

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

**(DS406)**

**Comments of the United States of America on Indonesia's Responses  
to the Second Set of Questions from the Panel to the Parties**

**March 10, 2011**

## I. FACTUAL ISSUES

### 81. Both parties: Is the Panel correct in its understanding that the only type of cigarettes that were imported from Indonesia to the United States before the entry into force of Section 907(a)(1)(A) were clove cigarettes?

1. Indonesia responds to the existence of official customs statistics showing importation of substantial quantities of non-clove cigarettes from Indonesia – for years well before the start of this dispute<sup>1</sup> – by speculating that the customs statistics must reflect a widespread, systemic practice by importers of mis-classifying clove cigarettes as “other” cigarettes. Indonesia’s suggestion is without foundation, and otherwise implausible. As the United States noted, the import duties for cigarettes containing clove were lower than for other cigarettes, and thus importers would have had no incentive to try to classify clove cigarettes as “other” cigarettes.

2. Indonesia also points to the fact that, for the first time in the last 20 years, there were no imports of non-clove cigarette from Indonesia in 2010. However, this fact could simply reflect a business decision by Indonesian importers or other market factors, and does not prove Indonesia’s theory that U.S. customs statistics for the last 20 years were consistently wrong.

## II. CLAIMS MADE BY INDONESIA

### B. ARTICLE 2.1 OF THE TBT AGREEMENT AND ARTICLE III:4 OF THE GATT 1994

85. **Indonesia: Indonesia has made clear that “[t]he imported product in this case is clove cigarettes” (Indonesia’s response to question 27, para. 16). Indonesia clarifies that it “is not asking the Panel to include candy-flavoured cigarettes in its like product analysis” (Indonesia’s response to question 27, para. 17) The United States has observed that, in addition to producing cigarettes flavoured only with clove oil, Indonesian manufacturers produced and exported clove cigarettes with additional flavourings, including vanilla, menthol, coconut, and strawberry (see e.g. United States’ first written submission, paras. 15, 37; United States’ second written submission, para. 47; Exhibit US-132).**

(a) **Is the Panel correct in its understanding that the scope of Indonesia’s claim is limited to clove cigarettes without additional characterizing flavours, and therefore does not include the treatment accorded to clove cigarettes with additional characterizing flavours?**

3. In its response to question 85(a), Indonesia confirms that its national treatment claims do not extend to clove cigarettes with additional characterizing flavors. Indonesia may limit its

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<sup>1</sup> Indonesia Cigarette Exports to the United States, 1990-1998 (showing that the United States has imported non-clove cigarettes since at least 1990), Exhibit US-150.

claims – and arguments – as it chooses. At the same time, however, the United States has explained that to evaluate any particular national treatment claim, one must consider the full factual record, including how imported products, generally, are treated as compared to like domestic products.

4. After confirming the scope of its national treatment claim, Indonesia’s answer to question 85(a) goes on to address a number of other points regarding sales on the U.S. market of clove cigarettes containing additional characterizing flavors. The United States has the following comments on these additional points contained in Indonesia’s answer to Question 85(a).

5. First, Indonesia’s answer to Question 85(a) emphasizes the point that some of the flavored cigarettes covered by Section 907(a)(1)’s prohibition were produced in Holland and India, and not Indonesia.<sup>2</sup> This may be true, but does not support Indonesia claims in this dispute. In particular, the fact that section 907(a)(1) applied to flavored cigarettes from countries other than Indonesia again undermines Indonesia’s prior position that “in practice, [the measure] applies to only clove cigarettes from Indonesia.”<sup>3</sup> Indonesia goes as far as to claim that if clove cigarettes were exempted from the ban, “the trade restrictiveness of the measure would slide back to zero.”<sup>4</sup> Indeed, as the United States has previously explained, many different types of flavored cigarettes were sold in the United States prior to the ban, including those flavored with: cinnamon, cherry, chocolate, coconut, espresso, grape, licorice, lime, mango, margarita, mint, scotch, strawberry, toffee, and vanilla. These cigarettes originated in the United States as well as other countries.<sup>5</sup>

6. Second, although Indonesia now acknowledges that its producers have been selling brands of clove cigarettes with additional characterizing flavors in the U.S. market in the years leading up to the enactment of the Family Smoking Prevention and Tobacco Control Act (“Tobacco Control Act”), Indonesia inaccurately represents the brands and flavors. Indonesia contends that one of its producers, PT Djarum, did not export to the United States clove cigarettes with characterizing flavors other than cherry, vanilla or menthol – and in particular did not export “cappuccino.” However, that assertion appears to be inaccurate. Evidence shows that PT Djarum was selling not only cappuccino-flavored clove cigarettes in the United States even after the ban went into effect,<sup>6</sup>

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<sup>2</sup> Indonesia Answer to Q85(a), para. 19; *see also* Exhibits US-40, US-52. Flavored cigarettes of a Belgian producer, Dreams, were also being sold in the United States. Exhibit US-52.

<sup>3</sup> Indonesia Second Closing Statement, para. 6.

<sup>4</sup> Indonesia Answer to Q102(a), para. 39.

<sup>5</sup> Exhibits US-40, US-52; *see also* U.S. Answer to Q90(a), n.25.

<sup>6</sup> *See* Exhibit IND-44 (U.S. Food and Drug Administration (“FDA”) Warning Letter regarding the illegal sale of, among other clove cigarette brands, “Djarum Black Cappuccino.”).

but also was selling clove cigarettes with other additional flavors as well, including Djarum Splash, Djarum Bali Hali, and Djarum Tea before and after the ban went into effect as well.<sup>7</sup>

7. In closing, the United States would again note that the cigarettes Indonesia collectively refers to as “candy-flavored” (including cigarettes with characterizing flavors such as spice, herb, tea, coffee, nuts, fruit, liquor and other flavors more traditionally associated with candy such as toffee and chocolate) also include the cigarettes with the characterizing flavor of clove, which imparts a sweet, aromatic flavor similar to cinnamon and cardamom.<sup>8</sup>

**(b) If so, please explain the basis for drawing this distinction.**

8. Indonesia has limited its national treatment claim and supporting argument to clove cigarettes and not to “cherry or other candy-flavored clove cigarettes.”<sup>9</sup> Moreover, Indonesia explains that it has limited its claims on the basis that these other flavors “*may* pose a health risk by encouraging new, young smokers” and “to the extent the scientific evidence were to support regulation of candy-flavored cigarettes, Indonesia would not object to a ban on cherry or other candy-flavored clove cigarettes.”<sup>10</sup>

9. Indonesia’s clarification of its views has significant implications for both its national treatment claims and its claim under Article 2.2. of the TBT Agreement. In Indonesia’s First Written Submission, Indonesia noted that “candy-flavored” cigarettes may not be “like” clove, tobacco or menthol cigarettes to the extent that “candy-flavored” cigarettes pose a specific health risk.<sup>11</sup> Here, Indonesia seems to confirm that it has no objection to the factual or legal premise that cigarettes that specifically appeal to youth present a particular health risk, which appropriately

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<sup>7</sup> FDA Warning Letter to clovecigaretteshop.com (November 3, 2009) (noting that as of that date, Djarum, Sapoerna, and Gudang Garam brands of clove cigarettes were still being sold in the United States, including with flavors such as cappuccino and tea), Exhibit US-151. *See also* Table 4 in Exhibit US-52 (showing that between 2008 and 2010, the top selling Kretek brands in the United States included two additional PT Djarum brands with clove and additional characterizing flavors: Djarum Splash and Djarum Bali Hali). Moreover, PT Djarum’s “international” web page, which advertises the brands it sells abroad, including (previously) to the United States, indicates that the company sells at least four brands of clove cigarettes with additional characterizing flavors: “Cherry,” “Vanilla,” “Splash,” and “Bali Hali.”; “International Brands,” available at <http://www.djarum.com/index.php/en/brands/page/15>. The United States would note that in paragraph 37 of its First Written Submission, the United States incorrectly considered that cigarettes manufactured or imported by Kretek International were manufactured in Indonesia. The United States does not dispute that the examples noted by Indonesia, such as that Liquid Zoo flavors are produced in Holland and the Zanzibar flavors are produced in Belgium.

<sup>8</sup> *See, e.g.*, Partial Guidelines to Article 9 and 10 of the WHO FCTC, FCTC/COP4(10) at 1.2.1.1, 3.1.2.2; World Health Organization, *The Scientific Basis of Tobacco Product Regulation*, at 25-40, 99, Exhibit US-113.

<sup>9</sup> Indonesia Answer to Q85(b), para. 19.

<sup>10</sup> Indonesia Answer to Q85(b), para. 20.

<sup>11</sup> Indonesia First Written Submission, para. 63; *see also* U.S. Second Written Submission paras. 105-106.

can be regulated differently than tobacco or menthol-flavored cigarettes without violating a Member’s trade obligations. This view seems to undermine Indonesia’s key factual and legal claims.

10. With respect to national treatment, Indonesia states that it has no claims with respect to clove cigarettes with additional characterizing flavors, on the basis that they may pose a particular health risk. In this regard, Indonesia appears to accept a key U.S. factor for determining whether the cigarettes in this dispute should be considered like products: their particular appeal to young people. Accordingly, Indonesia seems to agree that different cigarettes can and do pose different health risks depending on their patterns of use – *e.g.*, whether they appeal particularly to young people. Moreover, Indonesia does not contest that characterizing flavors such as cherry and vanilla – which, in absolute numbers are smoked by a small number of young people – may be banned, while flavors such as tobacco and menthol – which, in absolute numbers are smoked by *more* young people – are not banned. In other words, with respect to the characterizing flavors of cherry and vanilla, Indonesia seems to accept the validity of a health risk based on disproportionate use (*i.e.*, the *rate* of young people who smoke cigarettes with characterizing flavors is disproportionate to the *rate* of older adults who smoke them). Indonesia’s position appears to be that, to the extent that other characterizing flavors contained in some Indonesian cigarettes may encourage new, young smokers, those Indonesian cigarettes may appropriately be banned, even if tobacco or menthol flavored cigarettes are not banned.

11. Given these acknowledgments, the only basis for Indonesia to claim a national treatment breach with respect to clove cigarettes is to advance the factual inaccuracy that clove cigarettes – unlike the other flavors whose ban Indonesia does not object to – “do not appeal to youth” and therefore do not fall into this specific category of public health concern.

12. As a legal matter, Indonesia appears to agree that cigarettes from Indonesia that particularly appeal to young people can be regulated more restrictively than tobacco or menthol cigarettes. As to the factual point, the United States has presented ample evidence that clove flavored cigarettes appeal in the same way to young people as cherry, coffee, tea, nut, liquor, toffee, grape, etc. Clove cigarettes, like cigarettes with these other characterizing flavors, are disproportionately appealing to and used by young people. In addition, the World Health Organization has confirmed that cigarettes flavored with either cherry or clove appeal to young smokers and young potential smokers.<sup>12</sup>

13. With respect to Article 2.2 of the TBT Agreement, Indonesia’s position that “to the extent the scientific evidence were to support regulation of candy-flavored cigarettes, Indonesia would

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<sup>12</sup> World Health Organization, *The Scientific Basis of Tobacco Product Regulation*, at 99 (“The tobacco industry’s documents and expert evaluation reveal extensive manipulation of contents and designs to increase dependence potential and appeal. For example, the dependence-causing effects of nicotine can be increased by contents and designs that increase the free base fraction of nicotine, and flavourings such as *cherry and cloves* can be used to appeal to target populations.”) (emphasis added), Exhibit US-113.

not object to a ban on cherry or other candy-flavored clove cigarettes” appears to undermine its Article 2.2 argument.<sup>13</sup> Indonesia has long argued that the measure’s ban of clove cigarettes is inconsistent with Article 2.2 simply because it bans a product with a small market share (clove cigarettes) but does not ban products with larger market shares (menthol- and tobacco-flavored cigarettes).<sup>14</sup> As Indonesia explains its position in its latest submission, section 907(a)(1)(A) “cannot make a material contribution to the objective by banning the cigarette that youth for the most part do not smoke.”<sup>15</sup> However, given that cherry-flavored clove cigarettes have a smaller market share than clove cigarettes,<sup>16</sup> it is difficult to understand why Indonesia agrees that cherry-flavored clove cigarettes could be banned if they appeal to “youth” (as Indonesia defines that term), while at the same time Indonesia argues that a ban on clove cigarettes could not be justified based on the appeal of clove cigarettes to “youth.”

**92. Both parties: The Panel would like to obtain the parties’ views as to which are the relevant consumers that the Panel needs to consider in order to examine the consumers’ tastes and habits criterion within its likeness analysis under Article 2.1 of the TBT Agreement:**

- (a) Should the Panel consider that the relevant consumers are smokers? If so, should the Panel consider smokers in general, or should it focus on particular age segments?**
- (b) Or should the Panel instead consider as the relevant consumers the “pre-smoking” youth population, i.e., youth that have not taken up the habit of smoking yet but could potentially experiment with cigarettes?**

14. Indonesia suggests that the consumers the Panel should consider in its like product analysis are current smokers, without any reference to different perceptions or patterns of use as between young people and older adults. This approach should be rejected for three reasons.

15. First, the United States is aware of no dispute in which a panel specifically limited the scope of consumer tastes and preferences to current consumers of a product, carving out potential consumers. Potential consumers are a key demographic for which products compete, and it would skew any analysis of how consumers perceive and use a product to omit this group.

16. Second, potential consumers are particularly relevant to this dispute because the measure at issue specifically concerns smoking initiation. Indonesia agrees that the like product analysis

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<sup>13</sup> Indonesia Answer to Q85(b), para. 20.

<sup>14</sup> See, e.g., Indonesia Second Written Submission, para. 128.

<sup>15</sup> Indonesia Answer to Q99, para. 35.

<sup>16</sup> See Indonesia Answer to Q85(a), para. 18.

should consider the “purpose/objective of the measure at issue.”<sup>17</sup> Section 907(a)(1)(A) prohibits characterizing flavors other than tobacco and menthol because of their appeal to young people and their impact upon smoking initiation. Accordingly, how potential consumers perceive different cigarettes directly relates to the public health basis for the distinction among cigarettes and therefore whether those cigarettes should be considered “like products” in this dispute.

17. Third, how different consumers use different cigarettes – that is, the patterns of use as between young people in the window of initiation and older, regular smokers – is directly relevant to the like product, as well. The United States has submitted that Section 907(a)(1)(A) distinguishes among cigarettes based on their role in initiation, on the one hand, and the degree to which they are used by older adults as their regular cigarette, on the other hand. Accordingly, each of these patterns of use should be evaluated and considered in the “consumer tastes and preferences” criterion of the like product analysis, and in relationship to the public health basis for the measure.

18. In particular, the evidence shows that during the smoking initiation phase, when inexperienced smokers are trying and experimenting with tobacco products, clove and the other banned cigarettes presented an appealing option that facilitated further use of other products. Evidence shows that this pattern applies overwhelmingly to individuals in the age range of 12 to 26, which is when over 95% of regular smokers developed the habit.<sup>18</sup> Therefore, the perception of potential users in this age range are particularly relevant to the health risk at issue.

19. Once an individual becomes an established, habitual smoker, the pattern changes. Established smokers are no longer apt to switch products or experiment. Older adults were not using clove and other banned flavors at the same rate or in the same way as younger people, as older smokers who have established, regular smoking routines were less likely to experiment with different products.

20. In sum, the like product analysis in any particular dispute must be concerned with the differences and characteristics of products that are significant and important within the context of the particular circumstances of the dispute. Comparing consumer preferences and patterns of use – including with respect to potential consumers – is essential to the like product analysis in a dispute involving a measure aimed at reducing smoking initiation among young people.

**93. We note that, in paragraphs 81-82 of its second written submission, Indonesia argues that clove cigarettes are substitutable with menthol and regular cigarettes. We also note that, in paragraph 113 of its second written**

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<sup>17</sup> Indonesia Answer to Q96, para. 30. Indonesia also implicitly acknowledges that the perceptions of “youth” are relevant in its Answer to Q85(b), para. 20, where it notes cigarettes that appeal to youth may present a particular health risk.

<sup>18</sup> Exhibit US-89.

**submission, the United States argues that consumers do not view clove cigarettes as substitutable for tobacco or menthol cigarettes.**

**(a) Both parties: Should the Panel take into account brand loyalty in its examination of whether clove cigarettes are substitutable with menthol and/or regular cigarettes?**

21. The United States agrees that brand loyalty does not play a significant role in the like product analysis in the circumstances of this dispute.

22. However, Indonesia’s answer to Question 93(a) goes on to address a different question – the interchangeability of clove cigarettes with other types of cigarettes. The fact is that while regular smokers have some degree of brand loyal, they also are attached to a particular flavor. There is no evidence of any significant number of smokers switching from regularly smoking cigarettes with a characterizing flavor of tobacco or menthol to smoking cigarettes with clove or any of the other banned flavors as their primary, day-to-day cigarette. Whereas young people in the window of initiation are apt to be enticed by a cigarette with a characterizing flavor such as clove or other spice or fruit, older, established smokers are unlikely to switch to another flavor as their regular cigarette.

23. Moreover, Indonesia’s broader point with respect to substitutability among tobacco, menthol and clove flavored cigarettes is incorrect. Indonesia repeatedly has suggested that it is not important whether regular smokers of tobacco- and menthol- flavored cigarettes *actually* viewed clove cigarettes as interchangeable with their regular cigarettes, but rather it is important whether regular smokers of tobacco and menthol *could* have viewed clove cigarettes as interchangeable with their regular cigarettes, because of their overlapping end-use as a means of obtaining nicotine.<sup>19</sup> However, this contention misapplies an Appellate Body point concerning product end-uses. The Appellate Body has noted in various reports that assessing competition should consider both actual and potential competition where a measure may have affected competition among the products.<sup>20</sup> Such a circumstance is not present here. In fact, prior to section 907(a)(1)(A), clove cigarettes were subject to a lower duty than other cigarettes. In other words, there is no need in this case to consider hypothetical or potential competition among clove and menthol or tobacco cigarettes, because competitive conditions were such that clove cigarettes could have competed with menthol and tobacco among regular users, if they in fact were viewed as interchangeable. Evidence shows that after the stage of initiation, clove cigarettes and the other banned flavors were not used interchangeably with tobacco and menthol cigarettes.

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<sup>19</sup> Indonesia Answer to Q93(a).

<sup>20</sup> See, e.g., *Korea Alcohol (AB)*, para. 121 (“If reliance could be placed only on current instances of substitution, the object and purpose of Article III:2 could be defeated by the protective taxation that the provision aims to prohibit. Past panels have, in fact, acknowledged that consumer behavior might be influenced, in particular, by protectionist internal taxation.”)



**94. Both parties: How did the price of clove cigarettes compare with the price of menthol and regular cigarettes? If possible, please provide data for the period 2000-2009.**

24. In its response to Question 94, Indonesia provides wholesale prices reported by the distributor Kretek International (Exhibit IND-94). For a number of reasons, this data does not show – as Indonesia claims – that the wholesale price of clove cigarettes is approximately the same or lower than the wholesale price of tobacco- and menthol-flavored cigarettes sold in the United States.

25. First, the data referred to in Exhibit IND-94 are limited to specialty tobacco stores, which primarily sell exotic, premium-priced cigarettes, *i.e.*, “speciality” cigarettes. Yet the vast majority of menthol- and tobacco-flavored cigarettes are not sold in specialty stores, but instead in grocery and convenience stores. These outlets sell not only premium brands, but discount generic brands as well.

26. To help provide a proper comparison between clove cigarettes and mainstream cigarettes at the wholesale level of trade, the United States (in Exhibit US-153) is providing data on wholesale prices collected by a U.S. government agency from the years 1993 to 2007. These data demonstrate that the average wholesale price for premium (*i.e.*, not discount) brand cigarettes (the vast majority of which are menthol- and tobacco-flavored cigarettes) in 2006, for example, was US\$2.28, compared to US\$2.84-3.31, as reported in Exhibit IND-94.<sup>21</sup> The average wholesale price including discount brands would be even lower. Kretek International reports that the wholesale price for clove cigarettes in 2006 was US\$3.02.

27. Second, even on its face, Indonesia’s data in Exhibit IND-94 is implausible. The reported *wholesale* prices are nearly the same as the average *retail* prices for menthol and non-menthol for 2008 and 2009.<sup>22</sup> Yet the retail prices – but not wholesale prices – include federal, state and local taxes averaging 20 to 40% of the price per pack in 2008,<sup>23</sup> and 30 to 50% in 2010 (depending on the location of sale).<sup>24</sup> In other words, Exhibit IND-94 must substantially overstate wholesale prices, unless one assumes that retailers are taking a 20-40% loss on every cigarette pack they sell.

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<sup>21</sup> See Wholesale Prices for Cigarettes in the United States, 1993-2007 (containing wholesale price per pack and average retail price per pack from 1993 through 2007 as well as U.S. Department of Agriculture data, upon which it is based), Exhibit US-153.

<sup>22</sup> Exhibit IND-94 shows that the wholesale prices for regular and menthol cigarettes imported by Kretek International in 2008 was \$3.69 and \$3.31 respectively, and \$4.54 and \$4.26 in 2009. Exhibit US-143 shows that the average retail prices for regular and menthol cigarettes in 2008 was \$3.73 and approximately \$5.00 in 2009. Exhibit US-143 at 25-27.

<sup>23</sup> The U.S. Tax Burden on Tobacco, at 176-178, Exhibit US-152.

<sup>24</sup> The U.S. Tax Burden on Tobacco, at 179-182, Exhibit US-152.

**95. Both parties: At paragraph 118 of its second written submission, concerning “less favourable treatment”, the United States submits that the treatment at issue in both Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 is the treatment of “imported products” compared to the treatment of like domestic products.**

**(a) Is it the United States’ position that the Panel should compare the treatment accorded to cigarettes imported from all countries, as opposed to focusing only on the treatment accorded to cigarettes imported from Indonesia?**

**(b) If yes, then please explain the legal basis for that view.**

28. Indonesia may frame its national treatment argument however it chooses. Indonesia’s assertion is incorrect, however, that in evaluating the argument presented by Indonesia, the Panel must ignore the treatment accorded to the products of other Members. To the contrary, as the United States explained at in prior submissions,<sup>25</sup> the treatment accorded to imported products, as a group, compared to the treatment accorded to “like” domestic products is essential in the Panel’s examination of whether the measure at issue provides “less favorable treatment” to imported products.

### **C. ARTICLE 2.2 OF THE TBT AGREEMENT**

**98. Indonesia: At paragraph 275 of its first written submission, the United States argues that the second sentence of Article 2.2 of the TBT Agreement “explains what the first sentence means”, and that “Indonesia misconstrues the meaning of Article 2.2 by implying that whether the measure is an unnecessary obstacle to trade is an independent prong of the analysis to be interpreted separately from the rest of Article 2.2”. How does Indonesia respond?**

29. The United States and Indonesia apparently agree that the operative test for Article 2.2 is contained in the second sentence, and the second sentence alone. As is obvious from Indonesia’s answer, however, the parties continue to disagree as to what that test actually is.<sup>26</sup>

**99. Indonesia: At paragraph 112 of its second written submission, Indonesia indicates that it “concedes in its first written submission that both the protection of human health through the regulation of tobacco products and**

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<sup>25</sup> See, e.g., U.S. Second Opening Statement, paras. 19-20, 48-62; U.S. Second Written Submission paras. 90, 106, 121-125; U.S. Answer to Q52 paras. 113-116.

<sup>26</sup> See, e.g., U.S. Second Opening Statement, paras. 63-66; U.S. Second Written Submission, paras. 145, 174-188.

**reducing youth smoking are legitimate objectives”. However, at paragraph 140 of its second written submission, Indonesia argues that the measure is a “disguised restriction” on international trade, i.e. that it is a “wolf disguised in the sheep’s clothing” of public health. Please clarify your position on the question of whether Section 907(a)(1)(A) has a “legitimate” objective within the meaning of Article 2.2 of the TBT Agreement.**

30. Indonesia contends that section 907(a)(1)(A) is a “disguised restriction” on international trade, inconsistent with Article 2.2. None of the reasons Indonesia offers in its response to Question 99 are valid. As the United States has already responded to these erroneous arguments previously, we will be brief in our response here and respectfully refer the Panel to our more detailed positions on these arguments, as noted below.

31. First, whether the measure makes a “material contribution” to its objective is not a test of Article 2.2.<sup>27</sup> But even accepting Indonesia’s incorrect test, Indonesia’s analysis of whether such a measure makes a “material contribution” to its objective is in itself wrong.<sup>28</sup>

32. Second, the chapeau of Article XX of the GATT 1994 is not contained in TBT Article 2.2. In fact, no obligation relating to discrimination is included in TBT Article 2.2. The prohibition against discrimination is contained in TBT Article 2.1, and Indonesia’s Article 2.2 argument would render Article 2.1 meaningless, a point to which Indonesia has not responded.<sup>29</sup>

33. Finally, nothing in the text, design, architecture, or revealing structure of section 907(a)(1)(A) supports Indonesia’s allegation that the measure did not ban menthol cigarettes simply because a particular U.S. company opposed it.<sup>30</sup> Similarly, the extensive legislative history of the Tobacco Control Act provides no support to Indonesia. Indonesia’s “evidence” on this point – one media report – merely quotes one politician speculating as to his personal view of the legislation.<sup>31</sup> Such “evidence” cannot override an objective derived from the clear text of the measure.

**102. Indonesia: The following questions pertain to Indonesia’s argument that by prohibiting only a “tiny sliver” of the cigarettes smoked by youth, the**

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<sup>27</sup> See U.S. Answer to Q103(a), paras. 78-79.

<sup>28</sup> See U.S. Answer to Q103(b), paras. 82-86.

<sup>29</sup> Compare U.S. Second Submission, paras. 183-188 (explaining that there are at least four reasons why grafting the chapeau of GATT Article XX onto TBT Article 2.2 is without merit), with Indonesia Second Opening Statement, paras. 67-88 (discussing its Article 2.2 claim and not responding to any of these points).

<sup>30</sup> U.S. Second Opening Statement, para. 75.

<sup>31</sup> Likewise, Indonesia is only able to rely on the speculative comments of one politician to support its allegation that section 907(a)(1)(A) was designed to preserve domestic jobs.

**measure cannot make a “material contribution” to the objective of reducing youth smoking, and is therefore more trade-restrictive than necessary to fulfil this objective (Indonesia’s response to question 2, para. 6; Indonesia’s response to question 58, para. 124; Indonesia’s second written submission, paras. 2 and 125).**

- (a) If it is correct that by prohibiting only a “tiny sliver” of the cigarettes smoked by youth the measure cannot make a material contribution to the objective of reducing youth smoking, does it not logically follow that the measure is less trade-restrictive than necessary to fulfil this legitimate objective?**

34. Prior to analyzing Indonesia’s latest formulation of its Article 2.2 claim, it would be useful to review the basic tenets of Indonesia’s claim. First, Indonesia acknowledges that cigarettes are a deadly product. Second, Indonesia argues that eliminating access to certain cigarette products reduces smoking prevalence. In this regard, Indonesia repeatedly argues that banning menthol- and tobacco-flavored cigarettes would reduce smoking more than the ban on clove cigarettes does. In other words, Indonesia argues that the more restrictive the measure, the more benefit it produces. Given this position, it is difficult to understand how Indonesia can claim that any level of restriction on the trade of cigarettes is more trade-restrictive than necessary to fulfill a legitimate objective.<sup>32</sup>

35. Indonesia concludes by contending that “what Article 2.2 requires is that Members adopt measures that combine to achieve the biggest contribution toward the objective with the least restriction on trade.”<sup>33</sup> This proposition is untenable. Indonesia cannot support it based on the text of Article 2.2, and makes no attempt to do so. In addition, as the United States has stated, nothing in Article 2.2 prohibits Members from adopting an incremental approach to regulation. Indonesia is essentially asking this Panel to step into the place of the legislature of a WTO Member and make a *de novo* policy judgment regarding the optimal level of cigarette regulation. Article 2.2 does not place this burden on the WTO dispute settlement system. Rather, the issue to be addressed in dispute settlement is well defined in the text of the TBT Agreement, namely, whether the measure at issue is more trade-restrictive than necessary to fulfill a legitimate objective.

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<sup>32</sup> The United States would further note that it has previously discussed Indonesia’s hypothetical referred to in paragraph 39, *i.e.*, that clove cigarettes were exempted from the ban, in the U.S. Second Written Submission. Describing this hypothetical measure as “Alternative #3,” the United States fully explained why this alternative measure does not establish that section 907(a)(1)(A) is more trade-restrictive than necessary. As discussed in response to Indonesia’s Answers to Q106(b)-(c) and 107, as well as the U.S. Answer to Q107, paras. 89-93, Indonesia’s entire argument of the appeal (or lack thereof) of clove cigarettes to adolescents ultimately depends on the affirmative responses of an exceedingly tiny group – 3 individuals in the 2008 NSDUH and 4 individuals in the 2009 NSDUH, surveys that were not designed to assess the prevalence of clove cigarettes use.

<sup>33</sup> Indonesia Answer to Q102(a), para. 42.

**(b) Would it follow that the United States is correct in asserting that section 907(a)(1)(A) is “not very trade restrictive” (United States’ second written submission, footnote 226)?**

36. In Indonesia’s view, the question of how trade-restrictive the measure is of the products covered by the measure (*i.e.*, all cigarettes) “is not a factor” of the Article 2.2 analysis.<sup>34</sup> Such a position is difficult to understand given that the test of Article 2.2 is whether the measure is more trade-restrictive than necessary to fulfill a legitimate objective. In other words, the drafters explicitly made trade restrictiveness an element of the test to be applied under Article 2.2. Thus, the fact that the challenged measure only affects, at most, five percent of cigarette imports must be, at the very least, relevant to the analysis.<sup>35</sup>

**104. Indonesia: At paragraph 68 of its second written submission, the United States argues that “Indonesia attempts to minimize the public health problem of non-menthol flavored cigarettes by asking the Panel to consider each flavor separately, or at least cloves separately from cherry, chocolate, liquor, and other non-clove flavors” (emphasis added). How does Indonesia respond?**

37. Indonesia requests the Panel to consider clove cigarettes “separately” from other characterizing flavors that are banned under section 907(a)(1)(A), including flavors added to clove cigarettes.<sup>36</sup> This appears to be yet another formulation of Indonesia’s attempt to read section 907(a)(1)(A) as applying exclusively to clove cigarettes. As discussed above, the measure bans a broad range of flavored cigarettes, a point that Indonesia at times acknowledges, but does not appear to accept for the purpose of evaluating its WTO claims.

38. Apart from the evidence that cigarettes with characterizing flavors of nut, fruit, candy, liquor, etc. appeal disproportionately to young people, the United States has established that clove cigarettes not only appeal to young people, but do so disproportionately.<sup>37</sup> As the United States has previously discussed, the evidence shows clove cigarettes present the same particular public health concern as the overall class of banned flavored cigarettes.<sup>38</sup>

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<sup>34</sup> Indonesia Answer to Q102(b), para. 43.

<sup>35</sup> See Exhibit US-100. The United States would further note that when Indonesia refers to US\$15 million in annual exports, Indonesia appears to overstate its clove cigarette exports to the United States. Indonesia Answer to Q102(b), para. 43. As we have stated previously, the United States imported, on average, US\$11.36 million worth of clove cigarettes in the years 2000-2009. See Exhibit US-100.

<sup>36</sup> Indonesia Answer to Q104, para. 44; Indonesia Answer to Q85(b), para. 20.

<sup>37</sup> See U.S. First Written Submission, paras. 54-60 (citing Exhibit US-53 and Klein Article, Exhibit US-51).

<sup>38</sup> See U.S. Second Written Submission, paras. 41-49; Exhibit US-53.

**105. Indonesia: At paragraphs 16 and 17 of its second written submission, Indonesia submits that once the 2009 NYTS raw data are adjusted for certain mistakes, the number of youth smokers who have tried clove cigarettes falls to 8.7 per cent of youth smokers. However, at paragraph 19, Indonesia submits that once the errors in the analysis of the data are corrected, the NYTS shows that clove cigarettes were used by only 1.3 per cent of youth (17 and under) in 2009. Please clarify.**

39. The difference between the two numbers (8.7% vs. 1.3%), as Indonesia acknowledges, is because two slightly different questions are being answered. In both cases, the numerator is the same – adolescents (people age 12-17) who have smoked a clove cigarette in the last month. In the first case, the denominator is the number of adolescents who have smoked a cigarette in the last month (*i.e.*, “smokers”). In the second case, the denominator is the total number of adolescents in the United States. Because relatively few adolescents smoke, the percentage of adolescent smokers who smoke clove cigarettes is much higher than the percentage of adolescents who smoke clove cigarettes.

40. In its response, Indonesia continues to dispute that the National Youth Tobacco Survey (“NYTS”) data show that, in 2009, 11.3% of 12-16 year old smokers had smoked clove cigarettes in the past month and 8.9% of smokers age 17 had done so.<sup>39</sup> Rather, Indonesia contends that, based on its methodology, 8.7% of smokers aged 17 and younger had smoked clove cigarettes in the last month.<sup>40</sup>

41. The United States has previously responded to Indonesia's criticisms, and maintains its view that the NYTS data (which show that, overall, 10.9% of smokers age 12-21 in 2009 had smoked clove cigarettes in the past month) is accurate.<sup>41</sup> The United States would further note that even Indonesia agrees that over 8% of adolescent smokers in 2009 affirmed that they smoked clove cigarettes in the prior month. This figure equates to approximately 280,000 adolescents at any point in time.<sup>42</sup> As clove cigarette use by adolescents has been relatively stable over the past decade,<sup>43</sup> the 280,000 adolescent smokers is continually refreshed as adolescents turn into young adults and new adolescents begin experimenting with clove cigarettes.

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<sup>39</sup> Exhibit US-53, at 2.

<sup>40</sup> Indonesia Answer to Q105, para. 46. Indonesia further asserts that the “more accurate” figure is 0.9% which is the estimate of the number of adolescents clove smokers as a percentage of all adolescents, not just adolescent smokers. *Id.* The United States discusses this approach in relation to Question 106(a).

<sup>41</sup> *See, e.g.*, U.S. Second Opening Statement, paras. 7-16.

<sup>42</sup> Figure is based on the numbers presented in the U.S. First Written Submission, para. 13. Of course, the number of people within the window of initiation using clove cigarettes is much larger as many young adults continue to initiate smoking, as previously described by the United States. *See* U.S. Second Written Submission, paras. 33-40.

<sup>43</sup> Exhibit US-53, at 2-3.

**106. Indonesia: With respect to the National Survey on Drug Use and Health:**

- (a) **At paragraph 6 of its second written submission, Indonesia submits that the Panel “should consider only the rates of use by youth (17 and under) and adults (18 and over)”. The 2002 and 2003 NSDUH surveys contained the question, “During the past 30 days, have you smoked all or part of a clove cigarette?” Exhibit IND-73 indicates that in 2002, 7.3% of smokers under the age of 18 answered yes to this question, whereas only 2.5% of smokers over the age of 18 answered yes to this question. It indicates that in 2003, 5.8% of smokers under the age of 18 answered yes to this question, whereas only 2.2% of smokers over the age of 18 answered yes to this question. Does this support the proposition that, even if the Panel were to agree with Indonesia on the definition of “youth” (i.e. under 18), those under the age of 18 were almost three times more likely than those over the age of 18 to smoke all or part of a clove cigarette?**

42. The United States agrees with the data referred to in Question 106(a). The data from the 2002-2003 NSDUH indicates that – whether one is comparing adolescents to adults or all people within the window of initiation to older adults – the younger age group is more likely to use clove cigarettes than the older age group.

43. Indonesia’s argument in response to this question parallels its response to Question 105.<sup>44</sup> In essence, when calculating the prevalence of use of clove cigarettes, Indonesia argues that the denominator of the calculation should be all individuals in an age group rather than people who have tried a cigarette in the past month.<sup>45</sup> Presumably, one of the principal reasons that Indonesia makes this argument is that the prevalence of the use of clove cigarettes drops when looking at the entire population. This is true, of course, of the use of any type of cigarette.

44. However, Indonesia’s approach is unsound when comparing prevalence rates between populations that have very different rates of use of tobacco products. Indonesia’s approach artificially minimizes “youth” (i.e., adolescent) clove cigarette smoking when compared to adult

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<sup>44</sup> In paragraph 47, Indonesia again states that Indonesia believes that a better question to assess the use of clove cigarettes is to ask people which brand they have smoked “most often” in the past month. The United States has previously explained why this is a poor question to assess the prevalence of use of clove cigarettes. *See, e.g.*, U.S. First Written Submission, paras. 71-76; U.S. First Opening Statement, paras. 18;

<sup>45</sup> Indonesia begins its argument by discussing an “extreme” hypothetical of drawing conclusions from the affirmations of two people; a particularly ironic starting place given that Indonesia’s non-hypothetical statistical analysis ultimately relies on the affirmations of three adolescents in 2008 and four in 2009. *Compare* Indonesia Answer to Q106(a), para. 48, *with* Indonesia Answer to Q106(b), para. 52; *see also* U.S. Answer to Q107, paras. 89-92.

clove smoking as very young adolescents are included in the calculation.<sup>46</sup> Both common sense and the available data tell us that very few young adolescents smoke. Accordingly, by including all twelve and thirteen year olds in the denominator of the prevalence rate calculation, Indonesia minimizes the impact of clove cigarettes as a trainer product for smoking initiation.

45. An example may help illustrate the flaws in Indonesia’s approach. Consider a survey that found that among 10,000 twelve year olds, 100 smoked but that they all smoked clove cigarettes. Indonesia would argue to dismiss the importance of this data because only 1% of twelve year olds were smoking clove cigarettes. A more appropriate way of looking at clove cigarette use – in looking at twelve year olds who have smoked cigarettes – would find that 100% of twelve year olds that have tried cigarettes have smoked clove cigarettes. When trying to understand products used by smokers and making comparisons across age groups (or any groups with very different rates of use), it is important to restrict the analysis to people who are actually smoking. Any other method of analysis could lead one to draw inappropriate conclusions, as the above example demonstrates.<sup>47</sup>

46. Finally, Indonesia’s approach attempts to exaggerate adult use of clove cigarettes by presenting an age range never before used in these panel proceedings, people ages 18-29, and compares their clove use to people ages 12-17. By eliminating adults age 30 and older from its analysis, Indonesia appears to concede that, in fact, clove cigarettes do not appeal to older adults as they do to younger smokers.

- (b) **Page 4 of Exhibit IND-3 indicates “Clove 0.0%” under the heading, “Percent of Youth Smokers (18<) Who Smoked in the Past 30 Days and at Least 100 Cigarettes in their Lifetime by Type of Cigarette: NSDUH 2008”. However, Exhibit IND-73 indicates that in 2008, there were 6,854 individuals under the age of 18 (representing 0.3% of all smokers under the age of 18) who indicated that the brand of cigarettes they smoked most often during the past 30 days was clove. Does this mean that none of these 6,854 individuals had smoked more than 100 cigarettes in their lifetime? Please clarify.**

47. Indonesia concedes that its 2008 analysis of “youth” clove smokers relies on the affirmation of three individuals that they smoked clove cigarettes “most often,” although Indonesia now admits that one of those individuals gave an inconsistent answer. The United States has already explained that no sound statistical methodology would allow conclusions of

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<sup>46</sup> NSDUH surveys people as young as 12 years old.

<sup>47</sup> The United States would like to note that it did, in fact, include information on this very question in Exhibit US-53 (bottom table). The data from the 2002-2003 NSDUH – even when analyzed in a manner to Indonesia’s liking – found that when looking at all people, not just smokers, that 1.8% of people in the window of initiation (12-25) smoked clove flavored cigarettes while just 0.3% of older adults smoked clove flavored cigarettes.



nation-wide prevalence to be drawn from just three individuals in 2008 and four in 2009. The key reason for this is that the analysis is unreliable and unstable as even small changes in the data will cause significant effects on the results of the analysis. This problem is evident in Indonesia's answer to this question, as discussed below.

48. In Indonesia’s Second Written Submission, Indonesia criticized the United States for relying on affirmations of people who had given inconsistent answers in the NYTS and Monitoring the Future (“MTF”), contending that these people’s answers should not be taken into account.<sup>48</sup> The United States has explained that the inclusion of these respondents in the analysis was consistent with statistical methodology used by the U.S. Centers for Disease Control and Prevention (“CDC”), and in any event, excluding these respondents would have almost no discernable impact on the U.S. conclusions given that the numbers of respondents providing inconsistent answers was very small.<sup>49</sup>

49. Yet in its response to Question 106(b), Indonesia acknowledges that one of the three people responding that the brand of cigarettes smoked “most often” was a clove cigarette brand, but that the type of cigarette smoked “most often” was a “light” cigarette.<sup>50</sup> If Indonesia followed a consistent approach, this person would have been excluded from the results, leaving Indonesia with two affirmations and lowering its estimate of “youth” clove smoking in the United States by 33%, a ridiculous result. For this very reason, as the United States has explained, it would be inappropriate to draw conclusions from such a small number of respondents. Where large enough sample sizes were not available, the United States reported that the prevalence of clove smoking was “too low to calculate.” For Indonesia, however, no minimum exists below which one could not draw conclusions from. Indonesia goes as far to claim that it is able to make a reliable estimate of clove cigarette use by people age 65 and older based on a single response.<sup>51</sup>

50. In contrast, the data on the use of clove cigarettes presented by the United States from the NYTS, MTF, and 2002-2003 NSDUH have large sample sizes that can support rigorous statistical analyses.

- (c) **At footnote 5 of its second written submission, Indonesia indicates that “in 2008 and 2009, the NSDUH did not reveal any youth reporting that they smoke a clove brand most often” and that in “2008 and 2009, only 4 youth in the entire survey reported using a clove brand most often”. This does not correspond to the figures contained in Exhibit IND-73. Please clarify.**

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<sup>48</sup> Indonesia Second Written Submission, paras. 13, 24.

<sup>49</sup> U.S. Second Opening Statement, para. 12.

<sup>50</sup> Indonesia Answer to Question 106(b), para. 52.

<sup>51</sup> *Compare* Indonesia Answer to Q107, para. 56, *with* U.S. Answer to Q107, para 97.

51. In its response to Question 106(c), Indonesia confirms the U.S. understanding of the basis for Indonesia’s analysis of “youth” clove smoking – three adolescents in 2008 and four in 2009. These sample sizes are too small to draw meaningful conclusions.

**107. Both parties: Indonesia submits that the NSDUH survey for 2009 shows that there are more than ten times as many smokers over the age of 30 whose regular brand is clove as there are regular clove smokers under 18 (Exhibit IND-74; Indonesia’s second written submission, para. 31). The United States submits that the NSDUH survey for 2002-2003 shows that the percentage of smokers over the age of 26 who smoke clove-flavoured cigarettes is “too low to calculate” (Exhibit US-53, p. 7). What is the source of such a significant discrepancy?**

52. As an initial matter, Indonesia’s conclusion from Exhibit IND-74 is based on Indonesia’s calculation of the *number* of clove cigarette smokers.<sup>52</sup> The conclusions of the United States from Exhibit US-53 are based on the *prevalence* of clove cigarette use among smokers. As such, it is difficult to compare them directly.

53. More broadly, Indonesia simply avoids answering the Panel’s question directly and instead casts aspersions on the data Exhibit US-53 is based on and repeats previously made arguments.

54. Given Indonesia’s questions regarding Exhibit US-53, the United States will clarify what data Exhibit US-53 is based on. Data on page 2, which show that 10-12% of 12-21 year old smokers from 2002-2009 smoked clove cigarettes within the past month, are drawn from the NYTS. Data on page 3, which show that 6-10% of 12th graders (who are typically 17-18 years old) between 2001 and 2009 smoked clove cigarettes in the past year, are drawn from the MTF survey. Data on pages 7 and 8, which show that 5.5% of smokers age 12-25 but just 1.0% of smokers age 26 and older smoked clove cigarettes within the past month, are aggregated data from the 2002 and 2003 NSDUH.<sup>53</sup>

55. In addition, the United States notes that Indonesia’s claim that the United States is “simply incorrect” to believe that prevalence estimates cannot be calculated from very small sample sizes

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<sup>52</sup> Indonesia is using a question that is inappropriate for this task, as has been previously noted.

<sup>53</sup> The United States would also note that it is confused by Indonesia’s belief that, “the clove use data in Exhibit US-53 is outdated because the clove use question was dropped from the survey after 2003.” Indonesia Answer to Q107, para. 58. The United States agrees with Indonesia that the NSDUH did not ask a specific question about clove use after 2003. The United States has never presented data from the NSDUH after 2003, and has in fact repeatedly discussed why it is inappropriate for Indonesia to use data from the 2008 and 2009 NSDUH for this very reason. No data in Exhibit US-53 comes from a NSDUH other than the 2002 and 2003 versions that included specific questions (in fact, a module) about the use of clove cigarettes.

is yet another example of Indonesia’s fundamental misunderstanding of statistics.<sup>54</sup> The United States does not maintain that prevalence estimates based on small sample sizes cannot be calculated mathematically. Rather, and as discussed above, what the United States is saying is that it would be inappropriate to draw any meaningful conclusions from the arithmetic calculation because the small sample sizes introduces significant error into the analysis.<sup>55</sup>

56. The data on clove cigarettes on page 7 of Exhibit US-53 is drawn from the 2002-2003 NSDUH. The column calculating the percentage of smokers who smoke clove cigarettes is done consistent with the statistical methodology used by CDC to calculate smoking prevalence generally. Where samples sizes are large enough to permit accurate estimates of clove smoking rates, the United States has done so.

Age Range	Number of Smokers Who Smoke Clove Cigarettes	Percentage of Smokers Who Smoke Clove Cigarettes
12–25	1,015	5.5%
12–16	129	4.6%
17	109	6.5%
18–19	265	7.7%
20–21	215	5.6%
22–23	174	4.6%
24–25	123	4.2%
>= 26	127	1.0%
26–34	81	Too low to calculate
35–49	41	Too low to calculate
50–64	4	Too low to calculate
>=65	1	Too low to calculate

<sup>54</sup> Indonesia Answer to Q107, para. 56.

<sup>55</sup> For example, as the table below shows, there is sufficient sample size for the United States to estimate the prevalence of use among smokers 26 and older, but not any of the smaller age groups in this range: 26-34, 35-49, 50-64, and 65 and older.

57. Data relied on by Indonesia should have taken into account the extremely small sample sizes used by Indonesia in the calculations. If Indonesia had done so, Indonesia would not have been able to make comparisons between age groups.

58. This point – that Indonesia's preferred data cannot be used to compare prevalence between age groups – can also be illuminated through a statistical tool that many people are familiar with, the confidence interval, which is often used in political polls. Pollsters never survey everyone in a country to determine the actual level of support for a candidate. Instead, a pollster will ask enough people to be able to make a reasonable estimate of the level of support. Thus, a pollster might say that a candidate's level of support is 44% +/- 2%. That means the candidate's support might be as low as 42% or it might be as high as 46%. This is called the confidence interval. The pollster can only conclude that one candidate is ahead of another if the confidence intervals do not overlap. Generally, the more individuals surveyed, the smaller the confidence interval, and the more certain the pollster becomes of the estimate.

59. Applying this tool here demonstrates the different conclusions that each party can make. With regard to the U.S. data, the table on top of Page 7 of Exhibit US-53 shows that 5.5% of smokers age 12-25 smoked clove cigarettes in the past month while 1.0% of smokers age 26 and older smoked clove cigarettes in the past month. When confidence intervals are included, the United States estimates that 5.1%-5.8% of smokers age 12-25 smoked clove cigarettes while 0.8-1.2% of smokers age 26 and older smoke clove cigarettes. The United States is thus confident in concluding that there is a true difference in use between these two groups.<sup>56</sup>

60. In contrast, Indonesia's preferred data to compare the use of clove cigarettes among age groups, drawn from the 2009 NSDUH, have confidence intervals that are so wide that they overlap. When looking at the percentage of smokers age 17 and younger affirming that they smoke clove cigarettes "most often," the confidence interval ranges from 0.00%-0.72%. Among smokers age 18-29, the confidence interval is 0.47-1.02%. And among smokers age 30 and older, the confidence interval ranges from 0.04-0.37%. Since the confidence interval for adolescents overlaps with the other two confidence intervals, no conclusions can be drawn about the relative use of clove cigarettes by adolescents compared to the other age groups.<sup>57</sup>

61. Indonesia's approach to the data is inconsistent with sound statistical methodology, leading Indonesia to make erroneous conclusions. In contrast, the United States has followed

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<sup>56</sup> Given Indonesia's unsupported insistence on comparing adolescents to adults, the United States calculated the rates of clove cigarette use among smokers between these two groups with data from the 2002-2003 NSDUH. If one were just to look at smokers age 12-17, the United States calculated that 4.3-6.2% of that group smokes clove cigarettes, while for smokers age 18 and over the United States calculated that 1.8-2.2% of that age group smokes clove cigarettes. Thus, the United States feels comfortable concluding that there is a significant difference in the use of clove cigarettes between these two groups as well.

<sup>57</sup> The United States would like to emphasize, however, that it is inappropriate to conduct any analysis with sample sizes as small as the ones Indonesia bases its analysis on.

standard methodology used in data analysis and avoids the errors that befall Indonesia’s approach. The U.S. analysis leads to the inevitable conclusion that clove cigarettes not only appeal to younger smokers, but do so disproportionately. This is the case whether one compares people within the window of initiation (12-25) versus older adults (26+) or adolescents (12-17) versus adults (18+).

**108. Both parties: At paragraph 270 of its first written submission, the United States observes that Indonesia “simply lists” a number of alternative measures that the United States could have adopted. At paragraph 164 of its second written submission, the United States submits that Indonesia continues to make “vague references” to dozens of different alternative measures. How much argumentation and evidence must a complaining party present with respect to the proposed alternative measure(s) in order to establish a violation of Article 2.2 of the TBT Agreement?**

62. The United States has fully responded to this question and will only discuss discreet points here.

63. Indonesia claims that it has “presented evidence and argumentation” on the three elements that Indonesia maintains it needs to prove.<sup>58</sup> A review of Indonesia’s first submission, however, reveals that Indonesia in fact has submitted no evidence on any of its suggested alternative measures. In particular, Indonesia has not provided any evidence (or argument for that matter) establishing that measures that allow cigarettes with characterizing flavors of candy, fruit, nut, liquor, etc. to continue to be sold fulfills the objective of section 907(a)(1)(A) at the level the United States considers appropriate. Moreover, and as discussed previously, Indonesia has failed to provide any evidence as to why each of the measures it refers to are “reasonably available.”<sup>59</sup>

**110. Both parties: At paragraph 109 of its first written submission, Indonesia asserts that “New South Wales, Australia, and Singapore have all banned candy-flavored cigarettes, but not clove cigarettes” (emphasis original)**

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<sup>58</sup> Indonesia contends that: “for purposes of TBT Article 2.2 a complaining party must present evidence and argumentation that a proposed alternative: (1) is less trade restrictive than the challenged measure; (2) contributes equally to the realization of the end pursued at the same of level of protection as the challenged measure; and (3) is reasonably available.” The United States has already explained to establish a *prima facie* claim under Article 2.2 Indonesia must prove that a measure exists that: (1) that fulfills the objective of the measure at the level that the Member imposing the measure considers appropriate; (2) is significantly less trade restrictive; and (3) is reasonably available. To prove each of these elements, Indonesia must, consistent with the Appellate Body’s decision in *US – Wool Shirts and Blouses*, “adduce[] evidence sufficient to raise a presumption that what is claimed is true.” *US – Wool Shirts and Blouses (AB)*, p. 14; *see also Australia – Apples (AB)*, para. 366.

<sup>59</sup> Further, measures that are already part of U.S. law are complimentary to section 907(a)(1)(A), and cannot serve as an alternative to section 907(a)(1)(A) that could establish that the challenged measure is more trade-restrictive than necessary to fulfill a legitimate objective. U.S. Answer to Q109(c), para. 110.

**Please provide the Panel with additional information on the number of WTO Members that have banned certain types of flavoured cigarettes, and which types of flavoured cigarettes have been banned.**

64. Measures enacted by other WTO Members to restrict or prohibit flavors in cigarettes are factually relevant as evidence of the growing, worldwide objection to flavors that make cigarettes more appealing. Accordingly, several points should be observed.

65. First, the fact that measures enacted by different Members vary somewhat with respect to exactly which flavors or types of flavors are prohibited and which are permitted illustrates the point that a “one size fits all” approach is not appropriate. Regulators must take account of the specific circumstances of their particular jurisdictions, including the patterns of use of different cigarettes within their borders and the possibility of negative public health consequences of particular bans.

66. Second, none of the flavor bans noted by the United States or Indonesia prohibit all flavors. Accordingly, other WTO Members have recognized that it is appropriate to make regulatory distinctions even among cigarettes with flavors added.

67. Third, while a number of WTO Members have banned certain flavors or types of flavors, no WTO Member has attempted to ban the most heavily used cigarettes within its borders.<sup>60</sup> Members recognize that it is appropriate for the public health to prohibit some flavors without banning all of them, and that there is no contradiction in doing so.

68. Fourth, Indonesia has presented evidence in this dispute of flavor bans that never were enacted and has mischaracterized other measures. The factual record should be set straight.

69. Singapore: Indonesia claims that Singapore bans “candy-flavored” cigarettes not including clove cigarettes.<sup>61</sup> Indonesia presents evidence of proposed legislation in Singapore, which was never adopted.<sup>62</sup> In fact, Singapore's current tobacco laws make no reference to a restriction on flavors in cigarettes. Indonesia's characterization of Singapore's laws is thus inaccurate.

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<sup>60</sup> The United States has noted that a non-WTO Member, Bhutan, attempted a wider cigarette ban. See U.S. Second Written Submission paras. 24, 31.

<sup>61</sup> Indonesia Answer to Q110, para. 65; Indonesia Second Written Submission, para. 109.

<sup>62</sup> Exhibit IND-39.

70. Australian States: Both the United States and Indonesia have noted that different Australian states have banned certain flavors.<sup>63</sup> Quoting the language of the actual measures, the United States notes that the prohibited flavors include those with a “fruity,” “sweet,” or “confectionary”- like character.<sup>64</sup> Indonesia does not mention the actual terms used in the legislation but states that these bans apply only to fruit and “candy-flavored” cigarettes and do not apply to clove cigarettes.<sup>65</sup> However, the term “candy-flavor” never appears in Australian legislation. Moreover, Indonesia has provided no support for its assertion that clove cigarettes are not covered as having “fruity,” “sweet,” or “confectionary”-like character. Rather, Indonesia repeatedly attempts to imply, without basis, a distinction between so-called “candy-flavored” cigarettes and clove cigarettes.

71. Canada: Canada’s legislation prohibits additives that have flavoring properties or enhance the flavor of a cigarette, including “spices, seasonings and herbs.”<sup>66</sup> The measure expressly excludes menthol flavoring from the ban, but not clove flavoring.<sup>67</sup> Indonesia inaccurately characterizes the legislation by stating that it “still permits the manufacture and sale of clove cigarettes.”<sup>68</sup> In addition to referencing the actual legislation, Indonesia also cites to certain regulations. But these regulations are about health information and warning requirements, and were issued several years prior to Canada’s legislation prohibiting certain additives.<sup>69</sup> There is nothing on the record that would substantiate Indonesia’s assertion that the prohibition on additives excludes cigarettes with clove flavor.

72. U.S. States: Indonesia claims that the U.S. states of Maine, Hawaii, Massachusetts, New York, and Minnesota have enacted bans of cigarettes with characterizing flavors excluding menthol and clove.<sup>70</sup> This claim is incorrect. In each case, Indonesia submitted proposed legislation that was never actually enacted.

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<sup>63</sup> U.S. Answer to Q110, para. 112, Exhibit US-149 (citing laws from Australian Capital Territory and South Australia); Indonesia First Written Submission, para. 109 (no citation), Indonesia Answer to Q110, para. 65 (citing to Exhibit IND-98, an un-sourced, undated fact sheet on flavored cigarettes in Australia).

<sup>64</sup> U.S. Answer to Q110, para. 112. Exhibit US-149 (citing laws from Australian Capital Territory and South Australia). *See also* Legal Restrictions on flavors in New South Wales, South Australia, and Tasmania, Exhibit US-154.

<sup>65</sup> Indonesia Answer to Q110, para. 65; Indonesia First Written Submission, para. 109.

<sup>66</sup> Exhibit IND-97 at 10, Schedule of “Prohibited Additives,” number 9.

<sup>67</sup> Exhibit IND-97 at 9, Schedule of “Prohibited Additives,” among the list of excluded additives under number 1 (including menthol, but not clove).

<sup>68</sup> Indonesia Answer to Q110, para. 65.

<sup>69</sup> Exhibit IND-97 at 15-36.

<sup>70</sup> Indonesia Answer to Q15, para. 46.

**E. ARTICLE 12.3 OF THE TBT AGREEMENT**

**113. Indonesia: Article 12.3 of the TBT Agreement refers to the “special” development, financial and trade needs of developing country Members. In its response to question 77, the United States submits that “Indonesia has never identified any needs that are unique to a developing country (as opposed to a developed one)”. How does Indonesia respond?**

73. Indonesia’s interpretation of Article 12.3 would read the term “special” out of the text entirely, as, according to Indonesia, all needs of developing countries are “special” as long as the country has difficulty addressing that concern.

74. Indonesia’s answer exposes the central flaw of Indonesia’s Article 12.3 claim. As discussed, Indonesia is unable to articulate the legal standard the Panel is to use to judge whether the United States has acted consistently with Article 12.3, only saying that “something” more than what the United States did is required.<sup>71</sup> One reason for Indonesia’s difficulty is that by defining its “special” need as “unemployment” – and now as its “limited capacity to respond to unemployment” – Indonesia finds it impossible to describe how the United States could possibly take such a need into account in its consideration and enactment of section 907(a)(1)(A) without arguing that the mere inclusion of clove cigarettes within the ban is inconsistent with Article 12.3. As discussed previously, the United States does not breach Article 12.3 by making the reasonable public health choice of including clove cigarettes within the ban.<sup>72</sup>

75. In addition, Article 12.3 is not a “nullity,” as Indonesia claims, simply because the Member that “takes account” of special needs of a developing country is not required to modify its measure at the request of the developing country. To the contrary, Article 12.3 is one of many provisions contained in the TBT Agreement – and elsewhere in the WTO Agreement – providing that Members should take comments from other Members and from interested parties regarding trade-related measures. These types of provisions have intrinsic value – as reflected by Members’ decisions to include them in the WTO Agreement – even if the Member ultimately adopting or applying the trade-related measure does not accept every suggestion made by another Member or by an interested person.<sup>73</sup>

**114. Indonesia: At paragraph 5 of its first written submission, Indonesia estimates that as many as six million Indonesians are employed directly or indirectly in the manufacture of cigarettes and the growing of tobacco. At paragraph 108**

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<sup>71</sup> See Indonesia Second Submission, para. 157; Indonesia First Opening and Closing Statement, para. 186; see also U.S. Second Opening Statement, para. 106.

<sup>72</sup> U.S. Answer to Q73, paras. 152-154 (citing *EC – Biotech*).

<sup>73</sup> See, e.g., TBT Agreement Article 2.9, 2.10. See also U.S. Second Opening Statement, para. 110.



**of its opening statement at the second substantive meeting, the United States observes that Indonesia has provided no evidence that Section 907(a)(1)(A) has had any impact on employment in Indonesia. Can Indonesia provide an estimate of the impact that Section 907(a)(1)(A) has had on employment in Indonesia?**

76. Indonesia’s contention that “nothing in the text of TBT Article 12.3 requires a Member to demonstrate an economic effect or ‘injury’” is true, but irrelevant. Indonesia’s burden to make this showing does not derive from the text of Article 12.3; rather, it derives from the fact that Indonesia chose to assert specific economic effects, combined with the requirement that the party asserting a fact “is responsible for providing proof thereof.”<sup>74</sup>

77. Moreover, the United States does not agree with Indonesia’s apparent position that a showing of a particular economic effect would necessarily have a special relevance to its claim under Article 12.3. Nowhere is economic effect mentioned in the text of this provision.

78. That said, if Indonesia thinks “economic effects” are relevant to its claim, it remains Indonesia’s burden to prove that section 907(a)(1)(A) caused a “severe adverse impact” domestically, as Indonesia has repeatedly alleged. Indonesia has not met that burden.

79. Indonesia has submitted three letters from domestic stakeholders, which Indonesia claims prove that section 907(a)(1)(A) has caused the loss of 40,000 – 45,000 jobs.<sup>75</sup> These letters, one of which was dated last week, and the other two dated the week prior to that, do no such thing.<sup>76</sup> The letter from an employee union only says that the jobs of 20,000 people are “affected to a certain extent” without every saying what that extent is or how section 907(a)(1)(A) affected those jobs. The Tobacco Farmers Association letter is similarly opaque – declaring that “roughly 20,000 to 30,000 farms have undergone some form of economic loss in terms of revenue as well as employment opportunity due to the decrease in demand for tobacco leaves and cloves supply from the manufacturers.” Of course, these letters provide no underlying proof that what they assert is true.

80. Even more notable is the fact that at no time do any of the letters put forward evidence that section 907(a)(1)(A) caused a reduction in Indonesian cigarette production (instead of the global recession, for example), or that the reduction in production caused the loss in jobs to which these letters allude.

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<sup>74</sup> *US – Wool Shirts and Blouses (AB)*, p. 14.

<sup>75</sup> Indonesia Answer to Q114, para. 70.

<sup>76</sup> See Exhibit IND-100.

81. Simply put, these three letters are not credible evidence of anything, and the Panel should afford them no weight in considering Indonesia's claim under Article 12.3.

**List of Exhibits**

- US-150      Indonesia Cigarette Exports to the United States, 1990-1998
- US-151      U.S. Food and Drug Administration Warning Letter to clovecigaretteshop.com  
(November 3, 2009)
- US-152      The U.S. Tax Burden on Tobacco
- US-153      Wholesale Prices for Cigarettes in the United States, 1993-2007
- US-154      Legal Restrictions on Flavors in New South Wales, South Australia, and Tasmania