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

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

FEBRUARY 23, 2011

1. Given the threat posed by smoking, and the fact that cigarettes are as addictive as heroin or cocaine, it is *self-evident* that designing the product to be more appealing, such as adding pungently sweet flavorings of candy, fruit, or clove, is *harm enhancing*. Thus, not surprisingly, the public health scholarship, the World Health Organization, and the U.S. survey data all support the conclusion that these flavorings represent a particularly serious public health concern. Of course, all cigarettes present a health concern. But the fact that cigarettes are so highly addictive and heavily used makes it enormously difficult and complicated to ban them entirely. It is simply irresponsible to contend, as Indonesia does, that the elimination of a product that is as addictive and heavily used as cigarettes has no potential for negative consequences to the individual smoker, the U.S. health care system, and the society as a whole. The Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act") is the latest U.S. salvo in the ongoing fight against the problem of smoking, and section 907(a)(1)(A) represents a reasonable, pragmatic element of the overall strategy of the United States.

2. In its latest submission Indonesia makes new criticisms of the U.S. characterization of the survey data. All of Indonesia's criticisms are without merit. Indonesia's techniques of data analysis artificially lower the prevalence rates and minimize the role of clove cigarettes in smoking initiation. The inescapable fact is that section 907(a)(1)(A)'s ban of cigarettes with characterizing flavors including candy, fruit, and clove is perfectly in line with the available public health science on smoking, and Indonesia's criticisms of the survey data cannot change this reality.

I. Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement

3. Indonesia has not established that clove cigarettes are "like" menthol or tobacco flavored cigarettes. Indonesia has never substantiated its claim that clove cigarettes competed with menthol and tobacco cigarettes for "access to channels of distribution, shelf space and market share." From the view of Indonesian clove producers, clove cigarettes in the United States constitute a "kretek" market among themselves.

4. Indonesia has similarly failed to prove that U.S. consumers view clove cigarettes as interchangeable with tobacco or menthol cigarettes. Indonesia's sole claim to this effect is that a number of individuals who reported smoking clove cigarettes also reported smoking menthol or tobacco cigarettes. In fact, the statistic on concurrent use of clove cigarettes and other cigarettes is consistent with what survey evidence reveals: young consumers tend to smoke clove cigarettes experimentally, and not as a substitute for other brands. A "trainer" cigarette is not necessarily the first or only cigarette a young person tries; it is a cigarette, such as a clove cigarette, that is more appealing to inexperienced smokers, and thereby encourages further use of all tobacco products. Contrary to Indonesia's representation in this dispute, clove cigarette manufacturers market clove cigarettes as a unique clove and tobacco experience.

5. The differences in competition and consumer perceptions between clove cigarettes and menthol and tobacco cigarettes, in this dispute, are in sharp contrast to the competitive relationship and consumer perceptions among the products at issue in *Mexico – Soft Drinks*. The panel in that dispute placed significance on the fact that producers and consumers selected one sweetener or the other interchangeably, regardless of physical differences. In this case, consumers clearly perceive a difference in taste between clove cigarettes and tobacco and menthol cigarettes.

6. Indonesia also has failed to demonstrate that clove cigarettes are "like" tobacco and menthol cigarettes from a public health perspective, according to which, patterns of use are a relevant "likeness" factor. The United States has demonstrated that the patterns of use in the United States are different for clove and other flavored cigarettes than they are for menthol or tobacco flavored cigarettes. Indonesia's claim that clove cigarettes have the "same health risks as other cigarettes" is

inconsistent with the disproportionate appeal of clove cigarettes to younger smokers. Indonesia itself acknowledges that cigarettes that "encourage new, young smokers" may present a "specific health risk" and therefore need not be considered "like" other cigarettes.

7. The United States had a sound basis to conclude that clove cigarettes were disproportionately used by young people, and therefore presented a particular health risk. This conclusion is amply supported by peer-reviewed research. Against these solid, research-based findings, Indonesia argues that it is merely a "myth." Indonesia bases this assertion on a flawed reading of the surveys, and on the unsubstantiated views of a handful of selected commentators.

8. Indonesia's criticisms do not undermine or contradict the reasonable conclusion that clove cigarettes pose a particular risk to young people and to the public health. In *EC – Asbestos*, the panel recognized that it is not the panel's "function to settle scientific debate," but to take an objective assessment, based on the evidence presented, as to whether "a decision-maker responsible for taking public health measures might reasonably conclude" the presence of a risk.

9. As demonstrated in *Mexico – Soft Drinks* and *EC – Asbestos,* the question for the Panel is not whether products are identical in the abstract, but whether the products are "like" in the relevant context and circumstances. In *Mexico – Soft Drinks*, sweeteners derived from different plants were deemed to be "like products" despite this physical difference because the difference was unnoticeable to producers and consumers. In this case, like in *EC – Asbestos,* the differences among clove cigarettes and tobacco and menthol cigarettes directly relate to different consumer perceptions of the products and to the public health risk at issue.

10. Even aside from the fact that not all cigarettes are "like" products, Indonesia also has not demonstrated less favorable treatment. Indonesia purports to have established a *prima facie* case of "less favorable treatment" based on the assertion that "in practice, virtually all domestically produced cigarettes were not affected by the restrictions imposed by the Special Rule, thus the Special Rule results in *de facto* discrimination against imported clove cigarettes." This conclusion is based on a flawed and incomplete legal and factual analysis.

11. In prior disputes under the GATT 1994, where the measures at issue were taxes applied to products determined to be "like," the analyses have tended to accord significant weight to the ratio of imported products compared to domestic products that are taxed at the higher rate. Nevertheless, this ratio is neither dispositive of "less favorable treatment" by itself nor necessarily strong evidence of less favorable treatment in every case.

12. For example, in cases involving product standards, answering the question of whether there is *de facto* less favorable treatment involves determining whether the product standard is legitimate or is a means by which to treat imported products less favorably than domestic products. In this context, the ratio of imported products that fall short of the product standard compared to domestic products that fall short is relevant, but is not necessarily as strong an indicator of less favorable treatment as in the context described above.

13. The "less favorable treatment" analysis requires an examination of all relevant evidence, including the objective purpose of the measure and whether the alleged detrimental effects to imports depend on their national origin. The Appellate Body in *EC – Asbestos* noted that Members may draw distinctions between products determined to be "like" without necessarily according less favorable treatment to imported products. Similarly, the reports in *Dominican Republic –*

Cigarettes and *EC – Biotech* found that where an alleged detrimental effect on an imported product is not attributable to its foreign origin, that effect is not evidence of less favorable treatment. In this dispute, the only evidence of "less favorable treatment" that Indonesia has submitted amounts to the fact that section 907(a)(1)(A) bans some lesser-used cigarettes, including both foreign and domestic, and does not ban other more heavily used cigarettes, including both foreign and domestic. Indonesia has not demonstrated that the objective of the measure is to single out imports and to afford protection to domestic production. In *Mexico – Soft Drinks*, it was uncontested that Mexico's measures were designed to penalize U.S. products compared to Mexican products. In this dispute, the measure at issue, section 907(a)(1)(A), is not a fiscal measure designed to penalize imported products. It is a public health measure, based on U.S. consumers' patterns of use of different types of cigarettes and associated public health considerations.

14. With respect to the facts, Indonesia presents only a partial, misleading description of how the ban applies to imported compared to domestic cigarettes. The ban applies to a small category of cigarettes in general, including both imported and domestic cigarettes. Clove cigarettes comprised approximately 0.1% of the U.S. cigarette market. Section 907(a)(1)(A) also bans other flavored cigarettes made in the United States, which, like clove cigarettes, comprised a small portion of the U.S. market. In other words, a relatively small category of both domestic and imported products are banned under section 907(a)(1)(A). On the other hand, section 907(a)(1)(A) permits tobacco and menthol flavored cigarettes made by both U.S. and foreign producers. At least 95% of imported cigarettes are still permitted under section 907(a)(1)(A). Indonesia also has exported to the United States tobacco cigarettes that do not contain clove.

15. The circumstances in this dispute are not, as Indonesia suggests, directly analogous to the circumstances in *Mexico – Soft Drinks*, where nearly 100% of imported sweeteners were taxed at a higher rate than nearly 100% of domestic sweeteners. The *Mexico – Soft Drinks* panel considered the fact that imported products as a group were taxed at a higher rate than domestic products as a group to be strong evidence of *de facto* less favorable treatment. This approach is consistent with the Appellate Body's discussion in *EC – Asbestos.* In this case, the line section 907(a)(1)(A) draws between those cigarettes that are banned and those that are not does not coincide with the group of cigarettes that are imported versus the group of cigarettes that are domestic.

II. Indonesia Has Failed to Establish That Section 907(a)(1)(A) Is Inconsistent With TBT Article 2.2

16. Indonesia continues to insist that the Panel must look first and foremost to the interpretation of GATT Article XX(b) by panels and the Appellate Body in interpreting the text of TBT Article 2.2. There are a number of problems with Indonesia's approach. Most obvious, it forces Indonesia to include the term "necessary" twice, even though it is only used once in Article 2.2. Further, the second element, in Indonesia's view, imports into the Article 2.2 analysis numerous tests not reflected in the text Article 2.2, including whether the measure makes a material contribution to its objective and whether the measure arbitrarily or unjustifiably discriminates between countries where the same conditions prevail. Among other things, Indonesia fails to explain why Article 2.2 would include this element concerning discrimination in light of Article 2.1. What a Member must do to act consistently with Article 2.2 is, as the text says, to ensure that its technical regulation is not more trade-restrictive than necessary to fulfill a legitimate objective. In accordance with Articles 31 and 32 of the Vienna Convention, a measure fails this test if: (1) there is a reasonably available alternative measure; (2) that fulfills the objective of the measure at the level that the Member imposing the measure considers appropriate; and (3) is significantly less trade restrictive.

17. Indonesia makes three new criticisms of the U.S. characterization of section 907(a)(1)(A)'s objective. First, Indonesia is wrong to claim that the objective of the measure is not to protect all people who are at risk from becoming addicted smokers, but only those people ages 17 and below. In analyzing the objective chosen by the importing Member, the Appellate Body has said that it is necessary to focus on the text, design, architecture, and revealing structure of the measure. Section 907(a)(1)(A) eliminates from the U.S. market cigarettes with characterizing flavors of candy, fruit, clove, etc. The measure thus helps to protect all potential and novice smokers who would be attracted to these flavored cigarettes, which includes not only children and adolescents, but young adults as well. Children and adolescents are prominently referenced in the Tobacco Control Act and its legislative history because these age groups play a central role in reducing smoking rates. But they are not the only people that are at risk for becoming addicted smokers. Second, Indonesia is wrong to claim that avoiding negative consequences is not part of the objective of section 907(a)(1)(A). The text, design, architecture, and revealing structure of section 907(a)(1)(A) makes clear that the measure draws distinctions between products, banning some, and allowing others to continue to be sold in the United States. Third, Indonesia is wrong to claim that section 907(a)(1)(A) did not ban menthol cigarettes simply because a particular U.S. company opposed it. Nothing in the text, design, architecture, or revealing structure of the measure would indicate that this is so.

18. Indonesia continues to argue that section 907(a)(1)(A) is inconsistent with Article 2.2 because it does not fulfill its objective *sufficiently*. If such an argument is accepted, Article 2.2 would prohibit Members from regulating incrementally where such measures have an effect on trade. Nothing in the TBT Agreement requires Members to pursue objectives to the maximum extent possible. To the contrary, as confirmed by the preamble to the TBT Agreement, Members are permitted to fulfill their objectives at the level they consider appropriate.

19. Indonesia claims that as section 907(a)(1)(A) "does not materially contribute" to its objective, the question of whether a sufficient alternative measure exists is "moot." Indonesia does not establish that section 907(a)(1)(A) is more trade-restrictive than necessary to fulfill its objective by arguing that section 907(a)(1)(A) should fulfill its objective more completely than it does. Rather, Indonesia must show that at whatever level the United States has determined is appropriate for the objectives that section 907(a)(1)(A) fulfills, the measure is more trade-restrictive than necessary because there is a reasonably available alternative measure that is significantly less trade-restrictive and that fulfills the objectives of section 907(a)(1)(A) to at least the same degree. Indonesia has failed once again to adduce any evidence that such an alternative measure exists.

20. The reference to non-fulfillment in the second sentence directs the Members to take into account these risks. Moreover, Indonesia is incorrect that Article 2.2 obligates the importing Member to evaluate the risk of the imported product. Members need not base their technical regulations on risk assessments. The language refers to the risks of nonfulfillment of the *objective* would create, not the risks posed by a particular *product*.

III. Indonesia Has Not Shown That the United States Acted Inconsistently With TBT Articles 2.5, 2.8, 2.12, or 12.3

21. Indonesia argues that the United States acted inconsistently with Article 2.5. First, Indonesia ignores that Article 2.5 provides that "upon request" a Member shall explain the justification for the technical regulation in terms of the provisions of Article 2.2 to 2.4. Indonesia never made such a

request. Indonesia is further incorrect in believing that Article 2.5 requires importing Members to provide, in essence, a full legal analysis of each element as well as provide the exporting Member with all the accompanying scientific data. Second, Indonesia is wrong to claim that it has suffered any prejudice. Indonesia had ample opportunity, and as far as we are aware, took full advantage of that opportunity, to express its view to U.S. Government officials.

22. Indonesia's Article 2.8 claim is misplaced. First, it is entirely specious for Indonesia to imply that its producers do not know whether the measure bans their product. There is no doubt that clove is the characterizing flavor of clove cigarettes. Second, Indonesia still has not provided one example of how the measure could be written in terms of performance, nor provided one reason why it would be "appropriate" to do so. Certainly, Indonesia's Exhibit IND-70 does not provide an answer to this question. The United States fails to see how a measure that incorporates this standard, which only purports to provide a means of testing, establishes that the challenged measure could be written in fundamentally different terms, and what those terms would be.

23. Indonesia argues that the United States acted inconsistently with Article 2.12. Yet Indonesia has failed to provide even one reason why the interval should have been doubled to six months, nor why the lengthening of the interval would be consistent with the objective of the challenged measure. The Doha Ministerial Decision, which constitutes, at most, a means of supplemental interpretation under Article 32 of the Vienna Convention, does not require a different result.

24. Indonesia continues to argue that the United States acted inconsistently with Article 12.3. A risk of unemployment simply cannot be a "special need" given that *every* government is concerned about the unemployment rate of its citizens. But even if one were to assume that there was some aspect of employment in this instance as a need that is unique to developing countries, Indonesia has provided *zero* evidence that section 907(a)(1)(A) has had *any* impact on employment in Indonesia, much less the "severe adverse impact" that Indonesia repeatedly refers to. The United States acted consistently with Article 12.3 by providing ample opportunity to Indonesia to make its views known to the U.S. Government. Nothing in Article 12.3 requires the "something" more that Indonesia claims it does.

IV. Section 907 Is Justified Under Article XX of the GATT 1994

25. The United States has fully explained why section 907(a)(1)(A) would be justified under Article XX(b) of the GATT 1994. Section 907(a)(1)(A) was enacted in order to protect human life and health from the risk posed by smoking. And the measure is necessary to ensure that products that are predominantly used as trainer products by young people, leading to years of addiction, health problems, and possibly death, cannot be sold in the United States at all. For the reasons explained previously, section 907(a)(1)(A) also meets the requirements of the Article XX chapeau.

26. The United States has put forward ample scientific data to support the pragmatic decision by the United States to ban cigarettes with characterizing flavors such as those of candy, fruit, and clove on the one hand, while not banning heavily used products whose precipitous prohibition could have serious negative consequences. Indonesia asks the Panel to take the opposite approach and interpret the WTO Agreement as requiring the United States to choose between two extremes – banning all cigarettes or banning none. In its consideration of the evidence, Indonesia further asks the Panel, in a variety of ways, to ignore that cigarettes are highly addictive, very dangerous, and heavily used by tens of millions of people. Indonesia's approach should be rejected.