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

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

DECEMBER 22, 2010

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 U.S. companies from foreign competition or otherwise economically benefit U.S. companies.

3. The relevant survey data as highlighted in Exhibit US-53 establishes that both clove and other non-menthol flavored cigarettes have similar use patterns, with these products being used disproportionately by younger smokers. Thus, the most reliable data indicate that 5.5% of smokers between the age of 12-25 smoke clove cigarettes while only 1% of smokers ages 26 and above do so. Similarly, the age of the smoker is determinative of who smokes other prohibited products, such as chocolate, cherry, and vanilla flavored cigarettes. Based on the available data, almost 12% of smokers age 12-25 smoked these types of flavored products, while only slightly more than 6% of smokers age 26 and above did the same. In terms of absolute numbers, the evidence indicates that relatively few adults smoked clove, chocolate, or other banned flavored cigarettes as their primary cigarette prior to the enactment of the Tobacco Control Act. 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 two 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 flavor 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 U.S. 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 U.S. GATT 1994 Schedule, which is an integral part of the WTO Agreement, clove cigarettes and other cigarettes are included in different 8-digit tariff subheadings.

12. Article III:4 of the GATT 1994 requires Members to accord treatment no less favorable to imported products than that accorded to like domestic products. It is useful to recall that Article III:1 of the GATT 1994 states that internal taxes and regulatory measures "should not be applied to imported or domestic products so as to afford protection to domestic production." 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 – 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 U.S. ban on characterizing flavors other than tobacco or menthol is that some types of imported and domestic cigarettes are prohibited from the U.S. market, and some types of imported and domestic cigarettes are allowed on the U.S. market. 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 U.S. products to which the ban on characterizing flavors applies is significant. Section 907 prevents products from entering the U.S. market that U.S. manufacturers spent decades developing specifically for U.S. consumers. As U.S. industry documents reveal, domestic cigarette manufacturers developed product lines of flavored cigarettes with a view to recruiting a new generation of smokers in America. A federal ban was necessary to prevent U.S. manufacturers from putting flavored 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 favorable 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 U.S. tobacco legislation, and the United States has a compelling explanation for why clove cigarettes fall under a ban that does not apply to other cigarettes. 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 favorable 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 – 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, fulfills 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) fulfills 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-flavored cigarettes continue to be sold limits the scope of the ban and ensures that the ban that reduces youth smoking be appropriate for the protection of the public health by taking into account the risk of negative consequences that could result from banning a product to which tens of millions of adults are addicted. Such negative consequences could include a negative impact on the health on adult smokers, a negative impact on the U.S. health care system, and an expansion of an already existing black market for cigarettes, which in turn could result in less safe cigarettes, more youth access to cigarettes, and increases in crime.

20. Indonesia has not met its burden of proving that an alternative measure exists that is reasonably available, fulfills 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 U.S. 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 U.S. measure falls within the scope of Article XX. First, the interest at stake here – the protection of human life and health – is fundamental. Second, there is a strong, genuine connection between the measure and the policy goal it is intended to serve as it directly contributes to the protection of human life and health by ensuring products that present a particular risk to youths cannot be sold on the market. Third, both the danger posed by youth smoking and the fact that youth smoking rates have remained unacceptably high despite the numerous restrictions already in place *supports* rather than *undermines* the necessariness of the ban. 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 U.S. companies from marketing an entire product line that they have spent decades developing. The fact that foreign companies make products that pose the same risks and were likewise affected by the measure cannot make the measure a protectionist one. 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).