes, thereby disadvantaging imported products from other countries.

The WTO Panel found that the U.S. measure was inconsistent with Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement), which requires that imported products be accorded treatment no less favourable than that accorded to like domestic products.²³ The Panel determined that clove and menthol cigarettes are "like products" based on their physical characteristics, end-uses, consumer preferences, and tariff classification. It concluded that the U.S. ban afforded less favourable treatment to imported clove cigarettes than to domestically produced menthol cigarettes. At the same time, the Panel rejected Indonesia's claim under Article 2.2 of the TBT Agreement, which prohibits technical regulations that are more trade-restrictive than necessary to fulfil a legitimate objective. The Panel acknowledged that reducing youth smoking is a legitimate public

²³ WTO Dispute Settlement Document DS406 Panel Report (2012).

health objective and found that the ban on flavoured cigarettes, including clove cigarettes, was not more trade-restrictive than necessary to achieve that objective. This conclusion raised concerns in Indonesia because the measure was seen as creating discriminatory treatment against imported products particularly kretek, one of Indonesia's key export commodities. Although the export value of kretek to the United States was relatively small, ranging only from USD 7 to 15 million per year, the measure was nevertheless perceived as harmful because it closed off market access that, under non-discrimination principles of international trade, should have remained open.

Within the broader framework of international economic law, the FSPTCA was viewed as inconsistent with core principles of both GATT and the TBT Agreement. Article III:4 of GATT stipulates that imported products must not be accorded less favourable treatment than like domestic products. Similarly, Article 2.1 of the TBT Agreement requires that technical regulations must not treat imported products less favourably than like domestic products.²⁴ In the clove-cigarette dispute, both the WTO Panel and the Appellate Body agreed that Section 907(a)(1)(A) of the Federal Food, Drug and Cosmetic Act, as amended by the FSPTCA, constitutes a binding technical regulation. They further held that kretek and menthol cigarettes are like products because they share comparable physical characteristics and perform similar functions, particularly with respect to their use by both youth and adult smokers.

The central problem was that the ban on clove cigarettes de facto applied only to imported products, while menthol cigarettes most of which are produced domestically remained freely available on the U.S. market. The WTO Panel found that this situation created an uneven competitive environment and resulted in less favourable treatment for Indonesian products. Accordingly, the measure was held to be inconsistent with Article 2.1 of the TBT Agreement. Although the United States argued that its primary objective was to protect public health, especially by preventing youth smoking, this justification was insufficient within the TBT context, which unlike GATT does not provide an explicit general-exceptions clause. The Panel therefore considered it unnecessary to proceed to an analysis under Article 2.2 on whether the regulation was unnecessarily trade-restrictive, because a violation of Article 2.1 was already sufficient to establish inconsistency with WTO rules.

²⁴ Singh, S. (2012). *Dispute Analysis: United States – Measures Affecting the Production and Sale of Clove Cigarettes (AB)*. WTO Centre, Indian Institute of Foreign Trade.

Moreover, the U.S. claim that public health protection was the principal objective did not automatically legitimize discriminatory treatment of kretek. Indonesia argued that if health concerns were indeed paramount, the ban should also have applied to menthol cigarettes. From this perspective, the U.S. action appeared disproportionate and inconsistent with its international trade obligations. The WTO Appellate Body upheld the Panel's findings and emphasized that the interpretation of the TBT Agreement must be situated within the broader context of WTO commitments, including long-standing principles of non-discrimination and national treatment that underpin the multilateral trading system.

From an economic standpoint, although the ban did not significantly affect the aggregate value of Indonesia's kretek exports given that the United States is not the primary destination market the measure nonetheless had adverse implications for firms targeting the U.S. market.²⁵ Indonesia's kretek industry is a strategic sector that provides employment for approximately six million workers and contributes substantially to government revenue through excise taxes. In 2010, the export value of kretek cigarettes reached USD 433.8 million²⁶ and continued to increase in subsequent years, with major export markets located in Asian countries such as Cambodia, Malaysia, the Philippines, and Japan. Thus, even though the U.S. ban affected only a relatively small portion of total exports, its symbolic and political impact was considerable. Discriminatory action by a major economy such as the United States generates uncertainty and raises concerns about the possible emergence of similar trade barriers in the future.

To resolve the dispute, Indonesia brought the case before the WTO and ultimately prevailed on most of its key legal arguments. Rather than pursuing sanctions or retaliation, Indonesia and the United States opted to settle the dispute through bilateral negotiations. In 2014, the two countries signed a Memorandum of Understanding (MoU) encompassing cooperation on intellectual property protection and trade, and providing assurances that the United States would refrain from adopting similar unilateral measures against other Indonesian products. This diplomatic settlement was considered strategically advantageous, given Indonesia's dependence on stable trade relations with major partners such as the United States.

²⁵ Universitas Gadjah Mada. (2010, Oktober 18). *Larangan rokok kretek masuk AS rugikan Indonesia*.

²⁶ Ibid.

The FSPTCA thus clearly generated discriminatory effects against Indonesian kretek, contravening core principles of the TBT Agreement and the spirit of GATT. Although its direct economic impact was limited because the U.S. is not Indonesia's main export market for kretek, the legal and political ramifications are significant, as the measure challenges the integrity of the multilateral trading system. Diplomatic resolution offered a pragmatic middle ground for Indonesia to safeguard long-term economic relations, even though the discriminatory U.S. policy itself has never been fully revoked.

The Impact of the Family Smoking Prevention and Tobacco Control Act (FSPTCA) on Indonesian Clove Cigarettes and Dispute Settlement through the World Trade Organization

The WTO Panel found that the United States had acted inconsistently with Article 2.1 of the TBT Agreement, which requires that imported products be accorded treatment no less favourable than that accorded to like domestic products. The Panel held that clove and menthol cigarettes are like products, based on their physical characteristics, end-uses, consumer preferences, and tariff classification.²⁷ It concluded that the U.S. ban resulted in less favourable treatment for imported clove cigarettes than for domestically produced menthol cigarettes. At the same time, the Panel rejected Indonesia's claim under Article 2.2 of the TBT Agreement, which prohibits technical regulations that are more trade-restrictive than necessary to fulfil a legitimate objective. The Panel accepted that reducing youth smoking constitutes a legitimate objective and found that the ban on flavoured cigarettes, including clove cigarettes, was not more trade-restrictive than necessary to achieve this aim.

In essence, the FSPTCA is a statute designed to reduce tobacco consumption in the United States through a range of regulatory measures, including restrictions on cigarette advertising and the introduction of more prominent health warnings. One part of the statute is the prohibition of flavoured cigarettes other than menthol. This measure is primarily intended to reduce the attractiveness of tobacco products for young people and to raise awareness of the dangers of smoking. However, although the measure is framed as a public-health policy, Indonesia maintains that it has adversely and unfairly affected the Indonesian clove-cigarette industry.

²⁷ Opcit, DBS WTO.

Indonesia, as the world's largest producer of clove cigarettes²⁸, manufacturing more than 320 billion sticks annually, of which over 90 per cent are kretek²⁹, considers the ban on all flavoured cigarettes other than menthol, which in practice applies to kretek, to be a form of unequal treatment. This argument is grounded in the principle of non-discrimination contained in Article III of GATT 1994, which stipulates that imported products must be treated no less favourably than like domestic products.³⁰ In addition, the most-favoured-nation (MFN) principle in Article I of GATT 1994 provides that any advantage, favour, privilege, or immunity granted by a WTO member to the products of any country shall be accorded immediately and unconditionally to the like products of all other WTO members. Indonesia contends that banning clove cigarettes without a clear justification, while allowing menthol cigarettes to remain on the market, constitutes unequal treatment and therefore breaches international trade rules.

Indonesia's principal argument in its complaint was that the U.S. ban on clove cigarettes is inconsistent with the non-discrimination obligations set out in Article III of GATT 1994. This provision focuses on ensuring that imported and domestic products are treated in a non-discriminatory manner. Indonesia argued that the distinction drawn by the United States between menthol and clove cigarettes lacks a legitimate basis, as both are essentially flavoured tobacco products and there is no persuasive rationale for permitting menthol products while prohibiting kretek, which is similar in nature.

From Indonesia's perspective, the measure is better understood as a form of economic protectionism, by which the United States seeks to shield its domestic cigarette industry from foreign competition, even though the two products share similar characteristics. Although kretek has a stronger taste and the distinctive aroma of clove, it does not differ substantially from menthol cigarettes in terms of health risks or tobacco use.³¹ Indonesia therefore claims that the measure effectively undermines free and fair international trade and violates the core principles of free trade guaranteed by the WTO.³²

²⁸ Euromonitor International – Tobacco in Indonesia Report (2022)

²⁹ GAPPRI/Kemenperin, 2022

³⁰ World Trade Organization. *General Agreement on Tariffs and Trade (GATT) 1994: Article III – National Treatment on Internal Taxation and Regulation*. Geneva: WTO.

³¹ Van den Bossche, P., & Zdouc, W. (2021). *The law and policy of the World Trade Organization: Text, cases and materials* (5th ed.). Cambridge University Press.

³² Cottier, T., & Mavroidis, P. C. (Eds.). (2003). *The role of the judge in international trade regulation: Experience and lessons for the WTO*. University of Michigan Press.

Indonesia further maintains that the measure is inconsistent with the obligation of non-discriminatory treatment among WTO members. By restricting market access for Indonesian clove cigarettes while allowing similar products such as menthol cigarettes from other countries (including U.S. producers) to continue to be sold, the United States effectively accords more favourable treatment to its own domestic products. This, Indonesia argues, clearly contravenes Article III of GATT 1994, which requires equal treatment for foreign and domestic products.

The United States, on the other hand, bases its defence on the sovereign right of states to regulate legitimate public-health policies. It argues that the FSPTCA is a lawful measure consistent with its right to protect the health of its population. According to the United States, the statute is not intended to restrict international trade but to reduce the health risks associated with tobacco consumption, particularly among young people. The ban on flavours other than menthol is described as an important step in reducing the appeal of cigarettes to youth, who have historically been a key target group for cigarette marketing.

The United States maintains that the measure focuses on the protection of public health and is not designed to discriminate between foreign and domestic products. It argues that the ban on flavoured cigarettes other than menthol does not conflict with Article XX of GATT 1994, which allows exceptions for measures necessary to protect human health and safety.³³ Article XX grants WTO members policy space to adopt public-health measures, provided such measures are not applied in an arbitrary or unjustifiably discriminatory manner.³⁴ In its defence, the United States asserts that the measure does not violate the principle of non-discrimination, as the distinction is drawn not on the basis of a product's origin but on its flavour characteristics, which are considered to influence smoking behaviour, particularly among children and adolescents.

After Indonesia initiated WTO dispute settlement proceedings in 2010, a lengthy legal process ensued. During this process, the WTO Panel examined the claims raised by both parties. It assessed whether the U.S. measure violated international trade rules, particularly in relation to discriminatory treatment of imported products. The Panel ultimately concluded that the United States had breached the principle of non-discrimination embodied in Article III of GATT 1994, because the ban on

³³ General Agreement on Tariffs and Trade. (1994). *General Agreement on Tariffs and Trade (GATT) 1994: Article XX(b): Necessary to protect human, animal, or plant life or health.*

³⁴ World Trade Organization. (2001). *Appellate Body report, European Communities – Measures affecting asbestos and asbestos-containing products (WT/DS135/AB/R).*

clove cigarettes lacked a convincing justification while menthol cigarettes remained permitted.³⁵ This decision represented a legal victory for Indonesia, which succeeded in demonstrating that the U.S. measure was unfair and detrimental to its clove-cigarette industry. Indonesia's complaint thus underscored the centrality of the non-discrimination principle in international trade. Although the United States argued that the measure was intended to protect public health, the WTO's ruling highlighted that policies which unfairly disadvantage imported products can undermine the foundational principles of free and equitable trade. The decision constitutes an important milestone in defending the rights of developing countries such as Indonesia to ensure that international trade rules continue to uphold fairness and equality among all WTO members.

CONCLUSION

The dispute between Indonesia and the United States over the prohibition of clove cigarettes under the FSPTCA highlights the inherent tension between public health regulation and the core principles of international trade law under the WTO, particularly the principle of non-discrimination. Although the stated objective of the FSPTCA is to protect public health, the exemption granted to menthol cigarettes produced by the U.S. domestic industry, while prohibiting clove cigarettes exported from Indonesia, raises serious concerns regarding the equal treatment of all trading partners. By banning primarily kretek, which is largely imported from Indonesia allowing domestically produced menthol cigarettes and similar products from other countries to remain on the market, the United States was found to have accorded unbalanced treatment and to have violated the most-favoured-nation (MFN) principle.

In addition, the national treatment obligation under Article III of GATT 1994 was called into question. This provision requires that imported products be accorded treatment no less favourable than that accorded to like domestic products once they have entered the domestic market. The ban on clove cigarettes's products that are substantively comparable to menthol cigarettes in terms of function and target consumers but originate from another country was deemed discriminatory toward Indonesian imports. The WTO held that the differential treatment between kretek and menthol cigarettes could not be justified solely on public health grounds, as the distinction was not supported by sufficiently robust scientific evidence. The Appellate

³⁵ World Trade Organization. (2012). *Appellate Body report, China – Measures related to the exportation of rare earths* (WT/DS406/AB/R).

Body's decision in this dispute strengthened Indonesia's position and established an important precedent that domestic measures, including those adopted in the name of public health, cannot be used covertly to shield domestic industries from foreign competition. Policy-making must remain consistent with international obligations, including foundational WTO principles such as non-discrimination, national treatment, and MFN.

The resolution of this case through a combination of WTO dispute settlement and subsequent bilateral negotiations underscores the importance of trade diplomacy in safeguarding national economic interests within the global trading system. Indonesia's experience demonstrates that developing countries can assert their rights and secure fair treatment in international commerce when supported by strong legal arguments and a strategic approach. Overall, this dispute offers an important lesson on the need to design domestic regulations that are aligned with multilateral commitments. WTO members are required to strike an appropriate balance between protecting national interests and upholding fairness and equality in international trade.

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