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

OPENING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

December 13, 2010

1. Mr. Chairman, members of the Panel, and staff of the Secretariat: on behalf of the United States, thank you for your ongoing work in this panel proceeding.

I. INTRODUCTION

2. It is difficult to overstate the public health crisis caused by cigarette smoking, which is the leading cause of preventable death in the United States. Despite years of education and increasing restrictions on the sale, marketing, and advertising of cigarettes, young people continue to start to smoke, replenishing the ranks of regular, lifetime smokers.

3. Cigarette smoking remains pervasive in the United States. An estimated 20% of the U.S. adult population smoke cigarettes, and a similar percentage of youth smoke as well.[1] Smoking is also highly addictive. Of those people who have ever tried smoking, about one-third become daily smokers.[2] Moreover, of the approximately 46 million U.S. adult smokers, studies suggest that at least 18 million of them are trying to quit at any given time, with at most ten percent[3] – and as few as five percent – succeeding.[4] For those that either cannot quit or quit too late, the consequences are dire. Smoking harms every organ in the body and, in the United States alone, 8.5 million people currently suffer from smoking-caused illness and disease and with over 400,000 of them dying as a result every year.[5]

4. At least at this time, a total ban on all cigarettes is unworkable, however. Smoking remains legal in the United States, as it is in all other countries.

5. Cigarettes are a unique product – they are highly addictive, heavily used, harmful to public health, and legal. The combination of these factors creates complex problems for governments charged with protecting the public health, forcing them to walk a fine line between

---

[1] U.S. First Written Submission, paras. 13.

[2] U.S. Surgeon General, *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease, A Report of the Surgeon General*, at 105 (2010) ("2010 U.S. Surgeon General Report"), http://www.surgeongeneral.gov/library/tobaccosmoke/report/index.html. Excerpted at Exhibit US-88.

[3] *See* U.S. First Written Statement, para. 15.

[4] 2010 U.S. Surgeon General Report, at 105. Excerpted at Exhibit US-88.

[5] U.S. First Written Statement, para. 15.

doing good and causing harm. Given this complex situation, it is no surprise that the United States, like many countries, has addressed the issue incrementally – applying limited requirements and prohibitions for particular issues on a measure by measure basis. In the United States, this incremental approach began in 1965 when the United States imposed certain restrictions on labeling and advertising of cigarettes in its first nation-wide anti-smoking law. Federal, state, and local governments have continued, little by little, to address the difficult issue of smoking – and the serious damage to human health it causes – in the 45 years since then.

6. Before turning to the recently enacted U.S. measure at issue in this dispute, we will briefly discuss an anti-smoking development that occurred 12 years ago. In 1998, 40 state attorney generals collectively agreed to drop various lawsuits against major U.S. cigarette companies in exchange for annual payments as well as certain other concessions. The result was known as the Master Settlement Agreement (or "MSA"). In light of the fact that youth are the key demographic that needs to be targeted to reduce the population of smokers,[6] the MSA included commitments by the cigarette companies to cease engaging in marketing and advertising that targets young people.

7. While the MSA's restrictions were positive from a public health perspective, the MSA did not stop cigarette companies from coming up with creative ways to reach youth smokers. Soon thereafter, in fact, certain U.S. companies began to market new flavored products aimed squarely at attracting America's youth to smoking. These flavors included chocolate, watermelon, peppermint, and spice.[7] The emergence of these new flavored products was the result of decades of research. Internal cigarette company documents establish that these products were created to attract U.S. youth to the smoking ranks.[8]

8. We will now turn to the measure at issue in this dispute: the 2009 *Family Smoking Prevention and Tobacco Control Act* (or the "Tobacco Control Act"). The Tobacco Control Act is a comprehensive anti-smoking and public health legislation that imposes numerous restrictions on cigarette companies as well as others. These include requirements for new, more conspicuous warning labels, bans of free samples, and disclosure of cigarette companies' internal research on the dangers their products pose.[9] As U.S. companies dominate the U.S. market (with between 95 and 97.4% market share during the last decade[10]), the heavy burden of these requirements falls almost exclusively on these U.S. companies.

9. All the Tobacco Control Act requirements that limit the sale, marketing, and advertising of cigarettes are origin neutral. These provisions are all intended to protect the public health by

---

[6] U.S. First Written Submission, para. 7. *See also* National Survey on Drug Use and Health ("NSDUH") 2008 Table on Smoking Initiation. Exhibit US-89.

[7] U.S. First Written Submission, paras. 48-51.

[8] U.S. First Written Submission, paras. 43-47.

[9] U.S. First Written Submission, section III.H.1(b).

[10] Cigarettes: Domestic and Imported, 2000-2009, Exhibit US-31.

reducing smoking, particularly smoking of youth, and do not protect U.S. companies from foreign competition or otherwise economically benefit U.S. cigarette companies.

10. As with all aspects of the Tobacco Control Act, the objective of Section 907(a)(1)(A), which bans all cigarettes with a characterizing flavor other than tobacco or menthol, is to protect public life and health. The means by which the measure does this is by reducing youth smoking by eliminating certain products disproportionately used by youth and that are properly considered "trainer" products. (For purposes of convenience, we will refer to the challenged measures as simply "Section 907").

11. 20% of U.S. youth smoke.[11] If this situation is not improved, more than 19 million youth in the United States under the age of 18 will grow up to be addicted adult smokers and more than six million of them will die prematurely from smoking.[12] Given this substantial threat, and the fact that previous declines in youth smoking have stalled in recent years,[13] Section 907 represents an important next step toward addressing the public health concerns associated with smoking.

12. By limiting the scope of the ban to non-tobacco, non menthol-flavored cigarettes, the measures ensures that the ban will not prohibit the sale of a product to which tens of millions of adults are chemically and psychologically addicted. As discussed in the U.S. First Written Submission, such prohibitions would possibly produce negative consequences.[14] Such negative consequences could include immediate negative health impacts on the individual smoker, stress on the U.S. health care system, and an expansion of an already existing black market for cigarettes.[15]

13. Importantly, the objective of Section 907 is not to disadvantage imported cigarettes or benefit domestic ones. It was U.S. products, in fact, that were singled out in the legislative history as examples of the type of products that would be banned.[16] The measure prohibits flavored cigarettes – U.S. and foreign products alike – from being sold in the U.S. market while allowing tobacco and menthol flavored cigarettes – again, U.S. and foreign alike – to continue to be sold in the U.S. market as they always have been.

14. Before the United States discusses its response to Indonesia's legal claims, we want to take a moment to briefly discuss the survey data, which both parties have referred to, but from which they have drawn substantially different conclusions. As discussed in the U.S. First Written Submission, these data show that clove and other non-menthol, non-tobacco flavored

---

[11] U.S. First Written Submission, para. 13.

[12] U.S. First Written Submission, para. 18.

[13] U.S. First Written Submission, para. 16.

[14] U.S. First Written Submission, section III.C.

[15] U.S. First Written Submission, paras. 21-26.

[16] *See* U.S. First Written Submission, para. 234.

cigarettes are used disproportionately by youth.[17] By contrast, menthols are used heavily by both youth and adults.

15. The various surveys differ from each other as to what type of people are being questioned, how they are being questioned, and what questions are being asked. While these differences in methodology result in somewhat different data results, certain trends are apparent when looking at all the evidence, taking into account that not every data source is equally reliable.

16. The relevant survey data as highlighted in Exhibit US-53 establishes that both clove and other non-menthol flavored cigarettes have similar use patterns, with these products being used disproportionately by younger smokers. Thus, the most reliable data indicate that 5.5% of smokers between the age of 12-25 smoke clove cigarettes while only 1% of smokers ages 26 and above do so. Similarly, the age of the smoker is determinative of who smokes other prohibited products, such as chocolate, cherry, and vanilla flavored cigarettes. Based on the available data, almost 12% of smokers age 12-25 smoked these types of flavored products, while only slightly more than 6% of smokers age 26 and above did the same. In terms of absolute numbers, the evidence indicates that relatively few adults smoked clove, chocolate, or other banned flavored cigarettes as their primary cigarette prior to the enactment of the Tobacco Control Act.

17. By contrast, one large study found that approximately a third of smokers age 12-25 smoke menthols while a similar percentage of smokers age 26 and above does as well.[18] In terms of absolute numbers, it is estimated that menthols are smoked by 1.1 million people age 12-17, and 18 million people age 18 and above.

18. Indonesia hinges much of its argument on the 2007 National Survey on Drug Use and Health (or "NSDUH Survey"). However, the 2007 and other more recent editions of the survey, unlike earlier versions, never directly asked about clove cigarette use and thus the data from it drastically underestimated clove smoking in the United States.[19] For this reason, the earlier NSDUH surveys – which do contain specific questions on cloves cigarettes – are far more reliable for evaluating the usage of clove cigarettes. The earlier NSDUH surveys show that clove cigarettes, like those cigarettes flavored with candy, fruit, and other spice flavors, are disproportionately smoked by young people.[20] Further, the studies by the National Youth Tobacco Survey and Monitoring the Future confirm that young people do smoke cloves. To clarify the issue with the Panel, the United States submits Exhibit US-90, which provides the relevant questions asked in the 2002, 2003, and 2007 NSDUH surveys.

---

[17] *See* U.S. First Written Submission, para. section III.F.

[18] Exhibit US-53, at 7 (drawing upon 2002 and 2003 NSDUH data).

[19] *See* U.S. First Written Submission, paras. 70-75.

[20] *See, e.g.*, U.S. Submission, para. 55.

19. In addition to the recent NSDUH data, Indonesia also relies on a survey conducted by Western Watts.[21] Unlike the surveys just discussed, the Western Watts survey does not appear to be a major, well known national survey. As a threshold matter, it is impossible for the United States to understand or evaluate the representativeness of the survey given that Indonesia provides so little information regarding its methodology. Even without such information, the United States notes that the survey appears to be unreliable on its face. For example, while it reports on page 2 that cloves are the first cigarette smoked by *three percent* of "clove smokers," on the very next page the survey reports, that, in fact, *six percent* of clove smokers smoked a clove cigarette first, a difference of 100%.

20. During this debate over statistics, however, we cannot lose sight of the fact these figures represent real people at risk for serious disease and death. As noted before, if current trends in youth smoking are not improved, more than six million current young people in the United States will die prematurely from smoking.[22] But given that millions of youth smoke or at risk for starting to smoke,[23] even small changes in the prevalence of youth smoking translates to tens of thousands of lives saved.

21. In addressing the public health crisis of smoking, the United States, and all other Members considering anti-smoking legislation, must apply measures that walk a fine line so as to produce positive public health results while avoiding negative consequences. The United States emphasizes, however, the fact that the scope of Section 907 involved difficult public health considerations does *not* mean that Section 907 presents difficult issues concerning WTO-consistency. To the contrary, Members are free under the WTO Agreement to make just these types of difficult decisions with regard to public health measures. As we will show, nothing in the WTO Agreement prevents the United States from choosing the scope of a ban on harmful products based on public health considerations.

22. The United States will now address Indonesia's national treatment claims under the *General Agreement on Tariffs and Trade* 1994 and the *Technical Barriers to Trade Agreement*, Indonesia's other TBT claims, as well as the United States' defense under GATT Article XX.

II. LEGAL ARGUMENT

A. Article III:4 of the GATT 1994

23. Article III:4 of the GATT 1994 prohibits Members from adopting measures that treat imports less favorably compared to like domestic products. As the Appellate Body has noted, Article III seeks to prevent Members from applying measures so as to afford protection to

[21] Exhibit IND-26.

[22] U.S. First Written Submission, para. 18.

[23] U.S. First Written Submission, para. 13.

domestic production. On the other hand, Article III does not prevent Members from taking legitimate regulatory measures that draw distinctions among similar products. Indeed, the very purpose of product regulation is to make distinctions among similar products to achieve legitimate objectives, such as health, safety, or consumer protection.

24. Thus, in applying Article III:4 to a measure that makes distinctions among similar products, there are two basic questions. First, are the products so similar that they amount to "like products" for purposes of Article III:4? A relevant factor in this case is the degree to which differences among the regulated products directly relate to the public health objectives of Section 907. In this case, there is no basis for a finding that clove cigarettes are "like products" to tobacco or menthol flavored cigarettes.

25. As we noted, there is also a second, equally important question when evaluating a regulatory measure that makes distinctions among similar products: Even where the products are in such a competitive relationship and are otherwise similar enough so as to amount to "like products," does the measure accord different treatment based on origin? If not, then the measure does not accord less favorable treatment to imported products than to like domestic products for purposes of Article III:4. Rather, all products – domestic and foreign – in the like product category are subject to the same public health criteria.

Like Product Determination

26. The Appellate Body has noted that the determination of likeness under Article III:4 of the GATT 1994 is, fundamentally, a determination about the "nature and extent of a competitive relationship between and among products."[24] In addition, in this case, it is important to take into account two key aspects of the U.S. measure at issue. First, the measure is a technical regulation. Accordingly, the "like product" analysis in this case should be mindful that technical regulations by nature draw distinctions among broadly similar products, and such products may not be "like" due to that given regulatory context. While the TBT Agreement expressly emphasizes the specific context of technical regulations, Article III:4 of the GATT 1994 applies to technical regulations as well and the Appellate Body has emphasized the importance of considering all relevant facts in a like product analysis. The given regulatory context should be factored into the national treatment analysis, including the like product determination.

27. The second factor it is important to take into account in the "like product" analysis is that Section 907 is a public health measure, intended to minimize exposure to starter cigarettes that encourage addiction and a lifetime of smoking. Thus, those product differences that relate to these public health objectives are relevant to the "like product" analysis employed in evaluating Indonesia's claim that Section 907 amounts to a breach of Article III:4.

[24] U.S. First Written Submission, para. 156 (quoting *EC – Asbestos (AB)*, para. 98).

28. Past GATT and WTO reports have conducted a like product analysis based on four separate "like product" criteria, which the United States uses here as well. The United States would recall that the Appellate Body has considered that these criteria are just a tool in examining the nature and extent of a competitive relationship between and among products, and in this case, in examining the relationship of product characteristics to the health objective at issue.

29. The United States has shown in its first submission that clove cigarettes are different from tobacco and menthol in nearly every relevant respect: in terms of physical composition, consumer tastes and habits, and end-uses. Also, the United States notes that clove cigarettes and other cigarettes fall under separate tariff classifications.

30. First, with respect to physical composition, clove cigarettes have different physical composition than tobacco or menthol cigarettes, and these physical differences are directly related to how consumers differentiate them and are directly related to their different impact upon the public heath.

31. Most fundamentally, clove buds comprise roughly 40% of a clove cigarette. In contrast, the menthol- and tobacco-flavored cigarettes that Indonesia claims are "like products" contain no cloves at all. The clove buds contained only in clove cigarettes have two key implications for public health. First, the clove buds give the clove cigarettes a unique, sweet flavor that is especially attractive to young smokers. As we stated at the outset, this special attraction is borne out by the survey data. Second, clove buds not only provide a unique flavor, but they also contain an anesthetic, known as eugonol. Neither tobacco nor menthol contain eugonol. The eugenol creates a numbing effect which also makes clove cigarettes especially attractive to youth smokers.

32. In addition to the cloves themselves, clove cigarettes also have other physical differences from menthol- or tobacco-flavored cigarettes. Clove cigarettes contain the harmful chemical coumarin, which is no longer found other domestic cigarettes. Clove cigarettes also contain a special "sauce," which clove cigarette manufacturers claim adds to a "richer" and "fruitier" taste, sweet scented aroma, and pleasant after-taste.

33. In sum, clove cigarettes are physically different from other cigarettes; are designed to be distinguished by consumers based on these physical differences; and indeed consumers choose to smoke them because of these unique physical properties.

34. Second, with respect to consumer habits and tastes, the Appellate Body has noted that where, as here, physical properties are dissimilar, a "high burden" is placed on the complaining Member to show that all the evidence, taken together, demonstrates that products are "like."[25]

[25] U.S. First Written Submission, para. 177 (quoting *EC – Asbestos (AB)*, paras. 118, 136).

The Appellate Body also has emphasized that in such cases where physical properties are different, an examination of consumer habits and tastes is indispensible to determining likeness.[26] Indonesia has not met its evidentiary burden on this important factor.

35. Available evidence on the use of clove cigarettes in the United States demonstrates that consumers' habits and tastes with respect to clove cigarettes and tobacco or menthol cigarettes are markedly different, and that in fact these cigarettes are not viewed as interchangeable and do not compete. Moreover, the differences in consumer tastes and habits are directly relevant to the public health policy which underlies the product distinctions drawn under Section 907.

36. Clove cigarettes were smoked in the United States by young, experimental smokers. Clove cigarettes were smoked by less than approximately six percent of smokers in the United States, and primarily by smokers ranging in age from adolescent to young adult (age 25); less than one percent of American smokers over age 26 smoked clove cigarettes, and even then only occasionally.[27] Clove cigarettes were smoked by a very small percentage of the U.S. population, and this use dramatically skewed to young people.

37. In contrast, tobacco and menthol cigarettes are the cigarette of choice by nearly all of the 46 million regular adult smokers in the United States. Approximately one-third of adult smokers smoke menthol cigarettes as their main cigarette.

38. Indonesia has not borne its burden to shown that clove cigarettes sought to compete with tobacco or menthol cigarettes in terms of distribution channels, shelf space, or market share. Rather, clove cigarettes were sold in specialty shops and specifically were marketed as a special "indulgence." The fact that almost exclusively young people chose to smoke them strongly suggests that they were viewed, as intended, as an enticing indulgence for young people many of whom would become hooked on nicotine. With respect to established smokers, evidence suggests that smokers who reported smoking clove cigarettes tended not to view them as a substitute for their "regular," daily tobacco or menthol cigarettes.

39. Third, with respect to end-uses, it is worth noting that different cigarettes serve different end-uses in varying degrees. Cigarettes are used to smoke tobacco, and to sustain an addiction to nicotine. While all cigarettes contain nicotine and are addictive, survey evidence shows that tobacco cigarettes and menthol cigarettes (and not clove cigarettes) are used on a regular basis by a vast majority of smokers in the United States. Cigarettes also serve the end-use of creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke. Clove cigarette manufacturers purposefully design and market clove cigarettes based on the unique experience created. Clove cigarettes are intended to create a more appealing and indulgent taste and aromatic experience as compared to tobacco or menthol cigarettes.

---

[26] U.S. First Written Submission, para. 177 (quoting *EC – Asbestos (AB)*, para. 139).

[27] *See* U.S. First Submission section III.F and Exhibit US-53, pp. 7-10.

40. On the point of tariff classification, as the United States noted in its written submission, it is not apparent how the tariff classification is particularly relevant to evaluating "like product" in the context of a public health measure. Nonetheless, the United States cannot leave unrebutted Indonesia's claim that clove cigarettes and other cigarettes have the same tariff classification. Clove cigarettes and other cigarettes are treated differently at the 8-digit level. Under the U.S. GATT 1994 Schedule, which is an integral part of the WTO Agreement, clove cigarettes and other cigarettes are included in different 8-digit tariff subheadings. In fact, the U.S. binding for clove cigarettes is at a lower duty rate by roughly one-half, both by weight and by value, than the binding for other cigarettes. Exhibit US-91 is the relevant section of the U.S. Schedule XX to the GATT 1994, showing the lower rate for clove cigarettes (2402.20.10) than for "other" cigarettes (2402.20.80 and 2402.20.90).

41. In summary, Indonesia bears the burden of adducing evidence to show that clove cigarettes are "like" tobacco and menthol cigarettes and has failed to do so. Indonesia points to general similarities that do not assist in determining whether clove cigarettes compete with "regular" tobacco or menthol cigarettes. Indonesia also ignores relevant differences directly related to the different public health objective of Section 907. Clove cigarettes' unique product characteristics, including their special flavor and their association with indulgence and special occasions, are touted by advertisers and are directly relate to cloves' status on the market as a special or different cigarette, which was especially attractive to American youth. These unique product characteristics also directly relate to the public health criteria under Section 907, which removes cigarettes that are especially appealing to youth but not smoked heavily by adults.

Determination of Less Favorable Treatment

42. Indonesia fails to establish that Section 907 affords less favorable treatment to imported cigarettes. In particular, Indonesia fails to demonstrate that Section 907 accords different treatment to imported cigarettes based on their national origin. In fact, Section 907 differentiates among cigarettes based on public health criteria – not based on their national origin.

43. Article III:4 of the GATT 1994 requires Members to accord treatment no less favorable to imported products than that accorded to like domestic products. It is useful to recall that Article III:1 of the GATT 1994 states that internal taxes and regulatory measures "should not be applied to imported or domestic products so as to afford protection to domestic production."[28] The Appellate Body has explained that Article III:1 sets out a general principle that informs the rest of Article III of the GATT 1994 and that "[t]he broad and fundamental purpose of Article III is to avoid protectionism in the application of internal taxes and regulatory measures."[29] This guiding principle supports that Article III:4 should <u>not</u> be interpreted to prohibit measures that may result

[28] GATT 1994, Article III:1; *see also* U.S. First Written Submission, para. 197 (quoting *EC – Asbestos*, para. 97).

[29] U.S. First Written Submission, para. 197 (quoting *EC – Asbestos*, para. 97).

in some imported products being treated differently than some domestic like products where the basis for the different treatment is not national origin.

44. In this case, Section 907 is origin neutral, both facially and in fact. The measure does not differentiate among products based on their national origin. Clove cigarettes are banned because they fall into a category of cigarettes – along with other U.S-produced cigarettes – which poses a particular danger to the public health and which can be appropriately addressed by a ban.

45. It is Indonesia's burden to show that Section 907 differentiates among products based on their national origin. Indonesia has not met this burden. First, Indonesia does not appear to allege that Section 907 discriminates on its face. Second, Indonesia has not adduced facts to demonstrate that Section 907 – while origin-neutral on its face – in fact discriminates against imported cigarettes. The United States' ban on cigarettes with a characterizing flavor is not a proxy to discriminate against Indonesian cigarettes, and Indonesia has not adduced evidence to show otherwise.

46. One indicator of when a facially neutral measure in fact accords different treatment based on origin is when seemingly origin-neutral regulatory criteria apply almost exclusively to imported products and not to similar domestic products. For example, in *Mexico – Soft Drinks*, the panel considered it relevant that Mexico's higher tax measures, which were facially neutral, in fact applied almost exclusively to imported products.[30] In that dispute, the panel found that by applying a 20 percent tax on soft drinks that contained high-fructose corn syrup – a product that was almost exclusively an imported product – while applying no tax on soft drinks that contained cane sugar – a product that was solely domestically produced – Mexico was in fact applying a 20 percent tax on the use of imported sweeteners and no tax on the use of like domestic sweeteners.[31] In other words, the seemingly origin-neutral criteria for whether a product was subject to a tax or not was in fact a proxy to single out imports. Notably, in that case, Mexico did not refute that its tax measures were designed to afford protection to domestic production and attempted unsuccessfully to justify them under Article XX of the GATT 1994.

47. The circumstances here are different. Section 907 does not apply almost exclusively to Indonesian cigarettes as compared to domestic cigarettes, but rather applies to groups of both imported and domestic cigarettes. The result of the U.S. ban on characterizing flavors other than tobacco or menthol is that some types of imported and domestic cigarettes are prohibited from the U.S. market, and some types of imported and domestic cigarettes are allowed on the U.S. market. For example, on one hand, Section 907 does not prohibit imports such as tobacco-flavored Dunhill cigarettes from Britain and does not prohibit tobacco or menthol flavored Camel or Kool cigarettes from the United States. On the other hand, Section 907 does prohibit imports such as flavored "bidi" cigarettes from India and other flavored brands from Belgium, as

[30] *Mexico – Soft Drinks (Panel)*, para. 8.118.

[31] *Mexico – Soft Drinks (Panel)*, para. 8118.

well as exotically flavored product lines made by U.S. manufacturers. In other words, by banning cigarettes with characterizing flavors other than tobacco and menthol, Section 907 is not in fact singling out imported products, because both imported and domestic cigarettes are prohibited and both imported and domestic products are allowed.

48. The field of U.S. products to which the ban on characterizing flavors applies is significant. While the United States produced very few clove cigarettes, the U.S. industry invested significantly in developing other-flavored cigarettes which now are banned under Section 907. Section 907 prevents products from entering the U.S. market that U.S. manufacturers spent decades developing specifically for U.S. consumers. As U.S. industry documents reveal, domestic cigarette manufacturers developed product lines of flavored cigarettes with a view to recruiting a new generation of smokers in America. This business opportunity in which they heavily invested is foreclosed by Section 907.

49. Indonesia's claim that U.S. products were not affected by the ban because there were few U.S. flavored cigarettes on the market at the time the ban went into force is incorrect. The stated intentions of U.S. tobacco companies was to sell flavored cigarettes,[32] leaving little doubt that, given the opportunity, they would do so. A federal ban was necessary to prevent U.S. manufacturers from putting flavored cigarette brands on the market. The 2006 Consent Agreement, which settled litigation between a number of U.S. states and the U.S. cigarette company RJ Reynolds, was an insufficient tool to keep these cigarettes off the market. The agreement only required that RJ Reynolds – and not any other company – remove certain specified flavored cigarette brands from the market. It did not preclude RJ Reynolds from marketing and selling other flavored brands, and it did not apply to other cigarette manufacturers. Section 907 – and not any preceding agreements between U.S. states and cigarette companies – blocked these U.S. flavored brands from the U.S. market.

50. Moreover, while the 2006 Consent Agreement may have had some "chilling effect" on business decisions of other producers of flavored cigarettes, it is just as likely that the anticipated federal ban affected producers' product and business decisions. Language for the ban first appeared in draft legislation in 2004. It is not uncommon that an industry would make certain business decisions in anticipation of legislation. It should be noted that Indonesian manufacturers also were aware that the ban was likely, participated in the legislative process, and were on notice, as were other foreign and U.S. producers.

51. The panel's approach in *EC – Biotech* provides helpful guidance. Without addressing the question of "like products,"[33] the panel in *EC – Biotech* explained that even if it were true that the European Communities prohibited the marketing of imported biotech products but not corresponding domestic non-biotech products, "this would not be sufficient, in and of itself, to

[32] *See* Exhibit US-40 and Exhibit US-65.

[33] *EC – Biotech (Panel)*, paras. 7.2511, 7.2516.

raise a presumption" that the European Communities "accorded less favorable treatment to the group of like *imported* products than to the group of like *domestic* products"[34] because it was not self-evident that the alleged less favorable treatment was explained by the foreign origin of these products.[35] The *EC – Biotech* panel recognized that the intention of Article III:4 is to avoid regulatory measures that are a proxy for protectionism, and not to prevent Members from adopting regulations that make distinctions among similar products that are not based on origin.

52. As we just discussed, Section 907 bans both imported and domestic products – and the ban on domestic products is more than merely symbolic. However, even in cases where a measure treats most imports differently than most similar domestic products, such different treatment does not necessarily constitute less favorable treatment. It is important to recall that the essence of the "less favorable treatment" question is whether a measure is protectionist. Returning to the guiding principle of GATT Article III that measures should not be applied so as to afford protection to domestic production, the Appellate Body recognized in *Chile – Alcoholic Beverages* that a determination of protective application must consider the "measure's purposes, objectively manifested in the design, architecture, and structure of the measure" and possible countervailing explanations from the responding Member.[36] In *Chile – Alcoholic Beverages*, the Appellate Body concluded that the alcohol tax at issue was inconsistent with the broader regulatory context and that Chile had not offered a countervailing explanation – for example, how the structure of the measure had a clear relationship to the measure's stated purpose – to the panel to rebut the apparent "protective application" of the alcohol tax.[37]

53. In this case, the measure at issue is consistent with, and an integrated part of, broader U.S. tobacco legislation, and the United States has a compelling explanation for why clove cigarettes fall under a ban that does not apply to other cigarettes. Section 907 is consistent with the manifest design, architecture and structure of the Tobacco Control Act, which focuses in every respect upon curtailing the ability of tobacco producers to expand the cigarette market and on limiting the harms of tobacco products. There is a clear relationship between the structure of Section 907 and the broader purpose of the Tobacco Control Act to reduce youth smoking while avoiding negative public health consequences.

54. The Tobacco Control Act in general, and Section 907 in particular, strike a number of balances intended to achieve the objective of the legislation, including taking into account the reality that tens of millions of adults are addicted to cigarettes. Consistent with other provisions in the Act – such as the allowance of cigarette vending machines in adult-only venues and the allowance that tobacco products must be permitted to contain at least some nicotine – Section

---

[34] *EC – Biotech (Panel)*, para. 7.2514 (emphasis in original).

[35] *EC – Biotech (Panel)*, para. 7.2514.

[36] *Chile – Alcoholic Beverages (AB)*, paras. 71.

[37] *Chile – Alcoholic Beverages (AB)*, paras. 71.

907 balances the objective of reducing the number of new initiates without denying adults access to products to which they are addicted.

55. It is simply not the case that the United States' ban on cigarettes with a characterizing flavor other than tobacco or menthol discriminates against imported cigarettes. To briefly recount the reasons, first, Section 907 is facially neutral and based on public health criteria. Second, Section 907 is neutral in fact, and Indonesia has not demonstrated that any factors indicative of *de facto* discrimination are at play. For example, the ban does not apply only to imports but actually applies both to U.S. and imported cigarettes. In addition, the ban is not applied so as to afford protection to domestic industry, but to meet a public health objective, and the structure of the ban is consistent with its objective and with the broader context of the Tobacco Control Act.

56. We note that Indonesia has based its less favorable treatment conclusion on the assertion that Section 907 "creates unequal conditions of competition" by banning one product and not other like products.[38] This claim should be rejected for two reasons. First, Indonesia has not clarified exactly which cigarettes are being compared, and has not proven that clove cigarettes actually competed with the cigarettes that are not affected by the ban. Second, consistent with the Appellate Body's reasoning in *Dominican Republic – Cigarettes*, the fact that the application of a regulatory distinction may affect the competitive relationship between imported and domestic products does not render the measure a breach of a Member's national treatment obligations. GATT Article III:4 protects Members from detrimental effects resulting from discrimination, not from legitimate regulatory measures which often will impact differently upon different products. Accordingly, Indonesia has not met its burden to show that detrimental effects on Indonesian products resulting from Section 907 are the result of less favorable treatment.

57. To conclude the national treatment analysis under Article III:4 of the GATT 1994, we emphasize that "like product" and "less favorable treatment" determinations should be made on a case-by-case basis involving careful assessment of the particular circumstances. The heart of the analysis in this case is whether Section 907 regulates based on legitimate product distinctions or discriminates among products based on national origin. It is clear that Section 907 intends to reduce youth smoking while avoiding negative public health consequences, and the measure distinguishes among cigarette products on that basis.

B. Article 2.1 of the TBT Agreement

58. The national treatment obligation contained in Article 2.1 of the TBT Agreement should be interpreted similarly to Article III:4 of the GATT 1994. The United States agrees with the

[38] Indonesia First Written Submission, paras. 66-68.

European Union's observation that the each Agreement provides context for the other, and the analyses developed under Article III are relevant to an interpretation of Article 2.1.[39]

59. In its Written Submission, the United States notes the context provided by the TBT Agreement in evaluating the national treatment matters at issue in this dispute. First, the United States noted that the Preamble to the TBT Agreement provides that the TBT Agreement should be interpreted consistently with Members' right to take measures to protect the public health. In particular, it confirms that the Members' obligation under Article 2.1 to provide no less favorable treatment should not be interpreted to constrain Members from adopting legitimate policy measures, including to protect public health. Thus, like Article III:4, Article 2.1 does not prohibit Members from taking measures that may result in some imported products being treated differently than some like domestic products when the basis for the different treatment is to meet a legitimate policy objective such as protecting the public health and not based on origin.

60. Second, the Panel should give weight in its interpretation of Article 2.1 to the fact that the measure at issue in this dispute is a technical regulation. The TBT Agreement recognizes Members' right to adopt technical regulations subject to certain disciplines. As previously noted, technical regulations, by their very nature, differentiate among, and establish criteria for, broadly similar products. Such product distinctions might render generally similar products "unlike" in some circumstances, and such product distinctions may often impact generally similar products differently. These considerations specifically arises from the text of the Article 2.1 of the TBT Agreement. However, GATT Article III:4 applies to technical regulations as well, and an analysis under that provision equally should consider the nature of technical regulations.

61. For the reasons detailed above, the United States respectfully submits that the Panel should reject Indonesia's national treatment claims under Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement.

C. Section 907 Is Not Inconsistent With TBT Article 2.2

62. As is the case for Indonesia's national treatment claims, Indonesia has failed to offer sufficient evidence to establish each element of its TBT Article 2.2 claim. Specifically, Indonesia has not produced evidence that establishes that an alternative measure: is reasonably available; fulfills the challenged measure's legitimate objective and is significantly less trade restrictive than Section 907.

1. Section 907 Has the Legitimate Objective of Protecting Public Health

63. The objective of the Tobacco Control Act is to protect the public health by reducing smoking, particularly youth smoking. The means by which Section 907 fulfills the legitimate objective is to ban "starter" or "trainer" products that are disproportionately used by youth while

[39] European Union Third Party Written Submission, para. 7.

taking into account the negative consequences that could result from banning products to which tens of millions of adults are chemically and psychologically addicted.[40]

64. The text of Section 907 is straightforward. The measure bans the sale of cigarettes that have a "characterizing flavor" except if that characterizing flavor is tobacco or menthol. Accordingly, all cigarettes that have a characterizing flavor other than tobacco or menthol, U.S. and foreign alike, are banned.

65. Section 907 addresses the objective of reducing the rate of young people becoming smokers by eliminating certain products from the market place that have particular appeal to young people. As discussed earlier, the facts bear this out. The cigarettes banned under Section 907 – including clove cigarettes – appeal disproportionately to youth, and can be properly thought of as "starter" or "trainer" products for the novice or potential smoker. The use rates for menthol cigarettes are much different, however. Menthols are smoked by roughly a third of youth smokers and a similar percentage of adult smokers, translating into an estimated 18 million menthol smokers age 18 and over. Even more adults smoke tobacco-flavored cigarettes.

66. As we noted earlier, the measure's allowance that tobacco and menthol-flavored cigarettes continue to be sold limits the scope of the ban and ensures that the ban that reduces youth smoking be appropriate for the protection of the public health by taking into account the risk of negative consequences that could result from banning a product to which tens of millions of adults are addicted. Such negative consequences could include a negative impact on the health on adult smokers, a negative impact on the U.S. health care system, and an expansion of an already existing black market for cigarettes, which in turn could result in less safe cigarettes, more youth access to cigarettes, and increases in crime.[41] There is already a sizeable black market for cigarettes in the United States with approximately $2 billion dollars in federal excise tax revenue going uncollected annually.[42]

67. The legislative history of Section 907 confirms that this was in fact what Congress intended. The House of Representatives Report, which provides the most comprehensive explanation of Section 907, states that the provision is "*intended* to prohibit the manufacture and sale of cigarettes with certain 'characterizing flavors' *that appeal to youth*."[43] However, Congress specifically recognized that the prohibition of different products could have different negative health consequences. In particular, Congress recognized that the prohibition of non-menthol flavored cigarettes will not "result in a large number of heavily addicted smokers facing the sudden withdrawal of the products to which they are addicted, with unknown consequences for the health of the individual users or the overall population."[44] Just the opposite may be true for a

[40] U.S. First Written Submission, paras. 226.

[41] U.S. First Written Submission, para. 23-25.

[42] U.S. First Written Submission, para. 24.

[43] U.S. First Written Submission, para. 234 (quoting the HR Rep't, at 37 (emphasis added)).

[44] U.S. First Written Submission, para. 236 (quoting the HR Rep't, at 38 (emphasis added)).

heavily used product, such as tobacco or menthol-flavored cigarettes, which may create negative consequences to both the individual smoker and the U.S. health care system, as well as lead to an expansion of the black market.[45]

2. Indonesia Has Not Established That An Alternative Measure Exists That Satisfies the Elements of TBT Article 2.2

68. Indonesia has not met its burden of proving that an alternative measure exists that is reasonably available, fulfills Section 907's legitimate public health objective, and is significantly less trade restrictive than the challenged measure.[46] A complaining Member does not discharge its burden of establishing a *prima facie* case by simply making reference to alternative measures – it must adduce by way of sufficient evidence that the alternative measure satisfies each element of the claim.

69. Indonesia has not satisfied this burden. Rather, Indonesia simply refers to various measures, and provides no evidence that the referenced measures satisfies any of the elements of the claim. The United States notes that many of these measures are already in effect in U.S. law, and none of the measures appear to adequately protect youth from this same class of flavored cigarettes, which presents a unique health concern. We note that the Appellate Body, in the context of the SPS Article 5.6, the analogous provision to TBT Article 2.2, recently re-affirmed that "it is for the complainant to establish a *prima facie* case that there is an alternative measure that satisfies" all the elements of the claim.[47] Indonesia has not done so, and as such, has not established that Section 907 is inconsistent with Article 2.2.

3. GATT 1994 Article XX Does Not Inform as to the Meaning of TBT Article 2.2

70. The United States also notes that the proper interpretation of Article 2.2 flows from the text of the article itself, read in its context, taking into account the circumstances surrounding the conclusion of that article. We disagree with Indonesia's attempt to rely on the interpretation of GATT Article XX(b) to inform as to the meaning of TBT Article 2.2. As stated in the U.S. First Written Submission, the term "necessary" is used in GATT Article XX(b) in a different context than in TBT Article 2.2, and it would not be appropriate to use the same GATT XX(b) interpretation for TBT Article 2.2.[48]

D. Indonesia Has Not Shown That the United States Acted Inconsistently With Any Other TBT Article

---

[45] U.S. First Written Submission, para. 236 (quoting the HR Rep't, at 38).

[46] U.S. First Written Submission, para. 258.

[47] *Australia – Apples (AB)*, para. 360.

[48] U.S. First Written Submission, paras. 266-268.

71. As the United States fully explained in its First Written Submission, Indonesia has not established *prima facie* claims for any of its other claims under the TBT Agreement. The United States refers the Panel to its First Written Submission and will not repeat those arguments in this Statement.

E. Section 907 Is Justified Under GATT Article XX

72. As the United States has discussed, Indonesia has failed to establish that Section 907 breaches U.S. obligations under GATT Article III:4. Should the Panel reach the issue of GATT exceptions, however, the application of Section 907 would be justified under GATT Article XX(b) as it both falls under the scope of the subpart (b) exception and satisfies the requirements of the chapeau.

1. Section 907 Falls Under the Scope of GATT Article XX(b)

73. Section 907 was enacted in order to protect human life and health from the risk posed by smoking and therefore falls within the range of policies referenced in subpart (b).

74. Further, the measure is *necessary* to protect human life and health as it ensures that products that are predominantly used as "starter" products by youth, leading to years of addiction, health problems, and possibly death, cannot be sold in the United States at all.

75. In determining the meaning of the word "necessary," the Panel should apply the ordinary meaning of the term, which, according to the Appellate Body in *Korea – Beef*, normally denotes something that "cannot be dispensed with or done without, requisite, essential, needful." The Appellate Body further noted that the term is susceptible to different interpretations giving rise to meanings ranging from "mere convenience" to "indispensable." Given the grave danger posed by youth smoking and the fact that youth smoking rates have stubbornly remained high, Section 907's prohibition of certain products that are best described as starter cigarettes is in fact *necessary* to protect human life and health.

76. In the circumstances of this dispute, the United States submits that no further analysis is needed to show that Section 907 is necessary to protect human life and health. At the same time, some prior reports have undertaken additional analytical steps in considering whether a measure is "necessary" under Article XX; those steps would further confirm that the U.S. measure falls within the scope of Article XX. First, the interest at stake here – the protection of human life and health – is fundamental. Second, there is a strong, genuine connection between the measure and the policy goal it is intended to serve as it directly contributes to the protection of human life and health by ensuring products that present a particular risk to youths cannot be sold on the market. Third, both the danger posed by youth smoking and the fact that youth smoking rates have remained unacceptably high despite the numerous restrictions already in place *supports* rather than *undermines* the necessariness of the ban.

77. For these reasons Section 907 falls under the scope of the Article XX(b) exception.

2. Section 907 Satisfies the Requirements of the GATT Article XX Chapeau

78. Section 907 also satisfies the requirements of the GATT Article XX chapeau because it is neither a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, nor a disguised restriction on international trade.

79. First, Section 907 does not provide differential treatment between countries. The rules that apply to cigarettes manufactured in the United States apply equally to the rules that apply to the cigarettes manufactured in Indonesia and every other Member. And even if the measure could be found to discriminate, no such conduct could not be considered "arbitrary" or "unjustified" given that the measure was tailored to address a specific public health risk.

80. Second, Section 907 is not a disguised restriction on international trade. In particular, and as discussed earlier, the measure has no protectionist purpose. Just the opposite is true – the Tobacco Control Act generally, and Section 907 specifically, *targets*, rather than protects, U.S. companies. While Section 907 bans Indonesia's clove cigarettes, it also prohibits U.S. companies from marketing an entire product line that they have spent decades developing. The fact that foreign companies make products that pose the same risks and were likewise affected by the measure cannot make the measure a protectionist one. And this one is not.

81. As such, Section 907 satisfies Article XX's chapeau and, given that it falls within the scope of subpart (b), is justified under GATT Article XX(b).

III. CONCLUSION

82. Mr. Chairman, members of the Panel, this concludes our opening statement. We would be pleased to respond to any questions you may have.

LIST OF EXHIBITS

US-88	U.S. Surgeon General, *How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease, A Report of the Surgeon General* (2010) http://www.surgeongeneral.gov/library/tobaccosmoke/report/index.html.
US-89	NSDUH 2008 Table on Smoking Initiation
US-90	Questions Drawn from the 2002, 2003, and 2007 NSDUH Surveys
US-91	The U.S. Schedule XX to the GATT 1994