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

(DS406)

Executive Summary of the Second Written Submission of the United States of America

January 24, 2011

I. INTRODUCTION

1. Section 907(a)(1)(A) is a public health measure based on how cigarettes are used by the U.S. population as a whole. Cigarettes with certain characterizing flavors are prohibited under the measure because they are especially enticing to young people – and are therefore particularly harmful as they facilitate addiction – but also are not used by a large number of adults. As such, from a public health perspective, it is both desirable and appropriate to ban them. Indonesia's claims against section 907(a)(1)(A) rely on arguments that are either vague or wrong as a matter of law, and on factual assertions unsupported by evidence and refuted by the evidence submitted by the United States. And instead of engaging on the public health issues involving section 907(a)(1)(A) and youth smoking, Indonesia simply denies they exist.

2. With respect to national treatment, Indonesia maintains incorrectly that clove cigarettes are "like" tobacco and menthol cigarettes, and that section 907(a)(1)(A) accords less favorable treatment to Indonesian products because it does not also ban every domestic cigarette. However, the relevant facts support that in the circumstances of this case, clove cigarettes are not "like" tobacco or menthol cigarettes. Moreover, the prohibition on flavors contained in section 907(a)(1)(A) in fact applies both to imported and domestic cigarettes, and does not apply to the vast majority of imported cigarettes.

3. Like its national treatment arguments, Indonesia's arguments with respect to Article 2.2 of the TBT Agreement fail. In particular, Indonesia has not adduced any, much less sufficient, evidence to establish that a reasonably available less trade restrictive measure exists that fulfills the objective of section 907(a)(1)(A) at the level the United States considers appropriate. As such, Indonesia has failed to establish a *prima facie* claim that section 907(a)(1)(A) is inconsistent with TBT Article 2.2.

II. LEGAL ARGUMENTS

A. National Treatment Claims under Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement

4. As the United States noted in its Answers to the Panel's First Set of Questions to the Parties, the United States considers that the Panel can consider together the GATT 1994 and TBT national treatment claims, with due consideration to the particular context and requirements of each claim. In fact, the United States submits that the TBT Agreement provides specific context, which is relevant to the national treatment analyses under the TBT Agreement and under the GATT 1994. The repeated theme captured in the Preamble is that technical measures may make product distinctions that affect international trade, so long as certain conditions are met. Thus, as illustrated by the text of the TBT Agreement, Members recognized that technical measures often serve the purpose of prescribing and proscribing product characteristics, requirements and standards, and that such measures may often – legitimately and permissibly – affect international trade and the market access of products, both foreign and domestic. Standing alone, the mere fact that a technical regulation may affect international trade is not evidence that the measure is inconsistent with trade obligations. This layer of context is also relevant in the national treatment analysis under the GATT 1994, as technical regulations are a particular sub-set of the covered measures under Article III:4.

5. Indonesia's "like product" analysis is inconsistent – shifting from submission to submission – and without connection to the facts of the dispute or the context provided by the

agreements. Indonesia begins in its First Written Submission by noting – as it should – the Appellate Body's statement that the term "like product" "must be interpreted in light of its context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears." However, after noting the contextual nature of "likeness," in the immediately following paragraphs Indonesia abandons this principle and invokes the conclusions reached in two disputes with entirely different factual situations as the basis for its claim that "all" cigarettes should be deemed "like" products. In its Answers to the Panel's First Set of Questions to the Parties, Indonesia then makes an abrupt shift – suggesting that all cigarettes are *not* necessarily "like" products. Indonesia offers this characterization in response to a question concerning Indonesia's apparently different, less favorable tax treatment of foreign cigarettes.

6. In addition, in Indonesia's First Written Submission, Indonesia recognized – as it should – that cigarettes with characterizing flavors such as berry or chocolate are relevant to the dispute, and Indonesia included them in its like product analysis. Significantly, Indonesia acknowledged as a legitimate "like product" distinction cigarettes' implications for the public health, which is a primary distinction upon which clove and other characterizing flavors are in fact different from tobacco and menthol. Thus, Indonesia expressly recognized that, based on their appeal and, implicitly, the demographics of their users, different cigarettes may pose a different health risk. Moreover, Indonesia recognized that the health risk posed by certain types of cigarettes is so significant in the context of this case that it means that those cigarettes "need not be considered like" other cigarettes. The U.S. First Written Submission showed that clove cigarettes – like the cigarettes with cherry, chocolate and other characterizing flavors mentioned in Indonesia's first submission – presented public health risks due to their appeal to younger smokers. Indonesia then changed its position on flavored cigarettes. In addition, Indonesia approaches the four factors suggested in paragraph 18 of the *Report of the Working Party on Border Tax Adjustments* (*i.e.*, physical properties, end-uses, consumer tastes and habits, and tariff classification) as a mechanical exercise, lacking any sort of compass as to which characteristics are relevant and which are not.

7. The covered Agreements and the provisions at issue – Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 – provide the context to determine "which characteristics or qualities are important in assessing the 'likeness' of products," "the degree or extent to which products must share qualities or characteristics in order to be 'like products,'" and "from whose perspective "likeness" should be judged." The Appellate Body employs the traditional four factors, but has emphasized that these four factors are just tools to frame the inquiry, and should not be used as a substitute for the analytical task of determining which factors of "likeness" are relevant in particular circumstances. The United States has set forth the contextual principles of the GATT 1994 and the TBT Agreement that in this case inform a national treatment analysis under those Agreements. The like product analysis should apply weight to those characteristics which relate directly to whether the products regulated by the measure are competitive in the U.S. market and which are related to the measure's public health basis.

8. Based on these two guiding principles, the United States submits that certain characteristics are especially relevant to the like product analysis. First, certain physical properties that are different among the compared products should be accorded weight, not only to the extent that they are relevant in assessing the competitive relationship between and among products, but also because they are relevant to the public health basis upon which section 907(a)(1)(A) differentiates among products. Second, consumer tastes and preferences – which

stem from the relevant physical characteristics and which have important public health consequences – also should be accorded weight.

9. The physical presence of cloves in clove cigarettes is particularly relevant. The nearly equal mixture of clove and tobacco in clove cigarettes sets them apart to consumers in terms of their taste and aroma. Consumers select clove cigarettes because they contain clove, and select tobacco and menthol because of the flavor that characterizes those cigarettes. In addition, clove cigarettes contain a "special sauce" that manufacturers expressly tout as a distinguishing physical feature. Third, clove (and perhaps other flavors in the "special sauce") contains eugenol, which evidence strongly suggests creates a numbing sensation that differentiates cloves from other cigarettes, including menthol.

10. These physical characteristics, unique to clove cigarettes, are directly related to consumer tastes and preferences. These consumer choices and patterns of use also are particularly relevant to the public health basis upon which section 907(a)(1)(A) distinguishes among cigarettes. Section 907(a)(1)(A) is based on the finding that cigarettes with characterizing flavors (other than tobacco or menthol) are especially appealing to young people within the age window of initiation and are much less appealing to older adults.

11. The U.S. position that certain physical traits should carry significant weight because of their relationship to consumer tastes and habits, patterns of use, and the particular public health risk at issue in this case is consistent with the approach in *EC – Asbestos*. In that report, the Appellate Body considered each of the four criteria in turn, and then applied weight where it deemed appropriate to conclude that the particular physical characteristic of toxicity was significant in the given circumstances. And the relative toxicity of the products was directly relevant to the purpose of the challenged measure, which sought to protect the public health by banning asbestos because of its level of toxicity.

12. The characteristics of cloves noted above are the most relevant, and should be accorded significant weight. And even when one examines other factors, those factor do <u>not</u> support Indonesia's argument that clove cigarettes are like other types of cigarettes. Clove cigarettes are different than tobacco or menthol cigarettes in all of the traditional categories – physical properties, consumer tastes and habits, end-uses, and tariff treatment.

13. Indonesia would have the Panel consider the "less favorable treatment" claim without respect to the context of the relevant Agreements and based on an extreme view that has been squarely rejected by the Appellate Body. Indonesia submits that all different types of cigarettes are a single "like product," and that if *any* domestic cigarette is permitted under section 907(a)(1)(A), the measure accords less favorable treatment to Indonesian products. Indonesia bases this view not on the text of the WTO Agreement nor on any findings of the Appellate Body or of a WTO Panel; rather, Indonesia relies on a single GATT Panel report *(US – Malt Beverages)*.

14. As an initial matter, the circumstances in this case are different than the circumstances (involving several state measures) in *US – Malt Beverages*. In any case, the "best treatment" approach advocated by Indonesia is inconsistent with the language of GATT Article III:4 and Article 2.1 of the TBT Agreement. The relevant comparison is the treatment accorded to imported "products" and like domestic "products" – not single imports and compared to single

like domestic products. There is no textual basis to interpret either national treatment provisions as providing for treatment of "an imported product" that is no less favorable than the treatment of "a domestic product."

15. Nor is it consistent with the Article III principle that measures should not be applied so as to afford protection to domestic production and the TBT affirmation that Members may take measures to protect the public health, including by laying down product characteristics. Were Indonesia's view to prevail – and if national treatment obligations were violated when a *single* import is restricted by a measure and a *single* like domestic product is not – Members' ability to regulate for the protection of human health or any other purpose would be seriously encumbered.

16. Further, in *EC – Asbestos* the Appellate Body has rejected the "best treatment" approach Indonesia advances. The Appellate Body affirmed that the relevant comparison for purposes of the "less favorable treatment" is not between an import as compared to the "best" treated like domestic product, but rather "a complaining Member must [...] establish that the measure accords to the *group* of 'like' *imported* products 'less favorable treatment' than that it accords to the group of 'like' *domestic* products." The Appellate Body makes the important observation in *EC – Asbestos* that, to the extent that the term "like product" under Article III:4 of the GATT is broad, it is tempered or hemmed in by the fact that "a Member may draw distinctions between products which have been found to be 'like', without, for this reason alone, according to the group of 'like' *imported* products 'less favorable treatment' than that accorded to the group of 'like' *domestic* products." In other words, a measure that accords different treatment to some imported products as compared to some like domestic products based, for example, on their characteristics as trainer cigarettes (and not based on their origin) is not a measure that accords different treatment to "the group of 'like' *imported* products" than the "group of 'like" *domestic* products." It is a measure that accords different treatment to the group of products that are trainer cigarettes than that accorded to the group of products that are not trainer cigarettes.

17. Even apart from its misguided "best treatment" argument, Indonesia has failed to demonstrate that section 907(a)(1)(A) accords less favorable treatment to imported cigarettes. Whether a measure accords less favorable treatment turns on how the measure treats imported products as compared to domestic products. For this purpose, the Appellate Body has examined whether the measure alters the conditions of competition to the detriment of imported products as compared to domestic products – but has made clear that a measure does *not* alter the conditions of competition to the detriment of imported products when the alleged detriment is "explained by factors or circumstances *unrelated to the foreign origin of the product*s." Moreover, "[t]he term 'Less favorable treatment' expresses the principle, in Article III:1, that internal regulations 'should not be applied ... so as to afford protection to domestic production." Accordingly, the guiding principle to the analysis is that a measure must not single out imports based on national origin so as to afford protection to domestic product. This also holds with respect to Article 2.1 of the TBT Agreement, which must be interpreted so as to permit technical regulations based on legitimate product distinctions – even where those distinctions may have a different impact on different products.

18. In this case, the fact that section 907(a)(1)(A) is a public health measure must be considered in examining any allegation of less favorable treatment. Product distinctions based on how consumers use products, and with regard to the consequences that could result from different regulations, are consistent with a public health approach. Therefore, in this case, the fact that

lesser-used cigarettes are banned should not be confused with discrimination against imported products as compared to domestic products. The fact that cloves fall under section 907(a)(1)(A) has nothing to do with their national origin and owes solely to how they are used by consumers in the United States and other public health factors.

19. The only evidence that Indonesia has submitted to demonstrate less favorable treatment is the fact that clove cigarettes are prohibited by the measure, and tobacco and menthol cigarettes are not. This evidence is incomplete and otherwise insufficient to establish less favorable treatment.

20. The fact that section 907(a)(1)(A) *also affects domestic cigarettes* is relevant. As the United States has demonstrated, from 1999 until at least 2006, U.S. cigarette manufacturers, in particular R.J. Reynolds, aggressively marketed a new line of flavored products specifically targeted at young people, under the business plan of hooking new cigarette addicts. Evidence shows that U.S.-produced cigarettes with characterizing flavors were on the market in 2008 and 2009. The United States and Indonesia do not appear to disagree that, but for government intervention, U.S. manufacturers would be selling flavored cigarettes on the U.S. market. Federal legislation was critical to remove the threat. Looking at what flavors were on the market in 2009 only captures a small part of the effect of section 907(a)(1)(A) on U.S. products. In assessing the market in *Mexico – Soft Drinks*, the panel considered a time period of roughly five years before the measure. In this case, it is even more important to gauge the impact of the ban by considering the years leading up to it, because of the well-publicized campaign against cigarettes with characterizing flavors that culminated in section 907(a)(1)(A), and the undisputed fact that U.S. producers would sell their products if given the chance.

21. The United States also takes issue with Indonesia's assertion that the market share of U.S. cigarettes with characterizing flavors was not "significant" or "relevant." Section 907(a)(1)(A) applies to a very small percentage of the total of all types and volume of cigarettes sold in the United States. One of the reasons the ban on characterizing flavors other than tobacco or menthol is appropriate for the public health in the United States is that it applies to a relatively small number of cigarettes, which are nonetheless significant from a public health perspective, because they are especially attractive to young people. Clove cigarettes comprised between 0.06% and 0.13% of the U.S. market in the years 2000-2009, and the share of other flavors on the market, which also was very small, should be considered "relevant" to the extent that the share of clove cigarettes is considered relevant. Accordingly, both imported and U.S. products are affected by the measure, and in each case, it is products with a relatively small market share. In addition, the vast majority of imported cigarettes are still permitted under the measure.

22. Not only has Indonesia failed to demonstrate that the prohibition in section 907(a)(1)(A) singles out imports, Indonesia also has not demonstrated that any detriment to clove cigarettes is dependent upon the foreign origin of clove cigarettes. As articulated by the Appellate Body in *DR – Cigarettes*, a measure does not alter the conditions of competition to the detriment of imported products when the alleged detriment is "explained by factors or circumstances *unrelated to the foreign origin of the product*, such as the market share of the importer." Here, the Appellate Body re-affirms the fundamental principal that the "treatment" analysis concerns imported products *as compared to* domestic products, and that not all detriments claimed by imports are evidence of less favorable treatment – the detriment must be determined, base on all relevant evidence, to depend on the foreign origin of the product. This principal is reinforced by the context of the TBT

Agreement, which recognizes that technical regulations legitimately will "lay down product characteristics" and thus distinguish between products.

23. The panel in *EC – Biotech* affirms the point. The panel determined that Argentina failed to properly allege "less favorable treatment" because it was not self-evident that the "alleged less favorable treatment of imported biotech products is explained by the *foreign origin of these products*, rather than, for instance, *a perceived difference* between biotech and non-biotech products *in terms of their safety*, etc." The Panel reasoned further that Argentina's allegation that imported biotech products were not allowed to be marketed, while corresponding non-biotech products were allowed to be marketed, was an insufficient basis – in itself – to raise a presumption of less favorable treatment.

24. The United States also notes here that we are not suggesting that the "subjective intent" of a measure is a determining factor. However, consistent with the Appellate Body approach in previous Article III disputes, it *is* relevant to conduct a "comprehensive and objective analysis of the structure and application of the measure in question on domestic as compared to imported products" to determine whether the objective of the measure is to afford protection to domestic production or fulfil some other legitimate objective. In this case evidence shows that the design, architecture, and structure of section 907(a)(1)(A) are consistent with an acceptable public health approach to regulating cigarettes. Section 907(a)(1)(A) is designed to prohibit types of cigarettes that are especially appealing to young people, but not heavily used by adults. The fact that tobacco and menthol flavored cigarettes are not banned under section 907(a)(1)(A) is not an "anomaly" in the design, structure and operation of the measure. In this case, the facts, taken together, show that section 907(a)(1)(A) lays out product characteristics that have nothing to do with the origin of products, and therefore do not accord imported cigarettes including Indonesian cigarettes less favorable treatment than like domestic products.

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

25. To prove a breach of Article 2.2 of the TBT Agreement, a complaining party must establish that the measure at issue is "more trade-restrictive than necessary to fulfil a legitimate objective." As reviewed in the U.S. First Written Submission, interpreting Article 2.2 in accordance with customary rules of interpretation of public international law, a measure is "more trade-restrictive than necessary to fulfill a legitimate objective" 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. Indonesia has not established that such an alternative measure exists, nor could it. Indonesia also puts forth an interpretation of Article 2.2 that is inconsistent with customary rules of treaty interpretation reflected in the Vienna Convention, and accordingly should not be followed.

26. The objective of section 907(a)(1)(A) is protecting 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. These negative consequences are the potential consequences for the individual, the U.S. health care system, and the society at large through an expansion of an already existing black market as elaborated in the U.S. First Written Submission. The objective of section 907(a)(1)(A) is legitimate for all the reasons discussed in the U.S. First Written Submission.

27. Further, the level at which the United States considers is appropriate to protect public health is to eliminate from the market, not simply restrict access to, those products that are disproportionately used by young people, but not to eliminate from the market those products to which tens of millions of adults are addicted, and whose precipitous withdrawal from the market may cause negative consequences. This level is reflected in section 907(a)(1)(A). Members are entitled to choose for themselves "which policy objectives they wish to pursue and the levels at which they wish to pursue them."

28. The means by which section 907(a)(1)(A) fulfils its legitimate objective is to ban products that are disproportionately used by young people while not banning products to which tens of millions of adults are addicted. Specifically, in only prohibiting those products that serve as "trainer" cigarettes for young smokers and which are not regularly used by adult smokers, namely cigarettes with characterizing flavors that appeal to young people, while not prohibiting those products to which tens of millions of adults are addicted, namely menthol and tobacco cigarettes, section 907(a)(1)(A) fulfills its objective to reduce youth smoking while avoiding the potential for negative public health consequences that might be associated with banning cigarettes to which tens of millions of adults are addicted.

29. Indonesia appears to hinge its Article 2.2 claim on the allegation that section 907(a)(1)(A) does not fulfill its legitimate objective, and has only referenced ever briefly the potential existence of any alternative measures. As such, the United States considers that Indonesia has thus far not even attempted to establish a *prima facie* case, much less established one. It is undisputable that Indonesia has the burden of establishing each element of a *prima facie* case. This *prima facie* case must include adducing sufficient evidence that a reasonably available alternative measure exists that is significantly less trade-restrictive and fulfills the objective of the measure at the level that the United States considers appropriate.

30. Indonesia repeatedly mischaracterizes the objective of section 907(a)(1)(A) as "reducing youth smoking." That is a gross oversimplification of the objective of section 907(a)(1)(A), which strikes a balance of different public health considerations deriving from the use of different classes of products.

31. In determining the objective of a measure, the Appellate Body has indicated that panels should focus on the text, design, architecture, and revealing structure of the measure. The text, design, architecture, and revealing structure of section 907(a)(1)(B) draws distinctions between products, banning some, and allowing others to continue to be produced and sold in the United States. The text thus represents a counter-balancing of interests, which is entirely consistent with theories of sound public health policy making in general and smoking prevention measures in particular. The legislative history of section 907(a)(1)(B) confirms this complex balancing of interests, a point that Indonesia ignores in its analysis. Indonesia is thus in error when it ignores this complex consideration of various factors when characterizing that the objective of section 907(a)(1)(A) is merely to "reduce youth smoking."

32. Indonesia also appears to argue that section 907(a)(1)(A) does not fulfill its objective in that it does not "reduce youth smoking" *enough*, given that the measure does not also ban menthol and tobacco flavored cigarettes, the two most popular types of cigarettes with all age groups, including those people within the age of initiation. The United States has discussed in detail in

both this and previous submissions that nothing in the WTO Agreements limits the United States – or any Member – to pursuing on only those public health measures that *eliminate* the risk they target. Indeed, the preamble to the TBT Agreement makes clear that no Member should not "be prevented from taking measures . . . for the protection of human . . . life or health . . . at the levels it considers appropriate."

33. Further, Indonesia cannot 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 make a greater contribution to its objective. Indonesia must show that whatever contribution section 907(a)(1)(A) makes to its objectives it is more trade-restrictive than necessary because there is a reasonably available alternative measure that fulfils section 907(a)(1)(A)'s objectives that is significantly less trade-restrictive. Only if a reasonably available alternative measure is available that (i) fulfils the objective of the measure and (ii) is significantly less trade restrictive can it be concluded that the measure is more trade restrictive than necessary to fulfil its objective. Indonesia has not made, and cannot make, such a showing.

34. Indonesia also appears to contend that section 907(a)(1)(A) does not fulfill its objective because the United States has not provided any evidence that smoking rates have declined since the ban on September 22, 2009. Indonesia misunderstands both the proper legal inquiry, and the applicable rules for burden of proof. On the proper legal inquiry, Article 2.2 permits Member to adopt technical regulations that are designed "to fulfil a legitimate objective"; Article 2.2 does not impose a requirement that the adopting Member have evidence that the measure has succeeded in fulfilling that objective.

35. Indonesia continues to make vague references to "dozens" of different measures that apply to all cigarettes, such as advertising restrictions and the like. Indonesia does not adduce any evidence that any of these measures fulfill the legitimate objective at the level the United States considers appropriate. It has, therefore, not met its burden of establishing a *prima facie* case that section 907(a)(1)(A) is more trade-restrictive than necessary to fulfil its objective.

36. The alternative measures Indonesia identifies would not in fact fulfill the objectives of section 907(a)(1)(A) at the level the United States considers appropriate: those alternatives would all continue to allow trainer cigarettes with characterizing flavors of candy, fruit, liquor, etc. to remain on the market. The United States already imposes significant restrictions on the advertising, marketing, and sale of cigarettes. Section 907(a)(1)(A) together with other restrictions on the advertising, marketing and sale of cigarettes in place in the United States form part of a comprehensive U.S. strategy to address the public health concerns associated with smoking. If the United States substituted one aspect of this comprehensive strategy for another – for example to forgo section 907(a)(1)(A) in lieu of restrictions already in place in the United States – this would reduce the overall ability of the United States to address the very serious public health concerns associates with smoking. Any measure that does not eliminate from the market cigarettes with characterizing flavors of candy, fruit, liquor, etc. that tens of millions of adults do not smoke does not fulfill the legitimate objective at the level the United States considers appropriate.

37. Indonesia has implicitly suggested, although not formally identified, three alternative measures that would eliminate trainer cigarettes with characterizing flavors of candy, fruit, liquor, etc.: (1) a measure that bans all cigarettes; (2) a measure that bans all cigarettes except those with

a characterizing flavor of tobacco (*i.e.*, menthol, clove and other flavors would be banned); and (3) a measure that bans all cigarettes except those with characterizing flavors of tobacco, menthol, and clove. Each alternative measure is flawed, however, and none of them establish that section 907(a)(1)(A) is more trade-restrictive than necessary.

38. Neither of the first two alternative measures are less trade-restrictive than section 907(a)(1)(A), much less "significantly" so. This point is sufficient in of itself to establish that these possible alternative measures are *not* reasonably available alternative measures that are significantly *less* trade-restrictive that fulfil the objective of section 907(a)(1)(A). Moreover, neither measure fulfills the objective of section 907(a)(1)(A). In particular, while they eliminate trainer cigarettes from the market, they would also eliminate from the market cigarettes to which tens of millions of adults are addicted. They would therefore fail to fulfil a critical component of the objective of section 907(a)(1)(A), specifically avoiding the potential negative health consequences associated with banning cigarettes to which tens of millions of adults are addicted.

39. Indonesia also makes reference to a third possible alternative measure: all cigarettes are banned unless they have a characterizing flavor of tobacco, menthol, or clove. This alternative measure does not fulfill the objective of section 907(a)(1)(A) in that it would not eliminate from the market those products that are disproportionately used by young people; rather it would leave a portion of products that are disproportionately used by young people on the market (*i.e.*, clove cigarettes).

40. Indonesia contends that, given the "similarity of the text of Article XX of the GATT 1994 and its subparagraph (b) and Article 2.2 of the TBT Agreement and its Preamble," the Panel must look at the panel and Appellate Body reports that considered GATT Article XX to understand what TBT Article 2.2 obliges of Members. The EU further contends that the Panel cannot stop its analysis there, however, but must continue and determine whether the measure is inconsistent with the chapeau of GATT Article XX to consider whether the Member has acted consistently with TBT Article 2.2. Neither of these arguments are in accordance with the Vienna Convention, and both should be rejected.

41. The text of Article 2.2 in its context and in light of the object and purpose of the TBT Agreement, means that a measure is "more trade-restrictive than necessary to fulfill a legitimate objective" if there is a reasonably available alternative measure that fulfills the measure's objectives that is significantly less trade-restrictive. Accordingly, to prove that the challenged measure is inconsistent with Article 2.2 of the TBT Agreement, Indonesia must establish that: (1) there is a reasonably available alternative measure; (2) that measure fulfills the objectives of the U.S. provisions at the level that the United States has determined is appropriate; and (3) is significantly less trade-restrictive.

42. Rather than applying an interpretation of Article 2.2 based on Articles 31 and 32 of the Vienna Convention, Indonesia instead adopts an interpretation of Article 2.2 of the TBT Agreement based on prior panels' and the Appellate Body's interpretation of Article XX of the GATT 1994. It would not be appropriate to apply the same interpretive approach panels and the Appellate Body have undertaken in connection with the word "necessary" as it appears in Article XX of the GATT 1994 in analyzing whether a measure is "more trade restrictive than necessary" within the meaning of Article 2.2 of the TBT Agreement. In particular, the term "necessary" is used in Article XX of the GATT 1994 in a very different context than in TBT Article 2.2.

Further, there is no textual basis to apply the panel and Appellate Body's interpretive approach to Article XX of the GATT 1994 to Article 2.2 of the TBT Agreement.

43. The EU's position that the Panel must apply the GATT Article XX chapeau when determining whether a measure is consistent with Article 2.2 is without merit, for at least four reasons. First, the EU's argument ignores the most fundamental principle of treaty interpretation – that is, examining the text actually used by the drafters. The chapeau of Article XX is operative language: it plainly states that each one of the Article XX exceptions is "subject to the requirement" that the measure meets the requirements of the chapeau. In contrast, the TBT contains similar language in its preamble: the preambular language does not trigger any consequence under the agreement, but rather the preambular language may be used as an interpretive aid in construing operative provisions of the Agreement. Second, the EU is simply wrong that its view prevents "disparate legal evaluations" between the two agreements. To the contrary, the EU's proposed reading would create disparate legal evaluations. The EU would require that each and every TBT measure meet the requirements of the Article XX chapeau. But there is no similar requirement that every measure within the scope of the GATT 1994 must meet the requirements of the Article XX chapeau. Rather, the chapeau requirements only apply in the event that a measure is inconsistent with a GATT obligation, and if the defending member then tries to justify that otherwise GATT-inconsistent measure under one of the Article XX exceptions. Third, the EU's argument ignores that the purpose expressed in the TBT chapeau (to prevent measures that unjustifiably discriminate between Members) in fact is addressed in the operative provisions of the TBT Agreement, though not in Article 2.2. Rather, Article 2.1 addresses such concerns by requiring that technical regulations provide to imported products treatment no less favorable than that provided to like products of national origin and to like products originating in any other country. In fact, if the EU's argument were accepted (and if thereby the Article XX chapeau requirements were somehow read into TBT Article 2.2), it would seem to make inutile Article 2.1 of the TBT agreement. Fourth, it would be neither surprising nor alarming if analysis under the GATT 1994 and that under the TBT Agreement reached different results for the same measure. The two agreements contain different language and different obligations, and as a result can apply differently to the same measure. Indeed, if the GATT 1994 already addressed all of the matters covered under the TBT Agreement, there would have been no purpose in including the TBT Agreement within the Uruguay Round agreements.