ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX A-1

**EXECUTIVE SUMMARY OF THE
FIRST WRITTEN SUBMISSION OF INDONESIA**

I. INTRODUCTION

1. The Republic of Indonesia ("Indonesia") challenges Section 101 of the Family Smoking Prevention and Tobacco Control Act of 2009 (the "Act"). In particular, Indonesia challenges the "special rule for cigarettes" in Section 101(b), which banned the production or sale of certain cigarettes it characterized as "flavored" (hereinafter the "Special Rule").

2. According to the legislative history of the Act, the Special Rule was meant to stop cigarette manufacturers from targeting underage smokers with flavours intended to increase the appeal of smoking. One type of flavoured cigarette escaped the ban – menthol cigarettes.

3. Cigarettes may contain a variety of ingredients and flavours that are added to the tobacco or filter. There is, in short, "no logical difference", according to Professor Michael Siegel of Boston University, "between menthol and the hundreds of other flavor additives put into cigarettes", and that includes clove.

4. Clove cigarettes have been produced in Indonesia for over a century. It is estimated that as many as 6 million Indonesians are employed directly or indirectly in the manufacture of cigarettes and the growing of tobacco. The cigarette industry, including clove, accounts for approximately 1.66 per cent of Indonesia's total gross domestic product ("GDP"). Indonesia has exported clove cigarettes to the United States for well over 40 years.

5. Notwithstanding the importance of clove cigarettes to its economy and its people, Indonesia does not object to the United States regulating the production or sale of cigarettes within its borders. Nor does Indonesia object to reasonable measures designed to keep cigarettes, including clove cigarettes, out of the hands of minors. What Indonesia objects to is a measure, in this case the Special Rule, that imposes a complete ban on clove cigarettes from Indonesia, while little or no restrictions are placed on regular cigarettes and menthol cigarettes.

6. The challenged measure is, in short, discriminatory and a violation of Article 2.1 of the Agreement on Technical Barriers to Trade ("TBT Agreement") in Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization ("WTO"). For largely the same reasons, the challenged measure also violates Article III.4 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). Furthermore, the challenged measure is more trade restrictive than necessary to achieve the stated goal of reducing youth smoking and is, therefore, in violation of Article 2.2 of the TBT Agreement.

7. Finally, in adopting the Special Rule, the United States failed to follow a number of additional requirements of the TBT Agreement. The Special Rule is inconsistent with Article 2.8 of the TBT Agreement because it bans cigarettes solely on the basis of descriptive characteristics. The United States also failed to live up to a number of its procedural obligations under Article 2 the TBT Agreement. Accordingly, the United States acted inconsistently with its obligations under Article 2.5, 2.9, 2.10, and 2.12 of the TBT Agreement.

8. The ban on clove cigarettes in the Special Rule created an unnecessary barrier to exports from Indonesia, a developing country Member. The United States was obliged to take account of the special and development and trade needs of Indonesia, a developing country Member of the WTO,

when preparing and implementing the Special Rule. It did not do so. As such, the United States acted inconsistently with Article 12.3 of the TBT Agreement.

9. Because the United States has violated the GATT and the TBT Agreement, its actions are considered prima facie to constitute a case of nullification or impairment of Indonesia's rights under these agreements. As such, there is a presumption that the United States' actions have had an adverse impact on Indonesia in adopting and applying the Special Rule. The burden of proof, therefore, shifts to the United States to rebut the charge.

II. FACTUAL BACKGROUND

10. In 2007 the total US market for cigarettes was approximately 360 billion cigarettes. Imports of clove cigarettes totalled 398.8 million or approximately $1/10^{th}$ of one per cent of the total US market. According to the Tobacco Merchants Association, all natural clove cigarettes or "kreteks" sold in the United States are imported, with the vast majority coming from Indonesia.

11. The Act granted the Food and Drug Administration ("FDA") broad authority to regulate tobacco products. Among other things, the Act provided FDA with the authority to regulate marketing and promotion of tobacco products and to set performance standards for tobacco products to protect the public health.

12. Of concern in this matter is Section 101(b) of the Act, which contains a "special rule for cigarettes". The Special Rule states that, beginning three months after the date of enactment:

> a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke.

13. The prohibition on characterizing flavours other than menthol or tobacco established by the Special Rule went into effect on 22 September 2009. Since that time clove cigarettes have been prohibited in the United States causing Indonesia's annual exports of clove cigarettes to the United States to fall from approximately $15 million before the ban to zero, while menthol- and tobacco-flavoured ("regular") cigarettes continue to be produced and sold in the United States. Despite the repeated requests of Indonesia, the United States has not identified any scientific evidence, sound or otherwise, in existence on or before 22 June 2009 that could possibly justify its disparate treatment of clove cigarettes and all other cigarettes, especially menthol cigarettes.

III. LEGAL ARGUMENT

A. THE SPECIAL RULE ACCORDS MORE FAVOURABLE TREATMENT TO CERTAIN DOMESTIC CIGARETTES THAN IT DOES CIGARETTES IMPORTED FROM INDONESIA

14. Article 2.1 of the TBT Agreement requires Members of the WTO to, "ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to domestic like products of national origin and to like products originating in any other country".

15. The Special Rule, both on its face and as applied, violates Article 2.1 of the TBT Agreement because it is a technical regulation that accords "less favourable" treatment to imports of clove cigarettes than it accords to like domestic products – regular and menthol cigarettes.

16. The Special Rule constitutes a "technical regulation" subject to the TBT Agreement. The Appellate Body has interpreted "technical regulation" as encompassing documents that "regulate the 'characteristics' of products in a binding or compulsory fashion", having the effect of "prescribing or imposing one or more 'characteristics'. ..." Product characteristics are in turn defined as "any objectively definable 'features,' 'qualities,' 'attributes,' or other 'distinguishing mark' of a product". They may be "prescribed or imposed in either a positive or a negative form [-- t]hat is, the document may provide, positively, that products must possess certain 'characteristics', or the document may require, negatively, that products must not possess certain characteristics" In sum, a technical regulation must: (1) lay down "product characteristics"; (2) make compliance with those characteristics mandatory; and (3) be applicable to an identifiable product or group of products.

17. The Special Rule meets all of these criteria since it (1) prohibits the addition of characterizing flavours – except menthol; (2) compliance with the prohibition is mandatory; and (3) the rule applies to an identifiable group of products – certain flavoured cigarettes, especially clove cigarettes. The Special Rule, therefore, constitutes a "technical regulation" within the meaning of the TBT Agreement.

18. Clove cigarettes are "like" domestically produced regular and menthol cigarettes in the United States. The general approach used to determine "likeness" consists of an analysis that focuses on four basic factors: (1) the physical characteristics of the products; (2) end-uses; (3) consumer perceptions and behaviour; and (4) tariff classification.

19. Clove cigarettes and domestically produced cigarettes, including menthol cigarettes, have the same physical characteristics. Both cigarettes contain cured and blended tobacco in a paper wrapper with a filter. Both contain additional ingredients and flavourings that create the unique flavour of each brand. Flavourings such as brown sugar or vanilla are not dangerous and are added to virtually all cigarettes, even those that would be considered to have a "regular" tobacco flavour. There are literally hundreds of ingredients used by tobacco companies to enhance the appeal of cigarettes and create the unique flavour of each brand. In this regard, cigarettes are no different than many other consumer products, such as mint-flavoured toothpaste, that use flavourings to attract consumers. Clove cigarettes, like all cigarettes, contain a blend of tobacco and other ingredients (in this case, ground clove buds) to give them their unique flavour. Clove cigarettes are no different from cigarettes that contain a blend of tobacco, sugar, and vanilla, or of tobacco and menthol.

20. Clove cigarettes and domestically produced cigarettes are both "Class A" cigarettes for US tax purposes, weighing less than three pounds per thousand. Moreover, both clove cigarettes and domestically produced cigarettes satisfy the US government's definition of a "cigarette": "(1) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in paragraph (1)". Clove cigarettes and menthol cigarettes share even more specific properties in that they both contain tobacco and an added ingredient (i.e. an herb or spice) with soothing properties. Both clove oil (known chemically as "eugenol") and menthol are widely used in consumer products and are recognized as having an anesthetic effect.

21. The panel in *EC – Asbestos* noted that toxicity is also relevant to physical characteristics when determining whether products are "like". In that case, one product, chrysotile asbestos fibers, was known to be carcinogenic and the type of cancer concerned had a mortality rate of close to 100 per cent. In the current case, there is no evidence that clove cigarettes are more toxic or pose greater health risks than domestically produced so-called "regular" cigarettes or menthol cigarettes.

22. The end use of all cigarettes, including clove and menthol cigarettes, is the same – that is, they are used to smoke tobacco.

23. Consumers perceive regular cigarettes, menthol cigarettes, and clove cigarettes as an "alternative means of performing particular functions in order to satisfy a particular want or demand" (i.e. an alternative means of smoking). Market data indicates that 79 per cent of clove cigarette smokers do, in fact, smoke "regular" (those with a characterizing flavour of tobacco) and menthol cigarettes most frequently and use clove cigarettes as a "special occasion" cigarette. In short, all cigarettes are in a competitive relationship with one another for access to channels of distribution, shelf space, and market share.

24. Clove cigarettes and domestically produced cigarettes have the same international tariff classification at the 6-digit level, the most detailed level used among Members of the WTO.

25. Since the Special Rule's ban does not apply to cigarettes with a characterizing flavour of menthol or tobacco, and since clove cigarettes have been shown to be "like" those products, a ban on clove cigarettes but not menthol- or tobacco-flavoured cigarettes creates unequal conditions of competition in the US market and is, accordingly, "less favourable" treatment.

26. The Special Rule is also inconsistent with GATT Article III:4. Unlike TBT Article 2.1, Article III:4 does not require consideration of whether the Special Rule is a "technical regulation. Instead, a measure considered under Article III:4 must simply be a "law, regulation [or] requirement affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use" of an imported product. The Special Rule prohibits a cigarette in the United States from containing a characterizing flavour other than menthol or tobacco, which clearly affects the internal sale, offering for sale or use of imported clove cigarettes by banning them from the US market altogether.

27. For the same reasons outlined above with respect to TBT Article 2.1, the Special Rule is inconsistent with GATT Article III:4. Clove cigarettes are like domestically produced cigarettes in that they share the same physical characteristics, end-uses, consumer perceptions, and tariff classification. The Special Rule accords clove cigarettes less favourable treatment than domestically produced menthol- or tobacco-flavoured cigarettes in that clove cigarettes are banned, while menthol and "regular" cigarettes continue to be sold in the US market.

B. THE SPECIAL RULE IS MORE TRADE RESTRICTIVE THAN NECESSARY TO ACHIEVE THE LEVEL OF PROTECTION SOUGHT BY THE UNITED STATES

28. The Special Rule is inconsistent with Article 2.2 of the TBT Agreement because it is more trade restrictive than necessary to protect human health and is thus an unnecessary obstacle to international trade.

29. Indonesia agrees that protection of human health through regulation of tobacco products is a legitimate health objective. Indonesia would also agree that reducing youth smoking is a legitimate objective. But a ban is the most trade restrictive measure that can be adopted and, therefore, must be subject to the highest level of justification.

30. In determining whether a violation of TBT Article 2.2 exists, the Panel must consider whether the ban on some flavours, but not all, contained in the Special Rule is likely to achieve the level of protection sought by the United States and whether less-trade restrictive measures are available that could also achieve that level of protection.

31. The Act itself is helpful in understanding the level of protection sought by the United States. One of the stated objectives of the Act is "to continue to permit the sale of tobacco products to adults in conjunction with measures to ensure they are not sold or accessible to underage purchasers". Further, the standards set forth in the Act are intended to restrict the advertising and promotional

practices most likely to entice youth into tobacco use, while affording ample opportunity to market tobacco products to adults.

32. Even more revealing is what the Act does not intend to do. The Act and its supporters claim that additional government regulation is essential to stop young people from taking up smoking. However, while the FDA is given broad authority to regulate tobacco and set standards for cigarettes, the FDA is expressly prohibited by the Act from taking a number of actions that would likely be most effective at reducing the number of youth who begin smoking and become addicted. For example, the FDA is prohibited by the Act from banning cigarettes entirely, removing nicotine from cigarettes, raising the legal smoking age to 19, or requiring that cigarette sales be limited to adult-only stores.

33. Because the Act clearly contemplates continued use of cigarettes by adults, the level of protection sought is not the elimination of all risks associated with smoking. Further, the vast majority of cigarettes known to be smoked by youth are not banned by the Act at all. Based on results from the National Survey on Drug Use and Health, a US government funded study, those youth who smoke are overwhelmingly smoking "regular" cigarettes or menthol cigarettes, which are not banned by the Act. Thus, the level of protection sought is not zero access to cigarettes likely to be smoked by youth. By prohibiting the FDA from taking certain actions most likely to reduce youth smoking and dependence, the level of protection sought by the Act is not a dramatic reduction in the number of youth who smoke. Rather, what the Act describes as its desired level of protection is sufficient regulation to deter, but not prohibit, the use of tobacco products by adolescents.

34. A ban is the most trade-restrictive regulatory tool available and in certain circumstances may be the only option for achieving a health objective, for example where the level of protection needed is the *elimination* of risk. The United States could have decided that to prevent people from smoking it wanted to ban all cigarettes from its market entirely. But that was not the level of protection sought by the United States. The Special Rule does not allow for legitimate sales of clove cigarettes to adults and exempts from the ban the cigarettes most likely to be smoked by youth. Thus, the ban on clove cigarettes greatly exceeds the level of protection sought.

35. Panels have held that the question of whether a measure is "necessary" hinges on the degree to which the measure achieved the desired policy objective. In *US – Gambling* the Appellate Body confirmed that an assessment of the necessity of a measure involves a weighing and balancing of "the 'relative importance' of the interests or values furthered by the challenged measure", along with other factors, which will usually include "the contribution of the measure to the realization of the ends pursued by it [and] the restrictive impact of the measure on international commerce".

36. TBT Article 2.2 indicates that "necessity" is to be determined taking into account the risks associated with not taking the challenged measure. Thus, the Panel must consider whether banning clove cigarettes, but not menthol or regular cigarettes, contributes to a reduction in the level of smoking by adolescents. In making its decision, the Panel should evaluate the likely impact of not banning clove cigarettes. The facts clearly show that failure to ban clove cigarettes would not pose any significant risk to the stated objective of the Act or to the health of adolescents. Thus, a ban on clove cigarettes is not necessary to reduce youth smoking.

37. Evidence shows that youth are overwhelmingly more likely to smoke cigarettes not banned by the Act than clove cigarettes. In fact, eighty-seven (87) per cent of high school smokers smoke just three heavily marketed brands: "Marlboro", "Camel", and "Newport". Menthol cigarettes are used by 62 per cent of new middle school smokers and by 46 per cent of new high school smokers. By contrast, the National Survey on Drug Use and Health has found minimal levels of clove cigarette use by youth. In 2007, only 0.1 per cent of youth smokers used clove cigarettes and by 2008 that number had fallen to zero.

38. Another organization, *Monitoring the Future*, has been conducting annual, nationwide surveys of US teens in school for the past 35 years. The study's investigators have concluded that "kretek [clove cigarette] use was a short-term fad that simply did not catch on with mainstream youth".

39. In fact, youth appear to be totally unaware of what a kretek is. In a telephone survey conducted 23-26 September 2010 by Opinion Research Corporation, 98 per cent of teens surveyed indicated they had never heard of a kretek. Of the 2 per cent who claimed to have heard of a kretek, 25 per cent incorrectly identified it as a type of car and 24 per cent thought it was a drug. Not even one of the teens surveyed was able to correctly identify a kretek as a type of cigarette.

40. Dr. Michael Siegel, a noted expert on tobacco control, now with Boston University's School of Public Health, has refuted claims by the FDA and others that flavoured cigarettes are a gateway to smoking for youth and that a ban on flavoured cigarettes is necessary to reduce youth smoking:

> It is demonstrably false that flavored cigarettes are a gateway to cigarette smoking, that they contribute significantly to addiction of youths to tobacco, that the tobacco industry uses these flavored cigarettes to hook children, and that the FDA ban on candy-flavored cigarettes will have any impact whatsoever on youth smoking. (This is with the exception of menthol, the one flavouring which is actually used by the tobacco companies to hook kids, but which is exempt from the flavouring ban.)
>
> The truth is that the predominant gateway to youth smoking is non-flavored cigarettes (excluding menthol). The removal of flavored cigarettes from the market by the FDA will have *no impact whatsoever on youth smoking*. The only thing that would have had an impact is the removal of the non-flavored cigarettes - like Camels, Marlboros, and Newports - which are smoked by greater than 85% of all youth smokers.
>
> In fact, the one flavoring that was exempt - menthol - is the **one and only** flavoring that **is** actually used to hook kids. There are literally tens of thousands of kids using menthol-flavored cigarettes, but even prior to the FDA law, there were virtually none using candy-flavored cigarettes that were actually covered by the law.

41. The above evidence shows that banning clove cigarettes, but not menthol and regular cigarettes or other flavoured tobacco products, is unlikely to have any impact whatsoever on youth smoking. The ban on clove cigarettes is, thus, not "necessary".

42. Panels and the Appellate Body have consistently endorsed the view expressed in *US – Section 337 Tariff Act* "that a contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary'…if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it".

43. Regulation, short of the Special Rule's blanket ban on flavours, could have achieved the level of protection sought by the Act. The Act itself contains a number of new provisions applicable to menthol and regular cigarettes designed to reduce the ability of cigarette companies to engage in practices that target and attract youth. These measures could also have been applied to clove cigarettes:

- banning all outdoor tobacco advertising within 1,000 feet of schools and playgrounds;
- banning all remaining tobacco-brand sponsorships of sports and entertainment events;
- banning free giveaways of any non-tobacco items with tobacco products;

- limiting advertising in publications with significant teen readership, as well as outdoor and point-of sale advertising except in adults-only facilities;

- restricting vending machines and self-service displays to adult-only facilities; and

- requiring retailers to verify age for all over-the-counter sales and providing for federal enforcement and penalties against retailers who sell to minors.

44. The 2006 consent agreement between R.J. Reynolds and several State Attorneys General includes measures that are not trade-restrictive that could have been included in the Act to decrease appeal to youth. These include prohibiting the use of fruit-, candy-, or alcoholic beverage-related terms or images. Giving the FDA the authority to approve any new tobacco brands, labels, and packaging would give regulators the opportunity to ensure that any objectionable products do not come on the market, while allowing flavoured products, such as clove cigarettes, to continue to be sold to adults.

45. Other countries have adopted measures that are not trade-restrictive in order to address youth smoking. Australia, for example, has banned almost all tobacco advertising and prohibited tobacco companies from sponsoring events. Singapore has significantly increased fines for underage smoking and certain retailers are prevented from selling tobacco products to make them less available to youth.

46. The ban presents an insurmountable obstacle to Indonesia's trade of clove cigarettes, costing Indonesia approximately $15 million in exports. The ban on flavoured cigarettes was not "necessary", therefore, the ban on the use of some characterizing flavours in cigarettes, but not menthol and tobacco, is an unnecessary obstacle to international trade.

C. ARTICLE XX OF GATT 1994 DOES NOT APPLY BECAUSE THE MEASURE IS A RESTRICTION ON TRADE MASQUERADING AS A MEASURE NECESSARY TO PROTECT HUMAN HEALTH

47. Under certain circumstances, GATT Article XX allows Members to take actions that are inconsistent with their WTO obligations. Members may, for example, adopt certain measures to protect human health so long as they are not a "disguised restriction on trade" or "unjustifiable discrimination between countries". However, for the same reasons discussed with respect to TBT Article 2.2, the Special Rule, which applies to only some flavours but not all, is not justifiable and it is certainly not necessary to protect youth from smoking. Therefore, the exceptions provided for in Article XX are not available to the United States.

D. THE UNITED STATES' FAILURE TO PROVIDE A JUSTIFICATION FOR THE SPECIAL RULE VIOLATED ARTICLE 2.5 OF TTHE TBT AGREEMENT

48. TBT Article 2.5 requires that a WTO Member preparing, adopting or applying a technical regulation that will have a significant effect on the trade of another Member must explain the justification for that technical regulation. At various times, Indonesia requested a justification, including the scientific basis for the Special Rule. Despite Indonesia's repeated requests, the United States has never provided any scientific basis or explanation to Indonesia justifying the Special Rule. Further, the United States has never explained why the objectives of the Special Rule could not be achieved by a less trade restrictive measure. For these reasons, the United States has violated its obligations under Article 2.5 of the TBT Agreement.

E. THE SPECIAL RULE IS INCONSISTENT WITH ARTICLE 2.8 OF THE TBT AGREEMENT BECAUSE THE BAN ON CLOVE CIGARETTES IS BASED ON DESCRIPTIVE CHARACTERISTICS

49. Article 2.8 of the TBT Agreement requires that, "[w]herever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics". The Special Rule bans certain cigarettes solely in terms of descriptive characteristics. The Special Rule bans cigarettes with a "characterizing flavour" but provides no definition of "characterizing flavour". The FDA has provide no further guidance on what constitutes a "characterizing flavour". Neither the Act nor the Special Rule specifies the standards, performance or otherwise, by which certain ingredients, such as ground clove buds, added for purposes of flavour are to be deemed "characterizing", while other ingredients also added for flavour, such as brown sugar, are not. Therefore, by basing the ban in the Special Rule on descriptive characteristics, the United States has violated Article 2.8 of the TBT Agreement.

F. THE US DID NOT COMPLY WITH THE REQUIREMENTS IN ARTICLE 2 WHEN ADOPTING A TECHNICAL REGULATION THAT HAS A SIGNIFICANT EFFECT ON TRADE WITH INDONESIA

50. Article 2.9 of the TBT Agreement imposes various procedural requirements on Members before they adopt certain technical regulations. The United States failed to follow several of the procedures mandated by Article 2.9. The United States failed to provide the notification required under Article 2.9.2. Further, the United States acted inconsistently with its obligations under Article 2.9.3 when, as noted above in the discussion of Article 2.5, it failed to respond to Indonesia's request for an explanation of particular aspects of the Special Rule. For these reasons, the United States violated Article 2.9 of the TBT Agreement.

G. THE US VIOLATED ARTICLE 2.10 IF IT IS ASSERTING THAT ARTICLE 2.9 SHOULD NOT APPLY

51. Article 2.10 of the TBT Agreement provides Members with an exception to their obligation to follow the procedures in Article 2.9 "where urgent problems of safety, health, environmental protection or national security arise or threaten to arise". In such cases, paragraph 2.10.1 requires Members to "notify immediately other Members through the Secretariat of the particular technical regulation and the products covered, with a brief indication of the objective and the rationale of the technical regulation, including the nature of the urgent problems". If the United States believed that urgent problems necessitated the adoption of the Special Rule, it nonetheless violated Article 2.10 because it failed to provide the required notification to the TBT Committee.

H. THE SPECIAL RULE DOES NOT PROVIDE A REASONABLE INTERVAL BEFORE ITS EFFECTIVE DATE, WHICH VIOLATES ARTICLE 2.12 OF THE TBT AGREEMENT

52. Article 2.12 of the TBT Agreement requires Members to allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members to adapt. For purposes of implementing this article, the TBT Committee has stated that "the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued". The Act was signed on 22 June 2009 and the Special Rule went into effect 90 days later. A period of 90 days falls woefully short of the "reasonable interval" standard of six months recommended by the TBT Committee. Neither the Act itself nor any other statement by the United States indicates that having the Special Rule enter into force 90 days after signing was necessary to fulfil the objectives of the Act. The United States violated its obligations under Article 2.12 of the TBT Agreement.

I. THE SPECIAL RULE VIOLATES ARTICLE 12.3 OF THE TBT AGREEMENT BECAUSE THE BAN CREATED AN UNNECESSARY BARRIER TO EXPORTS FROM A DEVELOPING COUNTRY

53. Article 12.3 of the TBT Agreement requires Members to take into account the special needs of developing country Members of the WTO so that technical regulations do not create unnecessary obstacles to exports from developing country Members. The ban on clove cigarettes in the Special Rule was not necessary and completely eliminated exports of clove cigarettes from Indonesia, by far the most significant producer of clove cigarettes sold in the United States. The United States ignored Indonesia's repeated concerns and adopted a ban on clove cigarettes when less trade-restrictive approaches were available. Therefore, the United States violated Article 12.3 of the TBT Agreement in its preparation and application of the Special Rule.

J. THE SPECIAL RULE HAS NULLIFIED OR IMPAIRED BENEFITS ACCRUING DIRECTLY OR INDIRECTLY TO INDONESIA

54. GATT Article XXIII:1(a) provides that a Member has a cause of action and establishes a prima facie case of nullification or impairment of benefits if it establishes "the failure of another contracting party to carry out its obligations under this Agreement ..." The United States' violations of the TBT Agreement and GATT 1994 as demonstrated above creates a presumption of nullification and impairment. Further, there is compelling factual evidence that the tariff concession on clove cigarettes heretofore enjoyed by Indonesia has been nullified or impaired by the Special Rule.

IV. CONCLUSION

55. For the foregoing reasons, Indonesia respectfully requests that the Panel find that the Special Rule is inconsistent with the United States' obligations under the TBT Agreement and GATT 1994. Indonesia further requests that the Panel recommend the United States bring its measures into conformity with its obligations under the TBT Agreement and GATT 1994.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. Indonesia challenges the particular line drawn by Section 907(a)(1)(A) of the *Family Smoking Prevention and Tobacco Control Act*, which prohibits all cigarettes with a characterizing flavour (including clove flavour), but not tobacco or menthol, which tens of millions of Americans smoke every day. This line between these types of cigarettes was *not* drawn based on the national origin of products. The line was *not* drawn based on protectionism (the entire law targets US cigarette companies after all). Instead, the line *was* drawn to protect the public health based on evidence that certain products presented a unique risk to youth and the negative consequences of banning them were slight or non-existent. The evidence establishes that clove and other-flavoured cigarettes such as cherry, chocolate or cola are especially appealing to young people. The decision to ban clove cigarettes and the other flavoured cigarettes was done to protect the public health. WTO Members never intended that a measure of this sort would run afoul of the WTO obligations, and this measure is entirely consistent with those rules.

2. As to the claims in this case, the Republic of Indonesia ("Indonesia") has failed to satisfy its evidentiary burden. With regard to national treatment, cloves cigarettes are not like products with cigarettes generally and menthol cigarettes specifically. Moreover, Indonesia has not provided evidence that the difference in treatment provided clove cigarettes and the non-banned products is less favourable based on origin. As such, the United States has acted consistently with its national treatment obligations. Equally clear is the fact that Indonesia has failed to satisfy its burden under Article 2.2 of the Agreement on Technical Barriers to Trade ("TBT Agreement"). In fact, it has not adduced any evidence whatsoever that a reasonably available alternative measure fulfils the US legitimate objective at the level that the United States considers appropriate and that is significantly less trade restrictive. Similarly, Indonesia has fallen short of its burden of proving any of their other TBT claims as well.

II. LEGAL ARGUMENT

A. SECTION 907(A)(1)(A) IS NOT INCONSISTENT WITH THE NATIONAL TREATMENT PROVISIONS CONTAINED IN THE GATT 1994 OR THE TBT AGREEMENT

3. Indonesia argues that Section 907(a)(1)(A) is inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement based on a flawed analysis and insufficient evidence that Section 907(a)(1)(A) accords less favourable treatment to cigarettes imported from Indonesia than to cigarettes produced in the United States. Indonesia's argument boils down to the proposition that GATT 1994 Article III:4 precludes the United States from banning a specific class of cigarettes including clove cigarettes unless it also bans domestically produced cigarettes sold in the United States, without exception. However, Indonesia does not demonstrate that clove cigarettes are "like" domestically produced cigarettes (in particular tobacco and menthol cigarettes). Second, Indonesia fails to show that Section 907(a)(1)(A) accords less favourable treatment to clove cigarettes based on their national origin.

B. SECTION 907(A)(1)(A) IS NOT INCONSISTENT WITH GATT ARTICLE III:4

4. Indonesia proposes that domestic cigarettes and clove cigarettes are "like" products with respect to Section 907(a)(1)(A). However, the analysis below will demonstrate that clove cigarettes are not in a competitive relationship with tobacco or menthol cigarettes and are not substitutable or

interchangeable among retailers or consumers. Additionally, a "likeness" determination – in addition to focusing on the competitive relationship of the products – will need carefully to parse the significance of traits that are generally shared among all cigarettes and traits that are significant with respect to the public health provision at issue.

5. Physical composition. The physical composition of clove cigarettes is different than tobacco and menthol cigarettes. Clove buds are dried flower buds harvested from clove trees. They impart a sweet and spicy flavour and aroma. Clove is a prominent ingredient in a clove cigarette. Clove cigarettes typically contain 60% tobacco and 40% clove buds and cocoa. Tobacco and menthol cigarettes do not contain significant quantities of food ingredient. In addition, unlike other cigarettes, clove cigarettes contain significant quantities of eugenol, which creates an anesthetic and numbing effect reportedly appealing to new smokers. Clove cigarettes also contain a special, proprietary "sauce" that is credited with some of their appeal. The makers of clove cigarettes introduce these physically different flavouring additives for the purpose of differentiating clove cigarettes from other cigarettes, and they have succeeded in doing so. In short, clove cigarettes taste different from other cigarettes. Clove cigarettes also contain the harmful chemical coumarin, which is no longer found in most cigarettes, and a range of other flavour compounds not commonly found in tobacco or menthol cigarettes. In contrast to clove, which comprises nearly half of clove cigarettes by weight, menthol comprises less than 1% of a menthol cigarette. In addition, menthol cigarettes do not tend to contain coumarin or an array of other flavouring compounds typically found in clove cigarettes.

6. End-uses. Cigarettes have at least two end-uses in the United States, which clove, menthol and tobacco cigarettes serve in differing degrees. Cigarettes serve the end-use of satisfying an addiction to nicotine. Notably, evidence shows that of the some 46 million Americans who regularly smoke, the vast majority smoke tobacco or menthol cigarettes. Cigarettes also serve the end-use of creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke. Evidence suggests that clove cigarettes and other cigarettes with characterizing flavours, in particular, serve this end use in the United States, primarily among youths.

7. Consumer tastes and habits. The Appellate Body has emphasized that where, as here, physical properties of the products are very different, an examination of evidence relating to consumers' tastes and habits is indispensable to determining "likeness". The heart of this analysis is whether products are "interchangeable" or "substitutable" in the view of consumers, demonstrating a competitive relationship.

8. Unlike cases where panels have found that consumers perceive and use products as interchangeable and substitutable, in this case, consumers clearly differentiate between products. Indonesia has presented no evidence to demonstrate that clove cigarettes seek to compete with tobacco or menthol cigarettes, or that consumers view them as substitutable. Clove cigarettes are marketed, sold and used as a "special occasion" tobacco product while tobacco and menthol cigarettes are marketed, sold and used as a daily, regular cigarette. Clove cigarettes are smoked overwhelmingly by young people, who tend to be novice smokers. Tobacco and menthol cigarettes are used regularly by a large population of young people, but especially by adults, who smoke them regularly. Clove cigarettes were not competing for the "regular use" market. Indonesia asserts, but has provided no evidence to demonstrate, that clove cigarettes compete with tobacco or menthol cigarettes for access to channels of distribution, shelf space or market share. Existing evidence with respect to consumer tastes and habits suggests that clove cigarettes are used "like" the other flavours prohibited under Section 907(a)(1)(A). Clove cigarettes – like chocolate or "Midnight Madness" or "Mandalay Lime" – are chosen almost exclusively by youths, experimentally or for "special occasions". As such, they have the effect of making tobacco seem appealing, especially to new users. Indonesia presents unreliable data to suggest that clove cigarettes have a pattern of use similar to tobacco or menthol cigarettes, just on a smaller scale. Moreover – and revealingly – Indonesia does not dispute the key fact that clove cigarettes are smoked by an insignificant fraction of adults.

9. International tariff classification. The United States submits that the fiscal treatment of two different products should have very little weight in the "like product" analysis when the domestic measure under consideration is adopted not for fiscal purposes, but in order to protect human health.

10. Conclusion on like product. Indonesia has failed to meet its burden to prove that clove cigarettes are "like" tobacco and menthol cigarettes. As noted, the "four factors" applied above are considered by panels to the extent that they aid in a determination of likeness. In this case, the factors provide a framework to arrive at the crucial conclusions that (1) clove cigarettes are not in a competitive relationship with tobacco or menthol cigarettes, and (2) clove cigarettes are not interchangeable or substitutable with tobacco or menthol cigarettes. They are not like products.

11. Less favourable treatment based on origin. A measure violates the provisions of GATT III:4 if it accords less favourable treatment to an imported product than to a like domestic product based on national origin. Even aside from the fact that clove cigarettes are not like products to tobacco and menthol cigarettes, Indonesia has not met its burden to demonstrate that clove cigarettes are accorded less favourable treatment based on their national origin. Article III does not forbid Members from making regulatory distinctions between different products that may fall within a single "like product" class for Article III purposes. Rather, Article III forbids Members from according less favourable treatment – on a *de jure* or *de facto* basis – to imported products as compared to domestic products.

12. No *de jure* discrimination. The ban on cigarettes with characterizing flavours other than tobacco or menthol applies equally to all cigarettes sold in the United States, regardless of where they are produced. In this case, the measure at issue is facially neutral, and it is Indonesia's burden to prove that, as applied, the measure discriminates between Indonesian and domestic cigarettes based on origin and accords less favourable treatment to imported products as compared to domestic products.

13. No *de facto* discrimination. Indonesia has not met its burden to prove *de facto* discrimination. First, Indonesia does not clarify *which* products it claims are subject to different treatment. In its first written submission, Indonesia argues that clove cigarettes are "like" domestically produced cigarettes, without exception. It therefore would appear to be Indonesia's position that a US ban on cigarettes with a characterizing flavour that includes clove would discriminate based on origin, unless the United States also banned *every* domestically produced cigarette, flavoured or otherwise.

14. Second, Indonesia's insistence that Section 907(a)(1)(A) violates GATT Article III:4 because it draws a distinction between clove cigarettes and, apparently, any domestic cigarette is inconsistent with the Appellate Body interpretation of "less favourable treatment" – even if were to be determined that clove cigarettes and all domestic cigarettes are "like" products. The Appellate Body recognizes that a Member may draw distinctions between products determined to be "like" without affording protection to domestic production or according less favourable treatment to imported products.

15. Measures that do not treat products differently based on origin, and for which the effects resulting from the measure are not a result of the origin of the product, are not measures that afford protection to domestic production. The application of Section 907(a)(1)(A) is entirely consistent with the object and purpose of the FSPTCA and the approach of the United States to tobacco regulation, in general. An Indonesian product is adversely effected under Section 907(a)(1)(A) not as a result of origin-based discrimination, but because US health authorities legitimately determined that clove cigarettes fall into a category of cigarettes that should be banned from the US market for the protection of the public health. Section 907(a)(1)(A) distinguishes among cigarettes as appropriate for the public health, and not based on the national origin of the products.

16. Section 907(a)(1)(A) also does not afford protection to domestic production. Section 907(a)(1)(A) applies to a wide range of U.S.-made cigarettes that were headed for the

US market. The US tobacco industry spent over a decade and untold amounts of money to develop, research and market "exotic" flavoured cigarettes for the US market and now can sell none of these products to their intended consumers. In addition, Section 907(a)(1)(A) is part of a broader statute which imposes a range of restrictions on all cigarettes sold in the United States, nearly all of which – 97% – are US-produced. Article III:4 protects Members from discrimination based on origin – but does not protect foreign products from all adverse effects of a measure which, in pursuit of a legitimate objective, has an adverse impact upon a foreign product.

C. SECTION 907(A)(1)(A) IS NOT INCONSISTENT WITH TBT ARTICLE 2.1

17. The United States would note that certain textual and contextual differences should be taken into account in the Panel's analysis of "likeness" and "less favourable treatment" under Article 2.1 of the TBT Agreement. One such difference that the Panel should consider is the language in the Preamble of the TBT Agreement stating that "no country should be prevented from taking measures necessary ... for the protection of human ... life or health". It also should be noted that Article 2.1 states, in relevant part, that "Members shall ensure that *in respect of technical regulations*, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin ... ." (emphasis added) Thus, the obligation in Article 2.1 applies "in respect" of a technical regulation. A like product analysis under the TBT Agreement need be careful to distinguish between characteristics that make a product or group of products identifiable for purposes of the regulation, and characteristics that demonstrate a competitive relationship or substitutability in the marketplace.

D. SECTION 907(A)(1)(A) IS NOT INCONSISTENT WITH TBT ARTICLE 2.2

18. Indonesia argues that Section 907(a)(1)(A) is more trade-restrictive than necessary to meet a legitimate objective and therefore is inconsistent with Article 2.2 of the TBT Agreement. Indonesia's arguments should be rejected.

19. As a general matter, Section 907(a)(1)(A) fulfils the legitimate objective of protecting the public health. Specifically, the legitimate objective of Section 907(a)(1)(A) is to reduce youth smoking as appropriate for the protection of the public health, taking into account the negative consequences resulting from banning products that tens of millions of adults are chemically and psychologically dependent on. Such negative consequences may include the unknown, but possibly negative, impact on the health of adult smokers and the US health care system generally, as well as an expansion of the already existing black market for cigarettes in the United States. To not take the risk of such considerations, which are still being studied by FDA and others, into account could lead to the undermining, not improvement, of public health in the United States.

20. In light of the importance of public health, the United States has chose a high level of protection. Given the US Government's long and frustrating experience in trying to limit youth smoking, this high level of protection is evidenced by the measure applied – a ban. As explained below, Section 907(a)(1)(A) unquestionably fulfils this legitimate objective at the level the United States considers appropriate. Finally, Indonesia has failed to establish that any alternative measure fulfils the US legitimate objective at the level it considers appropriate and is also significantly less trade-restrictive than Section 907(a)(1)(A). As such, Indonesia has failed to satisfy its burden to establish a breach of Article 2.2.

21. The measure is generally intended to fulfil the objective of protecting the public health. Specifically, the first part of the measure, the ban, is intended to fulfil the objective of reducing the rate of young people becoming smokers by eliminating certain products from the market place that have particular appeal to young people. The second part of the measure, the limited exception to the ban, is intended to ensure that a ban that reduces youth smoking be appropriate for the protection of

the public health even when taking into account the risk of negative consequences for adult smokers, the US health care system, and society more generally from eliminating products from the market that tens of millions of adults are addicted to.

22. The legitimate objective is the protection of human health, which is explicitly listed as a legitimate objective in Article 2.2. Further, Article 2.2's list of legitimate objectives is non-exhaustive, as confirmed by the inclusion of the term "*inter alia*", a point confirmed by the *EC – Sardines* panel that found two objectives not listed in Article 2.2 to be legitimate. The measure seeks to reduce youth smoking as appropriate for the protection of the public health, taking into account the risk of negative consequences (including negatively impacting the health of addicted, adult smokers, protecting the integrity of the domestic health care system, and limiting the expansion of an unregulated, and illegal black market).

23. Section 907(a)(1)(A) fulfils the legitimate objective of protecting the public health by reducing youth smoking while avoiding the negative consequences that could result from prohibiting products that tens of millions of adults are addicted to by only prohibiting those products that serve as "starter"or "trainer" cigarettes for young smokers, and which are not regularly used by adult smokers. This is seen by the evidence that flavoured cigarettes – except for menthol – are disproportionately smoked by novice young smokers (both minors and young adults), rather than already addicted, older adult smokers.

24. A Member is entitled to ensure that its measures satisfy the Member's level of protection, which the Member may set at whatever level it deems appropriate. Although smoking rates of young people, as well as the population at large, had been in decline for a number of years, Congress has found that the number of smokers, particularly young smokers, remains "unacceptably high". Section 907(a)(1)(A) represents a comprehensive restriction on the sale of these products that appeal to youths but have negligible regular use by adult smokers, and was a necessary step in order to further reduce youth smoking given that previous efforts of advertising restrictions and the like had, in Congress's own words, "failed". Accordingly, the seriousness of the problem of youth smoking is evidenced by the type of measure Congress employed – a ban. Section 907(a)(1)(A)'s prohibition of flavoured cigarettes that are only used as "trainer" products while exempting those products that are not uniquely attractive to youth, fulfils the legitimate objective of protecting the public health at the level the United States considers appropriate.

25. Article 2.2 of the TBT Agreement provides that technical regulations shall not be "more trade-restrictive than necessary" to fulfil a legitimate objective. A measure that fulfils its legitimate objective at the level the Member finds appropriate is not, as a matter of law, more trade-restrictive than necessary unless the complaining Member proves that an alternative measure exists that is reasonably available, also fulfils the respondent Member's legitimate objective at the level the importing Member finds appropriate and is significantly less trade restrictive than the challenged measure. Indonesia has not put forth any evidence that even one of the numerous measures it has culled from various sources satisfies this standard, and, therefore, has not satisfied its burden of establishing a prima facie case of inconsistency.

26. Indonesia argues that the Panel should import the meaning of the term "necessary", as used in Article XX of the GATT 1994 and as understood by the Appellate Body and previous panels, to control the TBT Article 2.2 "more trade restrictive than necessary" test. Such an approach is without basis and is unwarranted. The proper interpretation of this test flows from the text of Article 2.2 itself and any relevant context in accordance with Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. The term "necessary" in Article XX is being used in a different sense to cover a different set of circumstances. Accordingly, 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.

27. In paragraphs 106-111, Indonesia simply lists a number of different restrictions drawn from other parts of the FSPTCA, the 2006 RJ Reynolds Consent Agreement, the laws of Singapore and Australia, and the *Framework Convention on Tobacco Control*. Indonesia briefly references these restrictions without providing any evidence that any of these restrictions fulfil the US objective at the level of protection it finds appropriate or that they are significantly less trade restrictive than Section 907(a)(1)(A). A complaining party does not discharge its burden of establishing a *prima facie* case by simply making reference to alternative measures – it must adduce by way of sufficient evidence a presumption of inconsistency with each part of the legal standard.

E. INDONESIA HAS NOT SHOWN THAT THE UNITED STATES ACTED INCONSISTENTLY WITH OTHER TBT ARTICLES

28. Article 2.5. Indonesia contends that the United States has acted inconsistently with TBT Article 2.5 by not providing "a complete response" to Indonesia's questions regarding Section 907(a)(1)(A) that provides "scientific evidence" and "refers to the terms of TBT Articles 2.2, 2.3, and 2.4". Indonesia misunderstands the obligation. In the instant dispute, the United States acted consistently with Article 2.5 and has explained the objectives of its measure and provided its justification for the measure's enactment. In fact, the United States and Indonesia have had numerous exchanges on this issue. For example, the United States agreed to make special arrangements to have a bilateral discussion with Indonesia in Geneva on 27 August 2009. The very next week, the US Trade Representative, Ambassador Ronald Kirk, discussed Indonesia's concerns while at a WTO Ministerial in India. This exchange was then itself followed by a discussion of the issue at the November 2009 TBT Committee meeting by the delegations of the respective countries.

29. Article 2.8. Indonesia contends that TBT Article 2.8 provides that "a Member's technical regulations must require products to meet a certain performance level rather than merely specify how products must be made or what they must contain". Indonesia concludes that "by basing the ban on clove cigarettes in the Special Rule on descriptive characteristics, the United States has violated Article 2.8 of the TBT Agreement". Indonesia's argument is in error.

30. Indonesia's argument ignores the key limitation in Article 2.8 – namely, that the obligation to specify technical regulations on performance characteristics only applies where it is "appropriate" to do so. As discussed above, Congress chose to structure Section 907(a)(1)(A) in terms of descriptive terms given that it is the additives, flavours, herbs, and spices that created the risk that Section 907(a)(1)(A) is intended to address. As such, it was "appropriate" for Congress to structure Section 907(a)(1)(A) in terms of descriptive characteristics. Moreover, it is Indonesia's burden to establish a breach of Article 2.8. Yet, Indonesia does not even put forth a rationale why it is not "appropriate" to structure Section 907(a)(1)(A) in terms of descriptive characteristics.

31. Article 2.9. Indonesia contends that the United States has acted inconsistently with TBT Article 2.9 by not notifying Section 907(a)(1)(A). It is Indonesia's burden to prove each element of its claim.

32. Article 2.12. Indonesia also argues that the United States acted inconsistently with TBT Article 2.12 because it only provided a three month delay between publication of the FSPTCA and its entry of force. Again, Indonesia's argument is in error. Indonesia's argument that the 90 day period provided by the United States was not reasonable is based on a TBT Committee decision. Indonesia's citation to the TBT Committee decision does not establish that the United States breached TBT Article 2.12 for numerous reasons. Given the fact that the TBT Committee decision does not bind the WTO membership, and given the qualified nature of its language, a panel's determination of whether a particular delay is "reasonable" must be considered on a case by case basis. In this instance, Indonesia has failed to meet its burden of demonstrating that the 90 day period provided by the United States is not reasonable.

33. Article 12.3. Finally, Indonesia argues that Section 907(a)(1)(A) is inconsistent with TBT Article 12.3. In order to establish a violation of Article 12.3, the complaining party must demonstrate the following: (1) that it is a developing country; (2) that the other Member did not take account of its special development, financial or trade needs during the preparation and application of a technical regulation; and (3) that the Member did not take account of these needs *with a view* to ensuring that the technical regulation does not create unnecessary obstacles to export.

34. Here, Indonesia has failed to meets its burden to prove any of these elements. Assuming *arguendo* that Indonesia is a developing country, Indonesia has not demonstrated that the United States failed to take account of one or more special needs of Indonesia in the enactment of the FSPTCA. To the contrary, in the five years between the initial bill being introduced for consideration in the House of Representatives in 2004, and the law being enacted in 2009, Indonesia had ample opportunity to make its views known to both Congress and the Executive Branch and, in fact, did make its views known. Indonesia had numerous communications with both Congress and the Executive Branch, making the United States well aware of Indonesia's position. By allowing Indonesia an opportunity to comment on previous iterations of the legislation, as well as the version that was actually enacted into US law, the United States complied with its obligations under Article 12.3.

F. SECTION 907(A)(1)(A) IS JUSTIFIED UNDER ARTICLE XX

35. Indonesia has failed to establish that Section 907(a)(1)(A) breaches US obligations under GATT Article III:4. Should the Panel reach the issue of GATT exceptions, the application of Section 907(a)(1)(A) would be justified under GATT Article XX(b). To justify a measure under Article XX(b), the Appellate Body has previously explained that the responding party must demonstrate that the measure: (1) falls under the scope of the Article XX(b) exception; and (2) satisfies the requirements of the Article XX chapeau.

36. Past panels have indicated that two elements must be met for a measure to fall under the scope of the Article XX(b) exception: (1) the policy in respect of the measure for which the provision is invoked must fall within the range of policies designed to protect human, animal or plant life or health; and (2) the inconsistent measure for which the exception is invoked must be necessary to fulfil the policy objective.

37. Section 907(a)(1)(A) was enacted in order to protect human life and health from the risk posed by smoking. Further, Section 907(a)(1)(A) was necessary to ensure that products that are predominantly used as "starter" products by youth, leading to years of addiction, health problems, and possibly death, cannot be sold in the United States at all. With regard to the latter point, the United States believes the Panel should reach the same conclusion if it follows the method used by past panels to determine whether a measure is necessary under one of the Article XX exceptions. When faced with the question of whether a measure is necessary, other panels have engaged in "a process of weighing and balancing a series of factors", which include (1) the importance of the interests or values at stake; (2) the contribution made by the measure to its objective; and (3) the trade restrictiveness of the measure. All three of these factors weigh in favour of a determination that Section 907(a)(1)(A) was necessary to protect human life and health from the risks posed by smoking, particularly youth smoking.

38. First, one factor panels generally examine to determine whether a measure is necessary is the importance of the interests or values at stake. If the interest at stake is of fundamental importance, past panels have been more inclined to determine that a measure is necessary to achieve its stated objective. Such is the case here. The United States is applying Section 907(a)(1)(A) for the protection of the life and health of its population, particularly the protection of its youth.

39. Second, to determine whether a measure is necessary to achieve a certain objective, panels have weighed the measure's contribution to the achievement of that objective. A contribution exists when there is a genuine relationship of the ends and means between the objective pursued and the measure at issue. As before, if a panel finds a genuine relationship between the measure and the policy goal it intends to pursue, panels are more inclined to consider the measure in question necessary. Section 907(a)(1)(A) is directly contributing to the protection of human life and health by ensuring that products that present a unique risk to youths cannot be sold on the market.

40. Third, to decide whether a measure is necessary to achieve its stated objective, panels have considered the measure's trade restrictiveness. The more restrictive a measure is, the more carefully it may need to be reviewed to determine whether it is necessary to achieve a particular objective. However, a restrictive measure may still be considered necessary based on the context of the situation in which the Article XX(b) defense is invoked. The context here, as explained above, is that youth smoking rates remained unacceptably high at the time of the FSPTCA's enactment and Congress found it appropriate to apply more severe restrictions than had been applied up to this date.

41. To justify a measure under GATT 1994 Article XX(b), the Appellate Body has explained that the responding party must also show that the measure meets the requirements of the Article XX chapeau. To meet the requirements of the chapeau, past Appellate Body reports have explained that the responding party must demonstrate that its measure (1) is not a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or (2) a disguised restriction on international trade.

42. Previous Appellate Body reports have explained that a measure will be considered to be applied in a manner that results in arbitrary or unjustifiable discrimination if three conditions are met: (1) the application of the measure results in discrimination; (2) the discrimination is arbitrary or unjustifiable in character; and (3) the discrimination occurs between countries where the same conditions prevail. In the instant dispute, these conditions are not met.

43. First, there is no differential treatment at all, and therefore cannot be any "discrimination", arbitrary, unjustified, or otherwise. As discussed above, the measure at issue is facially neutral measure that applies equally to all cigarette products, regardless of origin.

44. However, even if Section 907(a)(1)(A) is found to "discriminate", such conduct could not be considered "arbitrary" or "unjustified". If a responding party provides a rationale for the measure that is not capricious, random, or indefensible, the measure will not run afoul of this element of the chapeau. Here, that is clearly the case. As the United States has explained in great detail, the line Congress drew in deciding what products would be banned and what products would not was without question not an arbitrary or capricious one. Rather, it was one grounded in the evidence and tailored to address a specific public health risk. As such, Section 907(a)(1)(A) does not amount to an arbitrary or unjustified act of discrimination.

45. The final requirement for a measure to be justified under the chapeau and GATT Article XX(b) is that it must not be a disguised restriction on international trade. An examination of a measure's purpose to determine whether it has "protectionist objectives" is relevant to this issue. If a measure's purpose is protectionist in nature, it will likely be considered a disguised restriction on trade and will not meet the requirements of the chapeau. In this instance, the evidence demonstrates that Section 907(a)(1)(A) is not a disguised restriction on trade.

46. Accordingly, Section 907(a)(1)(A) meets the requirements of the chapeau and is justified under GATT Article XX(b).

ANNEX B

EXECUTIVE SUMMARIES OF THE THIRD PARTY SUBMISSIONS

ANNEX B-1

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF BRAZIL

I. ARTICLE 2.1 OF THE TBT AGREEMENT AND ARTICLE III.4 OF GATT 1994, THE *DE FACTO* DISCRIMINATION AND LIKENESS ANALYSIS

1. In its first written submission, Indonesia submits that the Special Rule is inconsistent with Article 2.1 of the TBT Agreement and with Article III.4 of GATT 1994 because it results in treatment that is "less favourable" to imported clove cigarettes than that accorded to the domestic like products. The United States rebuts these claims affirming that the Special Rule is consistent with its obligations under Article 2.1 of the TBT Agreement and with Article III.4 of GATT 1994 because it "*distinguishes among cigarettes based on their overall effects to the public health, and not based on their national origin*" and it does not present a protection to domestic industry.

2. Even though Brazil shares the United States concerns regarding smoking among youngsters, Brazil agrees with Indonesia that the Special Rule unjustifiably discriminates against imported cigarettes.

3. Concerning the meaning of "like products", Brazil agrees with Indonesia that the four criteria laid down by the Working Party on Border Tax Adjustments, as described by the Appellate Body in *EC – Asbestos*, may be of relevance, together with the Appellate Body's remark in that same appeal that "the term 'like products' is concerned with competitive relationships between and among products", and that "it is important to take account of evidence which indicates whether, and to what extent, the products involved are – or could be – in a competitive relationship in the marketplace".

4. In the case at hand, there is sufficient evidence to conclude that imported clove cigarettes and domestically-produced cigarettes in the United States, in particular menthol cigarettes, are like products, and, therefore, the imported product must be treated no less favourably than the like domestic products in the United States marketplace. Given this, Brazil concludes that the Special Rule does not provide for an equal competitive opportunity between imported cigarettes (clove) and the domestic like product (menthol cigarettes), in the United States marketplace, and that the Special Rule seems to be, therefore, inconsistent with Article 2.1 of the TBT Agreement and with Article III:4 of GATT 1994 as well.

II. ARTICLE 2.2 OF THE TBT AGREEMENT

5. In its first written submission, Indonesia argues that the United States did not comply with Article 2.2 of the TBT Agreement because the measures at issue are more trade restrictive than necessary to protect human health. The United States considers that the measures in question fulfil the legitimate objective to an appropriate and acceptable level, and alleges that Indonesia did not put forward an alternative measure which could have been reasonably available and significantly less trade restrictive than the questioned measure.

6. In what regards Article 2.2 of the TBT Agreement, Brazil wishes to focus on two aspects of the measure at issue in this dispute: (i) whether the Act and the Special Rule pursue a legitimate objective as provided under Article 2.2 of the TBT Agreement; and (ii) whether the Special Rule is more trade-restrictive than "necessary" to the fulfilment of this objective. Brazil understands that these two issues are related because, under the text of Article 2.2, a measure "shall" be no more trade-restrictive than "necessary" in order to achieve a legitimate objective. As the Appellate Body

reminded us in *Brazil – Retreaded Tyres*, the contribution of the measure to the achievement of its objective is a key element in the analysis of necessity.

7. Considering the health problems posed by cigarettes, actions addressed to their control are legitimate as a public health policy. However, it must be noted that menthol cigarettes account for 43 per cent of cigarettes smoked by young smokers in the United States, and the ban on the cigarettes imposed by the Special Rule does not cover menthol cigarettes. Based on the facts of this case, Brazil considers that, in order to assess the measure's conformity with Article 2.2 of the TBT Agreement, the key element to be scrutinized by the Panel is whether the Special Rule is "necessary" to the achievement of its legitimate objective.

8. In addressing Indonesia's claim under Article 2.2 of the TBT Agreement and the United States' claim for exception under Article XX(b) of GATT 1994 in this dispute, the Panel must evaluate whether the Special Rule is in fact "necessary". Here Brazil sees the case law on Article XX of GATT 1994 as especially useful. For Brazil, the interpretive question relating to the clarification of the meaning of the term "necessary" in Article 2.2 of the TBT Agreement is not whether the case law under Article XX of GATT 1994 applies; rather, it is whether essentially the same reasoning is required under Article 2.2 of the TBT Agreement as under Article XX of GATT 1994. Given the similarities in the respective texts of the two provisions, and given the similarities of their respective purposes, Brazil considers that the reasoning required is essentially the same, and therefore the case law under Article XX of GATT 1994 is highly relevant to the clarification of Article 2.2 of the TBT Agreement.

9. As already noted, the contribution of a measure to the achievement of its objective is a key element to determining whether a trade-restrictive measure is "necessary". Brazil is of the view that trade bans face a higher threshold for justification than other less trade-restrictive measures, and, thus, must clearly and significantly contribute to the achievement of their stated objectives, as the Appellate Body in *Brazil – Retreaded Tyres* explained.

10. Brazil sees the interests and values underlying the objective of the Act as of extreme importance, but Brazil understands that the exclusion of menthol cigarettes from the scope of the trade restrictions imposed by the Special Rule casts doubts on the contribution of the measure to the achievement of its stated purpose. From a health policy standpoint, the first option the United States could have envisaged to the fulfilment of the Act's legitimate objective was the imposition of a measure covering all flavoured cigarettes, domestic and imported, including menthol cigarettes. The Special Rule, however, chose not to ban precisely that type of flavour which is the most frequently used by young smokers. This explicit exclusion of a like domestic product – equally unhealthy – from the scope of the measure, casts doubts on the contribution of the measure to the achievement of its stated purpose.

11. Furthermore, in order to comply with Article 2.2 of the TBT Agreement, a technical regulation must not be "more trade-restrictive than" necessary to the achievement of its legitimate objective, what implies inquiring whether there are any less trade-restrictive measures available to the same policy purpose. In this matter, Brazil considers that the Panel should carefully assess whether Indonesia has made a prima facie case regarding the existence of less trade-restrictive measures to achieve the stated objective of the Act, and, if so, whether the United States has properly discharged itself of the burden of proving that the measures indicated by Indonesia are not able to achieve the Act's objective.

III. ARTICLE 2.8 OF THE TBT AGREEMENT

12. In its first written submission, Indonesia alleges that the United States has acted inconsistently with Article 2.8 of the TBT Agreement because the Special Rule established in the Act is based on

descriptive characteristics, instead of performance. The United States emphasizes that it is imperative to analyse the words "wherever appropriate" when interpreting Article 2.8 of the TBT Agreement, and submits that the aforementioned terms allow Members to structure their regulations based on descriptive characteristics when "appropriate".

13. It can be observed, by a simple reading of Article 2.8 of the TBT Agreement, that "descriptive characteristics" may not be an appropriate basis for technical regulations. However, this obligation does not apply in all cases. Article 2.8 of the TBT Agreement applies this obligation only "wherever appropriate".

14. Taking into consideration the ordinary meaning of those words and their context, it can be concluded that "appropriate" must be understood as somewhere between convenient and mandatory. Brazil understands the term "wherever appropriate" was included in Article 2.8 of the TBT Agreement as acknowledgment that not all products can be measured in terms of performance; but where a product can be measured by performance, a technical regulation shall not be based on design or descriptive characteristics.

15. In sum, when assessing the term "wherever appropriate" in Article 2.8 of the TBT Agreement, the Panel should give especial consideration to the objective and purpose of the provision, in order to ensure that it is not rendered less binding then its text and context seems to imply.

ANNEX B-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF BRAZIL AT THE FIRST SUBSTANTIVE MEETING

I. THE DEMONSTRATION OF D*E FACTO* DISCRIMINATION UNDER ARTICLE III:4 OF THE GATT 1994

1. In its first written submission, the United States pursues an interpretation of Article III:4 of the GATT that would require evidence of origin-based detrimental effects to the imported product as a pre-requisite for demonstrating a *de facto* discrimination. According to this view, if any other factor or circumstance other than the foreign origin of the product were found to be the base for the discrimination, there would be no violation of Article III:4, allegedly because, in such case, the measure would not afford protection to the domestic production.

2. The expression "treatment no less favourable", as it appears in Article III:4 of the GATT 1994, has been understood by the Appellate Body not to prevent Members to treat imported and domestic products differently, but rather to guarantee undistorted conditions of competition between imported and domestic like products. Therefore, differential effects of a measure on imported and domestic like products can only be justified if they do not change the conditions of competition in favour of the domestic products.

3. Brazil is of the view that, in assessing whether a measure modifies the conditions of competition between imported and domestic like products, no single characteristic or effect of the measure can be decisive in itself. It is true that not every difference in treatment of imported vis-à-vis domestic like products can be considered as a violation of Article III:4, in line with the Appellate Body decision in *Dominican Republic – Import and Sale of Cigarettes*. Nevertheless, it also is also true that a measure that, by its design, architecture and structure, modifies the conditions of competition in disfavour of the imported like products, is *ergo* a measure that "affords protection to domestic production", even if that measure is not based on the foreign origin of the disfavoured product.

4. Based on the aforementioned considerations, Brazil considers that in an Article III:4 analysis, the crucial question is to what extent the application of a measure results in less favourable treatment to the imported product, regardless of the measure's stated objective. Accordingly, Brazil believes that the panel should focus its assessment on Indonesia's Article III:4 claim about the characteristics of the contended US measure and on its actual effects on competition in the US cigarette market as a whole, and should carefully weigh all elements involved in this dispute.

ANNEX B-3

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF COLOMBIA AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. Colombia intervenes in this case given its systemic interest in the application of several provisions of the WTO covered agreements that are discussed in this dispute.

2. While not taking a final position on the facts of this case –largely relative to scientific evidence -, Colombia will provide its views on some of the legal claims advanced by the Parties to the dispute. First, Colombia will address the issue of likeness under the *Agreement on Technical Barriers to Trade* (the "TBT Agreement") and the GATT Agreements. Then Colombia will comment on the *necessity* requirement under Article 2.2 of the TBT. Subsequently, Colombia will present its assessment on the legal standard of interpretation under Article XX(b) of the GATT 1994. Finally, Colombia will provide some comments regarding the special and differential treatment pursuant to Article 12 of the TBT Agreement.

II. MORE FAVOURABLE TREATMENT TO CERTAIN CIGARETTES PRODUCED OR SOLD IN THE US THAN THE ONE PROVIDED TO CIGARETTES IMPORTED FROM INDONESIA

3. Indonesia claims that Section 101(b) of the *Family Smoking Prevention and Tobacco Control Act of 2009* (the "Special Rule") accords less favourable treatment to imported clove cigarettes than the one given to domestic menthol and regular cigarettes, both under Article 2:1 of the TBT Agreement and Article III:4 of the GATT 1994.[1] In response, the US claims that Indonesia has failed to meet its burden of proving that clove cigarettes are like products to tobacco and menthol cigarettes and that the Special Rule accords less favourable treatment to clove cigarettes than to tobacco or menthol cigarettes based on their national origin.[2]

4. In order to conclude if clove cigarettes are like to menthol and tobacco cigarettes, Colombia states that special attention must be given to consumer's tastes and habits, in a similar manner as was given by the Panel in the case of Indonesia – *Autos*, where a balance was drawn between acknowledging certain vehicles as like or not. In that case, the Panel held that: "although consumer's brand preferences may exist, the products themselves are generally recognized to belong to the same "sedan" category".[3]

5. In addition, Colombia considers that nonetheless the US holds that in order to be a breach of Article III:4 the discrimination has to be based on the cigarettes origin, it is not clear what is the legal source for that requirement to be met. The Appellate Body held in the case of *Korea – Various Measures on Beef* that "[f]or a violation of Article III:4 to be established, three elements must be satisfied: that the imported and domestic products at issue are 'like products'; that the measure at issue is a 'law, regulation or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use'; and that the imported products are accorded 'less favourable'

[1] Indonesia's first written submission, paras. 36-72.
[2] United States' first written submission, paras. 196-198.
[3] Panel Report, *Indonesia – Autos*, para. 5.8.

treatment than that accorded to like domestic products. Only the last element – 'less favourable' treatment – is disputed by the parties and is at issue in this appeal."[4]

6. In this context, the Panel could take this opportunity to clarify to what extent the complainant who claims a breach of Article III:4 of the GATT 1994, has to prove that the measure at issue is a discrimination based on the cigarettes origin, as an additional requirement to those described by the Appellate Body in the case of *Korea – Various Measures on Beef*.

III. NECESSITY TEST UNDER ARTICLE 2.2 OF THE TBT AGREEMENT

7. Indonesia claims that the Special Rule is more trade restrictive than it is *necessary* to fulfil the legitimate objective, taking into account the risk that non-fulfilment would create. The US responds by arguing that the Special Rule is not more trade restrictive than necessary pursuant to Article 2.2 of the TBT Agreement.

8. Colombia submits that Article 2.2 of the TBT Agreement requires a *necessity* test of the measure according to its trade restrictiveness, which should be weighed with respect to the risk that non-fulfilment would create. Thus, in order to find a breach of Article 2.2, the Panel should determine that the measure at issue is more trade restrictive than it is *necessary* to fulfil the legitimate objective; and that not complying with such a measure does not imply a risk to the protection of the legitimate objective pursued.

9. Colombia takes the view that the *necessity* test can be construed bringing for that purpose the *necessity* test used by several Panels and the Appellate Body in cases involving the application of Articles XX:(b) and XX:(d) of the GATT[5], following in this vein basic rules of interpretation such as analogy. In addition, Colombia calls the attention of the Panel to the crucial role of a *necessity* test in weighing the trade restrictiveness of a measure and the policy goals pursued by Members' through their national regulations.

10. Thus, Colombia considers that this type of test can provide clear elements for the compatibility analysis of national measures with various provisions of the WTO covered agreements, such as Article 2.2 of the TBT Agreement. In that sense, and as it is proposed by the Complainant Party, the Panel could use the *reasonably available alternatives* approach as an element of the *necessity* test under Article 2.2 of the TBT Agreement

11. Therefore, Colombia respectfully requests the Panel to elaborate on a clear *necessity* test for the proper application of Article 2.2 of the TBT Agreement by the Members.

IV. JUSTIFICATION OF A MEASURE UNDER ARTICLE XX (B) OF THE GATT

12. Indonesia asserts that the ban established in the Special Rule is not justifiable under the exception provided for in Article XX(b) of the GATT 1994, because it is not necessary to protect youth from smoking. On the contrary, the US submits that the exception provided for in Article XX(b) does apply.

13. In the *US – Gasoline*[6] case, the Panel set out that in order to justify the application of Article XX(b), the analysis requires a three-tier test: (i) "that the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal

[4] Appellate Body, *Korea – Various Measures on Beef*, para. 133.
[5] Panel Report, *US – Gasoline*; Appellate Body Report, *EC – Asbestos*; Appellate Body Report *Korea – Various Measures on Beef*.
[6] Panel Report, *US – Gasoline*, para. 6.20.

or plant life or health"; (ii) "that the inconsistent measures for which the exception was being invoked were *necessary* to fulfil the policy objective"; and (iii) "that the measures were applied in conformity with the requirements of the introductory clause of Article XX".

14. Concerning the first element of the test, in *Thailand – Cigarettes*[7], the Panel recognized that "smoking constitutes a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b)". Therefore, as Indonesia submits, there is no discussion that the Special Rule *falls within the range of measures to protect human health.*

15. With respect to the *necessity* requirement, the Panel in *Thailand – Cigarettes*[8] came to the conclusion that a measure is *necessary* only when: (i) there is no alternative for a GATT-consistent or less inconsistent measure; and (ii) it is reasonably expected that Members could employ such sort of measures to achieve the public health goal pursued. According to the Appellate Body in the case of *EC – Asbestos*[9], a measure would be deemed necessary under Article XX(b) of the GATT if there are no more GATT consistent reasonable alternatives available for the Member implementing the measure. In that case, the Appellate Body also clarified that the alternative measure must be *less trade restrictive* than the measure at issue.

16. Therefore, Colombia considers that the remaining question for the Panel is whether there is an alternative measure that: (i) would achieve the same policy goal, i.e. prevent cigarette smoking by the underage population; and (ii) it is less restrictive to trade than the ban adopted on clove cigarettes.

17. If the Panel finds that the ban on clove cigarettes imposed by the United States falls within the purview of Article XX(b) of the GATT 1994, it also should conduct an analysis of those restrictions under the chapeau of Article XX of the GATT 1994.[10] [11]

18. The Appellate Body in the *US – Gasoline* case stated that, "the fundamental theme – when interpreting the chapeau – is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX".[12] In other words, the Panel's task on this issue is to locate and mark out a line of equilibrium between the rights of the US invoking the exception and those of Indonesia.

19. Thus, the relevant question for the Panel is to determine whether there is a discriminatory treatment to imports from Indonesia and if such treatment in the application of the US measure is "unjustifiable" or "arbitrary" between countries where the same conditions apply.[13] Based on some WTO cases[14] [15], Colombia emphasizes that the test is not whether this discrimination is considered *justified*, but only that such discrimination is *justifiable* in the sense that it is *defensible, or able to be shown to be reasonable and just.*

20. In addition to "arbitrary or unjustifiable discrimination", the chapeau also provides that the measure provisionally justified under, for example, paragraph XX (b) is not to be applied such as to

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[7] GATT Panel Report, *Thailand – Cigarettes*, para. 73.
[8] Ibid., para. 75.
[9] Appellate Body Report, *EC – Asbestos*, para. 172.
[10] Appellate Body Report, *US – Shrimp*, para. 157. In *US – Shrimp (Article 21.5 – Malaysia).*
[11] Appellate Body Report, *US – Gasoline*, pp. 22-23.
[12] Appellate Body Report, *US – Gasoline*, p. 25.
[13] As stated by the Panel in *EC – Asbestos*, "if the application of the measure is found to be discriminatory, it still remains to be seen whether it is arbitrary and/or unjustifiable between countries where the same conditions prevail". Panel Report on *EC – Asbestos*, para. 8.226.
[14] Panel Report on *US – Shrimp (Article 21.5 – Malaysia)*, para. 5.124.
[15] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 225.

constitute a "disguised restriction on international trade". Colombia notes that the chapeau does not address the substance of the measure, but rather the manner in which that measure is applied.[16] This implies that the question is not whether the US measure has a restrictive effect on trade, but rather whether it is applied in a manner that constitutes a disguised restriction on international trade.

21. In sum, Colombia submits that this "disguised restriction" prohibition in the chapeau is, in the words of the Appellate Body, [17] really about "avoiding abuse or illegitimate use of the exceptions".[18]

V. SPECIAL AND DIFFERENTIAL TREATMENT OBLIGATIONS OF THE MEMBERS, ACCORDING TO ARTICLE 12 OF THE TBT AGREEMENT

22. Indonesia submits that the Special Rule is contrary to the obligations of the US under Articles 12 of the TBT Agreement, since it did not take due account of Indonesia's special conditions as a development country. In response, the US submits that Indonesia failed in satisfying the test of inconsistency of Article 12.3 of the TBT Agreement.

23. In this respect, Colombia considers that Article 12.3 of the TBT Agreement should be read in light of the provisions of Article 12.2 of the TBT Agreement.[19] In addition, it seems clear to Colombia that nonetheless the general rule on the burden of proof set by The *US – Wool Shirts and Blouses* case[20], where it was said that whoever asserts a fact has the burden of proving it, it is also clear that whenever a party advances evidence that raises a convincing presumption of the truth of the assertion made, the burden then shifts to the other party.

24. Colombia considers that the Panel should assess whether Indonesia has raised a convincing presumption on a breach of the TBT Article 12 obligations of the US. If the Panel is able to find that Indonesia has raised a convincing presumption on the breach of Article 12, then it is possible to shift the burden of proof to the US. Notwithstanding what has been mentioned above, Colombia also considers relevant to bear in mind the obligations of Member States under Article 12.3 of the TBT Agreement, are only verifiable through information available to the Member bound to comply with such provision.

25. Finally, Colombia kindly requests the Panel to complete the standard regarding the extent of the special and differential treatment, in accordance to the TBT Agreement.

26. Mr. Chairman, distinguished Members of the Panel, Colombia expects to contribute to the legal debate of the parties in this case, and would like to express again its appreciation for this opportunity to share its points of view regarding the application of Articles 2.1, 2.2, 12.1 and 12.3 of the TBT Agreement as well as Article III:4 of the GATT 1994. We thank you for your kind attention and remain at your disposal for any question you may have.

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[16] Appellate Body Report, *US – Gasoline*, p. 23 (original footnote omitted).
[17] Appellate Body Report, *US – Gasoline*, p. 25.
[18] Appellate Body Report, *US – Gasoline*, p. 25.
[19] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 74.7 sub 77.
[20] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 13.

ANNEX B-4

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION AND THE ORAL STATEMENT BY THE EUROPEAN UNION

I. THE TERM "LIKE PRODUCTS" IN ARTICLE 2.1 OF THE TBT AGREEMENT

1. The parties disagree on whether the term "like products" in Article 2.1 of the TBT Agreement needs to be interpreted as in Article III:4 of the GATT 1994 or whether there are relevant textual and contextual differences.

2. In the view of the European Union, a number of arguments indicate that it may be appropriate, in interpreting and applying the term "like products" in Article 2.1 of the TBT Agreement, to have regard to the way in which the term "like products" in Article III:4 of the GATT 1994 has been interpreted and applied[1]. The treaty terms are obviously the same. Furthermore, the GATT 1994 and the TBT Agreement are each context for the interpretation of the other. Finally, the second recital of the TBT Agreement refers to the desire to further the objectives of the GATT 1994. In the view of the European Union, however, one possibly relevant contextual difference is the fact that inconsistencies with Article III:4 of the GATT 1994 may be justified under Article XX of the GATT 1994, whereas the applicability of Article XX to claims outside the GATT 1994, including Article 2.1 of the TBT Agreement, remains unclear. If one were to find that Article XX does not apply outside the GATT 1994, the national treatment obligation under Article 2.1 of the TBT Agreement would risk being stricter than Article III:4 of the GATT 1994. One way to mitigate such discrepancy could potentially be a narrower interpretation of the term "like products" in Article 2.1 of the TBT Agreement.

II. THE CONCEPT OF "DE FACTO LESS FAVOURABLE TREATMENT" IN ARTICLE 2.1 OF THE TBT AGREEMENT AND ARTICLE III:4 OF THE GATT 1994

3. With regard to Indonesia's claims of a "de facto less favourable treatment" under Articles 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, the European Union notes that the Appellate Body has not yet fully clarified this legal concept. In the absence of clear guidance, panels should not lightly assume that any domestic measure that may have an impact on the quantity of products imported from another WTO Member should necessarily constitute *de facto* "less favourable treatment" of such imported products.[2] Regulatory diversity between Members, which neither the GATT 1994 nor the TBT Agreement intend to eliminate, may disrupt existing trade flows but it does not necessarily mean that there is less favourable treatment of imports. Panels rather need to assess whether any such detrimental effect on a given imported product is the result of factors or circumstances unrelated to the foreign origin of the product.[3] Therefore, the fact that Indonesian exports of clove cigarettes to the United States dropped after the entry into force of the US measure is not, in itself, sufficient to demonstrate a *de facto* less favourable treatment. The Panel should look at additional factors, such as to what extent the banned flavoured cigarettes were produced in the United States when the US measure was enacted or whether the different treatment of flavoured cigarettes, including clove cigarettes, on the one hand, and regular tobacco and menthol cigarettes, on the other, can be explained by reasons other than affording protection to the US cigarette industry.

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[1] See Appellate Body Report, *EC – Asbestos*, paras. 101-103.
[2] See Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96.
[3] See Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.2514.

III. THE RELEVANCE OF ARTICLE XX OF THE GATT 1994 FOR THE INTERPRETATION OF ARTICLE 2.2 OF THE TBT AGREEMENT

4. The parties and certain third parties disagree on whether jurisprudence relating to Article XX of the GATT 1994 informs the interpretation of Article 2.2 of the TBT Agreement.

5. In the view of the European Union, the relevance of the GATT 1994 to the interpretation of the TBT Agreement is, first, indicated by the second recital of the Preamble, which refers to the desire to further the objectives of the GATT 1994.

6. Secondly, it would go against the text and the purpose of Article 2.2 of the TBT Agreement to disregard the textual and purposive similarities with Article XX of the GATT 1994. The profound similarities in language – between Article XX of the GATT 1994, and its subparagraph (b) on the one hand, and Article 2.2 of the TBT Agreement and its Preamble on the other hand – appear to indicate a high degree of correlation between the intended meaning of the two provisions. The drafters obviously had Article XX of the GATT 1994 in mind when drawing up the text of Article 2.2 of the TBT Agreement. Furthermore, both provisions respectively seem to pursue similar purposes. Both provisions allow WTO Members to have in place measures which restrict trade (be they technical regulations or other measures which are found to be GATT-inconsistent), so long as (i) they pursue a legitimate objective, (ii) are necessary to fulfil or protect that objective, and (iii) are not more trade restrictive than necessary to fulfil or protect that objective, in other words there are no other alternative, less trade restrictive measures available which would make an equivalent contribution to the objective pursued. As to this latter point, both provisions attempt to ensure that the measure taken is *proportionate* to the objective pursued. The Appellate Body has held that "textual similarity" and "similar purposes" may render jurisprudence relating to one provision relevant and useful for the interpretation of another provision.[4]

7. The European Union fails to see how the “functional” difference between the two provisions – Article XX of the GATT 1994 constituting an exception and Article 2.2 of the TBT Agreement a prohibition – could be relevant for the question of whether jurisprudence under Article XX of the GATT 1994 is relevant. This difference affects the burden of proof between the parties, but not the meaning of the terms of a provision.[5]

8. From a systemic point of view, the European Union believes it important that the covered agreements are interpreted carefully and consistently, with due regard to all related provisions, in order to achieve harmony between the agreements, and the rights and obligations contained therein. For example, the standard should not be more or less stringent – for technical regulations over other measures which would fall under the GATT 1994 – when it comes to demonstrating the necessity of a measure taken to pursue a legitimate objective.

9. Therefore, it is appropriate to seek instruction from well established reasoning developed under Article XX(b) of the GATT 1994 when conducting an analysis under Article 2.2 of the TBT Agreement.

IV. ADDITIONAL CONSIDERATIONS CONCERNING THE LEGAL TEST UNDER ARTICLE 2.2 OF THE TBT AGREEMENT

10. Indonesia, as the party asserting the affirmative of Article 2.2 of the TBT Agreement, bears the burden of establishing a prima facie case by adducing sufficient evidence and argument to

[4] Appellate Body Report, *US – Gambling*, para. 291; also see Appellate Body Report, *EC – Bananas III*, para. 231.

[5] See Appellate Body Report, *EC – Tariff Preferences*, para. 98.

demonstrate inconsistency with each element.[6] The European Union's position that jurisprudence under Article XX of the GATT 1994 is relevant to an analysis under Article 2.2 of the TBT Agreement affects the certain aspects of the appropriate legal standard to be applied.

11. As a first matter, and with regard to the legitimate objective pursued by the measure, the European Union believes that panels should exercise restraint on the question of whether the objective is as stated by the responding party, and whether it is legitimate within the meaning of Article 2.2 of the TBT Agreement. We do not consider it necessary to debate the degree of regulatory space available under the TBT Agreement and it appears clear for purposes of resolving this dispute that the objective of protecting public health is legitimate, irrespective of the particular ALOP set.

12. The second, and more important matter which a panel has to determine is whether or not the measure is "more trade restrictive than necessary to fulfil the legitimate objective". In order for a panel to address this question, the complainant will basically have to advance sufficient evidence and argument to show that there are other less trade restrictive measures which are reasonably available to the respondent, and which equally fulfil the legitimate objective. A successful demonstration would lead the panel to conclude that the measure at issue is more trade restrictive than it has to be to achieve its objective, and it therefore amounts to an unnecessary obstacle to trade. The various dimensions to this analysis are very similar if not identical to those carried out as part of a "necessity analysis" under Article XX.

13. As further confirmation of this, it is useful to look at that test laid out by the Appellate Body in *Australia – Salmon* in relation to Article 5.6 of the SPS Agreement, which the United States wishes to rely upon in this dispute. Certainly, the role played by Article 5.6 of the SPS Agreement in the operation of the agreement is similar to that of Article 2.2 of the TBT Agreement. However, the European Union is hesitant to accord it too much weight on this basis alone.

14. In this regard, the European Union would point out, first, that the relevant legitimate objective to be protected using SPS measures – human health – is of great importance to WTO Members. Accordingly, greater deference must be exercised towards regulatory authorities, and a high burden is placed on complainants when challenging such measures. This is demonstrated through the more specific and onerous language used in Article 5.6 of the SPS Agreement, as compared with Article 2.2 of the TBT Agreement. This goes to our second point: the language used in each provision is very different, and the specific language relied upon in *Australia – Salmon*, present in the SPS Agreement, is not present here. Article 5.6 of the SPS Agreement places a significantly greater burden on complainants through this language. Specifically, with regard to the analysis of alternative measures, the clarifying footnote states that only measures which are "significantly less trade restrictive to trade", and "technically and economically feasible", will be deemed to be reasonably available.

15. On the other hand, Article 2.2 of the TBT Agreement simply states that technical regulations should not create "unnecessary obstacles to international trade" and they "should not be more trade restrictive than necessary to fulfil a legitimate objective". This language is very similar to that found – and already interpreted – in Article XX of the GATT 1994. In light of these differences, the European Union does not consider it appropriate to import the test set out in *Australia – Salmon* into the present case in order to resolve the interpretive question under Article 2.2 of the TBT Agreement.

[6] Appellate Body Report, *US – Gambling*, paras. 138-140.

ANNEX B-5

ORAL STATEMENT OF GUATEMALA AT THE FIRST SUBSTANTIVE MEETING

1. Mr. Chairman, Members of the Panel, delegations representing the Parties and the Third Parties, staff of the WTO Secretariat, good afternoon. On behalf of the delegation of Guatemala, I would like express our appreciation for this opportunity to present our views on the matters at issue.

2. Guatemala has a systemic interest on the legal interpretation of several provisions of the TBT Agreement and the GATT 1994.

3. Therefore, Guatemala will not offer any views with respect to the alleged legitimate objective of the United States nor the trade interests of Indonesia that motivated this dispute.

4. In particular, Guatemala will not comment on the convenience or inconvenience of banning cigarettes with a characterizing flavour in order to reduce the number of young smokers.

5. Instead, Guatemala would like to offer its views with regard to the definition of "like products" and the relationship between the TBT Agreement and Article XX of the GATT 1994.

6. Having said that, Guatemala observes that the measure at issue bans the production or sale of cigarettes characterized as "flavoured", except for menthol cigarettes. The alleged legitimate objective of the measure, according to the United States, is to protect the public health by prohibiting those products that serve as "starter" or "trainer" cigarettes for young smokers.[1]

7. Furthermore, the United States submits that there is evidence that flavoured cigarettes – except for menthol – are disproportionately smoked by novice young smokers (both minors and young adults), rather than already addicted, older adult smokers.[2]

8. Indonesia asserts that it objects this measure because it imposes a complete ban on clove cigarettes, while little or no restrictions are placed on regular cigarettes and menthol cigarettes. The arguments put forward by Indonesia concern all domestically produced cigarettes in the United States, especially menthol cigarettes. In the view of Indonesia, tobacco, menthol and clove cigarettes are like products.[3]

9. However, the United States argues that cigarettes and menthol cigarettes are different than clove cigarettes because they have different physical composition, end-uses and respond to different consumer tastes and habits.[4]

10. Article 2.1 of the TBT Agreement is a "non-discrimination provision". It contains the obligation to ensure that "in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country".

11. The Appellate Body, in *Japan – Alcoholic Beverages II*, stated that "[t]he concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and

[1] Indonesia's first written submission, paras. 1-3.
[2] Executive summary of the United States' first written submission, para. 23.
[3] Indonesia's first written submission, para. 6.
[4] United States' first written submission, paras. 154-189.

squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply."[5]

12. In the light of this, Guatemala is of the view that a Panel, when analysing the concept of "likeness", should also consider the "context and the circumstances that prevail in any given case to which that provision may apply".

13. In this dispute, Guatemala submits that the Panel should relate the concept of "likeness" to the *context* of a technical regulation; particularly, to the *circumstances* of the technical regulation at issue.

14. Guatemala understands that the United States is banning, through a technical regulation, certain types of cigarettes because they serve as "starter" or "trainer" cigarettes for young smokers. Therefore, Guatemala is of the view that the Panel, when analysing the concept of "likeness" in the present dispute, should also consider whether other cigarettes not included in the prohibition could serve as "starter" or "trainer" cigarettes for young smokers. In particular, the Panel may want to consider whether the only flavoured type of cigarettes not included in the prohibition could, eventually, take the place of all other prohibited flavoured cigarettes and serve as "starter" or "trainer" cigarette for young smokers.

15. In the opinion of Guatemala, this analysis would be consistent with: i) the context of the TBT Agreement (i.e. non-discrimination and technical regulations must not be more trade-restrictive than necessary to fulfil a legitimate objective); and ii) the specific circumstances of this case (i.e. the pursuance of the legitimate objectives freely decided by the United States).

16. Now let me turn to Guatemala's comments regarding the relationship between the TBT Agreement and Article XX of the GATT 1994.

17. The preamble of the TBT Agreement recognizes that "no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provision of this Agreement".

18. Article 2 of the TBT Agreement further develops some obligations with respect to the preparation, adoption and application of technical regulations. For example, the obligation of non-discrimination (Article 2.1); the obligation that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade (Article 2.2); the obligation that technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or can be addressed in a less trade-restrictive manner (Article 2.3); etc.

19. The chapeau of Article XX of the GATT 1994, on the other hand, requires that a measure justified under any of the items of such provision" are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries were the same conditions prevail, or a disguised restriction on international trade". This is a similar language to that used in the preamble of the TBT Agreement, although Article 2.1 of the TBT Agreement contains an unqualified obligation of non-discrimination.

[5] Appellate Body Report, *Japan – Alcoholic Beverages II*, p.21.

20. In the light of this, it is unclear when Article XX of the GATT 1994 might be applied to justify an exception on the application of the TBT Agreement in respect of a technical regulation. Guatemala is of the opinion that the TBT Agreement contains specific rules for the adoption of trade obstacles and provides for specific tests of necessity. In Guatemala's view, the only foreseeable possibility, at this stage, would be the application of Article XX of the GATT 1994 to justify an exception to Article 2.1 of the TBT Agreement; that is, a discrimination between countries were the same conditions prevail; of course, if such discrimination is not arbitrary or unjustifiable.

21. Having said that, Guatemala does not want to exclude, nor prejudge, in general, the scope of applicability of Article XX of the GATT 1994 in respect of technical regulations. Guatemala's intention is simply to draw your attention to the difficulties that the application of an exemption under Article XX in respect of a technical regulation would generate. If the Panel were to decide that Article XX(b) is applicable to the facts of the present dispute, Guatemala suggests that the Panel interprets this provision narrowly.

22. Mr. Chairman, members of the Panel, we wish you a successful completion of the task before you.

ANNEX B-6

ORAL STATEMENT BY MEXICO AT THE FIRST SUBSTANTIVE MEETING[*]

I. INTRODUCTION

1. It is a privilege for me to appear before you here today, on behalf of the Mexican delegation, to present Mexico's views in this dispute.

2. Mexico expressed its intention to participate as a third party in these proceedings because they involve important systemic issues relating to the interpretation of the Agreement on Technical Barriers to Trade (TBT Agreement) and certain provisions of the General Agreement on Tariffs and Trade 1994 (GATT 1994). At the same time, this dispute is of particular interest to us because Mexico is currently participating as complainant in two cases before the WTO involving the interpretation of these same provisions, specifically Article III:4 of the GATT and Articles 2.1 and 2.2 of the TBT Agreement. Consequently, Mexico is grateful for the opportunity to express its views on some of the issues raised in these proceedings.

3. We recognize that WTO rules do not prohibit Members from taking measures necessary to protect human, animal or plant life or health, provided they do not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Moreover, WTO rules allow for the introduction of technical regulations as long as they do not constitute an unnecessary obstacle to international trade.

4. In this oral statement, Mexico will be addressing three important aspects of this dispute: (i) the product likeness analysis for the arguments relating to discrimination under Articles III.4 of the GATT and 2.1 of the TBT Agreement; (ii) less favourable treatment for the purpose of those articles; and (iii) certain matters relating to Article 2.2 of the TBT Agreement.

II. ANALYSIS

A. DISCRIMINATION UNDER ARTICLE III.4 OF THE GATT 1994 AND ARTICLE 2.1 OF THE TBT AGREEMENT

1. Product likeness

5. Article III:4 of the GATT and Article 2.1 of the TBT Agreement prohibit WTO Members from introducing measures that accord products imported from any Member treatment less favourable than that accorded to <u>like</u> products of national origin.

6. Mexico considers that the analysis of whether imported products and national products are "like products" under the said provisions should be conducted on a case-by-case basis[1] and in the light of the particular circumstances of each dispute.

7. Panels and the Appellate Body have mainly relied on four criteria in analysing the "likeness" of products, creating a framework that would help to classify and examine the various qualities and characteristics without omitting the consideration of other, or of all relevant evidence. These four criteria include: (i) the properties, nature and quality of the products; (ii) the end users of the

[*] This statement was originally made in Spanish.
[1] Appellate Body Report, *Japan - Alcoholic Beverages II*, p. 20.

products; (iii) consumers' tastes and habits - more comprehensively termed consumers' perceptions and behaviour - in respect of the products; and (iv)the tariff classification of the products.[2]

8. In this specific case, although the Panel should consider the four criteria, Mexico believes that it should focus its analysis in particular on the properties, nature and quality of the products and on consumers' tastes and habits in respect of the products, because these are the criteria on which the parties have conflicting views.

9. The Appellate Body *EC - Asbestos* also stated that "... the word 'like' in Article III.4 is to be interpreted to apply to products that are in such a competitive relation". The Appellate Body further concluded that the scope of Article III:4 of the GATT, although broader than "... the *first* sentence of Article III:2, is certainly *not* broader than the *combined* product scope of the *two* sentences of Article III:2 of the GATT 1994".[3] Thus, to determine whether the two products are similar under the legal standard of Article III:4 of the GATT, the Panel may explore whether the products in question are in a competitive relationship.

10. Mexico is not convinced by the US argument that clove cigarettes are not like products with menthol cigarettes and regular cigarettes. We cannot understand what difference there can be - according to the US argument - between a regular cigarette and a clove cigarette or between a menthol cigarette and a clove cigarette.

11. It is important that the Panel's interpretation should not allow the possibility of imposing restrictive measures on a product that could be considered a like product by drawing a discriminatory distinction and favouring domestic products to the detriment of foreign products.

2. Less favourable treatment

12. Mexico believes that if the Panel were to find that clove cigarettes from Indonesia and menthol and regular cigarettes of domestic origin were like products, the existence of a prohibition for one product and not for the others would clearly constitute less favourable treatment under Article 2.1 of the TBT Agreement and Article III:4 of the GATT.

13. Nor would Mexico support the US argument that the measure is origin-neutral in that it bans all characterizing flavours whether in domestically produced or foreign cigarettes, since de facto, the ban only affects imports and not the domestic product. When a measure affects imported cigarettes (i.e. it prohibits them) but does have the same effect on domestic products (which are excluded from the prohibition) because of the type of tobacco produced in the Untied States, then what we have is less favourable treatment.

14. In *Mexico - Taxes on Soft Drinks*, for example, the Panel found that there was de facto discrimination. In that case, the Mexican measure consisted of a 20 per cent tax on the use of any sweetener other than cane sugar (like high fructose corn syrup), a distribution tax, and certain bookkeeping requirements. The Panel confirmed that this constituted discrimination against imports, since the majority of sweeteners produced in Mexico were cane sugar sweeteners, while imports consisted almost entirely of high fructose corn syrup sweeteners. Consequently, the imposition by Mexico of a 20 per cent tax on sweeteners other than cane sugar (other than its domestic production), a distribution tax, and different bookkeeping requirements was tantamount, in practice, to imposing a

[2] See Appellate Body Report, *EC - Asbestos*, para. 101 (citing the GATT Working Party Report in *Border Tax Adjustments* and the Appellate Body Report in *Japan - Alcoholic Beverages II*).

[3] See Appellate Body Report, *EC - Asbestos*, para. 99.

measure to ensure the withdrawal of all importers of sweeteners from the market by applying a higher tax than that imposed on domestic production.[4]

15. The possible discrimination in this case has characteristics very similar to the discrimination found in the aforementioned case, in that according to the data submitted by Indonesia, US production of flavoured cigarettes is insignificant, and before their prohibition, clove cigarettes were imported primarily from Indonesia[5], so that as a result of this prohibition, Indonesia's exports were reduced to zero.[6]

16. Mexico recognizes that trade may vary under the influence of a number of measures and factors. However, in this dispute the Panel must take account of the figures provided by Indonesia which show that before the ban, 99 per cent of clove cigarettes marketed in the United States came from Indonesia, and the measure had no equivalent effect on cigarettes produced in the United States.

17. As we have seen, a measure may have negative effects on trade provided foreign products are not accorded treatment less favourable than like national products.

B. OTHER ARGUMENTS UNDER THE TBT AGREEMENT

1. Article 2.2 of the TBT Agreement

18. Mexico does not understand how a measure can aim to protect the health of young people if, assuming the data provided by Indonesia is correct, the majority of cigarettes consumed by young people are regular or menthol cigarettes, which are excluded from the prohibition.

19. Nor is it clear to us how the US measure can achieve its legitimate objective if most young people smoke cigarettes other than those covered by the prohibition.

20. In its first written submission, the United States points out that clove cigarettes are cigarettes that are smoked "from time to time"[7] and that traditional cigarettes are consumed on a daily basis. Would it not be more dangerous to the health of young people, then, to smoke cigarettes that are consumed on a daily basis (regular and menthol) than to smoke another type of cigarettes (i.e. clove cigarettes) from time to time?

21. At the same time, Indonesia has managed to identify less restrictive measures which in Mexico's view could serve to meet the United States' objective.

III. CONCLUSION

22. Mexico hopes that its views will have contributed to the Panel's assessment with a view to producing a harmonious interpretation of the relevant provisions of the TBT Agreement and the GATT, in accordance with the objectives of these provisions.

23. Mexico also requests this Panel to take account of the precedents established by the panels and the Appellate Body in the cases cited.

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[4] See Panel Report, *Mexico - Tax Measures on Soft Drinks*. The Panel analysed the tax on soft drinks and the distribution tax in the light of paragraphs 2 and 4 of Article III of the GATT 1994 and the bookkeeping requirements in the light of paragraph 4 of Article III of the GATT 1994.

[5] See Indonesia's first written submission, para. 112.

[6] See Indonesia's first written submission, para. 29.

[7] United States' first written submission, para. 172.

24. Finally, Mexico would like to thank the Panel for its attention and would gladly reply to any questions that the Panel may wish to raise.

ANNEX B-7

EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY NORWAY AT THE FIRST SUBSTANTIVE MEETING

1. Norway will set out its views on: (i) the interpretation of the term "like products" under Article 2.1 of the TBT Agreement, and (ii) the existence of "de facto" discrimination under Article 2.1 of the TBT Agreement.

2. Norway supports the objective of reducing youth smoking. This case does not, however, revolve around that objective *as such*, but concerns the *means* chosen by the United States to fulfil that objective and, in particular, whether those means – and their design and effects – conform to the obligations of the United States under the GATT and the TBT Agreement.

1. The four general likeness criteria apply to the interpretation of the term "like product" under Article 2.1 of the TBT Agreement.

3. The Family Smoking Prevention and Tobacco Control Act of 2009 (the "Act"), in its "special rule for cigarettes", bans certain cigarettes which are characterized as "flavoured". The stated objective of the Act is to protect the public health, including by reducing the number of children and adolescents who smoke cigarettes. However, the United States did not ban all flavoured cigarettes, but excluded menthol cigarettes, which are produced in the United States and are apparently highly popular there with both youth and adult smokers.

4. It does not seem to be disputed that the "special rule for cigarettes" is a "technical regulation" covered by the TBT Agreement. The question is thus whether the Special Rule is inconsistent with Article 2.1 of the TBT Agreement because it results in treatment that is "less favourable" to imported clove cigarettes than that accorded to the domestic like products.

5. Article 2.1 of the TBT Agreement provides that:

> "Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded <u>treatment no less favourable</u> than that accorded to <u>like products</u> of national origin and to like products originating in any other country."[1]

6. The first issue that arises under Article 2.1 of the TBT Agreement is whether clove cigarettes from Indonesia are "like" the cigarettes produced in the United States. Norway considers that the legal standards developed under Article III, including Article III:4, are highly relevant in interpreting the term "like products" in Article 2.1 of the TBT Agreement.

7. Norway starts by recalling that "the 'general principle' in Article III seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, *between the domestic and imported products involved*, 'so as to afford protection to domestic production'".[2] In other words, the national treatment obligation seeks to ensure that government regulation does not interfere with consumers' choices between competing products. In

[1] Emphasis added.
[2] Appellate Body Report, *EC – Asbestos*, para. 98. Original emphasis.

that regard, the Appellate Body also noted in that same appeal that "the term 'like products' is concerned with competitive relationships between and among products ... in the marketplace".[3]

8. Norway considers that the four criteria laid down by the Working Party on *Border Tax Adjustments*, which were adopted by the Appellate Body in *EC – Asbestos*, provide a useful framework for analysing the "likeness" of particular products under Article 2.1 of the TBT Agreement, and that the competitive relationship between the products in question is an important factor to be considered by this Panel.

9. Norway notes that the United States does not seem to contest the usage of these criteria when establishing likeness. Rather, the United States seems to argue that a technical regulation – *even* though it almost by definition applies to products or groups of products that are "like" – should be considered to apply to distinct products based on the regulatory "purposes of the regulation". Norway disagrees with the United States in this respect. Norway considers that "the regulatory purposes" of a technical regulation relate to the justification for the measure, and do not "stretch or squeeze" the like product determination under Article 2.1 of the TBT Agreement.

10. Although Norway takes no position on the facts of the dispute, it does wish to comment on the Panel's assessment of the four likeness criteria. In *EC – Asbestos*, the Appellate Body noted that the scope of the word "like" in Article III:4 of the GATT 1994 is broader than the scope of the word "like" in Article III:2.[4] This is because Article III:2 applies to like products, as well as directly competitive or substitutable, whereas Article III:4 applies solely to like products.[5] Although the Appellate Body did not decide if the overall product scope of each provision was identical, it noted that its interpretation prevented Members from using fiscal and non-fiscal regulation to protect domestic products. In Norway's view, the overall product scope of Article 2.1 should be akin to the overall product scope of both Articles III:2 and III:4. Hence, the word "like" should be interpreted in a similar manner to its interpretation in Article III:4.

11. In that regard, Norway notes that it is accepted that products need not be identical to constitute "like" products under Article III:4, just as they need not be identical to constitute "directly competitive or substitutable" products under Article III:2. Rather, the evidence regarding the different likeness criteria must be assessed as a whole to determine if the products are "like".

12. In this dispute, the Parties disagree on whether clove cigarettes are "like" domestic cigarettes. For example, the United States has highlighted certain alleged physical differences between the products and contends that, because the products are physically different, a higher burden is placed on Indonesia. It cites to *EC – Asbestos*, in which the Appellate Body found that there was a "*highly significant* physical difference" between the fibres at issue.[6]

13. Norway considers that the Panel must assess the nature and significance of the physical similarities and the differences between the cigarettes at issue. Products may have the necessary competitive relationship to be covered by Article III, notwithstanding physical differences between them.

2. "De facto" discrimination under Article 2.1 of the TBT Agreement

14. It is for this Panel, based on the criteria referred to above, to determine whether the products at issue in this dispute are like products. Assuming that they are like products, the next question is

[3] Appellate Body Report, *EC – Asbestos*, paras. 99 and 103.
[4] Appellate Body Report, *EC – Asbestos*, para. 99.
[5] Appellate Body Report, *EC – Asbestos*, para. 99.
[6] Appellate Body Report, *EC – Asbestos*, para. 114.

whether Indonesian clove cigarettes are treated less favourably than cigarettes (including those flavoured with menthol) produced in the United States.

15. Norway is concerned by the legal standard for assessing less favourable treatment set out by the United States. The United States contends that:

> "Measures that do not treat products differently based on origin, and for which the effects resulting from the measure are not a result of the origin of the product, are not measures that afford protection to domestic production."

16. The United States appears to consider that, because its measure distinguishes between cigarettes on the basis of an "objective" criterion that is not origin-based, its measure is WTO-consistent. However, in a dispute involving a facially neutral measure, a panel must look beyond an apparent objective distinction to establish if there is *de facto* discrimination against imported goods.

17. In assessing whether there is *de facto* discrimination, panels and the Appellate Body have examined the design, structure and operation of the measure.[7] The Appellate Body has also said that "[i]t is irrelevant that protectionism was not an *intended objective*"; the issue is "how the measure in question is *applied*".[8] In other disputes, panels and the Appellate Body have found *de facto* discrimination if domestically produced products tended to be subject to more favourable treatment than like imported products.[9]

18. The United States relies on *Chile – Alcoholic Beverages*. In that dispute, the Appellate Body's examination of Chile's taxation of alcoholic beverages "tends to reveal that the application of" the measure protected like domestic products.[10] Against that background, the Appellate Body examined whether this apparent *de facto* discrimination could be explained by other factors. It found that there were certain "anomalies" in the measure and that Chile could not reconcile the measure's stated objectives with its "protective application".[11]

19. In the present case, the parties to the dispute agree that the US technical regulation does not *de jure* provide for different treatment of products based on nationality. The Parties also seem to agree that the measure bans flavoured cigarettes that were largely not produced in the United States when the ban was introduced, whereas it allows tobacco- and menthol-flavoured cigarettes that are produced in large quantities in the United States and that were imported in negligible quantities. As Norway understands it, a large proportion of the cigarettes produced domestically when the ban was introduced were not affected by the ban, whereas a large proportion of Indonesia's trade with the United States was affected by the ban.

20. Such a disparate effect is an important factor that Norway considers the Panel should take into account when addressing whether the contested measure gives rise to *de facto* discrimination under Article 2.1 of the TBT Agreement.

21. The United States appears to argue that it has banned *some* cigarettes that appeal to youth smokers but has not banned *all* of them, because doing so would have other negative public health effects, in particular a high demand for assistance in giving up smoking and an increase in black market sales. Thus, the United States has banned clove and other flavoured cigarettes, but has not banned "*any type of cigarette favoured by a large portion of US smokers*", such as tobacco- and

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[7] *See, e.g.* Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.

[8] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 28.

[9] Appellate Body Report, *Chile – Alcoholic Beverages*, paras. 51-53; *see also, e.g.* Panel Report, *Mexico – Taxes on Soft Drinks*, paras. 8.119-8.121.

[10] Appellate Body Report, *Chile – Alcoholic Beverages*, para. 66.

[11] Appellate Body Report, *Chile – Alcoholic Beverages*, para. 71.

menthol-flavoured cigarettes. Norway is troubled by this argument. As Norway understands, consumption of *all* the cigarettes at issue seems to present similar risks for public health. Moreover, menthol-flavoured cigarettes are amongst the most popular cigarettes with youth smokers – much more popular than clove cigarettes. Yet, they are excluded from the ban.

22. Thus, it appears that the United States has adopted a general ban on flavoured cigarettes; however, it has carved out exceptions for tobacco- and menthol-flavoured cigarettes that seem to undermine the ban and its objectives. Through the ban and exceptions, the United States seems to have chosen winners and losers among different types of cigarettes sold in the US market: some cigarettes are banned to promote public health, and other more popular cigarettes are permitted, apparently also to promote public health.

23. Norway considers that the Panel should scrutinize closely such apparent "anomalies"[12] in the design, structure, and operation of a measure to establish whether the combination of the general ban and the exceptions favours domestic over imported products.

[12] Appellate Body Report, *Chile – Alcoholic Beverages*, para. 71.

ANNEX B-8

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF TURKEY

I. INTRODUCTION

1. Turkey thanks the Panel for giving the opportunity to present its views in the proceedings of the Panel. Turkey aims to contribute to the Panel's analysis by assessing three elements, which are: (i) whether the measure at issue is a technical regulation or not; (ii) whether the measure at issue is more trade-restrictive than necessary to fulfil a legitimate objective; and (iii) whether regular cigarettes, menthol cigarettes and clove cigarettes are like products.

II. WHETHER THE MEASURE AT ISSUE IS A TECHNICAL REGULATION OR NOT

2. According to the definition enclosed in Annex 1.1 of the TBT Agreement and according and to the interpretation of the Appellate Body[1], (a) a technical regulation; must lay down "product characteristics"; (b) compliance with product characteristics laid down in the regulation must be mandatory and (c) the regulation must be applicable to an identifiable product or group of products.

3. In regard to the first criterion, Turkey understands from the reasoning of the Appellate Body in *EC – Asbestos* that, while a simple ban on an import of a product may not be regarded as a technical regulation, forbidding usage of a product in other products may well fall into the definition of a technical regulation. The second criterion determined in the Annex I is that compliance with the stated characteristics of the product laid down in its technical regulation must be mandatory. This means that a technical regulation must regulate the "characteristics" of products in a binding or compulsory manner. Finally, the last criterion determined in Annex 1 of the TBT Agreement is that the regulation must apply to a specific product or product group. Therefore if a regulation applies to a determinable specific product or a product group then it can be assumed that the third criterion is met.

4. In view of the determinations stated above, if the panel decides that the "special rule for cigarettes" in Section 101(b) of the FSPTCA constitutes a "technical regulation" within the meaning of the TBT Agreement, the panel should asses the conformity of the measure with the TBT provisions first.[2]

III. WHETHER THE MEASURE AT ISSUE IS MORE TRADE-RESTRICTIVE THAN NECESSARY TO FULFIL A LEGITIMATE OBJECTIVE OR NOT

5. In its submission, Indonesia claimed that among others, Section 101(b) of the FSPTCA is inconsistent with Article 2.2 of the TBT Agreement. Moreover, Indonesia argues that the ban in the Special Rule can not be justified by Article XX of the GATT. [3] Turkey considers that although not identical the "necessity test" envisaged in Article 2.2 of the TBT Agreement and GATT XX are quite similar to each other as explained below.

6. Within the WTO framework, the TBT Agreement is intended to ensure that technical regulations do not constitute unnecessary barriers to international trade, while recognizing the right of members to take regulatory measures to achieve their legitimate objectives. On the other hand,

[1] Appellate Body Report, *EC – Asbestos*, paras. 67-69.
[2] Appellate Body Report, *EC – Bananas III*, para. 204; Panel Report, *EC – Asbestos*, paras. 8.15-8.17; Panel Report, *EC – Sardines*, paras. 7.14-7.19.
[3] Indonesia's first written submission, p. 34.

Article 2.2 of the TBT Agreement defines the conditions that a technical regulation must carry, in order to achieve the intention of the Agreement.

7. According to Article 2.2 of the TBT Agreement, a technical regulation can not be considered as a measure consistent with the TBT Agreement if it creates unnecessary obstacles to international trade. The TBT Agreement explains that unnecessary obstacles to trade can result when a regulation is more restrictive than *necessary* to achieve a given policy objective e.g. national security requirements; protection of human health or safety, animal or plant life or health, or the environment, or when it does not fulfil a legitimate objective.

8. Turkey believes that consistency examination that should be carried out under Article 2.2 of the TBT Agreement is very similar to that of to be carried out under Article XX(b) and the introductory clause to Article XX.

9. Turkey would like to underline that, as emphasized by the AB, in accordance with Article II:2 of the WTO Agreement, all WTO Agreement must be interpreted as a whole, and in a manner that gives meaning to all of them harmoniously. This approach does not necessarily mean that each term should be given the same meaning in all the WTO Agreements or each commitment envisaged in the WTO Agreements should create the same level of obligation.

10. Turkey notes that the preamble of the TBT Agreement uses the same wording as Article XX of GATT. In this regard, Turkey considers that the preamble of the TBT Agreement should be considered in interpreting the obligations stipulated in the TBT Agreement in general and Article 2.2 in particular. Such an interpretation should be carried out in a harmonious way with that of the chapeau of Article XX of the GATT.

11. Turkey also notes that the wording of Article 2.2 of the TBT Agreement and Article XX (b) of GATT is similar.

12. In Turkey's view, one of the requirements that should be assessed in determining whether the measure is in conformity with Article 2.2 of the TBT Agreement is the necessity of the measure for the fulfilment of one of the legitimate objectives mentioned in Article 2.2 of the TBT Agreement.

13. Turkey believes that the elaboration of the "necessity test" under Article XX of the GATT by the Appellate Body and the previous Panels shed light on the assessment of the "necessity test" provided under Article 2.2. Therefore, Turkey considers that the "necessity test" under Article 2.2 of the TBT Agreement includes consideration of the measure's effectiveness in fulfilling the asserted objective, assessment of its degree of trade-restrictiveness; and reasonably available less trade-restrictive alternatives. If TBT consistent or less trade restrictive alternatives exist then the measure at issue would not be in conformity with Article 2.2. of the TBT Agreement.

14. On the other hand, a regulation cannot fulfil its legitimate objective, if the restrictions stated in the regulation do not apply to like products that have the same effect. The objective of the challenged measure is stated as "to address the particular problem of youth smoking".[4] In Turkey's view, to achieve this objective, all like products appealing to underage smokers should be included in the scope of the challenged measure. In this context, the decision of the Panel as to whether regular, menthol flavoured and clove flavoured cigarettes should be considered as like products or not, shall have an important affect in determining the conformity of the measure at issue with WTO obligations.

[4] United States' first written submission, para. 6.

IV. LIKENESS OF PRODUCTS

15. Both the TBT Agreement and GATT 1994 obligate Members of the WTO to accord to imported products "treatment no less favourable than that accorded to *like products* of national origin. Therefore, in Turkey's view, both under the TBT Agreement and the GATT, in order to determine whether "less favourable treatment" has been applied to clove cigarettes from Indonesia, the Panel has to decide whether clove flavoured cigarettes and; regular and menthol flavoured cigarettes are like products, within the scope of this dispute.

16. Accordingly in determining whether two products are like products there are four criteria that should be taken into consideration which are; (i) the physical characteristics of the product, (ii) end uses of the product, (iii) consumer perception of the products and finally (iv) the tariff classifications of products.

17. Moreover, Turkey would like to draw the Panel's attention to the statement emphasized by the Appellate Body in *EC – Asbestos*. The Appellate Body stated that "although each criterion addresses, in principle, a different aspect of the products involved, which should be examined separately, the different criteria are interrelated. For instance, the physical properties of a product shape and limit the end-uses to which products can be devoted. Consumer perceptions may similarly influence, modify or even render obsolete, traditional uses of the products."[5]

18. In Turkey's view, in the present dispute the Panel should carefully examine consumer (consumers which the Act aims to protect) perceptions, which may influence the determinations under other criteria. In this regard, the panel should identify (i) the consumers of each type of cigarettes, namely regular, menthol and clove cigarettes; (ii) cigarette preferences of consumer groups, consumers targeted by the Act specifically, in percentages; (iii) how the competition relation is effected by consumer preferences among the examined products and whether consumer preferences, specifically ones of the consumer group targeted by the Act slide to the other group of products. If the transition of consumption is easy, this means that the competition and likeness between products is high.

19. If the Panel were to determine that, for the sake of this dispute, regular and/or menthol flavoured and clove flavoured cigarettes are like products, the challenged measure would be in breach of the national treatment obligation under the TBT Agreement and/or under Article III.4 of GATT 1994, depending on the other elements of the national treatment obligation. However, at this stage Turkey will not comment on those elements of the national treatment obligation. Nevertheless, Turkey would like to remind the Panel that it should carefully examine main production places of each type of cigarettes *i.e.* whether they are domestically produced or imported. As the Appellate Body noted in *Japan – Alcoholic Beverages II* with regard to the first paragraph of the Article III of the GATT, which articulates a general principle that internal measures should not be applied so as to afford protection to domestic production, this consideration informs the application of national treatment obligation.[6]

V. CONCLUSION

20. Turkey appreciates this opportunity to present its views to the Panel. Turkey requests the Panel to review the comments stated in this submission, in interpreting the TBT Agreement and the GATT.

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[5] Appellate Body Report, *EC – Asbestos*, para. 102.
[6] Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 17-18.

ANNEX C

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF INDONESIA

I. INTRODUCTION

1. Indonesia recognizes that WTO rules provide Members with a certain amount of discretion regarding their regulatory regimes, especially regarding the protection of public health. Past panels and the Appellate Body have found that certain measures that restrict trade, but are necessary to protect human health are consistent with WTO commitments. However, WTO rules also clearly state that a Member's discretion is not unlimited and Members must satisfy certain requirements in their adoption of measures that restrict trade. In the instant case neither the scientific evidence nor the data on smoking supports banning clove cigarettes but not menthol- or tobacco-flavoured cigarettes. Thus Section 907(a)(1)(A) of the Federal Food, Drug, and Cosmetic Act (as amended by the Family Smoking Prevention and Tobacco Control Act of 2009 ("FSPTCA")) (hereinafter the "Special Rule") is inconsistent with Article 2.1 of the TBT Agreement and III:4 of the GATT 1994. Furthermore, the evidence shows that the Special Rule is more trade restrictive than necessary in violation of TBT Article 2.2. Finally, in adopting the Special Rule, the United States failed to comply with certain other provisions of the TBT Agreement, which resulted in violations of TBT Articles 2.5, 2.8, 2.9, 2.12, and 12.3.

II. FACTS

A. CLOVE CIGARETTES DO NOT APPEAL OVERWHELMINGLY TO YOUTH

2. The United States has claimed that flavoured cigarettes, including clove cigarettes, were banned because they "appeal overwhelmingly to youth". In considering the results of the various surveys put forward by both Indonesia and the United States, the Panel should look carefully at the age ranges used by the United States. In many cases, while the United States is making claims about "youth" use of flavoured cigarettes, they are actually using survey data that includes both youth (17 and under) and young adults (18-25). The FSPTCA itself and the House Report accompanying the legislation both make it clear that the objective of the FSPTCA is to reduce smoking by those under 18. The United States cannot "retrofit" a new objective into the measure simply to make the data more favourable to its case. Therefore, smoking rates of young adults are not relevant to the facts of this case and the Panel should consider only the rates of use by youth (17 and under) and adults (18 and over).

3. The United States has cited survey results from the *National Youth Tobacco Study* ("*NYTS*"), *Monitoring the Future* ("*MTF*"), and the *National Survey on Drug Use and Health* ("*NSDUH*") as supporting its claim that clove cigarettes were "overwhelmingly" and "disproportionately" used by youth. Indonesia has identified many inconsistencies in the survey data relied upon by the United States, which, when corrected, reveals a lower rate of use than that initially reported by the surveys. However, even assuming *arguendo* that the rates reported by the United States *were* correct, the results still prove that clove cigarettes are not popular with youth at all, much less "overwhelmingly" so. For example, the *NYTS* reported that 11 per cent of those smokers surveyed (including young adults up to the age of 21) had tried a clove cigarette in the last 30 days. *MTF* found that 5.5 per cent of 12th graders (some of whom may be 18) had tried a clove cigarette in the last year. The *NSDUH* – using the survey question from 2003 preferred by the United States – reported that 5 per cent of youth smokers had tried a clove cigarette in the past 30 days. This data shows that, at a minimum, close to 90 per cent of youth who smoke have not even touched a clove cigarette. This is consistent with the *MTF* researchers' conclusion that, "kretek [clove cigarette] use was a short-term

fad that simply did not catch on with mainstream youth". The survey data shows that menthol cigarettes, pipes, cigars and other tobacco products are even more popular with youth than clove cigarettes.

4. The data further shows that a consistent but small number of adult smokers (on average 0.3 per cent) do report using clove cigarettes as the brand smoked "most often". A breakdown of *NSDUH* clove cigarette smokers by age shows that there are more than ten times as many smokers over the age of 30 whose regular brand is clove as there are regular clove smokers under 18 years of age. Adults do use clove cigarettes and this fact cannot be dismissed as the United States has suggested.

5. Furthermore, Indonesia has provided substantial evidence that the "trainer" cigarettes that are familiarizing young people in the United States with smoking are not clove cigarettes, rather they are popular US brands, including menthol cigarettes. Forty-two per cent of youth smokers use menthol cigarettes "most often". The average rate of menthol use by adults falls to 30 per cent – a significant drop from the youth rate, indicating that youth start on menthol cigarettes and switch to tobacco-flavoured cigarettes in adulthood. Sixty per cent of current adult clove smokers identified "Marlboro" or "Camel" as their first brand of cigarette smoked and two thirds of all current clove cigarette smokers reported smoking their first clove cigarette more than one year after trying their first cigarette. In addition, Menthol cigarettes are used by 62 per cent of new middle school smokers and by 46 per cent of new high school smokers. Eighty-seven per cent of high school smokers smoke just three heavily marketed brands: "Marlboro", "Camel", and "Newport". Two of the three brands that were the subject of the *Klein Study*, which the United States asserts shows greater appeal of flavoured cigarettes to youth, were menthol-based flavours.

B. CLOVE CIGARETTES HAVE THE SAME HEALTH RISKS AS OTHER CIGARETTES

6. Indonesia has provided evidence from the Food and Drug Administration ("FDA") and Centers for Disease Control ("CDC") that indicates that clove cigarettes are just as addictive and have the same health risks as other cigarettes. Indonesia has also provided a series of studies by *Clark* (Exhibit IND-30) that conclude that clove cigarette smoke was no more harmful than conventional cigarette smoke, and in some cases was less harmful. In light of the fact that the Department of Health and Human Services ("HHS") has not notified Congress of any health risks attributable to ingredients found in clove cigarettes, the United States cannot suggest to this Panel that substances such as eugenol, coumarin, and others "possibly" constitute an additional health risk posed by clove cigarettes. There is absolutely no scientific evidence that any of the ingredients in clove cigarettes make them more dangerous than other cigarettes.

III. THE UNITED STATES HAS NOT ADEQUATELY REBUTTED INDONESIA'S NATIONAL TREATMENT CLAIMS

7. In its first written submission, Indonesia met its burden to establish a prima facie case that the Special Rule is inconsistent with both Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994. As set out in Indonesia's first written submission, to establish a breach of TBT Article 2.1, the complaining party must demonstrate: (1) the measure at issue is a technical regulation; (2) the imported and domestic products are "like" products"; and (3) the imported product is accorded less favourable treatment than the domestic like product. The elements for establishing a breach of GATT Article III:4 are the same except that Article III:4 does not require that a measure be a technical regulation, but instead "a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of the imported and domestic like products". Indonesia established each required element for each national treatment claim in its first submission.

A. THE UNITED STATES HAS NOT REBUTTED INDONESIA'S PRIMA FACIE CASE REGARDING TBT ARTICLE 2.1

8. Because Indonesia presented a prima facie case as to its claims under TBT Article 2.1 and GATT Article III:4, the burden of proof shifted to the United States to refute Indonesia's allegations of inconsistency. The United States chose, however, not to rebut the presumption of the Special Rule's inconsistency with TBT Article 2.1 in its first written submission and instead attempted to defend the prima facie case that Indonesia presented on Article III:4 of the GATT 1994. As a result of the United States' failure to refute Indonesia's prima facie case as to Article 2.1 of the TBT Agreement, the Panel should rule in Indonesia's favour on this claim.

B. THE SPECIAL RULE VIOLATES GATT ARTICLE III:4

9. In its first submission, Indonesia showed that clove cigarettes are "like" domestically produced menthol- and tobacco-flavoured cigarettes using the four criteria for assessing likeness established by past panels and the Appellate Body. For each of these criterion the United States tries to draw the smallest of distinctions between clove and menthol- and tobacco-flavoured cigarettes in an effort to show that they are not "like". The narrow distinctions identified by the United States are insignificant and do not detract from the competitive relationship that exists between clove cigarettes, on one hand, and menthol- and tobacco-flavoured cigarettes, on the other hand.

10. The United States asserts that because the specific ingredients of clove cigarettes are different from those of menthol- and tobacco-flavoured cigarettes, these cigarettes do not share sufficient physical characteristics to be "like" products. The relevant question, however, is whether all three cigarettes share similar physical "properties" or "characteristics". Indonesia deomonstrated in its first submission that they do – they all use flavouring substances in combination with tobacco to achieve a specific desired flavour, which is presented to the consumer in a paper wrapper with a filter. Indonesia has submitted evidence that up to 80 per cent of the tobacco used in clove cigarettes is the same kind of tobacco used in US-made cigarettes. All three types of cigarettes meet the US definition of cigarette and all three fall into the same size/weight class for tax purposes.

11. The United States tries to mask these similarities by putting forth several alleged physical differences between clove cigarettes and menthol- and tobacco-flavoured cigarettes. These claims both mischaracterize the facts about clove cigarettes and ignore relevant facts about menthol and tobacco cigarettes.

12. First, the United States asserts that because clove cigarettes are flavoured with cloves and a "sauce" of other flavours, they have different physical characteristics from menthol- and tobacco-flavoured cigarettes. This overlooks the fact that menthol and tobacco cigarettes each have their own flavouring agents, which are also referred to as "sauce" or "casing". The so-called "sauce" for clove cigarettes is very similar to the flavouring ingredients used in American cigarettes. All US manufactured cigarettes, not just clove as the United States claims, add flavourings to their cigarettes to differentiate their taste from other cigarettes.

13. Second, the United States is incorrect that unlike clove cigarettes, menthol- and tobacco-flavoured cigarettes do not contain significant quantities of food products. On the contrary, US manufacturers have released a list of almost 600 ingredients used in a wide variety of cigarettes. These ingredients include a number of food materials including cocoa, chocolate, licorice, sugars, honey, maple syrup, apple juice, beet juice, grape juice, pineapple juice, plum juice, coffee, corn oil, and vinegar. Furthermore, menthol itself is a common food flavouring.

14. Third, the United States tries to paint the various ingredients in clove cigarettes, such as eugenol and coumarin, as more dangerous than ingredients in menthol- or tobacco-flavoured cigarettes. Scientific and other data do not support this claim.

15. Finally, the United States claims in its first written submission that "the unique physical characteristics of clove cigarettes create a different physical experience for smokers than the experience created by other cigarettes such as tobacco or menthol". Indonesia disagrees that the design of clove cigarettes is a result of the "unique" physical characteristics of clove cigarettes. Cigarette manufacturers design cigarettes to provide a certain level of flavour intensity regardless of whether that flavour is clove, menthol, or tobacco.

16. Indonesia believes the end use of all cigarettes is the same – that is, they are used to smoke tobacco. Delivery of nicotine is a consequence of the end use of smoking tobacco since all tobacco products contain nicotine.

17. Data shows that the amount of nicotine delivered from a cigarette is determined by how much smoke is drawn from a cigarette. The United States itself provided a study showing that subjects' nicotine blood levels and heart rates were exactly the same after smoking a clove cigarette and a regular cigarette. The scientific data shows that flavoured cigarettes, including clove, are as addictive as other cigarettes. To the extent there is any information on the linkage between type of cigarette and level of addiction, that evidence indicates that menthol smokers have a more difficult time quitting smoking and may be more addicted than other smokers.

18. In its first written submission, Indonesia presented evidence that most consumers perceive clove cigarettes, menthol- and tobacco-flavoured cigarettes as an alternative means to smoking, as demonstrated by consumers actively substituting the three types for the end use of smoking. Indonesia and the United States agree that a majority of clove cigarette smokers (75-79 percent) also smoke menthol and regular cigarettes. Yet, despite its acknowledgment of this fact, the United States argues in its first written submission that consumers differentiate between these cigarettes such that they are not in a competitive relationship with one another. The facts simply do not support the United States' assertion.

19. First, the United States asserts that clove cigarettes and menthol- and tobacco-flavoured cigarettes do not compete with each other because clove cigarettes are used as a "special occasion" cigarette. Indonesia disputes that clove cigarettes are used only as an occasional or special-occasion cigarette. The *NSDUH* data provided by Indonesia shows that there is a small, but consistent, portion of adults who report smoking clove cigarettes "most often". Clove cigarettes have been sold in the United States for 40 years and have never been marketed as a "seasonal" or "limited edition" product. What is most relevant is that smokers are known to switch among clove, menthol, and tobacco cigarettes, which shows that they are, in fact, willingly substituting the products to achieve the same end use of smoking.

20. Second, the United States also tries to draw distinctions in consumer behavior with its assertion that young smokers "overwhelmingly" smoke clove cigarettes, while only a small fraction of adults do the same. According to the United States, this is in stark contrast to menthol- and tobacco-flavoured cigarettes that "are used regularly by a large population of young people, but especially adults, who smoke them regularly". None of the evidence provided by the United States shows this. In fact, the data that the United States uses to support its assertion actually proves that, at a minimum, almost 90 per cent of youth smokers (under 18 years of age) are not using clove cigarettes. The evidence shows that menthol-flavoured cigarettes are much more popular with youth than clove cigarettes. Further, adults do use clove cigarettes. There is simply no evidence which suggests that clove cigarettes are unlike menthol- and tobacco-flavoured cigarettes in terms of their use by youth and adults.

21. Clove cigarettes and domestically produced cigarettes have the same international tariff classification at the 6-digit level (2402.20). The 6-digit level of tariff classification is the relevant classification because it is the most detailed level that can be compared internationally.

22. In sum, Indonesia has established that clove cigarettes have the same physical characteristics, end uses, consumer preferences, and tariff classification as menthol- and tobacco-flavoured cigarettes. None of the assertions advanced by the United States point to significant differences between the three types of cigarettes that would render them not "like".

23. Because they are "like" products, GATT Article III:4 requires that imported clove cigarettes be treated no less favourably than domestically produced menthol- and tobacco-flavoured cigarettes in the US marketplace. While facially neutral, the Special Rule results in *de facto* discrimination against imported products. The ban on characterizing flavours does not include menthol- and tobacco-flavoured cigarettes. Both menthol- and tobacco -flavoured cigarettes are produced primarily in the United States, while clove cigarettes, which were banned, are predominantly imported from Indonesia. By banning clove cigarettes and not the domestic like products (menthol- and tobacco-flavoured cigarettes), the United States has modified the conditions of competition to the detriment of imported clove cigarettes. In fact, 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.

24. Indonesia and a number of third parties have expressed concern with the argument put forward by the United States that Indonesia must demonstrate that the Special Rule accords different treatment to clove cigarettes "based on their national origin". No panel or Appellate Body report has ever required both a "less favourable treatment" test and a second "based on national origin" test in Art. III.4 of the GATT 1994. As Indonesia and third parties have explained, domestic and imported products can be treated differently, but that treatment will be "less favourable" if it has the effect of modifying the conditions of competition to the detriment of the imported products. Indonesia urges the Panel to reject the notion proposed by the United States that the Special Rule must discriminate "based on national origin" in order to result in "less favourable treatment" to imported clove cigarettes.

25. The United States also is mistaken that "the fact that domestic cigarettes also fall under the ban, and that the vast majority of imported cigarettes are still permitted for sale in the United States means that the Special Rule does not provide "less favourable treatment". A violation of Article III:4 can be established by showing that there are some imported products that are treated less favourably than the most favourably treated domestic like product. The principle is simple – if the products at issue are "like", then a Member may not afford the imported product "less favourable treatment". In the present case, the relevant comparison is whether imported clove cigarettes are "like" any domestic cigarettes that were not banned, namely menthol- or tobacco-flavoured cigarettes. It is not necessary for the Panel to consider whether clove cigarettes are treated less favourably than domestic cigarettes that were also banned or imported cigarettes that were not banned. Furthermore, contrary to the United States' suggestions, neither intent to discriminate against imports nor the economic effect of a measure, are part of the Panel's "less favourable treatment" analysis.

26. In this case, Indonesia has shown that the United States treats imported clove cigarettes less favourably than the "like" domestic menthol- and tobacco-flavoured cigarettes. Clove cigarettes are banned while menthol- and tobacco-flavoured cigarettes are not. The United States' claim of a "based on national origin" requirement, its reasons for banning clove but not the other two "like" kinds of cigarettes, and the effect of the ban should not distract the Panel from this simple fact.

IV. THE UNITED STATES HAS NOT REBUTTED INDONESIA'S CLAIM THAT THE SPECIAL RULE IS INCONSISTENT WITH TBT ARTICLE 2.2

27. In its first written submission Indonesia established a prima facie case that the Special Rule is inconsistent with Article 2.2 of the TBT Agreement because it is more trade restrictive than necessary to protect human health taking into account the risks of non-fulfilment and, therefore, is an unnecessary obstacle to international trade. In response, the United States not only disagreed with Indonesia on the appropriate framework for the Panel's analysis, but also contended that Indonesia failed to establish a violation of Article 2.2. The United States' proposed test for the analysis of Article 2.2 is wrong and its other assertions similarly lack merit.

A. FRAMEWORK FOR THE PANEL'S ANALYSIS

28. In its first written submission Indonesia submitted that the test for applying GATT Article XX(b) and the chapeau developed by past panels and the Appellate Body is applicable to the Panel's analysis of TBT Article 2.2. The similarity of the text of Article XX of the GATT 1994 and its subparagraph (b), on one hand, and Article 2.2 of the TBT Agreement and its Preamble, on the other hand, would appear to indicate a high degree of correlation between the intended meaning of the two provisions. The purpose of TBT Article 2.2, when read with the Preamble, is similar to the purpose of Article XX of the GATT 1994 in that both provisions allow Members to have in place measures that restrict trade, so long as the Member (i) pursues a legitimate objective; (ii) the measure is necessary to fulfil the objective; and (iii) the measure is not more trade restrictive than necessary to fulfil the objective. It is these three factors that the Panel should evaluate in analysing whether the Special Rule is consistent with the United States' obligations under TBT Article 2.2.

29. For its part, the United States calls this proposed framework "radical" and instead advocates the use of Article 5.6 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") as relevant context for the interpretation of TBT Article 2.2. The United States' argument is unpersuasive for several reasons. First, it is hard to understand why the SPS Agreement provides relevant context, but the GATT 1994 does not. Second, the United States overemphasizes the significance of the contextual differences of the term "necessary" in TBT Article 2.2 and GATT Article XX. The "contextual difference" asserted by the United States does not speak to the ordinary meaning of the term "necessary". Finally, the language used in SPS Article 5.6 is more specific and puts a greater burden on Members challenging a measure than the language in TBT Article 2.2. In contrast, the language in Article 2.2 is very similar to that found in Article XX of the GATT 1994.

B. LEGITIMATE OBJECTIVE OF THE SPECIAL RULE

30. As to what objective the Special Measure pursues, Indonesia believes the Panel should look to the House Report accompanying the FSPTCA. According to the House Report, the objective of the Special Rule is the protection of public health by reducing the number of children and adolescents who smoke cigarettes. Indonesia concedes that both protecting human health through the regulation of tobacco products and reducing youth smoking are legitimate objectives.

31. The United States asserts the objective of the Special Rule 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 chemically and psychologically addicted due to the potential but unknown consequences for the health of the individual users or the overall population". Thus, this formulation diverges from the House Report in several important ways that have implications for the Panel's analysis of the United States' defenses.

32. First, the United States refers to "young people" not "children and adolescents" as used in the House Report. By the United States' own definition it is attempting to capture both "children" (ages

17 and younger) and "young adults" (ages 18 to 25) in a category of "young people" (ages 12-26). By referring to "young people" rather than "children and adolescents", or "youth", it appears the United States is trying to "retrofit" the objective of the Special Rule to cover a broader population than Congress intended. The House Report plainly states that the Special Rule is aimed at reducing smoking of children and adolescents (people aged 17 or younger).

33. Second, before the Panel the United States adds to the objective of the Special Rule "avoiding *potential* negative health consequences". In Indonesia's view, this is not part of the objective of the Special Rule as stated in the House Report. In any event, the United States presents no evidence, scientific or otherwise, of these supposed negative health effects (e.g. a strain on the health care system and the expansion of the cigarette black market) that the Special Rule is designed to avoid; that is because, as the United States acknowledges, these consequences are "unknown". In truth, there is evidence that an objective other than "avoiding potential negative health consequences" was at work in the design of the Special Rule. Indonesia has provided evidence that the United States did not include menthol cigarettes in the Special Rule because a domestic cigarette producer objected to it.

C. MORE TRADE RESTRICTIVE THAN NECESSARY

34. However legitimate the objective of the Special Rule may be, the Special Rule itself is not necessary to achieve this objective. The United States' arguments to rebut Indonesia's prima facie case must fail because the lynchpin of their defense – that the Special Rule only bans "trainer" cigarettes not regularly used by adults – is not supported by the evidence. As a result, the Special Rule does not materially contribute to the objective of reducing youth smoking and, thus, not banning clove cigarettes would pose no significant risk to the fulfilment of the measure's objective to reduce youth smoking. At this point whether there are less-trade restrictive measures is moot as the Special Rule cannot be necessary if it does not fulfil its objective. However, as Indonesia demonstrated in its first written submission, there were several less-trade restrictive measures available to the United States to limit the availability of clove cigarettes to youth.

35. In determining whether the Special Rule is "necessary" to achieve its objective, the Panel should examine whether it makes a material contribution toward achieving the objective of reducing youth smoking. Indonesia submits that the Special Rule cannot make a material contribution to the high level of protection sought by the United States by banning the cigarette that youths for the most part do not smoke.

36. TBT Article 2.2 provides that the necessity of a measure is to be determined by taking into account the risks associated with not adopting the challenged measure (*i.e.*, the risk of non-fulfilment). Accordingly, the Panel should evaluate the likely impact of not banning clove cigarettes. To answer this the Panel should again consider whether banning clove cigarettes, but not menthol- or tobacco-flavoured cigarettes, contributes to a reduction in the level of smoking by youth. Indonesia has made a prima facie case that the failure to ban clove cigarettes would not pose any significant risk to the stated objective of the Special Rule or the health of adolescents.

37. For its part, the United States asserts that the risk of non-fulfilment is that "the smoking rates of young people remaining unchanged". As very few adolescents actually smoke clove cigarettes, it is hard to comprehend how not banning them would make any difference, significant or otherwise, in smoking rates, never mind the 50 per cent reduction sought by the FSPTCA. The United States admits as much when it was not able to provide any data on reduction in youth smoking since the Special Rule went into effect.

38. As Indonesia has adduced evidence that the Special Rule does not materially contribute to the objective of reducing youth smoking and that failure to ban clove cigarettes would not pose a significant risk to the fulfilment of the objective, the burden shifts to the United States to rebut this

claim. Since the United States has failed to satisfy this burden, the Special Rule is not necessary. As such, there is no need to examine whether less-trade restrictive measures were available.

39. However, if the Panel disagrees, Indonesia demonstrated in its first written submission that there were several less-trade restrictive measures available to the United States to limit the availability of clove cigarettes to youth. These included limiting sales to adult-only locations, restricting cigarette advertising/labelling, and raising the minimum age required to buy the product. The United States argues that Indonesia failed to prove that its proposed alternatives would fulfil the objective of the measure at the level of protection sought by the United States or that these alternatives were significantly less trade restrictive.

40. As an initial matter, Indonesia does not have to show that its proposed alternatives are "significantly" less trade restrictive, only that they are "less trade restrictive". Any of one of Indonesia's proposed alternatives would have been "less trade restrictive" than the measure applied by the United States – a complete ban on all imports, production, and sale of clove cigarettes. All of the proposed alternatives were reasonably available to the United States and could achieve a reduction in youth smoking as they were either (1) already in the FSPTCA and considered effective by the United States for keeping youth from smoking menthol- or tobacco-flavoured cigarettes; (2) had been adopted by the United States in other contexts to remove flavoured cigarettes from the market and could have been incorporated into the FSPTCA; or (3) are in use by other countries for the same purpose of reducing youth smoking.

41. For instance, the United States could have relied upon the other regulatory powers in the bill to prevent youth smoking and achieve the same result as with the Special Rule. As Indonesia has demonstrated, banning clove cigarettes cannot make a significant dent in youth smoking because so few youth smoke them and there is no evidence that they are a starter cigarette that leads to smoking other cigarettes. Thus, if the United States considers the measures aimed at reducing youth smoking of menthol- and tobacco-flavoured cigarettes effective, they should be equally effective at reducing clove cigarette smoking by youth. To the extent that the United States is worried about tobacco companies introducing new flavoured cigarettes, the FSPTCA gives HHS the authority to approve new tobacco products and therefore can prevent new flavoured cigarettes from becoming available to youth. The United States has provided no evidence to rebut the reasonable availability of Indonesia's proposed alternative measures or their ability to achieve a reduction in youth smoking.

D. DISGUISED RESTRICTION ON INTERNATIONAL TRADE

42. The Preamble to the TBT Agreement provides in part that technical regulations are "subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade". Thus, even if the Panel finds that the Special Rule was necessary to reduce youth smoking, the Panel must also consider whether it constitutes a disguised restriction on international trade. Indonesia believes it does. By tailoring the ban on "characterizing flavours" in such a way that virtually no domestic cigarettes, including those most popular with youth, were removed from the market, the United States was able to appear to be cracking down on youth smoking without actually inflicting any real harm on US tobacco companies or eliminating any domestically produced cigarettes that are popular with youth. As discussed above, the scope of the ban in the Special Rule was a result of a compromise with the domestic industry and not solely motivated by public health concerns. In light of this and the other evidence showing that the Special Rule is not "necessary", the Panel should find that the Special Rule is inconsistent with TBT Article 2.2.

V. THE UNITED STATES HAS FAILED TO ADEQUATELY REBUT INDONESIA'S OTHER CLAIMS UNDER THE TBT AGREEMENT

A. THE UNITED STATES ACTED INCONSISTENTLY WITH ITS OBLIGATIONS UNDER TBT ARTICLE 2.5

43. In its first written submission, Indonesia showed how the United States failed to explain its justification for the Special Rule in accordance with the terms of Article 2.5. TBT Article 2.5 requires a Member to explain its justification "in terms of the provisions of Articles 2-4", including the "scientific and technical information" related to the "risks non-fulfilment [of the health objective] would create", and how the measure chosen "fulfils" the objective sought. It is precisely this content "in terms of Articles 2-4" that was missing from the United States' responses to Indonesia. As Indonesia has established its prima facie case and the United States has failed to adequately rebut these claims, the Panel should find that United States acted inconsistently with TBT Article 2.5.

B. THE UNITED STATES HAS FAILED TO REBUT INDONESIA'S CLAIMS UNDER TBT ARTICLE 2.8

44. The United States contends that, with respect to the Special Rule, a performance-based standard was not appropriate given that it is the additives, flavours, herbs, and spices that the Special Rule is intended to address. Indonesia submits that the ban on cigarettes with a characterizing flavour could have been specified in terms of performance, rather than descriptive characteristics, and it would have been appropriate to do so. Indonesia has provided evidence that virtually all cigarettes include at least some additives, flavours, herbs, and spices. The United States has indicated that the presence of constituents or additives do not meet the definition of "characterizing flavour" *per se*. Without a performance-based standard, a producer cannot know which cigarettes are deemed to have a characterizing flavour of something other than tobacco or menthol. In the instant case, the product can be defined in terms of performance. As such, the Panel should find that the United States has acted inconsistently with TBT Article 2.8 by failing to specify a performance-based standard in the Special Rule.

C. THE UNITED STATES ADMITS IT ACTED INCONSISTENTLY WITH TBT ARTICLE 2.9

45. The United States has admitted it did not provide notification of the Special Rule in accordance with TBT Articles 2.9 or 2.10. Therefore the Panel should find that the United States has acted inconsistently with TBT Articles 2.9.

D. THE UNITED STATES HAS NOT REBUTTED INDONESIA'S CLAIMS UNDER TBT ARTICLE 2.12

46. Since Indonesia has made its prima facie case that the 90-day interval before the Special Rule went into effect was significantly shorter than the 6 months normally required and the United States has not asserted any "urgent circumstances" surrounding the adoption of the Special Rule, the Panel should find that the United States has acted inconsistently with TBT Article 2.12.

E. THE UNITED STATES HAS FAILED TO REBUT INDONESIA'S CLAIMS UNDER TBT ARTICLE 12.3

47. Indonesia submits that it has presented prima facie evidence that the United States did not consider, along with other factors, its special needs as a developing country before reaching a decision that creates an unnecessary obstacle to trade. The only question is whether the United States' actions satisfied the requirements of Article 12.3 of the TBT Agreement. TBT Article 12.3 requires a Member to affirmatively do something. The actions the United States undertook fall short of the requirements of TBT Article 12.3 and, therefore, the Panel should find that the United States acted inconsistently with its WTO commitments.

VI. THE SPECIAL RULE CANNOT BE JUSTIFIED UNDER GATT ARTICLE XX

48. In its first written submission, the United States asserts that if the Special Rule is found to be inconsistent with GATT Article III:4, then it is justified under GATT Article XX. Indonesia has already demonstrated in Section IV, above, that the ban in the Special Rule is not necessary to reduce youth smoking and is a disguised restriction on international trade. As such, GATT Article XX does not save the Special Rule from a finding of WTO inconsistency.

VII. THE SPECIAL RULE HAS NULLIFIED OR IMPAIRED BENEFITS TO INDONESIA

49. As Indonesia has established that the United States has violated its obligations under the TBT Agreement and GATT 1994, there is a presumption that the United States has nullified or impaired benefits accruing to Indonesia within the meaning of GATT ArticleXXIII:1(a). The United States has failed to rebut this presumption and, therefore, the Panel should find that the Special Rule has nullified or impaired benefits accruing to Indonesia.

VIII. CONCLUSION

50. Indonesia has made a prima facie case on its claims under Article III:4 of the GATT 1994 and Articles 2.1, 2.2, 2.5, 2.8, 2.9, 2.12, and 12.3 of the TBT Agreement. The United States has failed to rebut Indonesia's claims. Indonesia respectfully requests the Panel to find that the United States has acted inconsistently with its WTO commitments outlined above and recommend that the United States bring the measure into compliance.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. Section 907(a)(1)(A) is a public health measure based on how cigarettes are used by the US population as a whole. Cigarettes with certain characterizing flavours 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 favourable 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 flavours 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 fulfils 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 favourable tax treatment of foreign cigarettes.

6. In addition, in Indonesia's first written submission, Indonesia recognized – as it should – that cigarettes with characterizing flavours 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 flavours 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 US first written submission showed that clove cigarettes – like the cigarettes with cherry, chocolate and other characterizing flavours mentioned in Indonesia's first submission – presented public health risks due to their appeal to younger smokers. Indonesia then changed its position on flavoured 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 US 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 flavour 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 flavours 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 flavours (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 US 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 not 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 favourable 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 favourable 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 favourable 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 favourable 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 favourable 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 favourable 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 favourable treatment to imported cigarettes. Whether a measure accords less favourable 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 favourable 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 favourable 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 favourable 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 favourable 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, US cigarette manufacturers, in particular R.J. Reynolds, aggressively marketed a new line of flavoured products specifically targeted at young people, under the business plan of hooking new cigarette addicts. Evidence shows that US-produced cigarettes with characterizing flavours were on the market in 2008 and 2009. The United States and Indonesia do not appear to disagree that, but for government intervention, US manufacturers would be selling flavoured cigarettes on the US market. Federal legislation was critical to remove the threat. Looking at what flavours were on the market in 2009 only captures a

small part of the effect of Section 907(a)(1)(A) on US products. In assessing the market in *Mexico – Taxes on 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 flavours that culminated in Section 907(a)(1)(A), and the undisputed fact that US 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 US cigarettes with characterizing flavours 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 flavours 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 US market in the years 2000-2009, and the share of other flavours 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 US 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 *Dominican Republic – Import and Sale of 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 favourable 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 – Approval and Marketing of Biotech Products* affirms the point. The panel determined that Argentina failed to properly allege "less favourable treatment" because it was not self-evident that the "alleged less favourable 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 favourable 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 flavoured 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 favourable treatment than like domestic products.

B. INDONESIA HAS FAILED TO ESTABLISH THAT SECTION 907(A)(1)(A) IS CNCONSISTENT 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 US 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 fulfil a legitimate objective" if: (1) there is a reasonably available alternative measure; (2) that fulfils 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 US health care system, and the society at large through an expansion of an already existing black market as elaborated in the US first written submission. The objective of Section 907(a)(1)(A) is legitimate for all the reasons discussed in the US 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 flavours 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) fulfils 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 fulfil 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 fulfils 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 fulfil its objective in that it does not "reduce youth smoking" *enough*, given that the measure does not also ban menthol and tobacco flavoured 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 fulfil 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 fulfil 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 fulfil 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 fulfil 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 flavours 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 US 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 flavours of candy, fruit, liquor, etc. that tens of millions of adults do not smoke does not fulfil 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 flavours of candy, fruit, liquor, etc.: (1) a measure that bans all cigarettes; (2) a measure that bans all cigarettes except those with a characterizing flavour of tobacco (*i.e.* menthol, clove and other flavours would be banned); and (3) a measure that bans all cigarettes except those with characterizing flavours 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 fulfils 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 flavour of tobacco, menthol, or clove. This alternative measure does not fulfil 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 fulfil a legitimate objective" if there is a reasonably available alternative measure that fulfils 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 fulfils the objectives of the US 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 analysing 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 favourable 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.

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ANNEX D

EXECUTIVE SUMMARIES OF THE ORAL STATEMENTS BY THE PARTIES AT THE FIRST AND SECOND SUBSTANTIVE MEETINGS

ANNEX D-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF INDONESIA AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. In this dispute Indonesia has challenged the "special rule for cigarettes" in Section 101(b), which banned the production or sale in the United States of certain cigarettes it characterized as "flavoured". Indonesia does not object to the United States regulating the production or sale of cigarettes within its borders. Nor does Indonesia object to reasonable measures designed to keep cigarettes, including clove cigarettes, out of the hands of minors. What Indonesia objects to is a measure, in this case the Special Rule, that imposes a complete ban on clove cigarettes from Indonesia, while little or no restrictions are placed on regular cigarettes and menthol cigarettes, which are produced in the United States and quite popular with minors. The Special Rule is discriminatory and more trade-restrictive than necessary to address the United States' concerns with youth smoking.

II. ARTICLE III.4 GATT AND 2.1 OF TBT AGREEMENT

A. LESS FAVOURABLE TREATMENT

2. According to the United States, Article III.4 only prohibits measures that accord less favourable treatment to imports "based on their national origin". It appears that what the United States means by "based on national origin" is "so as to afford protection to domestic production". According to the United States, Members may not accord less favourable treatment to imports if that treatment is intended to afford protection to domestic production of the like product.

3. The Appellate Body in *Chile – Alcoholic Beverages* (quoting its report in *Japan – Alcoholic Beverages II*) said panels need not inquire into the "subjective intentions inhabiting the minds of individual legislators or regulators". How the measure in question is "applied" is what matters. Certainly no panel or Appellate Body report has ever said there is a "less favourable treatment" test and a second "afford protection to domestic production" test in Article III.4 of the GATT.

4. In *Korea – Various Measures on Beef* and other cases, the Appellate Body has been quite clear about the showing needed to prove a violation of Article III.4:

> "three elements must be satisfied: that the imported and domestic products at issue are '**like products**'; that the **measure at issue is a 'law …** affecting their internal sale …; and that the imported products are accorded '**less favourable' treatment** than that accorded to like domestic products."

5. The Appellate Body in *Korea – Various Measures on Beef* defined "treatment no less favourable" as "according conditions of competition no less favourable to the imported product than to the like domestic product". The Apellate Body in *EC – Asbestos* further found that "if there is less favourable treatment of the imported product, there is, conversely, 'protection' of the 'like' domestic product".

6. The panel report in *Mexico – Taxes on Soft Drinks* found that a Mexican measure that imposed a 20 per cent tax on the use of non-cane sugar sweeteners (such as high fructose corn syrup) discriminated against imports because the sweeteners produced in Mexico at the time the tax was adopted consisted overwhelmingly of cane sugar, whereas almost 100 per cent of imported sweeteners consisted of high fructose corn syrup. The panel looked at whether the challenged measure accorded

"less favourable treatment" to imports. In doing so, it did not apply an additional test that looked at whether the less favourable treatment was "based on national origin" or whether that treatment was intended to "afford protection to domestic production of the like product". Instead, it looked at two sets of like products, one primarily imported and one produced in Mexico. It looked at a tax regime that applied to imports and exempted the domestic like product, not on a *de jure*, but on a *de facto* basis. And it looked at how the disparate tax treatment penalized consumers of the imported product. Based on this and this alone, it found less favourable treatment.

7. In this case, if the United States is not comfortable banning menthol cigarettes, then it cannot ban clove cigarettes. So why didn't the US ban menthol cigarettes? Because Philip Morris opposed it. Philip Morris pressured the Congress … and as one industry analyst put it, the Congress "caved". The Chairman of one of the relevant congressional committees that considered the bill, Rep. John Dingell, when given an opportunity to comment on the suggestion that menthol cigarettes be banned, did not express concern about a black market or an excessive burden on the public health care system in the US from people seeking help with quitting. He talked about the potential loss of jobs – jobs in the United States making menthol cigarettes!

B. LIKE PRODUCT

8. A key question before the panel is whether clove cigarettes are "like" any cigarettes produced in the United States not banned by the Special Rule. In this case, the relative toxicity of clove and domestic cigarettes is not an issue. The US has conceded that clove cigarettes are no more dangerous or toxic than menthol- and tobacco-flavoured cigarettes. As the Appellate Body stated in *EC – Asbestos*, like products will often share "a number of identical or similar *characteristics* or *qualities*" sufficient to be in a competitive relationship with one another.

9. Clove, menthol, and regular cigarettes have the same physical *properties* and *characteristics*: they use special flavouring substances in combination with tobacco to achieve a specific desired flavour, which is presented to the consumer in a paper wrapper with a filter. All three types of cigarettes meet the US definition of a cigarette and all three fall into the same size/weight class for tax purposes. Tobacco and menthol cigarettes also contain significant quantities of food ingredients, such as chocolate, licorice, sugars, honey, maple syrup, juices, coffee, corn oil and vinegar. The flavouring ingredients used in American blend cigarettes are very similar to what goes into the "sauce" for clove cigarettes: things like vanilla, sugars, mint, licorice, fruit concentrates and liquors. The United States alleges that the eugenol in clove cigarettes numbs the throat and makes it easier for uninitiated smokers to tolerate inhaling smoke. More recent research on animals has cast doubt on the premise. And most importantly, similar concerns have also been raised with respect to menthol cigarettes.

10. Indonesia agrees that the ultimate end use of cigarettes is to smoke tobacco so that nicotine is delivered to the body. The United States suggested that differences in the physical composition of clove cigarettes make the smoking experience different since clove smokers take larger and more frequent puffs. A 1988 Surgeon General's Report concluded that smokers expose themselves to as much smoke as necessary to obtain a specific, satisfying quantity of nicotine. Study data confirms that nicotine blood levels and heart rates were exactly the same after smoking a clove cigarette and a regular cigarette. There is no data to show that clove smokers' "experience" is different from menthol or regular cigarette smokers or that the delivery of nicotine is different.

11. As an initial matter let me say that the United States is dead wrong when it alleges that clove cigarettes are smoked overwhelmingly by youth (US para. 185). Not one shred of the evidence provided by the United States shows this. The *Klein Study* focused on the use of three heavily marketed brands two of which were menthol-based brands. None of the three are clove cigarette brands. The Klein Study did not generate any data about the use of clove cigarettes by youth or

adults. It is not reasonable to conclude that the results of the Klein Study applies to all flavoured cigarettes.

12. The United States cites several other studies as evidence that clove cigarettes are, "smoked overwhelmingly by youth". The *National Youth Tobacco Study* and *Monitoring the Future* studies cited by the United States do not even measure use of cigarettes by adults so that a comparison of youth and adult use can be made. Moreover, the *Monitoring the Future* authors state: "The investigators conclude that kretek use was a short-term fad that simply did not catch on with youth." What the evidence shows, including the United States' own evidence, is that menthol-flavoured cigarettes are much more popular with youth. In all studies provided by the United States, the rate of youth menthol use is many times greater than the rate of youth clove use.

13. Further, with respect to consumer behaviour, Indonesia and the United States agree that users of clove cigarettes also smoke regular and menthol cigarettes. The Appellate Body in *EC – Asbestos* explained the analysis for consumer behaviour: "the extent to which consumers are willing to use the two products for the function of their end use". The United States has not provided any evidence that consumers are unwilling to use all three cigarettes for the end use of smoking. In fact, the US concedes that 75 per cent of those who smoke tobacco and menthol cigarettes also smoke clove cigarettes. That should be evidence enough that consumers are willing to use clove, menthol and regular cigarettes to meet the end use of smoking and that the products are "interchangeable" and "substitutable".

14. Clove, menthol and regular cigarettes share the same international tariff classification.

15. None of the issues raised by the United States point to significant differences between clove, menthol, and regular cigarettes that would render the products not "like". Products do not have to be identical to be "like". The narrow distinctions identified by the United States are insignificant. They are effectively asking the Panel to find that a cup of coffee that contains milk and sugar is not like plain coffee or that an automobile with leather seats is somehow not like one with cloth seats.

III. ADDITIONAL ISSUES WITH ARTICLE 2.1 OF THE TBT AGREEMENT

16. Indonesia has a number of concerns with arguments put forward by the United States with respect to interpretation of Article 2.1 of the TBT Agreement. The United States does not challenge the proposition that Section 907 is a "technical regulation" within the meaning of the TBT Agreement. The United States has tried to add a "based on national origin" requirement into Article III.4. For the reasons outlined earlier, that effort should fail. How does the US think this same requirement (or test) applies to Article 2.1 of the TBT Agreement. We are at a loss to understand what the alleged "textual" and "contextual" differences are between the TBT Agreement and, I guess it is the GATT.

17. Finally, Indonesia agrees with the proposition seemingly being advanced by the United States that simply because a set of products are subject to a technical regulation, it does not automatically follow that they are "like" products within the meaning of the TBT Agreement. We can well imagine a scenario where, for example, a technical regulation covers "food", or say, "toys". However, here, in this case, we should not lose sight of the fact that Section 907 applies to a subset of products as specific as "flavoured cigarettes", and not all flavoured cigarettes, but just certain flavoured cigarettes.

IV. ARTICLE 2.2 OF THE TBT AGREEMENT

18. Article 2.2 expresses the view that a technical regulation cannot be more trade restrictive than is necessary to fulfil a "legitimate objective". In making this assessment, Members and panels may consider the risks that non-fulfilment of the objective would create. One of the specific examples of a "legitimate objective" mentioned in Article 2.2 is the "protection of human health".

19. The United States states that the "legitimate objective" for banning clove cigarettes was to (a) reduce youth smoking in order to protect the public health, while (b) "taking into account" the "unknown, but possibly negative", consequences resulting from banning products (*e.g.*, menthols) that tens of millions of adults are dependent on. Given the importance the United States attaches to public health, it says it chose a high level of protection – a complete ban on clove cigarettes and certain other flavoured cigarettes.

20. The United States contends that Indonesia has failed to establish that any alternative measure fulfils the United States legitimate objective at the level it considers appropriate and is also "significantly" less trade-restrictive than Section 907. According to the United States "a measure that fulfils its legitimate objective at the level the Member finds appropriate is not, *as a matter of law*, more trade restrictive than necessary unless the complaining Member proves that an alternative measure exists that is reasonably available, also fulfils the respondent member's legitimate objective at the level the importing Member finds appropriate and is *significantly* less trade restrictive than the challenged measure".

21. There is but a single question under Article 2.2 of the TBT Agreement, was it "necessary" to ban clove cigarettes in order to protect youth from smoking? As a matter of simple logic, the answer must be "no". Somewhere between 2.2 and 2.5 million people under the age of 18 smoke cigarettes in the United States. Of that amount, approximately 1.1 million (or 43 per cent) regularly smoke menthol cigarettes. This compares to only 6,800 minors that regularly smoke clove cigarettes. If the objective, legitimate or otherwise, of the ban was to protect youth from smoking and the US did not ban the cigarette that youth overwhelming smoke, how could it have been truly "necessary" to ban the cigarette that they for the most part do not smoke? Either it is necessary to ban flavoured cigarettes to protect the public health or it is not. The United States cannot have it both ways.

22. WTO panels and the Appellate Body have held that in determining whether a measure is "necessary" to achieve a legitimate public health objective, a relevant consideration is the actual contribution of the measure toward achieving the objective. Is not the best evidence of which cigarettes are starter or trainer cigarettes the cigarettes kids most often smoke? How can the measure contribute toward reducing youth smoking, if the cigarettes youth smoke are not banned?

23. The United States argues that the "necessary" standard in Article 2.2 should not be read in light of the "necessary" standard in Article XX of the GATT, but instead, should be read in light of Article 5.6 of the SPS Agreement. In particular, the US believes the Appellate Body report in *Australia – Salmon* imposes an obligation to show that there is an alternative measure to the Special Rule that (1) is reasonably available taking into account technical and economic feasibility; (2) achieves the US's appropriate level of protection of human health; and (3) is significantly less restrictive to trade than the measure contested.

24. I am at a loss to understand how the "necessary" standard in Article 5.6 of the SPS Agreement is any more instructive for our purposes than the "necessary" standard in Article XX of the GATT. In any event, even if Article 5.6 informs the meaning of Article 2.2 of the TBT Agreement, it, at most, informs only part of Article 2.2. Under Article 2.2 it must be shown that the Member has identified a public policy objective and the measure (i.e. technical regulation) chosen "fulfils" that objective. If the measure bears no rational relationship to the objective and, therefore, does not "fulfil" it, questions about necessity and reasonably available alternative measures are moot.

25. The same holds true under Article 5.6 of the SPS Agreement. There, one does not get to the question of alternatives and less trade restrictive SPS measures if the measure itself is not established and maintained at the appropriate level needed to "achieve" the objective sought, which of necessity requires an examination of the scientific basis for the measure in accordance with Article 2.2 of the SPS Agreement. Indonesia is not required to prove that an alternative to the Special Rule was

reasonably available that would have accomplished the same things as the Special Rule and been "significantly" less trade restrictive than the Special Rule. We do not get to that issue because the measure in question (i.e, the Special Rule) does not fulfil the objective identified by the US – reduction in youth smoking.

26. The repeated assertion that clove cigarettes are targeted at youth, are particularly appealing to youth, and are a starter or "trainer" cigarette for youth, lacks a foundation in fact, lacks a foundation in science, and, therefore, the Special Rule bears no rational relationship to the objective, legitimate or otherwise, pursued by the United States.

V. ADDITIONAL CLAIMS UNDER THE TBT AGREEMENT

27. Indonesia has raised claims under Articles 2.5, 2.8, 2.9, 2.12, and 12.3 of the TBT Agreement. Indonesia has shown that the United States failed to live up to its obligations under each of these Articles as the Special Rule was being adopted and implemented. The United States contends that it has satisfied its obligations with respect to each of these commitments. But if the minimal actions taken by the US are considered sufficient for compliance with these commitments, then these provisions of the TBT Agreement are largely meaningless. Indonesia submits to the Panel that, if the TBT Agreement is to mean anything at all, for each of its claims under Articles 2.5, 2.8, 2.9, 2.12 and 12.2, surely more is required than what the US believes to be sufficient for compliance.

ANNEX D-2

EXECUTIVE SUMMARY OF OPENING ORAL STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING

1. Cigarettes are a unique product – they are highly addictive, heavily used, harmful to public health, and legal. The combination of these factors creates complex problems for governments charged with protecting the public health, forcing them to walk a fine line between doing good and causing harm. Given this complex situation, it is no surprise that the United States, like many countries, has addressed the issue incrementally – applying limited requirements and prohibitions for particular issues on a measure by measure basis.

2. The 2009 *Family Smoking Prevention and Tobacco Control Act* ("Tobacco Control Act") is an anti-smoking and public health legislation that imposes numerous restrictions on cigarette companies as well as others. All the Tobacco Control Act requirements that limit the sale, marketing, and advertising of cigarettes are origin neutral. These provisions are all intended to protect the public health by reducing smoking, particularly smoking by youth, and do not protect US companies from foreign competition or otherwise economically benefit US companies.

3. The relevant survey data as highlighted in Exhibit US-53 establishes that both clove and other non-menthol flavoured cigarettes have similar use patterns, with these products being used disproportionately by younger smokers. Thus, the most reliable data indicate that 5.5% of smokers between the age of 12-25 smoke clove cigarettes while only 1% of smokers ages 26 and above do so. Similarly, the age of the smoker is determinative of who smokes other prohibited products, such as chocolate, cherry, and vanilla flavoured cigarettes. Based on the available data, almost 12% of smokers age 12-25 smoked these types of flavoured products, while only slightly more than 6% of smokers age 26 and above did the same. In terms of absolute numbers, the evidence indicates that relatively few adults smoked clove, chocolate, or other banned flavoured cigarettes as their primary cigarette prior to the enactment of the Tobacco Control Act. By contrast, one large study found that approximately a third of smokers age 12-25 smoke menthols while a similar percentage of smokers age 26 and above does as well. In terms of absolute numbers, it is estimated that menthols are smoked by 1.1 million people age 12-17, and 18 million people age 18 and above.

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

5. In addressing the public health crisis of smoking, the United States, and all other Members considering anti-smoking legislation, must apply measures that walk a fine line so as to produce positive public health results while avoiding negative consequences. The fact that the scope of Section 907(a)(1)(A) involved difficult public health considerations does *not* mean that Section 907(a)(1)(A) presents difficult issues concerning WTO-consistency. To the contrary, Members are free under the WTO Agreement to make just these types of difficult decisions with regard to public health measures. Nothing in the WTO Agreement prevents the United States from choosing the scope of a ban on harmful products based on public health considerations.

6. In applying Article III:4 to a measure that makes distinctions among similar products, there are <u>two</u> basic questions. First, are the products so similar that they amount to "like products" for purposes of Article III:4? Second, even where the products are in such a competitive relationship and

are otherwise similar enough so as to amount to "like products", does the measure accord different treatment based on origin?

7. The Appellate Body has noted that the determination of likeness under Article III:4 of the GATT 1994 is, fundamentally, a determination about the "nature and extent of a competitive relationship between and among products". The "like product" analysis in this case should be mindful that technical regulations by nature draw distinctions among broadly similar products, and such products may not be "like" due to that given regulatory context. Past GATT and WTO reports have conducted a like product analysis based on four separate "like product" criteria. The United States would recall that the Appellate Body has considered that these criteria are just a tool in examining the nature and extent of a competitive relationship between and among products, and in this case, in examining the relationship of product characteristics to the health objective at issue.

8. Clove cigarettes are different from tobacco and menthol. First, with respect to physical composition, clove cigarettes have different physical composition than tobacco or menthol cigarettes, and these physical differences are directly related to how consumers differentiate them and are directly related to their different impact upon the public heath. Most fundamentally, clove buds comprise roughly 40% of a clove cigarette, which gives clove cigarettes a unique, sweet flavour that is especially attractive to young smokers. Clove buds also contain an anesthetic, known as eugonol. Neither tobacco nor menthol contain eugonol. Clove cigarettes also contain a special "sauce", which clove cigarette manufacturers claim adds to a "richer" and "fruitier" taste, sweet scented aroma, and pleasant after-taste.

9. Second, with respect to consumer habits and tastes, the Appellate Body has noted that where, as here, physical properties are dissimilar, a "high burden" is placed on the complaining Member to show that all the evidence, taken together, demonstrates that products are "like". Indonesia has not met its evidentiary burden on this important factor. Clove cigarettes were smoked in the United States by young, experimental smokers. Clove cigarettes were smoked by a very small percentage of the US population, and this use dramatically skewed to young people. In contrast, tobacco and menthol cigarettes are the cigarette of choice by nearly all of the 46 million regular adult smokers in the United States. Indonesia has not borne its burden to shown that clove cigarettes sought to compete with tobacco or menthol cigarettes in terms of distribution channels, shelf space, or market share. Rather, clove cigarettes were sold in specialty shops and specifically were marketed as a special "indulgence". The fact that almost exclusively young people chose to smoke them strongly suggests that they were viewed, as intended, as an enticing indulgence for young people many of whom would become hooked on nicotine. With respect to established smokers, evidence suggests that smokers who reported smoking clove cigarettes tended not to view them as a substitute for their "regular", daily tobacco or menthol cigarettes.

10. Third, with respect to end-uses, it is worth noting that different cigarettes serve different end-uses in varying degrees. Cigarettes are used to smoke tobacco, and to sustain an addiction to nicotine. Survey evidence shows that tobacco cigarettes and menthol cigarettes (and not clove cigarettes) are used on a regular basis by a vast majority of smokers in the United States. Cigarettes also serve the end-use of creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke. Clove cigarette manufacturers purposefully design and market clove cigarettes based on the unique experience created.

11. Fourth, on the point of tariff classification, under the US GATT 1994 Schedule, which is an integral part of the WTO Agreement, clove cigarettes and other cigarettes are included in different 8-digit tariff subheadings.

12. Article III:4 of the GATT 1994 requires Members to accord treatment no less favourable to imported products than that accorded to like domestic products. It is useful to recall that Article III:1

of the GATT 1994 states that internal taxes and regulatory measures "should not be applied to imported or domestic products so as to afford protection to domestic production". The Appellate Body has explained that Article III:1 sets out a general principle that informs the rest of Article III. This guiding principle supports that Article III:4 should not be interpreted to prohibit measures that may result in some imported products being treated differently than some domestic like products where the basis for the different treatment is not national origin.

13. Indonesia does not appear to allege that Section 907 discriminates on its face. In addition, Indonesia has not adduced facts to demonstrate that Section 907 – while origin-neutral on its face – in fact discriminates against imported cigarettes. One indicator of when a facially neutral measure in fact accords different treatment based on origin is when seemingly origin-neutral regulatory criteria apply almost exclusively to imported products and not to similar domestic products. The circumstances here are different than in *Mexico – Taxes on Soft Drinks*. Section 907 does not apply almost exclusively to Indonesian cigarettes as compared to domestic cigarettes, but rather applies to groups of both imported and domestic cigarettes. The result of the US ban on characterizing flavours other than tobacco or menthol is that some types of imported and domestic cigarettes are prohibited from the US market, and some types of imported and domestic cigarettes are allowed on the US market. The result of Section 907 is that both imported and domestic cigarettes are prohibited and both imported and domestic products are allowed.

14. The field of US products to which the ban on characterizing flavours applies is significant. Section 907 prevents products from entering the US market that US manufacturers spent decades developing specifically for US consumers. As US industry documents reveal, domestic cigarette manufacturers developed product lines of flavoured cigarettes with a view to recruiting a new generation of smokers in America. A federal ban was necessary to prevent US manufacturers from putting flavoured cigarette brands on the market.

15. As we just discussed, Section 907 bans both imported and domestic products – and the ban on domestic products is more than merely symbolic. However, even in cases where a measure treats most imports differently than most similar domestic products, such different treatment does not necessarily constitute less favourable treatment. Returning to the guiding principle of GATT Article III that measures should not be applied so as to afford protection to domestic production, the Appellate Body recognized in *Chile – Alcoholic Beverages* that a determination of protective application must consider the "measure's purposes, objectively manifested in the design, architecture, and structure of the measure" and possible countervailing explanations from the responding Member. In this case, the measure at issue is consistent with, and an integrated part of, broader US tobacco legislation, and the United States has a compelling explanation for why clove cigarettes fall under a ban that does not apply to other cigarettes. There is a clear relationship between the structure of Section 907 and the broader purpose of the Tobacco Control Act to reduce youth smoking while avoiding negative public health consequences.

16. We note that Indonesia has based its less favourable treatment conclusion on the assertion that Section 907 "creates unequal conditions of competition" by banning one product and not other like products. This claim should be rejected for two reasons. First, Indonesia has not clarified exactly which cigarettes are being compared, and has not proven that clove cigarettes actually competed with the cigarettes that are not affected by the ban. Second, consistent with the Appellate Body's reasoning in *Dominican Republic – Import and Sale of Cigarettes*, the fact that the application of a regulatory distinction may affect the competitive relationship between imported and domestic products does not render the measure a breach of a Member's national treatment obligations.

17. The national treatment obligation contained in Article 2.1 of the TBT Agreement should be interpreted similarly to Article III:4 of the GATT 1994. Each Agreement provides context for the other, and the analyses developed under Article III are relevant to an interpretation of Article 2.1 of

the TBT Agreement. The United States notes the context provided by the TBT Agreement in evaluating the national treatment matters at issue in this dispute. First, the Preamble to the TBT Agreement provides that the TBT Agreement should be interpreted consistently with Members' right to take measures to protect the public health. Second, the Panel should give weight in its interpretation of Article 2.1 to the fact that the measure at issue in this dispute is a technical regulation. As previously noted, technical regulations, by their very nature, differentiate among, and establish criteria for, broadly similar products. Such product distinctions might render generally similar products "unlike" in some circumstances, and such product distinctions may often impact generally similar products differently.

18. Indonesia has failed to offer sufficient evidence to establish each element of its TBT Article 2.2 claim. Specifically, Indonesia has not produced evidence that establishes that an alternative measure: is reasonably available, fulfils the challenged measure's legitimate objective, and is significantly less trade restrictive than Section 907(a)(1)(A).

19. The objective of the Tobacco Control Act is to protect the public health by reducing smoking, particularly youth smoking. The means by which Section 907(a)(1)(A) fulfils the legitimate objective is to ban "starter" or "trainer" products that are disproportionately used by youth while taking into account the negative consequences that could result from banning products to which tens of millions of adults are chemically and psychologically addicted. The facts bear this out. The cigarettes banned under Section 907(a)(1)(A) – including clove cigarettes – appeal disproportionately to youth, and can be properly thought of as "starter" or "trainer" products for the novice or potential smoker. Further, the measure's allowance that tobacco and menthol-flavoured cigarettes continue to be sold limits the scope of the ban and ensures that the ban that reduces youth smoking be appropriate for the protection of the public health by taking into account the risk of negative consequences that could result from banning a product to which tens of millions of adults are addicted. Such negative consequences could include a negative impact on the health on adult smokers, a negative impact on the US health care system, and an expansion of an already existing black market for cigarettes, which in turn could result in less safe cigarettes, more youth access to cigarettes, and increases in crime.

20. Indonesia has not met its burden of proving that an alternative measure exists that is reasonably available, fulfils Section 907(a)(1)(A)'s legitimate public health objective, and is significantly less trade restrictive than the challenged measure. A complaining Member does not discharge its burden of establishing a prima facie case by simply making reference to alternative measures – it must adduce by way of sufficient evidence that the alternative measure satisfies each element of the claim.

21. The proper interpretation of Article 2.2 flows from the text of the article itself, read in its context, taking into account the circumstances surrounding the conclusion of that article. The United States disagrees with Indonesia's attempt to rely on the interpretation of GATT Article XX(b) to inform as to the meaning of TBT Article 2.2. The term "necessary" is used in GATT Article XX(b) in a different context than in TBT Article 2.2, and it would not be appropriate to use the same GATT XX(b) interpretation for TBT Article 2.2.

22. Indonesia has failed to establish that Section 907(a)(1)(A) breaches US obligations under GATT Article III:4. Should the Panel reach the issue of GATT exceptions, however, the application of Section 907(a)(1)(A) would be justified under GATT Article XX(b) as it both falls under the scope of the subpart (b) exception and satisfies the requirements of the chapeau.

23. Section 907(a)(1)(A) was enacted in order to protect human life and health from the risk posed by smoking and therefore falls within the range of policies referenced in subpart (b). Given the grave danger posed by youth smoking and the fact that youth smoking rates have stubbornly remained high, Section 907(a)(1)(A)'s prohibition of certain products that are best described as starter cigarettes

is in fact *necessary* to protect human life and health. While no further analysis is needed to show that Section 907(a)(1)(A) is necessary to protect human life and health, the analysis of some prior reports confirm that the US measure falls within the scope of Article XX. First, the interest at stake here – the protection of human life and health – is fundamental. Second, there is a strong, genuine connection between the measure and the policy goal it is intended to serve as it directly contributes to the protection of human life and health by ensuring products that present a particular risk to youths cannot be sold on the market. Third, both the danger posed by youth smoking and the fact that youth smoking rates have remained unacceptably high despite the numerous restrictions already in place *supports* rather than *undermines* the necessariness of the ban. For these reasons Section 907(a)(1)(A) falls under the scope of the Article XX(b) exception.

24. Section 907(a)(1)(A) also satisfies the requirements of the GATT Article XX chapeau because it is neither a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, nor a disguised restriction on international trade. First, Section 907(a)(1)(A) does not provide differential treatment between countries. And even if the measure could be found to discriminate, no such conduct could not be considered "arbitrary" or "unjustified" given that the measure was tailored to address a specific public health risk. Second, Section 907(a)(1)(A) is not a disguised restriction on international trade. In particular, and as discussed earlier, the measure has no protectionist purpose. While Section 907(a)(1)(A) bans Indonesia's clove cigarettes, it also prohibits US companies from marketing an entire product line that they have spent decades developing. The fact that foreign companies make products that pose the same risks and were likewise affected by the measure cannot make the measure a protectionist one. As such, Section 907(a)(1)(A) satisfies Article XX's chapeau and, given that it falls within the scope of subpart (b), is justified under GATT Article XX(b).

ANNEX D-3

CLOSING STATEMENT OF INDONESIA AT THE FIRST SUBSTANTIVE MEETING

1. I would like to thank the Panel for its attention to the issues Indonesia has brought forward in this case. We believe that there are important issues of law for the Panel's consideration. There are also many facts that are in dispute. I hope the Panel will pay careful attention to the facts presented and look closely to find the truth. I believe that if the Panel does that, you will find four things to be true:

- clove cigarettes are like domestically produced cigarettes that have not been banned;
- clove cigarettes are not more dangerous than any other kind of cigarette;
- clove cigarettes are not overwhelmingly popular with youth and have not been targeted or marketed at youth; and
- there is no factual or scientific basis for banning clove cigarettes if menthol and other cigarettes much more popular with youth are not banned.

2. If these four things are true, then the United States has acted inconsistently with its commitments under the GATT and TBT Agreement and the Panel should recommend that the US bring the Special Rule for Cigarettes into compliance with its WTO commitments.

3. I want to be very clear about what Indonesia is asking in this case. Indonesia is not trying to undermine the United States' efforts to fight smoking – especially smoking by minors. Indonesia is not advocating that clove cigarettes be allowed to be sold in the United States with no restrictions whatsoever. Indonesia would be happy to abide whatever rules the United States has adopted, or adopts in the future, regarding marketing, advertising, or labelling – rules that that apply to regular and menthol cigarettes. At the very least, we believe that clove cigarettes were entitled to the kind of careful study that the United States is giving to menthol cigarettes to determine the appropriate regulatory approach.

4. All we are seeking here is fair treatment of an industry that is extremely important to Indonesia. As I mentioned in my opening statement, some 6 million people in Indonesia are employed directly or indirectly in the production of cigarettes and the growing of tobacco. On behalf of all of them and the Indonesian government, I thank you.

ANNEX D-4

CLOSING STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING

1. In closing, we would like to focus on a few points which Indonesia contests or tries to minimize, but that we consider central to understanding the dispute.

2. First, the United States is addressing an inherently dangerous product that presents a complex public health challenge for the United States, and indeed for all countries that seek to reduce the harm of tobacco. It is important to bear in mind that the Tobacco Control Act is a measure designed to address this difficult issue and that Section 907(a)(1)(A) is but one provision of this larger measure. Section 907(a)(1)(A) is a public health measure and makes distinctions among products on a public health basis. It addresses the important, yet difficult, issue of youth smoking, and its goal is to reduce such smoking while taking into account the risk of negative consequences arising from a broad ban.

3. We note that Indonesia raises the possibility, but quickly dismisses, that health considerations are relevant here because the United States acknowledges that all cigarettes are harmful. This misses the point. At issue in this dispute are the public health consequences of flavoured cigarettes, namely, that flavours (including clove) have a particular appeal to young people and encourage young people to start using, and become addicted to, this harmful product.

4. Second, Indonesia frequently states that Section 907(a)(1)(A) is a ban on clove cigarettes. It is not. It is a ban on class of flavoured cigarettes that appeal to youth. Clove is one, but not the only, type of product that does this, and is thus subject to the ban.

5. Indonesia would also have the Panel believe that flavoured cigarettes other than clove cigarettes are irrelevant to this dispute. In fact, clove cigarettes bear a number of significant similarities to the other flavoured cigarettes banned under Section 907(a)(1)(A). For example, clove cigarettes, like other banned flavours, are marketed with emphasis on the special and pleasurable experience associated with the characterizing flavour, and, as intended, are attractive to novice smokers.

6. Third, we would like to emphasize that the available survey data indicate that clove cigarettes are used by a significant number of younger smokers who are in the "window of initiation" and are used disproportionately by younger smokers when compared to smokers over the age of 26. Across published nation-wide studies, five percent or more of younger smokers smoke clove cigarettes; one percent or less of smokers 26 and older smoke them. This demographic breakdown makes clove cigarettes similar to other flavoured cigarettes and explains why flavoured cigarettes are a logical target when seeking to reduce youth smoking.

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

8. As they say, the writing was on the wall for the cigarette companies. The companies recognized that the flavour ban was coming and began to position themselves to address this new reality. It is not uncommon that companies would react to an impending ban before it took effect.

Nevertheless, as late as 2008, at least four US cigarette companies were producing at least 26 distinct flavoured cigarettes. The Panel may refer to paragraph 51 of the US first written submission and Exhibit US-52 for this point.

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

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

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

ANNEX D-5

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF INDONESIA AT THE SECOND SUBSTANTIVE MEETING

1. Indonesia understands that WTO rules give Members a significant amount of discretion in setting their own regulatory policies, particularly on issues as critical as protecting the public health. Indonesia has consistently stated throughout this dispute that efforts to reduce smoking, particularly youth smoking, are a legitimate public health objective. However, WTO rules also clearly state that a Member's discretion is not boundless and Members must satisfy certain requirements in their adoption of measures that restrict trade. The United States has not done so. The Special Rule is discriminatory in violation of Article 2.1 of the Agreement on Technical Barriers to Trade ("TBT"), is more trade restrictive than necessary in violation of TBT Article 2.2, and in adopting the Special Rule, the United States failed to comply with certain other provisions of the TBT Agreement, which resulted in violations of TBT Articles 2.5, 2.8, 2.9, 2.12, and 12.3.

I. NATIONAL TREATMENT CLAIMS

2. Indonesia is not saying that Members cannot pursue legitimate public policy objectives in an incremental fashion. However, an incremental approach to regulation cannot be used if it treats imported products less favourably than domestic like products. The United States characterizes its actions as "temporarily" setting aside menthol cigarettes for further study. TBT Article 2.1 and GATT Article III:4 do not allow for "temporary" less favourable treatment. Moreover, "temporary" does not equate to "incremental".

A. CLARIFICATION OF FACTS RELATED TO NATIONAL TREATMENT

3. The United States says in its second written submission that the Special Rule targets people between the ages of 12 and 26 because that is what public health officials consider the "window of initiation" for smoking. Indonesia disagrees with the United States that the Special Rule is targeted at people over age 18. The Special Rule targets people under the age of 18 consistent with the intent of the Family Smoking Prevention Tobacco Control Act ("FSPTCA") overall. Indonesia is not making any claims about the general validity of a "window of initiation" or the potential benefits of targeting smoking reduction efforts to people in that age group. But the plain fact of the matter is that the FSPTCA and the Special Rule itself do not by their own terms target this population.

4. The House Report plainly states that the objectives of the FSPTCA are "to protect the public health and to reduce the number of individuals under 18 years of age who use tobacco products". The House Report also explains the purpose of the Special Rule as banning cigarettes with certain "characterizing flavours" that <u>appeal to youth.</u>

5. This same emphasis on curbing tobacco use by youth is found consistently throughout other provisions of the FSPTCA as well. These other provisions of the FSPTCA either target youth (age 17 and under) or adults (18 and over). There is not a single provision that is targeted at reducing smoking by adults between the ages of 18 and 26 and there is no reference in the FSPTCA itself or in the House Report to reducing smoking in the "window of initiation".

6. The United States argues repeatedly that "clove cigarettes are used disproportionately by youth and not in large numbers by adults". Data submitted by both Indonesia and the United States show that youth do not disproportionately smoke clove cigarettes. In fact, Indonesia's Exhibit 73 shows that the average rate of youth clove use and adult clove use is <u>the same</u> at 0.3 per cent. Even if the Panel only considers data from studies that the United States deems "reliable", the simple fact is

that there is nothing unique about the pattern of clove cigarette use that would distinguish it from the use of menthol or regular cigarettes. The United States points to the 2002 and 2003 *NSDUH* which show that a higher percentage of youth had tried clove cigarettes than adults. But the same use pattern is also true for menthol and tobacco cigarettes. Indonesia has provided evidence in its Exhibit 75 that 51 per cent of youth use menthol cigarettes, but the adult rate of use falls by almost 20 per cent to only 32 percent, indicating that youth start on menthol cigarettes and switch to other cigarettes in adulthood. This trend is true for cigarettes generally as well. The US Congress noted among its findings in the FSPTCA that over 80 per cent of youth smoke one of three heavily marketed brands -- "Camel", "Marlboro", and "Newport" – but only 54 per cent of adults smoke those same brands. Thus, there is nothing from the survey data regarding youth and adult usage that supports the conclusion that clove cigarettes are disproportionately used by youth but other kinds of cigarettes are not.

7. The United States argues that data reflecting those who reported smoking clove cigarettes "most often" should not be relied upon because clove cigarettes are so-called "special occasion" cigarettes, therefore, this data will not accurately capture everyone who has tried or experimented with clove cigarettes. Indonesia rejects the premise that clove cigarettes are only a "special occasion" cigarette. *NSDUH* data from 2002-2009 show that there is a small, but consistent group of both youth and adults who say they smoke clove cigarettes most often. Furthermore, to the extent that the *NSDUH* data on cigarettes smoked "most often" does not capture youth who smoke clove cigarettes occasionally, it also does not capture adults who smoke clove cigarettes occasionally.

8. The United States also argues that data from the 2002-2003 *NSDUH*, *Monitoring the Future* ("*MTF*"), and the *National Youth Tobacco Study* ("*NYTS*") best represent youth use of clove cigarettes because these surveys ask about clove cigarette usage in the last month or year. In its second written submission, Indonesia identified many inconsistencies with the data in these surveys, which, when corrected, reveal a lower rate of clove use than that initially reported by the surveys. However, even assuming *arguendo* that the rates reported by the United States were correct, the results still prove that clove cigarettes are not popular with youth at all, much less "overwhelmingly" so. For example, the *NYTS* reported that 11 per cent of those smokers surveyed (including young adults up to the age of 21) had tried a clove cigarette in the last 30 days. *MTF* found that 5.5 per cent of 12th graders (some of whom may be 18) had tried a clove cigarette in the last year. The *NSDUH* – using the survey question from 2003 preferred by the United States – reported that 5 per cent of youth smokers had tried a clove cigarette in the past 30 days. This data shows that, at a minimum, close to 90 per cent of youth who smoke have not even touched a clove cigarette. This is consistent with the *MTF* researchers' conclusion that clove cigarette use was "a short-term fad that simply did not catch on with mainstream youth".

9. However, responses to these questions do not tell us several things that are critical to the questions before this Panel. For example, there is no way to know from these responses whether the person answering "yes" smoked only part of a cigarette on only one occasion or whether they were smoking clove cigarettes regularly. Similarly, these survey questions tell us absolutely nothing about whether the clove cigarette use reported was the respondent's first use of any cigarette or whether they were already smoking regular and menthol cigarettes before they tried a clove cigarette. In fact, there is no way to know from these survey questions whether the respondents ever became addicted to tobacco at all. *Monitoring the Future* and the *National Youth Tobacco Study* do not include adults, so these two surveys provide absolutely no evidence supporting the conclusion that youth disproportionately use clove cigarettes and adults do not. Limitations like these are why Indonesia believes it is important to look at a much wider range of data than just that presented by the United States.

10. The United States continues to assert in its second written submission that clove cigarettes are "starter" cigarettes that contribute to the addiction of youth to cigarettes. The United States is the party

that raised the allegation that clove cigarettes are "starter" cigarettes that contribute to youth cigarette addiction, and therefore it is the United States' burden to provide evidence supporting this allegation. It has not done so. What the evidence in this dispute shows is that other cigarettes, not clove, are the "starter" cigarettes. To Indonesia, the best evidence of which cigarettes are starter cigarettes are the cigarettes youth smoke most. Youth are smoking menthol- and tobacco-flavoured cigarettes in far greater numbers than clove cigarettes. The data show youth smoke menthol in large numbers and then move to other cigarettes in adulthood. The data on current adult clove smokers also confirm this. For instance, two-thirds of all current clove smokers report smoking their first clove cigarette more than one year after trying their first cigarette, while only 6 per cent reported clove as their first cigarette.

11. The United States makes several assertions in its second written submission about the public health concerns related to flavoured cigarettes subject to the ban in the Special Rule, including clove cigarettes. These assertions relate to the appeal of these cigarettes to youth. In Section D.1 of the United States' second written submission, it explains how cigarette companies developed, designed, and marketed new flavours of cigarettes in the 1990s to appeal to youth. None of the evidence cited concerns clove cigarettes. Clove cigarettes have been sold in the United States for over 40 years. They are not a new product designed to attract youth smokers. Clove cigarettes have never been marketed as a "seasonal" or "limited edition" product.

12. The United States also quotes selectively from the WHO Report in its discussion of public health concerns raised by flavoured cigarettes banned by the Special Rule. The WHO Report ultimately recommends different regulatory approaches for, on the one hand, candy-flavoured cigarettes (*i.e.*, prohibition on manufacturing and restricted marketing) and on the other hand, kretek (or clove) and menthol cigarettes (i.e. education about the additives in these cigarettes). The excerpts from the WHO Report cited by the United States that refer to clove cigarettes discuss the potential of flavours to appeal to consumers. Indonesia agrees with the United States that "for purposes of the analysis in this dispute, the terms 'appeal' and 'use' are equivalent". The data do not show a broad consumer appeal of clove cigarettes. A very small percentage of youth and adult smokers actually use clove cigarettes.

B. LIKE PRODUCT ANALYSIS

13. Indonesia has presented sufficient evidence and arguments to establish that clove cigarettes are "like" menthol- and tobacco-flavoured cigarettes. Indonesia has established that clove cigarettes have the same physical characteristics, end uses, consumer preferences, and tariff classification as menthol- and tobacco-flavoured cigarettes. None of the assertions advanced by the United States point to significant differences between the three types of cigarettes that would render them not "like". In its second written submission, the United States asserts that physical characteristics and consumer tastes and preferences are particularly relevant as they have public health consequences. However, the distinctions the United States raises related to these factors are insignificant and do not detract from the competitive relationship that exists between clove cigarettes, on one hand, and menthol- and tobacco-flavoured cigarettes, on the other hand. These differences also do not demonstrate that clove cigarettes pose a unique public health risk.

14. The United States again touts the presence of cloves and a so-called "secret sauce" as a significant difference in physical properties between clove cigarettes and menthol- and tobacco-flavoured cigarettes. It claims that their presence creates a difference in taste, and as a result, consumers do not view clove cigarettes as substitutable for menthol- and tobacco-flavoured cigarettes. This overlooks the fact that menthol- and tobacco- flavoured cigarettes each have their own flavouring agents, which are also referred to as "sauce" or "casing". The so-called "secret sauce" for clove cigarettes is very similar to the flavouring ingredients used in American cigarettes. All US manufactured cigarettes add flavourings to their cigarettes to differentiate their taste from other cigarettes. In fact, Indonesia has presented evidence that consumers actively substitute these three

types of cigarettes. Indeed, Indonesia and the United States even agree that 75-79 per cent of clove cigarette smokers also smoke menthol and regular cigarettes. The United States is also wrong that flavour differences make clove cigarettes more appealing to youth and less appealing to adults. The data that the United States uses to support its assertion actually proves that, at a minimum, almost 90 per cent of youth smokers (under 18 years of age) have not tried clove cigarettes. Furthermore, the use of clove cigarettes does not decrease significantly among adults.

C. LESS FAVOURABLE TREATMENT

15. Indonesia has demonstrated through both its written submissions and in its first appearance before the Panel, that the Special Rule treats imported clove cigarettes less favourably than the "like" domestic products. While facially neutral, the Special Rule results in *de facto* discrimination against imported products. The ban on characterizing flavours does not include menthol- and tobacco-flavoured cigarettes. Both menthol- and tobacco -flavoured cigarettes are produced primarily in the United States, while clove cigarettes, which were banned, were predominantly imported from Indonesia. By banning clove cigarettes and not the domestic like products (menthol- and tobacco-flavoured cigarettes), the United States has modified the conditions of competition to the detriment of imported clove cigarettes. In fact, virtually all domestically produced like 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.

16. The United States continues to assert that Indonesia must show that clove cigarettes are subjected to different treatment based on their national or foreign origin. At the first meeting with the Panel, Indonesia and a number of third parties expressed concern with this argument. No panel or Appellate Body report has ever required both a "less favourable treatment" test and a second "based on national origin" test.

17. Indonesia disagrees that the "less favourable treatment" analysis under TBT Article 2.1 and GATT Article III:4 requires a separate analysis of whether a measure is applied "so as to afford protection to domestic production". The Appellate Body found in *EC – Bananas III* that "Article III:4 does *not* specifically refer to Article III:1. Therefore, a determination of whether there has been a violation of Article III:4 does *not* require a separate consideration of whether a measure 'afford[s] protection to domestic production.'" If there is no need to conduct a separate "so as to afford protection to domestic production" inquiry under GATT Article III:4, then there is no basis to conduct such an inquiry under TBT Article 2.1, which does not even contain this language.

II. ARTICLE 2.2 OF THE TBT AGREEMENT

18. Indonesia has established a prima facie case that the Special Rule is inconsistent with Article 2.2 of the TBT Agreement because it is more trade restrictive than necessary to fulfil the objective of reducing youth smoking. According to the House Report, the objective of the Special Rule is the protection of public health by reducing the number of children and adolescents who smoke cigarettes.

19. As Norway noted at the first meeting of the Panel, under the Special Rule, "some cigarettes are banned to promote public health, and other more popular cigarettes are permitted, apparently also to promote public health". But the United States appears to have based its decision not to exclude menthol- or tobacco-flavoured cigarettes from the Special Rule on hypothetical, negative consequences. This despite the fact that there is a mountain of evidence that menthol-flavoured cigarettes are the real "starter" cigarettes for youth.

20. The United States tries to add to the objective of the Special Rule "avoiding *potential* negative health consequences". However, the United States presents no evidence, scientific or

otherwise, of these supposed negative health effects that the Special Rule is designed to avoid; that is because, as the United States acknowledges, these consequences are "unknown, but possibly negative". In asserting these negative effects, the United States assumes without substantiation that if menthol cigarettes were banned, everyone who smoked menthol cigarettes would either just go right to the doctor or right to the black market. Both Parties have noted several other options available for menthol cigarette smokers had menthol cigarettes been included in the ban such as switching to regular cigarettes or using other menthol-flavoured products, *e.g*. filtered menthol cigars.

21. Indonesia does not assert that the Special Rule must eliminate youth smoking; rather, the Special Rule must make a material contribution to the objective of the measure. In this case, the Special Rule cannot make a material contribution by only banning the cigarette that youth for the most part do not smoke. Several of the third parties have made this same point.

22. The United States insists that the Special Rule was necessary to prevent cigarette companies from putting new flavoured cigarettes on the market. However, under Section 910(c) of the FSPTCA, HHS must approve the introduction of any new tobacco products onto the US market. This provision alone is sufficient to prevent new flavoured cigarettes from entering the market if HHS believes such cigarettes would be attractive to youth.

23. The United States' rebuttal arguments to Indonesia's prima facie case under TBT Article 2.2 must fail because the lynchpin of its defense – that the Special Rule only bans "starter" cigarettes that are overwhelming used by youth and not by adults – is not supported by the evidence. As a result, the Special Rule does not materially contribute to the objective of reducing youth smoking and, thus, not banning clove cigarettes would pose no significant risk to the fulfilment of the measure's objective to reduce youth smoking. Since Indonesia has demonstrated that the Special Rule is not necessary, there is no need to examine whether less-trade restrictive measures were available.

24. However, if the Panel disagrees, Indonesia has submitted several less-trade restrictive measures available to the United States to limit the availability of clove cigarettes to youth. The United States contends that "any measure that does not eliminate from the market cigarettes with a characterizing flavour of candy, fruit, liquor, etc. that tens of millions of adults do not smoke does not fulfil the legitimate objective at the level the United States considers appropriate". The United States is conflating the objective of the measure with the means chosen to achieve the objective (i.e. the measure itself). The Panel should reject this self-serving pronouncement and carefully consider the alternatives proposed by Indonesia.

25. Any one of Indonesia's proposed alternatives would have been "less trade restrictive" than the complete ban on the import of clove cigarettes. All of the proposed alternatives were reasonably available to the United States and could achieve a reduction in youth smoking as they were either (1) already in the FSPTCA and considered effective by the United States for keeping youth from smoking menthol- or tobacco-flavoured cigarettes; (2) had been adopted by the United States in other contexts to remove flavoured cigarettes from the market and could have been incorporated into the FSPTCA; or (3) are in use by other countries for the same purpose of reducing youth smoking.

III. OTHER TBT AGREEMENT CLAIMS

26. Indonesia has made a prima facie case with respect to its claims under TBT Articles 2.5, 2.8, 2.9, 2.12, and 12.3. The United States has failed to meet its burden to rebut Indonesia's claims with respect to these articles of the TBT Agreement.

IV. US DEFENSE UNDER ARTICLE XX

27. In its first written submission the United States asserts that if the Special Rule is found to be inconsistent with GATT Article III:4, it is nonetheless justified under GATT Article XX. Indonesia has demonstrated that the ban in the Special Rule is not necessary to reduce youth smoking and is a disguised restriction on international trade. As such, GATT Article XX cannot be used to justify the Special Rule if there is a finding of inconsistency with GATT Article III:4.

ANNEX D-6

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

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

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

I. ARTICLE III:4 OF THE GATT 1994 AND ARTICLE 2.1 OF THE TBT AGREEMENT

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

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

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

6. Indonesia also has failed to demonstrate that clove cigarettes are "like" tobacco and menthol cigarettes from a public health perspective, according to which, patterns of use are a relevant "likeness" factor. The United States has demonstrated that the patterns of use in the United States are different for clove and other flavoured cigarettes than they are for menthol or tobacco flavoured cigarettes. Indonesia's claim that clove cigarettes have the "same health risks as other cigarettes" is inconsistent with the disproportionate appeal of clove cigarettes to younger smokers. Indonesia itself acknowledges that cigarettes that "encourage new, young smokers" may present a "specific health risk" and therefore need not be considered "like" other cigarettes.

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

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

9. As demonstrated in *Mexico – Taxes on 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 – Taxes on Soft Drinks*, sweeteners derived from different plants were deemed to be "like products" despite this physical difference because the difference was unnoticeable to producers and consumers. In this case, like in *EC – Asbestos,* the differences among clove cigarettes and tobacco and menthol cigarettes directly relate to different consumer perceptions of the products and to the public health risk at issue.

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

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

12. For example, in cases involving product standards, answering the question of whether there is *de facto* less favourable 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 favourable treatment as in the context described above.

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

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

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

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

II. INDONESIA HAS FAILED TO ESTABLISH THAT SECTION 907(A)(1)(A) IS INCONSISTENT WITH TBT ARTICLE 2.2

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

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

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

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

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

III. INDONESIA HAS NOT SHOWN THAT THE UNITED STATES ACTED INCONSISTENTLY WITH TBT ARTICLES 2.5, 2.8, 2.12, OR 12.3

21. Indonesia argues that the United States acted inconsistently with Article 2.5. First, Indonesia ignores that Article 2.5 provides that "upon request" a Member shall explain the justification for the technical regulation in terms of the provisions of Article 2.2 to 2.4. Indonesia never made such a request. Indonesia is further incorrect in believing that Article 2.5 requires importing Members to provide, in essence, a full legal analysis of each element as well as provide the exporting Member with all the accompanying scientific data. Second, Indonesia is wrong to claim that it has suffered any prejudice. Indonesia had ample opportunity, and as far as we are aware, took full advantage of that opportunity, to express its view to US Government officials.

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

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

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

IV. SECTION 907 IS JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

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

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

ANNEX D-7

CLOSING STATEMENT OF INDONESIA AT THE SECOND SUBSTANTIVE MEETING

1. Thank you Mr. Chairman and members of the Panel. Before I yield the microphone to Ambassador Erwidodo, I want to comment, as part of Indonesia's closing statement, on the closing statement just delivered by the United States.

2. With one exception, Indonesia fundamentally disagrees with everything stated by the United States. The one exception concerns the comment made about new Panel question 11. We agree with the United States that this is an interesting question and we appreciate the Panel raising it.

3. During the question and answer session earlier today we provided a response to this question. You may recall us talking about two "sliding scales", one tracking the trade-restrictiveness of a measure under Article 2.2 of the TBT Agreement and another tracking the contribution of the measure toward achieving its objective under Article 2.2.

4. As we reflected further on new Question 11, we were struck by the possibility that it may relate to another question raised by the Panel, and that is the scope of the measure at issue. I'm referring in particular to question 23(a) raised by the Panel following its first substantive meeting with the Parties.

5. That question asked whether it was correct, "strictly speaking", to say that the measure in question applies "to all cigarettes".

6. The Panel should not confuse the alleged objective of the measure put forth by the United States before the Panel with the measure itself. Indonesia wishes to reiterate in the strongest possible terms that the challenged measure – the so-called "Special Rule" – does not apply to all cigarettes. It applies to only certain flavoured cigarettes and, in practice, it applies to only clove cigarettes from Indonesia. For example, the Special Rule applies no more to domestically produced (i.e. US-produced) menthol- and tobacco-flavoured cigarettes than it does to bicycles, cars, and refrigerators. Indeed, the measure specifically exempts menthol- and tobacco-flavoured cigarettes from its reach.

7. There has been debate over what else was on the market when the Special Rule went into effect. Yet, when pressed to identify any other cigarettes produced in the United States during 2009 that were affected by the Special Rule, including any other flavoured cigarettes, the United States could not do so with the exception of a small amount of cigarettes produced by a company called "Nat Sherman" that produced a cigarette called "Touch of Clove."

8. Thus, to be clear, the burden of the ban on the production or sale in the United States of certain flavoured cigarettes fell almost exclusively on clove cigarettes produced in Indonesia.

9. The Special Rule extinguished U.S. imports of those products in their entirety. In so doing, it treated imports less favourably than a "like" product produced domestically in violation of Article 2.1 of the TBT Agreement and Article III.4 of the GATT 1994 because it unquestionably modified the conditions of competition to the detriment of the imported product.

10. Ambassador Erwidodo will now continue with Indonesia's closing statement.

11. Mr. Chairman, again I want to offer Indonesia's sincere thanks to the Panel and the staff of the Secretariat for your attention to the concerns raised by Indonesia during this meeting and throughout

this dispute. WTO disciplines and the ability to challenge measures through the dispute settlement process are critical to ensure that the regulatory policies adopted by one Member do not unfairly discriminate against the imports of another Member. This process is especially essential for a developing country like Indonesia.

12. The United States' ban on clove cigarettes has had a significant impact on an industry that employs as many as 6 million people in Indonesia. Indonesia believes that the Special Rule's ban on clove cigarettes, but not menthol- or tobacco-flavoured cigarettes is inconsistent with the United States' obligations under both the TBT Agreement and GATT 1994. Indonesia has provided evidence and arguments that prove each of the claims that we have raised before this Panel. The United States has failed to effectively rebut Indonesia's claims—in some cases it has not even attempted to do so. As a result, Indonesia asks the Panel to find that the Special Rule is inconsistent with TBT Articles 2.1 and 2.2, and GATT Article III:4. Indonesia further asks the Panel to find that in adopting the Special Rule, the United States violated its commitments under TBT Articles 2.5, 2.8, 2.9, 2.12 and 12.3.

ANNEX E

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY INDONESIA

WORLD TRADE ORGANIZATION

WT/DS406/2
11 June 2010

(10-3223)

Original: English

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

Request for the Establishment of a Panel by Indonesia

The following communication, dated 9 June 2010, from the delegation of Indonesia to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 7 April 2010, the Republic of Indonesia requested consultations with the United States pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 11 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement"), and Article 14 of the *Agreement on Technical Barriers to Trade* ("TBT Agreement") with respect to the measure adopted by the United States banning flavored cigarettes, including clove cigarettes. The Republic of Indonesia and the United States agreed to hold those consultations on 13 May 2010. Unfortunately, consultations did not resolve the dispute.

The measure that was the subject of consultations is reflected in Section 907 of the *Family Smoking Prevention and Tobacco Control Act*[1] ("the Act"), which prohibited the production or sale in the United States of all cigarettes with a "characterizing flavor" other than menthol or tobacco beginning 90 days after the Act was signed. Indonesia believes that the measure discriminate against imported clove cigarettes based on the fact that the clove cigarettes that were sold in the United States were imported (primarily from Indonesia), while virtually all of the menthol cigarettes sold in the United States are produced domestically (imports are negligible). Indonesia also believes that the measure creates an unnecessary obstacle to trade in that the United States has available to it less trade-restrictive means to accomplish the objectives of the Act.

The Government of Indonesia maintains that banning clove cigarettes in the United States while exempting menthol cigarettes from the ban is inconsistent with the following provisions of GATT 1994:

[1] Public Law 111-31.

(a) Article III: 4 of the GATT 1994 because the measure provides treatment to an imported product, clove cigarettes, that is "less favorable" than that accorded to a like domestic product, menthol cigarettes.

(b) Article XX of GATT 1994 because there is no scientific or technical information indicating that clove cigarettes pose a greater health risk than menthol cigarettes and, as a result, the measure results in arbitrary and unjustifiable discrimination, a disguised restriction on trade, and is more trade restrictive than necessary to achieve a legitimate objective, if one were to exist.

Indonesia also considers the measure to be inconsistent with the following provisions of the TBT Agreement:

(c) TBT Article 2.1 because the measure results in treatment that is "less favorable" to imported clove cigarettes than that accorded to a like domestic product, menthol cigarettes.

(d) TBT Article 2.2 because there is no scientific or technical information indicating that clove cigarettes pose a greater health risk than menthol cigarettes or that youth smoke clove cigarettes in greater numbers than menthol. As a result, the measure is more trade restrictive than necessary and constitutes an unnecessary obstacle to international trade.

(e) TBT Article 2.5 because the United States did not respond to questions from Indonesia seeking an explanation and justification for the ban submitted during bilateral discussions held 27 August 2009 and through the TBT Committee on 20 August 2009 (G/TBT/W/323).

(f) TBT Article 2.8 because the ban on characterizing flavors is based on descriptive characteristics.

(g) TBT Article 2.9 because the United States did not comply with the requirements of Articles 2.9.1, 2.9.2, 2.9.3, and 2.9.4 when adopting a technical regulation that has a significant effect on the trade of Indonesia.

(h) TBT Article 2.10 because in the event the United States believed there was a justification for not following the procedures in Article 2.9, it did not provide the Secretariat with notification of the measure and the urgent nature of the problem.

(i) TBT Article 2.12 because the effective date was less than six months from the enactment of the ban.

(j) TBT Article 12.3 because the ban created an unnecessary barrier to exports from developing countries.

Should the United States assert that the flavored cigarette ban is an SPS measure, then it is Indonesia's view that the measure is inconsistent with Articles 2, 3, 5, and 7 of the SPS Agreement.

Additionally, the measure identified in this request has nullified or impaired benefits accruing to Indonesia directly or indirectly under the cited agreements.

Therefore, the Government of Indonesia respectfully requests that pursuant to Article 6 of the DSU, the Dispute Settlement Body establish a panel to examine the matter, with standard terms of reference, as set out in Article 7.1 of the DSU.