

***UNITED STATES – MEASURES AFFECTING
THE PRODUCTION AND SALE OF CLOVE CIGARETTES
(DS406)***

**CLOSING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

December 14, 2010

1. In closing, we would like to focus on a few points which Indonesia contests or tries to minimize, but that we consider central to understanding the dispute.
2. First, the United States is addressing an inherently dangerous product that presents a complex public health challenge for the United States, and indeed for all countries that seek to reduce the harm of tobacco. It is important to bear in mind that the Tobacco Control Act is a measure designed to address this difficult issue and that Section 907(a)(1)(A) is but one provision of this larger measure. Section 907(a)(1)(A) is a public health measure and makes distinctions among products on a public health basis. It addresses the important, yet difficult, issue of youth smoking, and its goal is to reduce such smoking while taking into account the risk of negative consequences arising from a broad ban.
3. We note that Indonesia raises the possibility, but quickly dismisses, that health considerations are relevant here because the United States acknowledges that all cigarettes are harmful. This misses the point. At issue in this dispute are the public health consequences of flavored cigarettes, namely, that flavors (including clove) have a particular appeal to young people and encourage young people to start using, and become addicted to, this harmful product.
4. Second, Indonesia frequently states that Section 907(a)(1)(A) is a ban on clove cigarettes. It is not. It is a ban on class of flavored cigarettes that appeal to youth. Clove is one, but not the only, type of product that does this, and is thus subject to the ban.
5. Indonesia would also have the Panel believe that flavored cigarettes other than clove cigarettes are irrelevant to this dispute. In fact, clove cigarettes bear a number of significant similarities to the other flavored cigarettes banned under Section 907(a)(1)(A). For example, clove cigarettes, like other banned flavors, are marketed with emphasis on the special and pleasurable experience associated with the characterizing flavor, and, as intended, are attractive to novice smokers.
6. Third, we would like to emphasize that the available survey data indicate that clove cigarettes are used by a significant number of younger smokers who are in the “window of initiation” and are used disproportionately by younger smokers when compared to smokers over the age of 26. Across published nation-wide studies, five percent or more of younger smokers smoke clove cigarettes; one percent or less of smokers 26 and older smoke them. This

demographic breakdown makes clove cigarettes similar to other flavored cigarettes and explains why flavored cigarettes are a logical target when seeking to reduce youth smoking.

7. Fourth, Indonesia claims that the entire burden of Section 907(a)(1)(A) fell upon clove cigarettes. This is not the case. The ban negatively affected a range of U.S. cigarettes, and that effect began even before Section 907(a)(1)(A) went into force in 2009. One cannot just look at what was being sold in 2009 to analyze the effect of section 907. Drafts of Section 907(a)(1)(A) were debated in Congress starting in 2004, and the U.S. cigarette companies were well aware of it. In addition, flavored cigarettes heavily marketed by the U.S. cigarette company RJ Reynolds were the subject of a high profile dispute with a number of U.S. states in 2006.

8. As they say, the writing was on the wall for the cigarette companies. The companies recognized that the flavor ban was coming and began to position themselves to address this new reality. It is not uncommon that companies would react to an impending ban before it took effect. Nevertheless, as late as 2008, at least four U.S. cigarette companies were producing at least 26 distinct flavored cigarettes. The Panel may refer to paragraph 51 of the U.S. First Written Submission and Exhibit US-52 for this point.

9. In any event, the true effect of Section 907(a)(1)(A) is that it forced U.S. cigarette companies to give up an entire line of products that were aimed at attracting young people to their products. As has been noted many times, young people, both children and young adults, are the key demographic for cigarette companies trying to maintain and grow their market share. The real answer is that the measure's burden falls heavily on U.S. companies.

10. We conclude by noting that while Indonesia has made broad claims as to the insufficiency of the United States' evidence, it has presented very little of its own evidence to substantiate its claims – even though it is Indonesia, and not the United States, that bears the burden of proof in the first instance. Where Indonesia has presented evidence, as discussed in our written submissions and at this meeting, it's purported evidence is not reliable for the points it purports to support.

11. On behalf of our delegation, I would like to thank the Panel and the Secretariat for their work in this dispute. We look forward to further addressing the issues we have discussed and other questions raised by the Panel in our future submissions.