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

(DS406)

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

February 15, 2011

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. Indonesia begins its Second Written Submission by citing to the *EC – Asbestos* dispute.[1] We also think this is a proper starting point for the discussion. Like asbestos, the product at issue here is dangerous: cigarettes lead to the deaths of more than 400,000 people in the United States every year,[2] and millions of deaths world-wide. Given that threat, and the fact that cigarettes are as addictive as heroin or cocaine,[3] 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,[4] the World Health Organization,[5] and the U.S. survey data[6] all support the conclusion that these flavorings represent a particularly serious public health concern.

3. 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. The unavoidable fact is that over 20% of the U.S. adult population smokes (an estimated 46 million adults),[7] and virtually all of those addicts regularly smoke either tobacco- or menthol-flavored cigarettes. 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.

4. Smoking is a hard problem. It is hard for smokers to quit, and it is hard for governments to prevent people from smoking in the first place. 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. As the United States has discussed, and will continue to discuss at this meeting, Indonesia's attacks on this measure are unwarranted under the science and the law, and should be rejected.

II. INDONESIA'S CRITICISMS OF THE RELIABLE SURVEY DATA SHOULD BE REJECTED

5. The United States maintains that the reliable survey data supports the U.S. position that the cigarettes banned by section 907(a)(1)(A) disproportionately appeal to young people.[8] In this

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[1] *See* Indonesia Second Written Submission, para. 1.

[2] *See* U.S. First Written Submission, paras. 15-20.

[3] U.S. Second Written Submission, para. 21.

[4] U.S. Second Written Submission, paras. 43, 46; *see also* U.S. First Written Submission, paras. 35-42.

[5] U.S. Second Written Submission, paras. 45, 49.

[6] U.S. First Written Submission, paras. 54-77; Exhibit US-53, at 7; U.S. First Opening Statement, paras. 14-17.

[7] U.S. First Written Submission, para. 1.

[8] U.S. First Written Submission, paras. 54-77; Exhibit US-53, at 7; U.S. First Opening Statement, paras. 14-17.

regard, we have further explained why Indonesia derives the wrong conclusions by relying on unreliable surveys, such as the Western Watts survey, and by misusing other surveys, such as recent National Survey on Drug Use and Health ("NSDUH") reports.[9] We will not repeat all those points today.

6. In its latest submission, however, Indonesia makes new criticisms of the U.S. characterization of those surveys. All of Indonesia's criticisms are without merit. In essence, Indonesia criticizes the United States for being consistent with its own long-standing data analysis practices as well as the world-wide consensus on the use of survey data.

7. First, Indonesia argues that the Panel should ignore any data regarding smoking prevalence rates of people ages 18 and over as, in Indonesia's view, the objective of section 907(a)(1)(A) is not to prevent such people from becoming addicted smokers.[10] As we will discuss in the context of the Article 2.2 claim of the *Agreement on Technical Barriers to Trade* ("TBT Agreement"), a careful analysis of the measure reveals that Indonesia's view is in error. The objective of the measure is to deter all people at risk of smoking initiation from becoming regular smokers.[11] Indonesia's effort to dilute the data of both the National Youth Tobacco Study ("NYTS") and Monitoring the Future ("MTF") by pulling out data regarding people age 18 and older should thus be rejected.[12]

8. Second, Indonesia is wrong to criticize the reliance of the United States on surveys that classify individuals as clove smokers if they have smoked all or part of a clove cigarette in the past 30 days.[13]

9. We would note that this question is not just used in the tobacco context, but is used in surveying the use of illegal drugs, alcohol, and prescription drugs as well. For example, the NSDUH inquires: "Have you **ever**, even once, used marijuana or hashish?"; and "Have you **ever**, even once, **sniffed or 'snorted'** heroin powder through your nose?". (Emphasis in original). In-class surveys of students asks similar questions. For example, the MTF asks "Have you ever taken cocaine in 'crack' form or in another freebase form-that is, where you inhaled the fumes from smoking, heating, or burning it?". And the Youth Risk Behavior Survey asks "Have you ever used methamphetamines . . . one or more times in your life?".

10. Public health surveys of alcohol, tobacco, illegal drugs, and abuse of prescription drugs employ these types of questions, where even one use of a substance is important, to monitor progress in reducing population patterns of abuse. Such a question is particularly appropriate for

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[9] U.S. Second Written Submission, paras. 50-78; U.S. First Opening Statement, paras. 18-21; U.S. First Written Submission, para. 78.

[10] Indonesia Second Written Submission, para. 6.

[11] *See* U.S. Second Opening Statement, sec. III.B.2; *see also* U.S. Second Written Submission, paras. 33-40.

[12] *See* Indonesia Second Written Submission, paras. 15, 25.

[13] Indonesia Second Written Submission, paras. 7-8.

smoking, given how addictive it is. Symptoms of nicotine addiction can begin within the first day of smoking,[14] and a third or more of the people that try a cigarette once become regular smokers.[15] The U.S. reliance on this question to determine prevalence is thus perfectly in line with established practices of public health researchers. The prevalence of use of clove cigarettes provides important information about the role of clove cigarettes in the initiation of smoking. Notably, Indonesia has not pointed to *even one* scientific article that purports to criticize the reasonableness of the question itself, or the conclusions that the United States draws from the responses to that question.[16]

11. Third, Indonesia fails to establish why it believes that the United States did not present the NYTS data on a weighted basis.[17] The United States relied on the standard methodology in presenting the NYTS data in Exhibit US-53, and the percentages presented in that exhibit were appropriately weighted to represent the U.S. population of the age groups represented in the exhibit.

12. Fourth, Indonesia's claim that those people who provided inconsistent answers to the NYTS and MTF should have been excluded from the survey results would have almost no discernable effect on the results.[18] While surveys can be designed to limit inconsistent answers, by, for example, allowing people to skip questions depending on answers already given, in-school surveys typically are not so designed for reasons related to overall validity and anonymity. In any event, for the four NYTS reports done in the years 2002-2009, less than 1% of the people who reported that they had never smoked a cigarette also reported that they had smoked a clove cigarette (55 people total). For the eight MTF reports done in years 2002-2009, 1.0% of respondents (162 people) gave the same inconsistent answer. These small numbers do not skew the data in a significant manner as Indonesia suggests.

13. Fifth, Indonesia claims that people who failed to answer the clove question in the NYTS and MTF surveys should have been included within the "total population."[19] There are a number of different approaches to addressing the problem of missing data. The standard public health approach is to exclude those responses with missing data so long as those who did not respond are not substantially different to those who did, and the bias (if any) is minimal.[20] Our analysis indicates that this is the case here.

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[14] U.S. First Written Submission, para. 20.

[15] *See* NSDUH 2008 Table on Smoking Initiation, Exhibit US-89.

[16] *See* Indonesia Second Written Submission, paras. 7-8.

[17] Indonesia Second Written Submission, para. 12.

[18] Indonesia Second Written Submission, paras. 13, 24.

[19] Indonesia Second Written Submission, paras. 14, 24.

[20] *See* Jewel, *Statistics for Epidemiology*, at 237-240 (2004), Exhibit US-130.

14. Finally, the United States has previously addressed all of Indonesia's remaining arguments on the survey data, including Indonesia's arguments regarding the NSDUH.[21]

15. All of Indonesia's interpretations of the survey data are different from the published conclusions of the surveys. Indonesia's techniques of data analysis artificially lowers the prevalence rates and minimize the role of cloves in smoking initiation. As if this is not enough, Indonesia also creates an incorrect comparison when it compares adolescent clove use as a percentage of *all adolescents* to adolescent clove use as a percentage of *adolescent smokers*, as Indonesia does in paragraph 19 of its Second Submission.

16. In sum, Indonesia's criticisms not only run counter to the methodologies based on sound statistical techniques, but to the conclusions of public health experts as well. Clove cigarettes are an addictive, deadly product, and one which has a sweet and distinctive aroma and taste.[22] The World Health Organization itself has recognized that "younger smokers are more open to unique and exotic flavors," which includes not only candy and fruit flavors, but the flavor of clove as well.[23] 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.

III. LEGAL ARGUMENTS

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

17. Indonesia has failed to establish that section 907(a)(1)(A) is inconsistent with the national treatment obligations under either Article 2.1 of the TBT Agreement or Article III:4 of the *General Agreement on Tariffs and Trade 1994 ("*GATT 1994").

18. First, Indonesia has not established the predicate for its national treatment claims – that clove cigarettes are "like" menthol or tobacco cigarettes produced in the United States.

19. Second, Indonesia's rationale for why section 907(a)(1)(A) accords less favorable treatment to Indonesian cigarettes as compared to "like" domestic cigarettes is both legally and factually flawed. With respect to its legal arguments, Indonesia submits that "less favorable treatment" exists so long as any one Indonesian import (clove cigarettes) is banned and any one domestic cigarette is not.[24] This test is inconsistent with the language of Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994; is inconsistent with the context of each

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[21] *See* U.S. Second Written Submission, paras. 50-78; U.S. First Opening Statement, paras. 18-21; U.S. First Written Submission, para. 78.

[22] U.S. First Written Submission, para. 36.

[23] U.S. Second Written Submission, paras. 46-49 (quoting World Health Organization, "The Scientific Basis of Tobacco Product Regulation," WHO Technical Report Series 945, at 27, 99 (2007), Exhibit US-113).

[24] *See, e.g.*, Indonesia Second Written Submission, para. 100.

agreement; has been correctly rejected by the Appellate Body in *EC – Asbestos*; and would prevent Members from taking legitimate regulatory measures.[25] Measures, such as section 907(a)(1)(A), that establish product standards based on legitimate evidence and criteria are not inconsistent with the national treatment obligations contained in the GATT 1994 or the TBT Agreement simply where an imported product falls short of the product standard and other domestic products do not.

20. A determination of less favorable treatment must consider all relevant evidence. Relevant evidence includes a consideration of how a measure applies to imported products, generally, and domestic products, generally. However, the "less favorable treatment" analysis should not be reduced, as Indonesia suggests, to this simple comparison. Other evidence, such as the objective design of the measure, and whether the alleged detrimental effect to the imported product is dependent upon is national origin, is relevant as well. Indonesia has not adduced any evidence to rebut the U.S. demonstration that section 907(a)(1)(A) is a legitimate public health measure, except for the fact that clove cigarettes are banned and menthol and tobacco cigarettes are not. This fact alone does not demonstrate less favorable treatment.

21. With respect to factual matters, Indonesia distorts the facts of this dispute in order to present section 907(a)(1)(A) as akin to the measures at issue in *Mexico – Soft Drinks*.[26] To make the share of banned imported cigarettes in this case seem disproportionate to the share of the banned domestic cigarettes, Indonesia entirely eliminates a category of relevant products, U.S. produced cigarettes with characterizing flavors other than tobacco or menthol. However, when all cigarettes affected by section 907(a)(1)(A) are taken into account, it is clear that, unlike the measures in *Mexico – Soft Drinks*, section 907(a)(1)(A) does not in fact draw a line between imported products and domestic products. Section 907(a)(1)(A) draws a line between products based on public health data concerning the patterns of use of different cigarettes by consumers in the United States. Accordingly, the comparison of how section 907(a)(1)(A) applies to imported products and domestic products does not support a finding of *de facto* less favorable treatment.

1. Like Product Determination

22. As a threshold matter, Indonesia has not met its burden of proof to establish that clove cigarettes are "like" menthol or tobacco flavored cigarettes. And even though it was not the U.S. burden, the United States has presented evidence showing significant differences among the products, and Indonesia has failed to supply persuasive arguments as to why these differences should be overlooked by the Panel.

23. The guiding principles to determine likeness in this dispute are whether the products at issue directly competed in the U.S. market and are considered interchangeable in the U.S. market

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[25] U.S. Second Written Submission, paras. 119-125.

[26] Indonesia First Opening and Closing Statement, paras. 47-52; Indonesia Second Written Submission, paras. 95-96.

place, and whether the products are similar from a public health perspective.[27] The *Border Tax* "four factors" provide a framework to approach these broader questions.[28] Indonesia fails to establish "likeness" under any of the four factors and especially with regard to the relevant broader principles.

a. Competitive Relationship and Substitutability

24. Indonesia has not provided any evidence that clove cigarettes directly competed with menthol or tobacco cigarettes. In its First Submission, Indonesia claimed without any evidence that clove cigarettes competed with menthol and tobacco cigarettes for "access to channels of distribution, shelf space and market share."[29] Indonesia has never substantiated this claim. The only "evidence" provided was an anonymous comment posted to a website for a convenience store in California.[30] Instead, Indonesia appears in the end to have abandoned the claim, stating that channels of distribution are "not at issue in this case."[31]

25. From the view of Indonesian clove producers, clove cigarettes in the United States apparently do not, in fact, compete with regular and menthol-flavored cigarettes, but constitute a "kretek" market among themselves. In fact, Djarum's website notes that the company held "70% of the *kretek market*" in the United States.[32] This statement evidences the fact that Indonesian clove producers view other Indonesian kretek cigarettes – and not U.S. produced menthol and tobacco cigarettes – as their competitive "market" in the United States.

26. 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.[33] Indonesia submits that this fact proves that consumers perceive the products as interchangeable. However, Indonesia provides no evidence to support this inference, which on its face is no more obvious than the suggestion that water and cola are perceived as interchangeable because consumers report drinking each of them in certain circumstances.

27. 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

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[27] U.S. First Written Submission, paras. 158-159; U.S. Second Written Submission, paras. 109-111.

[28] First Written Submission, paras. 155-159; U.S. Second Written Submission, paras. 108-111; U.S. First Opening Statement, paras. 26-28.

[29] Indonesia First Written Submission, para. 60.

[30] Indonesia Second Written Submission, para. 89, Exhibit IND-85.

[31] Indonesia Second Written Submission, para. 89.

[32] Exhibit US-39 (emphasis added).

[33] Indonesia First Written Submission, para. 60; Indonesia First Opening and Closing Statement, para. 119; Indonesia Second Written Submission, para. 82.

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.[34] Evidence shows that young consumers tend to perceive clove cigarettes as a different, indulgent experience with a unique taste and aroma, appropriate for special social occasions.[35]

28. Djarum itself makes clear the differences that Indonesia attempts to minimize in this dispute. For example, the Djarum website notes that "just like [a] cuban cigar that is reserved for special occasions, kretek are often savoured at festivals or celebrations, enjoyed after gourmet dining or paired with fine wine. Enjoying a kretek means indulging in a completely different smoking experience; it means trying something new [...]."[36] Another advertisement for Djarum Black states the physical differences more specifically, noting that

> Blacks are a medium potency cigarette, comparable with "medium" flavor cigarettes of many other common brands like Marlboro, *though their tastes are dissimilar*, attributable to the Asian "Srintil" versus American tobacco and the *addition of cloves*. By weight, *cloves make up about 40% of the cigarette*, the remaining 60% being tobacco. The filter of blacks are coated in *spiced "sauce", flavored with spices native to the region*; mainly the taste is of *clove, cardamon, and cinnamon*; *the "sauce" is also rather sweet. Blacks are packed much tighter than most American brands of cigarettes*, and tend to be harder to draw from for the first few drags. ..."[37]

Contrary to Indonesia's representation in this dispute, clove cigarette manufacturers market clove cigarettes as a unique clove and tobacco experience.

29. The physical differences in clove cigarettes are directly related to the identity of the product and how consumers perceive and experience the cigarette. Indonesia has attempted to liken the circumstances in this dispute to the circumstances in *Mexico – Soft Drinks*; however, the comparison fails on every element, including the "like product" determination. 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 *Mexico*

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[34] U.S. Answer to Panel Q43, paras. 107-109.

[35] U.S. First Written Submission, paras. 35-42, 170, fn. 217, 182-189; U.S. Second Written Submission, paras. 112-114; U.S. Answer to Q38(c).

[36] History of Kretek, "Enjoying a kretek cigarette" available at http://www.djarum.com/index.php/en/history (Last visited February 14, 2011). Exhibit US-131.

[37] "Djarum Black Clove Cigarettes," available at http://www.djarumblackcigarettes.com/ (Last visited February 14, 2011) (emphasis added). Exhibit US-132.

– *Soft Drinks* placed significance on the fact that producers and consumers selected one sweetener or the other interchangeably, regardless of physical differences.[38]

30. The *Mexico– Soft Drinks* panel noted that "for the particular end-use that is relevant in this case, the production of soft drinks and syrups, there is no difference between beet sugar and cane sugar. Producers can use beet sugar or cane sugar, or any combination of the two, when preparing soft drinks or syrups."[39]

31. The *Mexico – Soft Drinks* panel further noted that:

> with regard to consumers' perceptions and behaviour in respect of the products, the Panel notices that both beet sugar and cane sugar are *almost identical* 'sugars.' *There does not seem to be a conspicuous difference in taste between the two products*. ... Consumers of soft drinks and syrups would *not be aware that one type of sugar has been used, rather than the other, since the use of one or the other does not alter the taste of the product, nor is it normally indicated on the labelling of the soft drink or syrup*."[40]

Unlike in *Mexico – Soft Drinks*, in this case, consumers clearly perceive a difference in taste between clove cigarettes and tobacco and menthol cigarettes. The presence of 20 to 40 percent clove in clove cigarettes obviously and intentionally alters the taste and experience of the cigarette, and this difference is clearly indicated in clove cigarettes' labeling and marketing, as well as in how consumers perceive and experience the cigarettes.[41]

b. Public Health

32. Indonesia also has failed to demonstrate that clove cigarettes are "like" tobacco and menthol cigarettes from a public health perspective. From a public health perspective, patterns of use is a relevant "likeness" factor.[42] 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,[43] and these differences support that clove cigarettes are not "like" tobacco or menthol flavored cigarettes in this regulatory context. Clove cigarettes, and other cigarettes with characterizing flavors banned by the Tobacco Control Act, were used in low

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[38] *Mexico – Soft Drinks (Panel)*, paras. 8.30-8.34. It should be noted that the panel conducted a "like product" analysis under Article III:2 of the GATT 1994, and commented that the analysis was applicable under Article III:4 as well (para. 8.105).

[39] *Mexico – Soft Drinks (Panel)*, para. 8.32.

[40] *Mexico – Soft Drinks (Panel)*, para. 8.33 (emphasis added).

[41] U.S. First Written Submission, para. 170, para. 217; Exhibit US-38, Exhbit US-39, Exhibit US-43.

[42] U.S. Second Written Submission, paras. 46-52, 114-115. *See*, *e.g.*, Exhibit US-113 at 26.

[43] U.S. First Written Submission paras. 35-42, 54-78, 124-135, 140-143; U.S. Second Written Submission, paras. 33-78; U.S. Answer to Q19, paras. 49-54, Q42, paras. 102-106, and Q43, paras. 107-109.

numbers overall but disproportionately by young people. Menthol and tobacco flavored cigarettes, on the other hand, are heavily used by a large number of addicted adults as their regular cigarette. These two different patterns of use pose different public health challenges and call for different responses.

33. 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.[44] In its First Written Submission, 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.[45] And Indonesia has not rebutted the evidence that clove cigarettes, like other flavors other than tobacco or menthol, *do* fall into a specific category of health risk. Clove cigarettes, like other flavors besides tobacco and menthol, have a particular pattern of use in the United States, and therefore are different from a public health perspective. Although clove, cherry, chocolate and other flavored cigarettes are used in low numbers throughout the United States, they are significant from a public health perspective because they disproportionately appeal to and are used by young people specifically because of their flavors.

34. The United States has demonstrated that it had a sound basis to conclude that clove cigarettes, like other flavors banned under the Tobacco Control Act, were disproportionately appealing to and used by young people, and therefore presented a particular health risk.[46] This conclusion is amply supported by peer-reviewed research, much of which has been presented in these proceedings, gathered or conducted by the U.S. Food and Drug Administration and Centers for Disease Control and Prevention.[47] Sharing this conclusion are such public health organizations as the American Academy of Pediatrics, and the World Health Organization.[48] For example, the American Academy of Pediatrics noted that "clove cigarettes should be suspected as a gateway drug because of their properties and the manner in which they are smoked."[49] Moreover, the World Health Organization stated that "younger and inexperienced smokers are more inclined to try flavoured cigarettes since enticing flavouring agents suppress the harsh and toxic properties of tobacco smoke, making it more appealing to novices in smoking"[50] and that "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."[51]

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[44] Indonesia Second Written Submission, para. 56.

[45] Indonesia First Written Submission, para. 63; *see also* United States First Written Submission, paras. 105-107.

[46] U.S. First Written Submission paras. 35-42, 54-78, 124-135, 140-143; U.S. Second Written Submission, paras. 33-78; U.S. Answer to Q19, paras. 49-54, Q42, paras. 102-106, and Q43, paras. 107-109.

[47] U.S. First Written Submission, paras. 54-78; U.S. Second Written Submission, paras. 46-78.

[48] *See* Exhibit US-35, Exhibit US-43, Exhibit US-50, Exhibit US-113.

[49] *Hazards of Clove Cigarettes* at 395-96, Exhibit US-43.

[50] WHO, *The Scientific Basis of Tobacco Product Regulation*, at 26, Exhibit US-113.

[51] WHO, *The Scientific Basis of Tobacco Product Regulation*, at 99, Exhibit US-113.

35. Against these solid, research-based findings by established public health authorities, academic organizations, and government agencies, Indonesia argues that it is merely a "myth" that clove cigarettes are especially appealing to young people. Indonesia bases this assertion on a flawed reading of the surveys presented by the United States, and on the unsubstantiated views of a handful of selected commentators.

36. First, Indonesia argues that there is no legitimate public health difference between clove cigarettes and tobacco and menthol cigarettes by claiming that most clove cigarettes are smoked by adults, and not young people. However, Indonesia bases this claim on a flawed view of the evidence. As the United States has previously noted, Indonesia incorrectly focuses on absolute numbers, which show a higher use of menthol and tobacco generally, instead of focusing on the prevalence of use which shows that cloves are disproportionately used by young people. When Indonesia does focus on prevalence, it misreads and mischaracterizes the available survey data to make it seem that ratio between young people and older adults who smoke cloves is more even. This view should be rejected. Indonesia has not demonstrated based on the survey evidence that the public health risks posed by clove cigarettes and menthol and tobacco cigarettes is the same.

37. Second, much of the other evidence that Indonesia has put forth lacks credibility. For example, Indonesia cites as factual support regarding the public health risk of clove cigarettes the views of a Dr. Michael Siegel. These views are presented as opinion pieces on his personal website and have not been subjected to peer review or any other scrutiny.[52] In addition, Indonesia has presented as evidence the opinions of a gentlemen named John R. Polito. Mr. Polito possesses no apparent scientific or other relevant credentials, and publicizes his views on how to quit smoking and other matters related to cigarettes at his business website "whyquit.com."[53] Indonesia also has submitted purported facts about clove cigarettes derived from the un-sourced writings of a columnist at a political web blog, "townhall.com"[54] and the un-sourced website "indepthinfo.com."[55] Sources such as these provide no useful evidence in this dispute, and certainly cannot serve as "proof" as to the facts asserted.

38. Finally, the criticisms that Indonesia has raised with respect to the public health risks of clove cigarettes and other flavored cigarettes banned by the Tobacco Control Act do not undermine or contradict the U.S. reasonable conclusion that these 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,"[56] but to take an objective assessment, based on the

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[52] Indonesia First Written Submission, fns. 75, 85, 106, 122, 124; Exhibit IND-22, Exhibit IND-36, Exhibit IND-37; *see also* Indonesia First Written Submission, fns. 8, 155 (Newspaper columnist citing Dr. Siegel) Exhibit IND-6; Indonesia First Opening and Closing Statement, para. 16.

[53] Indonesia First Written Submission, fn. 100, Exhibit IND-28. *See* the biography of John. R. Polito available at http://whyquit.com/JohnBio.html (Last visited February 14, 2011) Exhibit US-133.

[54] Indonesia First Written Submission, fn. 110; Indonesia Second Written Submission, fn. 42; Exhibit IND-31.

[55] Indonesia First Written Submission, fn. 72, Exhibit IND-20.

[56] *EC – Asbestos (Panel)*, para. 8.181.

evidence presented, as to whether "a decision-maker responsible for taking public health measures might reasonably conclude" the presence of a risk.[57] In *EC – Asbestos*, the complaining party admitted that asbestos is carcinogenic,[58] but nevertheless claimed that there had been no scientific studies undertaken to show a direct correlation between the toxicity of asbestos fibers and any particular harm caused in the occupational setting at issue.[59] The complaining party also questioned the reliability of existing studies,[60] and the experts in the dispute noted certain limitations of the studies relied upon.[61] The panel nevertheless concluded that "the doubts raised by Canada [...] not sufficient to conclude that an official responsible for public health policy would find that there was not enough evidence of the existence of a public health risk."[62] This standard was affirmed by the Appellate Body.[63]

39. In this case, the United States has presented more than sufficient evidence of the existence of a specific public health risk posed by clove and other flavored cigarettes, which makes those cigarettes "unlike" tobacco or menthol cigarettes from a public health perspective. Tobacco and menthol cigarettes also are dangerous, but, based on their patterns of use, pose a much different public health challenge. Indonesia's criticisms are flawed and insufficient. Moreover, Indonesia has presented no evidence that this public health risk should be overlooked by the Panel as a factor in determining likeness. To the contrary, Indonesia actually raised the public health concern as a factor of likeness.[64]

c. Four Factors

40. With regard to the four-factor framework used in prior disputes for assessing likeness, the United States has demonstrated that clove cigarettes are different from menthol and tobacco cigarettes under *each* factor.

41. In terms of physical properties, clove cigarettes tend to contain 20 to 40 percent clove and a unique, "special sauce." Clove cigarettes tend to contain relatively high amounts of eugenol and coumarin, while other cigarettes do not. Clove cigarettes contain a unique blend of tobacco, including regional, java sun-cured tobacco not found in U.S.-produced cigarettes. In addition, a number of Indonesian clove cigarette brands also contain other characterizing flavors besides clove, such as cherry and vanilla.[65] Clove cigarettes tend to be tightly packed in a thick paper,

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[57] *EC – Asbestos (Panel)*, para. 8.193.

[58] *EC – Asbestos (Panel)*, para. 8.187.

[59] *EC – Asbestos (Panel)*, paras. 8.191-8.192.

[60] *EC – Asbestos (Panel)*, para. 8.192.

[61] *EC – Asbestos (Panel)*, para. 8.192.

[62] *EC – Asbestos (Panel)*, para. 8.188.

[63] *EC – Asbestos (AB)*, para. 163.

[64] Indonesia First Written Submission, para. 63.

[65] Exhibit US-39; Exhibit US-50 at 1602; Exhibit US-52.

which affects the experience of smoking the cigarette.[66] These differences create a different taste, aroma, and experience.

42. In terms of consumer tastes and habits, clove cigarettes are often described by consumers as different, richer, sweeter, and more pungent than other cigarettes.[67] In terms of patterns of use, clove cigarettes were used disproportionately by young people in the age window of initiation. Menthol and tobacco cigarettes are used by the vast majority of regular adult smokers.

43. In terms of end-uses, different cigarettes have varying, though overlapping, end-uses. Clove cigarettes, in particular, were used to create a special experience, compared to the "regular" experience of smoking other, "traditional" cigarettes such as tobacco or menthol.

44. Finally, in terms of tariff classification, both the United States and Indonesia treat clove cigarettes differently than other cigarettes at the 8-digit subheading in their GATT 1994 Schedules.[68] In addition, Indonesia has not explained the apparently different, preferential tax treatment it accords to domestic kretek cigarettes as compared to foreign cigarettes.[69]

d. Conclusion on Like Product

45. Indonesia maintains that it need not prove that clove cigarettes are "identical" to menthol and tobacco flavored cigarettes.[70] The United States would note that, 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. By contrast, the products in *EC – Asbestos* were deemed not to be "like products" because a physical difference was directly related to consumer preferences and to the public health risk at issue.[71] 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. In short, clove cigarettes are not "like products" to tobacco or menthol cigarettes in the circumstances of this dispute.

2. Less Favorable Treatment

46. Even aside from the fact that not all cigarettes are "like" products, Indonesia also has not demonstrated less favorable treatment. In a dispute such as this one where a measure does not on

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[66] Djarum Black Clove Cigarettes, Exhibit US-132.

[67] U.S. First Written Submission, para. 165, Exhibit US-39.

[68] U.S. Opening Statement at the First Substantive Meeting With the Panel, para. 40; U.S. Second Written Submission, para. 116.

[69] U.S. First Written Submission, paras. 192-193; Indonesia Answer to Q47, para. 99.

[70] Indonesia First Opening and Closing Statement, para. 94.

[71] U.S. Second Written Submission, para. 115.

its face discriminate between imported and domestic products, the burden falls to the complaining party to show that, based on all the relevant evidence, the measure, in practice, accords less favorable treatment to imported products as compared to domestic products.

47. 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."[72] This conclusion is based on a flawed and incomplete legal and factual analysis.

a. *De Facto* Less Favorable Treatment Cannot Be Determined by A Single "Test" but Requires an Assessment of all Relevant Evidence

48. 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.[73] In the context of a fiscal measure with no other demonstrated objective but to assess a tax on products determined to be "like," this ratio has been considered to be particularly relevant to determining whether a facially neutral measure in practice treats imported products less favorably than domestic products. Nevertheless, this ratio is neither dispositive of "less favorable treatment" by itself nor necessarily strong evidence of less favorable treatment in every case.

49. 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. Therefore, the fact that a given imported product is barred by a measure is not necessarily an instance of less favorable treatment. In other words, while the ratio of banned imported products compared to banned like domestic products is relevant, it must be viewed in the context of the facts at issue an accorded appropriate weight.

50. Indonesia is incorrect in its insinuation that the "less favorable treatment" analysis is simply a matter of looking at which cigarettes are banned and which cigarettes are not banned, without also examining all relevant evidence, including the objective purpose of the measure and whether the alleged detrimental effects to imports depend on their national origin.[74] As the Appellate Body in *EC – Asbestos* stated: "a Member may draw distinctions between products

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[72] Indonesia Second Written Submission, para. 96. *See also* Indonesia Answer to Q48, para. 102.

[73] *See*, *e.g.*, *Mexico – Soft Drinks (Panel)*, paras. 8.118-8.120, *Chile Alcohol (AB),* paras. 65-68.

[74] U.S. Second Written Submission, para. 141.

which have been found to be 'like', without, for this reason alone, according to the group of 'like' imported products 'less favourable treatment' than that accorded to the group of 'like' domestic products."[75] 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, but to some other factor, that effect is not evidence of less favorable treatment.[76]

51. 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. This distinction is based on patterns of use and associated public health considerations and should not be confused with discrimination based on origin. Indonesia has provided no other evidence that section 907(a)(1)(A) provides less favorable treatment to imported cigarettes compared to domestic cigarettes.

52. For example, Indonesia has not demonstrated that the objective of the measure is to single out imports and to afford protection to domestic production.[77] In *Mexico – Soft Drinks*, it was uncontested that Mexico's measures were designed to penalize U.S. products compared to Mexican products. Mexico characterized its own actions as "countermeasures" designed specifically to penalize U.S. products for the U.S. alleged non-compliance with the NAFTA.[78] In other words, it was essentially undisputed that the differential tax rates for sweeteners made from cane sugar and sweeteners made from other sources were based on the national origin of the sweeteners. That the tax measures, in practice, drew a line between imported products, as a group, and domestic products, as a group, confirmed that, although facially neutral, the tax measures in fact accorded less favorable treatment to imported products.

53. 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. The United States is not arguing that the stated intention of the measure is the legal lest for "less favorable treatment;" however, the United States does submit that the objective design of the measure is relevant evidence as to whether the measure, in fact, accords less favorable treatment. Indonesia has made no evidentiary showing that the objective design of section 907(a)(1)(A) is to afford protection to domestic production, aside from the subjective opinions of a handful of

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[75] *EC – Asbestos (AB)*, para. 100.

[76] U.S. First Written Submission, paras. 205-212; U.S. Second Written Submission, paras. 137-144; U.S. First Opening Statement, paras. 51-57.

[77] U.S. First Written Submission, paras. 207-211; U.S. Second Written Submission, paras. 142-144.

[78] *Mexico – Soft Drinks (Panel)*, para. 8.162.

commentors. On the other hand, the United States has demonstrated in its submissions that the objective design of the measure is consistent with its public health objective.[79]

b. Section 9079(a)(1)(A) Bans From the U.S. Market a Similar Proportion of U.S.-Produced Cigarettes and Indonesian Imports

54. With respect to factual matters, Indonesia presents only a partial, misleading description of how the ban applies to imported compared to domestic cigarettes. Indonesia is incorrect that "the evidence shows that imported clove cigarettes were the only flavored cigarette removed from the U.S. market as a result of the ban."[80] The evidence shows that the ban applies to a small category of cigarettes in general, including both imported and domestic cigarettes. Cloves are one type of cigarette with a characterizing flavor that comprised approximately 0.1% of the U.S. cigarette market.[81] However, section 907(a)(1)(A) also bans other flavored cigarettes made in the United States, such as cherry, chocolate and liquor flavored cigarettes, which, like clove cigarettes, comprised a small portion of the U.S. market.[82] In other words, a relatively small category of both domestic and imported products are banned under section 907(a)(1)(A).

55. On the other hand, section 907(a)(1)(A) permits tobacco and menthol flavored cigarettes made by both U.S. and foreign producers.[83] At least 95% of imported cigarettes are still permitted under section 907(a)(1)(A).[84] Indonesia also has exported to the United States tobacco cigarettes that do not contain clove.[85]

56. The field of U.S.-produced cigarettes affected by the ban is at least as significant as the field of imported cigarettes affected by the ban – and clove cigarettes in particular. The United States has demonstrated that section 907(a)(1)(A) affected entire product lines of major U.S. manufacturers, which were gaining momentum in the United States until U.S. Government measures curtailed and eventually banned them throughout the country.[86] Indonesia is incorrect that the ban on characterizing flavors other than tobacco or menthol affects only imported and not domestic products, and omits the fact that it does not affect the vast majority of imported products.

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[79] U.S. First Written Submission, paras. 21-26, 103-143, 207-211, 229-243; U.S. Second Written Submission, paras. 9-14, 21-49; U.S. First Opening Statement, paras. 53-54.

[80] Indonesia Second Written Submission, para. 2.

[81] U.S. Second Written Submission, para. 135; U.S. Answer to Q16, para. 38.

[82] U.S. First Written Submission, paras. 85-88, 93-102, 210; U.S. Second Written Submission, paras. 131-136; U.S. Answer to Q17, paras. 43-45; U.S. First Opening Statement, paras. 46-50.

[83] U.S. First Opening Statement, para. 47.

[84] U.S. Answer to Q16, para. 39.

[85] Exhibit US-134.

[86] U.S. First Written Submission, paras. 85-88, 93-102; U.S. Second Written Submission, paras. 79-86, 131-132; U.S. First Opening Statement, paras. 48-50.

57. Indonesia must not be permitted to limit the facts the Panel considers so as to produce the result it seeks. There is no basis, as Indonesia suggests, to look at how section 907(a)(1)(A) applies to some cigarettes while ignoring how it applies to other cigarettes.

c. Section 907(a)(1)(A) Is Not Analogous to the Measures in *Mexico – Soft Drinks*

58. The circumstances in this dispute are not, as Indonesia suggests, directly analogous to the circumstances in *Mexico – Soft Drinks*. In that dispute, the panel determined that Mexico applied a higher tax "to almost all imported products."[87] In *Mexico – Soft Drinks*, nearly 100% of imported sweeteners were taxed at a higher rate than nearly 100% of domestic sweeteners.[88] The panel noted that *"as a group* imported sweeteners in Mexico were overwhelmingly constituted by non-cane sugar sweeteners."[89] In other words, the 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*, where it indicated that evaluation of whether a measure accords less favorable treatment to imported products is about the treatment of the "group" of imported products compared to the "group" of like domestic products.[90]

59. 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, as it did in *Mexico – Soft Drinks*, with the group of cigarettes that are imported versus the group of cigarettes that are domestic. Section 907(a)(1)(A) bans both domestic and imported products, each of which held relatively similar shares of the U.S. market. Moreover, the vast majority of imported cigarettes – at least 95% – are still permitted.[91] The line drawn by section 907(a)(1)(A) is based on the patterns of use of different cigarettes by consumers in the United States and associated public health considerations. Again, as the Appellate Body stressed in *EC – Asbestos*, Article III:4 does not prohibit Members from drawing such lines.

60. Finally, the comparison of how a measure applies to imported products, as a group, compared to domestic products, as a group, is not determinative, in itself, of whether a measure accords less favorable treatment to imported products. Indonesia has not demonstrated that the weight of relevant evidence supports a finding of *de facto* less favorable treatment in this case.

d. Conclusion on Less Favorable Treatment

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[87] *Mexico – Soft Drinks (Panel)*, para. 8.115.

[88] *Mexico – Soft Drinks (Panel)*, paras. 8.118-8.120.

[89] *Mexico – Soft Drinks (Panel)*, para. 8.120. (Emphasis added).

[90] U.S. Second Written Submission, paras. 123-125; *EC – Asbestos (AB)*, para. 100.

[91] U.S. Answer to Q16, para. 39; U.S. Second Written Submission, para.136.

61. Indonesia's entire "less favorable treatment" argument hinges on an analogy to *Mexico – Soft Drinks*, and fails on every element. First, unlike the products in *Mexico – Soft Drinks*, the products in this case have physical differences that directly relate to different consumer perceptions of the products and to the public health risk at issue. Therefore, clove cigarettes are not "like" menthol or tobacco cigarettes.

62. Second, *Mexico – Soft Drinks* involved a measure specifically designed to penalize imported products and the facts of that dispute showed that, in practice, the measure drew a clear line between imported products that were subject to a higher tax rate and domestic products that were subject to a lower tax rate. This dispute involves a measure designed to protect the public health and, on its face and in fact, the measure draws a line between cigarettes that are banned and those that are not banned based on public health considerations. Unlike the measure in *Mexico – Soft Drinks*, under section 907(a)(1)(A) a relatively similar share of imported and domestic cigarettes on the U.S. market are banned, and the vast majority of imported cigarettes on the U.S. market are still permitted. Indonesia has offered no other evidence that would indicate that the alleged detrimental effect to clove cigarettes owes to their national origin.[92] Indonesia has not put forth a sound legal or evidentiary basis upon which to conclude that section 907(a)(1)(A) amounts to *de facto* less favorable treatment of imported products. Accordingly, Indonesia has failed to present a *prima facie* case of less favorable treatment under Article 2.1 of the TBT Agreement or Article III:4 of the GATT 1994.

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

1. Indonesia's Interpretation Is Not in Accordance With the Vienna Convention

63. The United States has fully explained why reading the chapeau and item (b) of GATT Article XX into TBT Article 2.2 is not consistent with the customary rules of interpretation of public international law.[93]

64. Indonesia continues to insist, however, 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. From this faulty basis, Indonesia derives a hybrid set of elements from the two provisions. In Indonesia's view, to be consistent with Article 2.2, every technical regulation must: "(i) pursue[] a legitimate objective; (ii) [be] necessary to fulfill the objective; and (iii) [be] not more trade restrictive than necessary to fulfill the objective."[94]

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[92] U.S. First Written Submission, paras. 205-212; U.S. Second Written Submission, paras. 137-144; U.S. First Opening Statement, paras. 51-57.

[93] *See* U.S. Second Written Submission, paras. 174-188; U.S. Answer to Q55, paras. 121-125; U.S. First Written Submission, paras. 266-269.

[94] Indonesia Second Written Submission, para. 107.

65. 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.

66. 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.[95]

2. Indonesia Misstates the Legitimate Objective of Section 907(a)(1)(A)

67. The legitimate objective of section 907(a)(1)(A) is to protect public health by reducing smoking prevalence among young people while avoiding the potential negative consequences associated with banning products to which tens of millions of adults are addicted. The means by which section 907(a)(1)(A) does this is to ban products that are disproportionately used by young people while not banning products to which tens of millions of adults are addicted.[96]

68. In its latest submission, Indonesia makes three criticisms of the U.S. characterization of section 907(a)(1)(A)'s objective.

69. First, Indonesia claims 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.[97] Indonesia does not base its criticism on a public health reason; and nor could it, given the uncontested evidence that people remain at risk for becoming addicted to smoking into their mid-twenties.[98] Rather, Indonesia derives its criticisms from a selective reading of the legislative history.

70. 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

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[95] U.S. Second Written Submission, para. 145; U.S. First Written Submission, para. 264.

[96] U.S. Second Written Submission, para. 160; U.S. Answer to Q18, para. 47.

[97] Indonesia Second Written Submission, para. 114.

[98] U.S. Second Written Submission, paras. 33-40; *see also* NSDUH 2008 Table on Smoking Initiation, Exhibit US-89.

measure.[99] Applying this analysis to the measure at issue supports the U.S. view, and directly contradicts Indonesia's arguments.

71. 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.[100] Indonesia also appears to agree that an objective of section 907(a)(1)(A) is to protect all young people within the age of initiation when it contends that *raising the minimum age* for purchasing cigarettes to prevent young adults from legally obtaining cigarettes would fulfill the objective of section 907(a)(1)(A).[101]

72. Indonesia's arguments regarding the measure's legislative history are also misguided. As an initial matter, under the U.S. system, the Report of the House of Representatives is not definitive, and nothing in the Tobacco Control Act limits the objective of the Act generally, and section 907(a)(1)(A) specifically, to protecting only those people age 17 and under. Furthermore, the House of Representatives Report never states that reducing smoking by children and adolescents is the ultimate or only aim of section 907(a)(1)(A), but rather that it is a significant part of the overall intent. The House of Representatives Report states that the intent of the bill "includes" reducing the number of children and adolescents who smoke; the Report does not say this is the only intent of the bill.[102]

73. To put this issue another way, the purpose of the Tobacco Control Act generally, and section 907(a)(1)(A) specifically, is not simply to delay the age at which people begin smoking, but to deter people from smoking in the first place. 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. By *eliminating* these products from the market *entirely*, section 907(a)(1)(A) seeks to protect *all* people at risk of becoming smokers.

74. 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.[103] The text thus represents a balancing of interests, which is entirely consistent with theories of sound public health policy-making in general and smoking prevention measures in particular.[104] The legislative history of

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[99] *Chile – Alcohol (AB)*, para. 62; *see also Japan – Alcohol (AB)*, at 27; U.S. Second Written Submission, para. 40 (citing same).

[100] U.S. Second Written Submission, paras. 33-40; NSDUH 2008 Table on Smoking Initiation, Exhibit US-89.

[101] *See* Indonesia Second Written Submission, para. 134.

[102] H.R. Rep. No. 111-58, Pt. 1 at 37-38 (2009), Exhibit US-67.

[103] U.S. Second Written Submission, paras.154-155.

[104] U.S. Second Written Submission, paras. 21-32, 162.

section 907(a)(1)(A) confirms this complex balancing of interests, a point that Indonesia continues to ignore.[105] Indonesia is thus in error when it denies that the consideration of potential negative consequences is an important aspect of section 907(a)(1)(A).[106] The reality is far more complicated than Indonesia would have the Panel believe, and the text of the challenged measure, and its underlying objective, reflects this complex reality.

75. 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.[107] Nothing in the text, design, architecture, or revealing structure of the measure would indicate that this is so. In addition, Indonesia finds no support for its claim in the hundreds of pages of legislative history that accompanies the Tobacco Control Act. The fact is that neither the text nor the legislative history support that the objective of section 907(a)(1)(A) is any other than the objective the United States has put forward. Even Indonesia's "evidence" for this view – one media report – only quotes one politician speculating as to his personal view of the legislation. Such "evidence" cannot override an objective derived from the clear text of the measure.

76. As to the legislative process, the United States has previously explained that the Tobacco Control Act generally, and section 907(a)(1)(A) specifically, targets U.S. companies, and does not support or protect them in any way.[108] We also find Indonesia's claims difficult to understand given that the U.S. company has invested heavily in the Indonesian clove cigarette industry, purchasing the second largest clove cigarette producer in Indonesia for US$5.2 billion in 2005.[109] If the company had the leverage that Indonesia alleges it does, we would have thought that it would have been able to prevent the banning of clove cigarettes to protect this substantial investment.

3. Indonesia Fails to Establish That Section 907(a)(1)(A) Does Not Fulfill Its Legitimate Objective at the Level the United States Considers Appropriate

77. Indonesia continues to argue that section 907(a)(1)(A) is inconsistent with Article 2.2 because it does not fulfill its objective *sufficiently*. In particular, Indonesia claims that the measure cannot make a "material contribution towards achieving" its objective because a relatively little used class of cigarettes is banned under the measure, while menthol-flavored cigarettes, which constitutes an estimated 26% of the U.S. market, and tobacco-flavored cigarettes, which constitute the vast majority of all the remaining cigarettes sold in the market,

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[105] *See* U.S. Second Written Submission, para. 154.

[106] *See* Indonesia Second Written Submission, para. 112.

[107] Indonesia Second Written Submission, para. 118.

[108] U.S. First Written Submission, paras. 113, 234.

[109] Nichter, "Reading culture from tobacco advertisements in Indonesia," Tobacco Control, 2009: 18, at 99, Exhibit US-135.

continue to be sold.[110] In other words, Indonesia continues to argue that Article 2.2 requires an approach where Members are prohibited from adopting an incremental approach to regulation, and instead are obligated to regulate only in a manner that has the greatest impact possible – regardless of the consequences.

78. The policy implications of such an argument are significant. If accepted, Article 2.2 would prohibit Members from regulating incrementally where such measures have an effect on trade. This argument not only ignores the text of Article 2.2, which only requires that Members tailor their technical regulations so that they are not more trade-restrictive than necessary, but ignores that many, if not all, Members regulate complex issues, such as smoking, in this manner.[111] Notably, Indonesia cannot cite to even one source for support of its particular view of Article 2.2.

79. As a legal matter, 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.[112] As the United States has stated several times, banning tobacco- and menthol-flavored cigarettes would not reflect the broader and more complex objective of section 907(a)(1)(A), which includes avoiding the potential negative consequences associated with precipitously banning products to which tens of millions of adults are addicted.[113]

4. Indonesia Fails to Establish That Section 907(a)(1)(A) Is More Trade Restrictive Than Necessary

80. 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."[114] It is, however, highly unlikely that whether an alternative measure exists will ever be "moot," and it is certainly not so in this case. 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.[115] The question of whether such an alternative measure exists remains highly relevant to the Panel's inquiry.

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[110] Indonesia Second Written Submission, para. 126.

[111] U.S. Second Written Submission, paras. 15-20.

[112] U.S. Second Written Submission, para. 161.

[113] U.S. Second Written Submission, para. 162.

[114] Indonesia Second Written Submission, para. 120.

[115] U.S. Second Written Submission, para. 159; *see also* U.S. Answer to Q54, para. 119.

81. In its latest submission, Indonesia fails once again to adduce any evidence that such an alternative measure exists, but merely refers the Panel to its First Written Submission where it referenced various measures and classes of measures. We have previously discussed the numerous flaws in Indonesia's approach in this regard,[116] and continue to maintain that, as such, Indonesia has failed to establish a *prima facie* case for its Article 2.2 claim.

5. Indonesia Misinterprets the Reference to the Phrase "Risks of Non-Fulfillment"

82. Indonesia argues that the reference to the risks of non-fulfillment are an instruction to the Panel, rather than the Members themselves, and that the Panel should evaluate the likely impact of not banning clove cigarettes.[117] As we have stated previously, the reference to non-fulfillment in the second sentence directs the Members to take into account these risks.[118] And the fourth sentence requires that in doing so a Member consider among other things available scientific and technical information. In this case, not fulfilling the objective would result in the smoking rates of young people, and the population overall, remaining unchanged.

83. Moreover, Indonesia is incorrect that Article 2.2 obligates the importing Member to evaluate the risk of the imported product.[119] Members need not base their technical regulations on risk assessments as is required by Article 5.1 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement"), and it is incorrect for Indonesia to try to import that obligation to the TBT Agreement. The language refers to the risks of nonfulfillment of the *objective* would create, not the risks posed by a particular *product*.

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

84. As the United States has previously explained, Indonesia has not established *prima facie* cases for any of its other TBT claims.

1. Indonesia Has Not Shown That the United States Acted Inconsistently with Article 2.5

85. In its First Written Submission, the United States discussed that it has fully complied with Article 2.5 by explaining to Indonesia that the United States has applied the measure for the protection of public health, in particular the health of the young people in the United States.[120] Moreover, the United States noted that the Tobacco Control Act itself provides ample

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[116] *See* U.S. Second Written Submission, paras. 164-165; U.S. First Written Submission, paras. 270-271.

[117] Indonesia Second Written Submission, para. 130-131.

[118] U.S. Answer to Q61, para. 142.

[119] *See* Indonesia Second Written Submission, para. 130.

[120] U.S. First Written Submission, paras. 280-283.

explanation of the law and its purposes, and is supplemented by a thorough legislative history, all of which is, and has been, readily available.[121]

86. Indonesia continues to disagree with that view, arguing that Article 2.5's reference to "justification" means that the importing Member must provide a separate explanation of each element contained in paragraphs 2-4 of Article 2, along with all supporting data.[122] Indonesia also claims it was "prejudiced" by the alleged inaction of the United States because it "undermined" Indonesia's ability to "provide a fact-based rebuttal to any specific concerns."[123] Indonesia is mistaken on both points.

87. 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. While Indonesia requested an explanation regarding various aspects of section 907(a)(1)(A) and the basis for it, it never invoked Article 2.5 nor requested an explanation of the justification for section 907(a)(1)(A) in terms of the provisions of Article 2.2 to 2.4.[124] It is thus not surprising that in response to Indonesia's request for an explanation, the United States similarly did not refer to these provisions.

88. However, as discussed in the U.S. First Written Submission, the United States did explain to Indonesia that it applied the measure to protect public health, in particular the health of young Americans, that clove cigarettes are particularly appealing to young people, and that clove cigarettes could pose a range of additional health risks over conventional cigarettes. 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.

89. The United States also notes that the Tobacco Control Act together with its legislative history provides the justification for section 907(a)(1)(A). In this regard, Indonesia argues that if the text and legislative history of the measure at issue could be considered in evaluating whether a Member has met its obligation under Article 2.5, Article 2.5 would be rendered "largely meaningless." Indonesia is incorrect.

90. Nothing in Article 2.5 suggests that explanations provided in the text of the measure itself or its legislative history should be discounted in evaluating whether a Member has explained the justification of a measure. In this dispute, the challenged measure is part of a much larger law, which has an extensive legislative history that is publicly available. The fact that much of the

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[121] U.S. First Written Submission, para. 282.

[122] Indonesia Second Written Submission, para. 145.

[123] Indonesia Second Written Submission, para. 145.

[124] *See* Communication from Indonesia, "Certain New Measures by United States Addressing the Ban on Clove Cigarettes," G/TBT/W/323 (20 Aug. 2009); TBT Committee, "Minutes of the Meeting of 5-6 November 2009," G/TBT/M/49 (22 Dec. 2009); Indonesia First Written Submission, paras. 130-132 (citing same).

information that Indonesia claims to need was already readily available – and no doubt reviewed by Indonesia – certainly is relevant to Indonesia's claim.

91. Second, Indonesia is wrong to claim that it has suffered any prejudice. As noted previously, 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. The language of section 907(a)(1)(A) is basically unchanged from when it was originally drafted in 2004, and it has been well-known for some time that part of the underlying purpose of the measure was to eliminate those products that appeal to young people. If Indonesia considered that there was a lack of scientific evidence supporting the ban, it certainly had the opportunity to provide fact-based arguments on that issue.

2. Indonesia Has Not Shown That the United States Acted Inconsistently with Article 2.8

92. Indonesia argues that not only is it "appropriate" but "essential" for the United States to define the requirement of section 907(a)(1)(A) in terms of performance rather than descriptive characteristics because cigarette producers are confused as to whether the measure bans their products.[125] Indonesia's claim is misplaced.

93. First, it is entirely specious for Indonesia to imply that its producers do not know whether the measure bans their product. Indonesia makes a unique cigarette, which is composed of up to 40% cloves. This physical characteristic gives the Indonesian product a pungently sweet aroma and taste, and provides a distinct flavor from any other cigarette. There is no doubt that clove is the characterizing flavor of clove cigarettes. In fact, Indonesia has not only failed to contest that the measure bans its product, it has put forth evidence testifying to this fact.[126]

94. 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. Indeed, Indonesia appears not to understand what a performance requirement means.

95. Article 2.8 requires Members, "wherever appropriate," to "specify technical regulations based on product requirements in terms performance rather than design or descriptive characteristics." An example of a performance requirement would be a technical regulation for chairs, for example, that set requirements in terms of the chair must support a person of at least 130 kilograms, rather than in terms of the components of the chair (*i.e.*, if made of wood then the wood must be of a certain thickness and the nails must be of a certain length).

96. Section 907(a)(1)(A) prohibits the inclusion within the product of additives, flavors (other than tobacco or menthol), or herbs or spice "that is a characterizing flavor of the tobacco

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[125] Indonesia Second Written Submission, para. 148.

[126] *See* Exhibit IND-44 (Letter from Pennsylvania to PT Djarum; FDA Warning Letter to indonesiacigarettes.com).

product or tobacco smoke." The measure is thus written in terms of design and description in that it prohibits cigarettes whose characterizing flavors are other than tobacco or menthol. It thus differs from a measure that regulates the performance *of the product*. An example of such a measure for cigarettes is the requirement that cigarettes be "fire safe." "Fire safe" cigarettes are those that are designed to self-extinguish when they are lit but not being smoked. The United States measure is entirely different in that it does not regulate the performance of the product as a whole, but rather the effect of certain ingredients of the cigarette. The United States continues to fail to see how the requirements of section 907(a)(1)(A) could be put in terms of performance, and, as such, does not see how it would be "appropriate" to do so.

97. Certainly, Indonesia's Exhibit IND-70 does not provide an answer to this question. Indonesia purports that the standard referred to in Exhibit IND-70 clarifies what concentration of an additive is needed to give the product a characterizing flavor of that additive. Thus, the standard Indonesia refers to would not be a performance standard – it is not a standard as to how a cigarette is to perform. Nor would it replace the standard in section 907(a)(1)(A). Instead, it merely purports to provide a particular means of testing whether that standard is met.

98. As a threshold matter, the United States is not clear that the standard referred to in Exhibit IND-70 is applicable to cigarettes at all, and Indonesia has made no showing that it is. But even if it is, the United States fails to see how a measure that incorporates this standard, which only purports to provide a particular means of testing, establishes that the challenged measure could be written in fundamentally different terms, and what those terms would be.

99. Indonesia's underlying Article 2.8 complaint appears to be that section 907(a)(1)(A) is vague.[127] But Article 2.8 does not to obligate the Members to set requirements that are as specific as possible. Rather, it requires Members, "where appropriate," to avoid setting requirements of description and design, which tend to be more prescriptive than performance requirements. Indonesia does not establish that it is appropriate for the United States to base section 907(a)(1)(A) on performance rather than design by noting that a standard exists that Indonesia purports could help implement – but not fundamentally alter – the requirement of section 907(a)(1)(A).

100. Indonesia would need to establish that it would be appropriate for section 907(a)(1)(A) to be based on performance rather than design, and Indonesia has made no showing that that is the case in this dispute.

3. Indonesia Has Not Shown That the United States Acted Inconsistently with Article 2.12

[127] *See* Indonesia Second Written Submission, para. 148; Indonesia First Opening and Closing Statement, para. 172; Indonesia First Written Submission, para. 135.

101. Indonesia continues to claim that the United States acted inconsistently with Article 2.12 of the TBT Agreement by not providing a six month interval between publication and entry into force, even though the text of Article 2.12 only requires that a "reasonable" interval be set. Nevertheless, Indonesia insists that a six month interval is necessary in the application of *all* technical regulations of *every* Member, unless "urgent circumstances" exist.[128]

102. To determine whether a Member has acted consistently with Article 2.12, the Panel must determine whether the interval set by the measure is reasonable given the facts of that particular situation.[129] 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.

103. The Doha Ministerial Decision that Indonesia purports to rely on does not require a different result. As noted previously, the Ministerial Decision constitutes, at most, a means of supplemental interpretation under Article 32 of the Vienna Convention, and nothing in the Ministerial Decision can be used to directly supplant the text of Article 2.12, which allows Members to set any interval between publication and entry into force as long as the interval is "reasonable."[130]

104. Further, the Ministerial Decision provides that the interval shall "normally" be not less than six months. In other words, the Ministerial Declaration contemplates that there will be instances where Members do not provide at least six months between publication and entry into force. Indonesia has not established that the circumstances of this dispute are such that the United States should have provided not less than six months, or, said another way, why the months between publication and entry into force of section 907(a)(1)(A) is inconsistent with "normally" providing not less than six months.

105. Given the above, the United States understands Indonesia's complaint here as being more one of form than of substance. In any event, Indonesia fails to prove that the United States has acted inconsistently with Article 2.12.

4. Indonesia Has Not Shown That the United States Acted Inconsistently with Article 12.3

106. Indonesia continues to argue that the United States acted inconsistently with Article 12.3 for allegedly failing to "take account of the special development, financial and trade needs of" Indonesia as a developing country. Indonesia claims that its "special need" is employment related to the production of tobacco and cigarettes and that section 907(a)(1)(A) "would have a

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[128] *See* Indonesia Second Written Submission, para. 151.

[129] U.S. First Written Submission, paras. 301-302.

[130] U.S. Answer to Q6, paras. 3-5.

severe adverse impact on farmers and manufacturing jobs."[131] As to the legal standard at issue, Indonesia will only say that "something" more than what the United States has done is required, without explaining what that "something" more is exactly.[132] Indonesia even goes as far as to assert that the issue of what evidence Indonesia would need to show that an importing Member did "take account of" the special needs of Indonesia is "not before the Panel."[133] The essence of the latest version of Indonesia's argument appears to be that the United States has acted inconsistently with Article 12.3 simply because it did not agree with Indonesia that clove cigarettes should continue to be sold in the U.S. market.[134] This subjective standard cannot be what was intended to be the test for Article 12.3.

107. As a threshold issue, Indonesia has yet to show that it has identified to the United States a "special need" as a developing country for purposes of Article 12.3.[135] A risk of unemployment simply cannot be a "special need" given that *every* government is concerned about the unemployment rate of its citizens.

108. 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. As Indonesia repeatedly asserts, the U.S. market for clove cigarettes is very small. In fact, Indonesian cigarette exports to the United States comprised just .07% of Indonesian cigarette *exports* in 2008.[136] It is difficult to understand how the closure of this market would have a "severe adverse impact" on the multi-billion dollar Indonesian clove cigarette industry.

109. As discussed previously, 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.[137] Nothing in Article 12.3 requires the "something" more that Indonesia claims it does. In particular, Article 12.3 does not require the developed country Member to accept every recommendation presented by the developing country Member.[138] The U.S. view is thus in accordance with the *EC – Biotech* panel's interpretation of the analogous provision in the SPS Agreement, Article 10.1, which provides relevant context for the interpretation of TBT Article 12.3.[139]

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[131] Indonesia Second Written Submission, para. 154.

[132] Indonesia Second Written Submission, para. 157; Indonesia First Opening and Closing Statement, para. 186.

[133] Indonesia Answer to Q77, para. 152.

[134] *See* Indonesia Second Written Submission, paras. 156-157.

[135] *See EC – Biotech*, para. 7.1622.

[136] U.S. First Written Submission, para. 211 (citing to World Atlas Report of Indonesian Cigarette Exports 2001-2009, Exhibit US-75).

[137] U.S. First Written Submission, para. 308.

[138] U.S. First Written Submission, para. 309.

[139] U.S. Answer to Q73, paras. 152-154.

110. Finally, the U.S. view does not render Article 12.3 redundant of Article 2.9.4 as Indonesia claims.[140] Article 2.9.4 could, in some instances, provide a mechanism for a dialogue on the "special needs" referenced in Article 12.3. The obligation of Article 2.9.4 is only one of a set of obligations contained in Article 2.9. If the conditions contained in the Article 2.9 chapeau are satisfied, then the transparency mechanism described in the subparagraphs of Article 2.9 are triggered. Article 12.3 is not so conditioned and does not specify a particular mechanism to facilitate the communications. In this regard, Article 12.3 is a broader obligation than the one provided in Article 2.9.4. The fact that in certain circumstances, Article 12.3 could be satisfied by satisfying Article 2.9.4 does not mean that Article 12.3 is inutile.

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

111. Even aside from the fact that section 907(a)(1)(A) is consistent with U.S. obligations under the GATT 1994, 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.[141] For the reasons explained previously, section 907(a)(1)(A) also meets the requirements of the Article XX chapeau.[142]

112. The United States would also add that, in terms of protecting the environment, the Appellate Body has stated that the GATT and the other covered agreements provide a "large measure of autonomy [to the Members] to determine their own policies."[143] This "large measure of autonomy" should exist to at least the same degree where the Member is acting to protect human life and health, and should be taken into consideration in any Article XX analysis.

113. Finally, the Panel's inquiry into whether the measure is necessary will almost certainly involve considering the scientific data put forward by the parties. In this regard, we finish where we started – with *EC – Asbestos*. That panel there believed "that it is not its function to settle a scientific debate."[144] "In proceeding with [the analysis of the public health risk], the Panel will have to make a pragmatic assessment of the scientific situation and the measures available, as would the decision-makers responsible for the adoption of a health policy."[145] 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

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[140] *See, e.g.*, Indonesia's First Opening and Closing Statement, para. 185.

[141] *See* U.S. First Written Submission, paras. 315-329.

[142] *See* U.S. First Written Submission, paras. 330-337.

[143] *US – Gasoline (AB)*, at 30.

[144] *EC – Asbestos (Panel)*, para. 8.181.

[145] *EC – Asbestos (Panel)*, para. 8.183.

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.

114. Indonesia's approach should be rejected.

III. CONCLUSION

115. 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-130 Jewel, *Statistics for Epidemiology* (2004)

US-131 History of Kretek, "Enjoying a kretek cigarette"

US-132 Djarum Black Clove Cigarettes

US-133 Biography of John. R. Polito

US-134 Indonesia Cigarette Exports to the United States

US-135 Nichter, "Reading culture from tobacco advertisements in Indonesia," Tobacco Control, 2009:18, 98-107