



**AUSTRALIA – CERTAIN MEASURES CONCERNING TRADEMARKS,  
GEOGRAPHICAL INDICATIONS AND OTHER PLAIN PACKAGING  
REQUIREMENTS APPLICABLE TO TOBACCO PRODUCTS AND PACKAGING**

AB-2018-4  
AB-2018-6

*Reports of the Appellate Body*

*Addendum*

This Addendum contains Annexes A to C to the Reports of the Appellate Body circulated as documents WT/DS435/AB/R, WT/DS441/AB/R.

The Notices of Appeals and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at 1 in the original may have been renumbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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**ANNEX A-1****HONDURAS' NOTICE OF APPEAL\***

Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review* (WT/AB/WP/6, 16 August 2010) ("Working Procedures"), Honduras hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretation in the Panel Report in *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (WT/DS435) ("Panel Report").

Pursuant to Rules 20(1) and 21(1) of the Working Procedures, Honduras files this Notice of Appeal together with its Appellant Submission with the Appellate Body Secretariat.

Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Honduras' ability to rely on other paragraphs of the Panel Report in its appeal.

Honduras seeks the Appellate Body's review of the Panel's conclusions that Honduras has not demonstrated that Australia's Tobacco Plain Packaging measures, as identified in Honduras' request for the establishment of a panel (the "TPP measures" or "plain packaging measures"), are inconsistent with Australia's obligations under Articles 20 and 16.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement");<sup>1</sup> and Article 2.2 of the Agreement on Technical Barriers to Trade ("TBT Agreement").<sup>2</sup>

In particular, Honduras has identified the following errors of law and legal interpretation, including the failure of the Panel to make an objective assessment of the matter as required by Article 11 of the DSU.

**I. REVIEW OF THE PANEL'S FINDINGS UNDER THE TRIPS AGREEMENT****1. The Panel's interpretation and application of the term "unjustifiably" in Article 20 of the TRIPS Agreement is in error**

Honduras appeals the Panel's finding that Honduras has not demonstrated that the TPP measures are inconsistent with Article 20 of the TRIPS Agreement since this finding is based on an erroneous legal interpretation of the term "unjustifiably" in Article 20. In addition, and in the alternative, the Panel's application of Article 20 of the TRIPS Agreement to the plain packaging measures constitutes an error of law.

First, the Panel's interpretation of the term "unjustifiably" as referring to "good reasons" sufficient to support special requirements encumbering the use of a trademark is in error.<sup>3</sup> The Panel fails to interpret the term "unjustifiably" on the basis of its ordinary meaning, in the context of Section 2 of the TRIPS Agreement on trademarks, and in the light of the object and purpose of the TRIPS Agreement. In addition, the Panel errs in law in its analysis by finding that paragraph 5 of the Doha Declaration on the TRIPS Agreement and Public Health constitutes a subsequent agreement under Article 31.3(a) of the Vienna Convention on the Law of Treaties.<sup>4</sup>

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\* This document, dated 19 July 2018, was circulated to Members as document WT/DS435/23.

<sup>1</sup> Panel Report, paras. 8.1(d) and (e).

<sup>2</sup> Panel Report, para. 8.1(a).

<sup>3</sup> Panel Report, paras. 7.2394-7.2396, 7.2430, and related paras. 7.2439-7.2442, and 7.2492-7.2508.

<sup>4</sup> Panel Report, paras. 7.2409-7.2411.

Second, and in the alternative, should the Appellate Body find that the Panel's legal interpretation was correct, the Panel errs in law in the application of Article 20 of the TRIPS Agreement to the plain packaging measures.<sup>5</sup> In particular, among others:

- The Panel errs in its failure to focus the analysis on the impact on the distinguishing function of a trademark.<sup>6</sup>
- The Panel errs in its application of Article 20 of the TRIPS Agreement to the product as its findings are focused on the packaging only.<sup>7</sup>
- The Panel errs in its examination of available alternative measures that are less trademark encumbering while providing an equivalent contribution;<sup>8</sup>
- The Panel errs by relying on non-covered agreements to justify the plain packaging measures.<sup>9</sup>

Honduras requests the Appellate Body to reverse the Panel's findings under Article 20 of the TRIPS Agreement, which are vitiated by the above errors of law and legal interpretation,<sup>10</sup> and thus to declare moot and of no legal effect the Panel's findings that Honduras has not demonstrated that the TPP measures are inconsistent with Article 20 of the TRIPS Agreement.<sup>11</sup>

## **2. The Panel's interpretation and application of the "rights conferred" under Article 16.1 of the TRIPS Agreement is in error**

Honduras appeals the Panel's finding that Honduras has not demonstrated that the TPP measures are inconsistent with Article 16.1 of the TRIPS Agreement.<sup>12</sup> This finding is based on an erroneous legal interpretation of the "rights conferred" by Article 16.1 and the related obligation on Members to ensure the minimum guaranteed level of protection for trademark owners, and is vitiated by an error of law in the application of Article 16.1 of the TRIPS Agreement to the plain packaging measures.

First, the Panel's interpretation of Article 16.1 of the TRIPS Agreement on the "rights conferred" to trademark owners is in error, as the Panel fails to interpret this provision in good faith, based on the ordinary meaning of all of the terms used, in their context, and in the light of the object and purpose of the TRIPS Agreement.<sup>13</sup> The Panel's erroneous approach led to a number of related errors of law, including among others the following:

- The Panel errs in finding that Article 16.1 of the TRIPS Agreement does not protect the distinctiveness of a trademark.<sup>14</sup>
- The Panel errs in finding that Article 16.1 of the TRIPS Agreement is not engaged and can therefore not be violated unless there is a risk of actual confusion.<sup>15</sup>

Second, the Panel errs in its application of Article 16.1 of the TRIPS Agreement to the plain packaging measures as it does not consider it necessary to address the relevant question of whether the plain packaging measures reduce the distinctiveness of the trademark and its scope of protection such that the level of protection falls below the minimum level that Members are required to guarantee under Article 16.1 of the TRIPS Agreement.<sup>16</sup> The Panel's erroneous exercise of judicial economy is an error of law. In addition, as a result of this false exercise of judicial economy, the

<sup>5</sup> Panel Report, paras. 7.2556-7.2574, 7.2586-7.2589, and 7.2590-7.2606.

<sup>6</sup> See, e.g. Panel Report, paras. 7.2569-7.2571, and 7.2604-7.2606.

<sup>7</sup> See, e.g. Panel Report, para. 7.2570.

<sup>8</sup> See, e.g. Panel Report, paras. 7.2600-7.2601.

<sup>9</sup> See, e.g. Panel Report, paras. 7.2595-7.2596, and 7.2604.

<sup>10</sup> See, e.g. Panel Report, paras. 7.2393-7.2431, and 7.2556-7.2606.

<sup>11</sup> Panel Report, paras. 7.2606, and 8.1(e).

<sup>12</sup> Panel Report, para. 8.1(d).

<sup>13</sup> Panel Report, paras. 7.1966-7.2032, and 7.2051.

<sup>14</sup> See, e.g. Panel Report, paras. 7.2005-7.2016.

<sup>15</sup> See, e.g. Panel Report, paras. 7.2000, and 7.2010.

<sup>16</sup> Panel Report, paras. 7.2015, and 7.2032.

Panel also fails to comply with its obligation under Article 11 of the DSU to make an objective assessment of the matter.

Honduras requests the Appellate Body to reverse the Panel's findings which are vitiated by the above errors of law and legal interpretation, and thus to declare moot and of no legal effect also the Panel's finding that Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 16.1 of the TRIPS Agreement.<sup>17</sup>

## II. REVIEW OF THE PANEL'S FINDINGS UNDER ARTICLE 2.2 OF THE TBT AGREEMENT

Honduras appeals the Panel's finding that Honduras has not demonstrated that the plain packaging measures are inconsistent with Article 2.2 of the TBT Agreement.<sup>18</sup> The Panel's finding is vitiated by a number of errors of law and legal interpretation with respect to each aspect of the enquiry under Article 2.2 of the TBT Agreement relating to (1) the trade-restrictive nature of the plain packaging measures; (2) the degree of contribution by the plain packaging measures to the legitimate objective of Australia; and (3) the availability of less trade-restrictive alternative measures that provide an equivalent contribution to that legitimate objective.

### 1. The Panel's interpretation of the term "trade-restrictive" in Article 2.2 of the TBT Agreement and its application to the TPP measures is in error

The Panel errs in its interpretation and application of the term "trade-restrictive" in Article 2.2 of the TBT Agreement, and Honduras therefore requests the Appellate Body to modify the Panel's conclusion that the plain packaging measures are trade restrictive.<sup>19</sup> In particular, among others, the Panel commits the following errors of law and legal interpretation:

- The Panel errs in its finding that a modification or distortion of conditions of competition or the competitive opportunities for imported products is only a "trade" distortion if it *de jure* restricts imports or is discriminatory in nature.<sup>20</sup>
- The Panel errs in imposing a different and higher evidentiary standard of demonstrating actual trade effects for measures that are not challenged as being discriminatory in nature and by thus requiring that evidence must be adduced of actual trade effects of the plain packaging measures on prices and sales to demonstrate that this distortion amounts to a restriction on trade.<sup>21</sup>

### 2. The Panel's application of the legal standard with respect to the degree of contribution to the TPP measures is in error

The Panel errs in its application of the legal standard for assessing the degree of contribution of the plain packaging measures.<sup>22</sup> In particular, among others, the Panel commits the following errors:

- The Panel errs by examining the degree of contribution of the measures to the specific "mechanisms" by which the measures were expected to achieve the objective rather than by examining the degree of contribution to the fulfilment of the legitimate objective as identified.<sup>23</sup>
- The Panel errs when failing to examine the "actual" contribution of the plain packaging measures instead basing its finding on unsubstantiated speculation about an uncertain future impact of the measures "over time" without any qualitative or quantitative projections supported by sufficient evidence.<sup>24</sup>

<sup>17</sup> Panel Report, para. 8.1(d).

<sup>18</sup> Panel Report, paras. 8.1(a), and 7.1724-7.1732.

<sup>19</sup> Panel Report, paras. 7.1071-7.1089, and 7.1160-7.1255.

<sup>20</sup> Panel Report, paras. 7.1166-7.1168, 7.1196-7.1197, 7.1214-7.1218, and 7.1255.

<sup>21</sup> Panel Report, paras. 7.1074-7.1075, 7.1166, 7.1208, and 7.1255.

<sup>22</sup> Panel Report, paras. 7.483-7.1045.

<sup>23</sup> See, e.g. Panel Report, paras. 7.1024-7.1034.

<sup>24</sup> Panel Report, para. 7.1044.

- The Panel errs by not determining the degree of contribution of the challenged plain packaging measures themselves.<sup>25</sup>
- The Panel errs in its application of the legal standard it set for itself for examining the evidence.<sup>26</sup>

Honduras requests the Appellate Body to reverse the Panel's findings on the degree of contribution of the plain packaging measures since these are vitiated by the above errors of law and legal interpretation.<sup>27</sup>

### **3. The Panel errs in law in its interpretation and application of Article 2.2 of the TBT Agreement with respect to the availability of less trade-restrictive alternative measures**

The Panel errs in its interpretation and application of Article 2.2 of the TBT Agreement with respect to the availability of less trade-restrictive alternative measures that provide an equivalent contribution to the legitimate objective.<sup>28</sup> In particular, among others, the Panel commits the following legal errors:

- The Panel errs in its interpretation and examination of whether the alternative measures that were presented by Honduras were less "trade restrictive" by failing to examine their impact on the conditions of competition and on competitive opportunities, instead unduly focusing on their degree of contribution to the objective.<sup>29</sup>
- The Panel errs in its interpretation and application of the legal standard for assessing whether the alternative measures provided an "equivalent" contribution to the challenged measures. In particular:
  - The Panel fails to examine the degree of contribution of the proposed alternative measures in light of the legitimate objective as identified;<sup>30</sup>
  - The Panel errs by requiring that the alternative measures provide an identical contribution as a "substitute" to the challenged measures, rather than an "equivalent" contribution;<sup>31</sup>
  - The Panel errs by requiring a greater degree of contribution by the proposed alternatives;<sup>32</sup> and
  - The Panel errs when applying a different standard for assessing equivalence depending on whether a measure is part of a suite of measures.<sup>33</sup>

Honduras requests the Appellate Body to reverse the Panel findings on the availability of less trade restrictive alternative measures which are vitiated by the above errors of law and legal interpretation.<sup>34</sup>

<sup>25</sup> See, e.g. Panel Report, paras. 7.974, 7.1036, and 7.1043.

<sup>26</sup> See, e.g. Panel Report, paras. 7.499, 7.622, 7.643-644, 7.660, 7.695, and 7.697.

<sup>27</sup> Panel Report, paras. 7.1024-7.1045, and 7.1724-7.1732.

<sup>28</sup> Panel Report, paras. 7.1362-7.1723, and 7.1724-7.1732.

<sup>29</sup> See, e.g. Panel Report paras. 7.1411-7.1417 (MLPA); and 7.1490-7.1495 (Taxation increase).

<sup>30</sup> See, e.g. Panel Report, paras. 7.232. (Defining the legitimate objective); 7.1459-7.1460, 7.1464, 7.1468-7.1471 (MLPA); and 7.1526-7.1527, 7.1531, 7.1542-7.1545 (Taxation increase).

<sup>31</sup> See, e.g. Panel Report, paras. 7.1455-7.1461, 7.1464 (MLPA); and 7.1526-7.1527, 7.1529, 7.1531 (Taxation increase).

<sup>32</sup> See, e.g. Panel Report, paras. 7.1376, 7.1391, 7.1461, 7.1528, and 7.1721-7.1722.

<sup>33</sup> Panel Report, paras. 7.1376-7.1391.

<sup>34</sup> See, e.g. Panel Report, paras. 7.1468-7.1471 (MLPA); 7.1542-7.1545 (Taxation increase); and 7.1724-7.1732 (Overall conclusion).

### III. REVIEW OF THE PANEL'S ASSESSMENT OF THE EVIDENCE ON THE DEGREE OF CONTRIBUTION OF THE TPP MEASURES

Honduras requests the Appellate Body's review of the assessment the Panel made of the evidence that was presented on the degree of contribution of the plain packaging measures to the achievement of Australia's identified legitimate objective. Honduras submits that the Panel fails to conduct an "objective examination" of the evidence on the plain packaging measures' contribution to the objective of reducing the use of tobacco products in violation of its obligation under Article 11 of the DSU. In particular, among others:

- The Panel fails to provide a reasoned and adequate explanation of how the facts before it supported the conclusion that the plain packaging measures were apt to, and do, make a meaningful contribution to their legitimate objective because, *inter alia*:
  - The Panel's own findings on actual smoking behaviour, proximal and distal outcomes do not support its conclusion.<sup>35</sup>
  - The Panel's intermediate findings on the effect of the plain packaging measures are not based on the totality of the evidence on the record and are not supported by a reasoned and adequate explanation;
  - The Panel's findings on the effects of the measures "over time" are not based on any quantitative or qualitative analysis or reasoned explanation supported by sufficient evidence;
  - The Panel's intermediate findings on the relevance of the behavioural science theories are internally inconsistent and not supported by a reasoned and adequate explanation;
  - The Panel's findings on the contribution of the measures to the reduction in cigar smoking do not have a sufficient basis in the evidence on the record and are not supported by a reasoned and adequate explanation.
- The Panel disregards, ignores and misrepresents the evidence presented by the complainants.
- The Panel fails to examine the evidence on contribution in an even-handed manner and applies a double standard of proof in favour of Australia.
- The Panel fails to respect the due process rights of the parties by not exercising its authority under Article 14.2 of the TBT Agreement or Article 13 of the DSU to appoint a technical expert and by instead relying on a "ghost expert" raising alleged "robustness" concerns not identified by any of the parties without ever offering the parties an opportunity to comment on or subsequently review the concerns and methodologies of this ghost expert.

Honduras therefore requests the Appellate Body to reverse the Panel's findings and conclusions relating to the degree of contribution of the measures in the Panel Report and its Appendices,<sup>36</sup> as such findings were not the result of an objective assessment of the matter. The failure to objectively assess the evidence vitiates the Panel's findings on the degree of contribution of the measures and thus its findings under Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement, which should therefore be reversed.

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<sup>35</sup> Panel Report, paras. 7.945-7.958 and Appendix A (Proximal outcomes); 7.959-7.963 and Appendix B (Distal outcomes); 7.968-7.972 and Appendix C (Smoking prevalence); paras. 7.973-7.979 and Appendix D (Consumption and sales impact); 7.980-7.986 and 7.1024-7.1045 (Overall conclusions); see also Panel Report: Appendix A, paras. 86-87; Appendix B, paras. 120-121; Appendix C, paras. 123-124; and Appendix D, paras. 137-138 (leading to the unqualified finding in para. 7.1043 of the Panel Report on actual smoking behaviour).

<sup>36</sup> Panel Report, paras. 7.1024-7.1045 and Appendices.



For this reason as well, Honduras requests the Appellate Body to declare moot and of no effect the Panel's findings that Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.2 of the TBT Agreement,<sup>37</sup> and the related finding that Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS agreement.<sup>38</sup>

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<sup>37</sup> Panel Report, paras. 7.1732, and 8.1(a).

<sup>38</sup> Panel Report, paras. 7.2606, and 8.1(e).

**ANNEX A-2****DOMINICAN REPUBLIC'S NOTICE OF APPEAL\***

1. Pursuant to Article 16.4 and Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), the Dominican Republic hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (DS441).

2. Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, the Dominican Republic simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

3. The Dominican Republic restricts its appeal to those errors that it believes constitute serious errors of law and legal interpretation that need to be corrected. Non-appeal of an issue does not signify agreement therewith. The Dominican Republic also believes that it may not be necessary for the Appellate Body to decide all the issues raised in this notice of appeal since some may become moot as a result of decisions on other issues.

4. For the reasons to be further elaborated in its submissions to the Appellate Body, the Dominican Republic appeals, and requests the Appellate Body to reverse, modify, or declare moot and of no legal effect certain findings and conclusions of the Panel, with respect to the following errors of law and legal interpretations contained in the Panel Report:

**I. APPEALS OF THE PANEL'S FINDINGS UNDER ARTICLE 2.2 OF THE TBT AGREEMENT<sup>1</sup> ON THE CONTRIBUTION OF THE TPP MEASURES**

5. The Dominican Republic appeals the Panel's finding that "the Dominican Republic has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.2 of the TBT Agreement".<sup>2</sup> The Panel failed to make an objective assessment of the matter before it, as required under Article 11 of the DSU, as elaborated below.

6. The Dominican Republic appeals the Panel's overall conclusion on the contribution of the TPP measures to Australia's objective.<sup>3</sup> The Panel failed to make an objective assessment of the matter before it, as required under Article 11 of the DSU.

7. The Dominican Republic appeals the Panel's overall findings<sup>4</sup> and intermediate findings<sup>5</sup> resulting from its assessment of the evidence from the period *after* the implementation of the TPP measures ("post-implementation" evidence) on the *actual* impact of the TPP measures on smoking behaviours – *i.e.*, prevalence and consumption – in Australia. The Panel failed to make an objective assessment of the matter before it, as required under Article 11 of the DSU.

8. The Dominican Republic appeals the Panel's overall findings<sup>6</sup> and intermediate findings<sup>7</sup> resulting from its assessment of the evidence from the period *prior to* the implementation of the TPP measures ("pre-implementation evidence") on the *anticipated* impact of the TPP measures. The

\* This document, dated 23 August 2018, was circulated to Members as document WT/DS441/23.

<sup>1</sup> *The Agreement on Technical Barriers to Trade* ("TBT Agreement").

<sup>2</sup> Panel Report, paras. 8.1(b)(i). See also Panel Report, para. 7.1732.

<sup>3</sup> Panel Report, paras. 7.1025, 7.1040-7.1043, 7.1045, 7.1725(b).

<sup>4</sup> Panel Report, paras. 7.972, 7.979, 7.980-7.986, 7.1037, 7.1039; Appendix C, paras. 122 and 123; and Appendix D, paras. 117 and 137.

<sup>5</sup> Panel Report, paras. 7.964-7.971, 7.973-7.978; Appendix C, paras. 8, 51-57, and 96-122; and Appendix D, paras. 101-116.

<sup>6</sup> Panel Report, paras. 7.929-7.931, 7.1024-7.1034, and 7.1038.

<sup>7</sup> Panel Report, paras. 7.518-7.928.

Panel failed to make an objective assessment of the matter before it, as required under Article 11 of the DSU.

9. The Dominican Republic appeals the Panel's overall findings<sup>8</sup> and intermediate findings<sup>9</sup> resulting from its assessment of the *post-implementation evidence* on the *actual* impact of the TPP measures on proximal and distal outcomes. The Panel failed to make an objective assessment under Article 11 of the DSU.

10. The Dominican Republic appeals the Panel's overall finding<sup>10</sup> and intermediate findings<sup>11</sup> regarding the potential future impact of the TPP measures. The Panel erred in the application of Article 2.2 of the *TBT Agreement*. In addition, the Panel failed to make an objective assessment under Article 11 of the DSU.

## **II. APPEALS OF THE PANEL'S FINDINGS UNDER ARTICLE 2.2 OF THE *TBT AGREEMENT* ON THE TRADE-RESTRICTIVENESS OF THE TPP MEASURES**

11. The Dominican Republic appeals the Panel's finding that "the Dominican Republic has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.2 of the *TBT Agreement*".<sup>12</sup> The Dominican Republic appeals the Panel's overall findings and intermediate findings on the trade-restrictiveness of the TPP measures, in the context of its analysis under Article 2.2 of the *TBT Agreement*.<sup>13</sup> The Panel failed to make an objective assessment under Article 11 of the DSU. In addition, the Panel erred in the application of Article 2.2 of the *TBT Agreement*.

## **III. APPEAL OF THE PANEL'S FINDINGS UNDER ARTICLE 2.2 OF THE *TBT AGREEMENT* ON THE AVAILABILITY OF LESS TRADE-RESTRICTIVE ALTERNATIVE MEASURES**

12. The Dominican Republic appeals the Panel's finding that "the Dominican Republic has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.2 of the *TBT Agreement*".<sup>14</sup> The Dominican Republic appeals the Panel's overall findings and intermediate findings on the trade-restrictiveness of the Dominican Republic's proposed alternative measures (relative to the trade restrictiveness of the TPP measures), made in the context of the Panel's evaluation under Article 2.2 of the *TBT Agreement*.<sup>15</sup> The Panel failed to make an objective assessment under Article 11 of the DSU. In addition, also with respect to its analysis of the trade-restrictiveness of the proposed alternatives, the Panel erred in the application of Article 2.2 of the *TBT Agreement*.

13. The Dominican Republic appeals the Panel's overall findings and intermediate findings on the contribution of the Dominican Republic's proposed alternative measures to Australia's objective (relative to the contribution of the TPP measures), made in the context of the Panel's evaluation under Article 2.2 of the *TBT Agreement*.<sup>16</sup> On this issue, the Panel failed to make an objective assessment under Article 11 of the DSU. In addition, also with respect to its analysis of the contribution of the proposed alternatives, the Panel erred in the application of Article 2.2 of the *TBT Agreement*.

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<sup>8</sup> Panel Report, paras. 7.985, 7.1036, 7.1038, and 7.1039.

<sup>9</sup> Panel Report, paras. 7.945-7.963, 7.980-7.984, 7.1040-7.1042; Appendix A, paras. 28-32, 66-72, 83-86; and, Appendix B, paras. 36-41, 71-77, 99-103, and 113-120.

<sup>10</sup> Panel Report, para. 7.1044.

<sup>11</sup> Panel Report, paras. 7.938-7.943.

<sup>12</sup> Panel Report, paras. 8.1(b)(i). See also Panel Report, para. 7.1732.

<sup>13</sup> Panel Report, paras. 7.1071-7.1089, 7.1166-7.1171, 7.1196-7.1225; and, Appendix E, paras. 12-15, 24-32, and 47-56.

<sup>14</sup> Panel Report, paras. 8.1(b)(i). See also Panel Report, para. 7.1732.

<sup>15</sup> Panel Report, paras. 7.1362-7.1391, 7.1411-7.1418, 7.1459, 7.1468-7.1471, 7.1490-7.1496, and 7.1542-7.1545.

<sup>16</sup> Panel Report, paras. 7.1362-7.1391, 7.1398-7.1402, 7.1432-7.1464, 7.1468-7.1471, 7.1476-7.1480, 7.1506-7.1531, 7.1542-7.1545, and 7.1717-7.1723.

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**IV. APPEALS OF THE PANEL'S FINDINGS UNDER ARTICLE 20 OF THE TRIPS AGREEMENT<sup>17</sup>**

14. The Dominican Republic appeals the Panel's overall findings and intermediate findings that the TPP measures, to the extent that they prohibit the use of trademarks on cigarette sticks, do not unjustifiably encumber the use of a trademark in the course of trade, under Article 20 of the *TRIPS Agreement*.<sup>18</sup> The Panel failed to examine part of the matter referred to the DSB, in violation of Article 7.1 of the DSU. In addition, the Panel failed to make an assessment of part of the matter under Article 11 of the DSU.

15. The Dominican Republic appeals the Panel's overall findings and intermediate findings that the TPP measures do not unjustifiably encumber the use of a trademark in the course of trade, under Article 20 of the *TRIPS Agreement*.<sup>19</sup> These Panel findings derive from the Panel's failure to make an objective assessment under Article 11 of the DSU, in the course of its analysis under Article 2.2 of the *TBT Agreement* (regarding the contribution of the TPP measures to Australia's objective, and the existence of less trade-restrictive alternatives that make an equivalent contribution to Australia's objective).<sup>20</sup>

**V. INCORPORATION OF CLAIMS ON APPEAL BY HONDURAS IN DS435**

16. The Dominican Republic incorporates by reference into this appeal the claims on appeal made by Honduras in the dispute *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (DS435).<sup>21</sup>

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<sup>17</sup> The *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("*TRIPS Agreement*").

<sup>18</sup> Panel Report, paras. 7.2240-7.2247, 7.2260-7.2264, 7.2287-7.2292, 7.2556-7.2574, and 7.2590-7.2606.

<sup>19</sup> Panel Report, paras. 7.2236, 7.2240-7.2247, 7.2260-7.2264, 7.2287-7.2292, 7.2556-7.2574, and 7.2590-7.2606.

<sup>20</sup> Panel Report, paras. 7.2236, 7.2240-7.2247, 7.2260-7.2264, 7.2287-7.2292, 7.2556-7.2574, and 7.2590-7.2606.

<sup>21</sup> Notice of Appeal by Honduras, WT/DS435/23.

**ANNEX B**

ARGUMENTS OF THE PARTICIPANTS

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**ANNEX B-1****EXECUTIVE SUMMARY OF HONDURAS' APPELLANT'S SUBMISSION****INTRODUCTION<sup>1</sup>**

1. Honduras seeks the Appellate Body's review and reversal of a number of errors of law and legal interpretation reflected in the Panel Report. In particular, as stated in the Notice of Appeal, Honduras' appeal concerns a number of the Panel's findings under the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") and the Agreement on Technical Barriers to Trade ("TBT Agreement"). In addition, Honduras considers that the Panel failed to make an "objective assessment" of the evidence before it relating in particular to the degree of contribution of Australia's tobacco plain packaging measures (hereinafter the "TPP measures" or "plain packaging measures") to the fulfilment of the objective of the measure, i.e. the reduction of the use of tobacco products. The Panel thus acted inconsistently with Article 11 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes ("DSU").

**II. CLAIM 1: THE PANEL'S INTERPRETATION AND APPLICATION OF THE TERM "UNJUSTIFIABLY" IN ARTICLE 20 OF THE TRIPS AGREEMENT IS IN ERROR**

2. Honduras submits that the Panel's findings in relation to Article 20 of the TRIPS Agreement are based on an erroneous interpretation of the term "unjustifiably". Alternatively, Honduras considers that the Panel committed legal error in applying its legal standard to the facts of this case and its finding under Article 20 thus constituted an error of law for that reason as well.

3. First, the Panel develops an erroneous legal standard for justifying even the most far-reaching encumbrances on the use of trademarks on lawfully available products. The Panel finds that as long as there are "good reasons" sufficient to support the measures, any trademark encumbering requirement, no matter how intrusive, is justifiable. The approach of the Panel and the legal reasoning supporting it reflects several errors of law and legal interpretation. In particular:

- The Panel fails to read the term "unjustifiably" in its trademark-specific context. The Panel errs in considering that the term "unjustifiably" effectively introduces a general exception that justifies any restriction on the use of a trademark when adopted for purposes of furthering certain otherwise undefined policy objectives or "good reasons". Honduras submits that whether a requirement "unjustifiably" encumbers the use of a validly registered trademark with respect to a lawfully available product requires the interpreter to examine the specific concern raised by the encumbered trademark rather than the product to which it applies and to examine the extent of the encumbrance. Whether the special requirements are encumbering the use of a trademark in an "undue or disproportionate manner", i.e. "unjustifiably" must thus be based on an assessment of the particular trademark and of the manner in which it is encumbered. However, under the Panel's approach there is no need to examine whether a particular trademark may be problematic and thus be encumbered in its use, including being prohibited from being used.

In fact, the Panel acknowledges that many of the prohibited trademarks are not problematic *per se*. Nevertheless, under its approach to the term "unjustifiably", it considers that their use may be justifiably prohibited simply because they are trademarks that identify a product. That cannot be a correct approach given the international protection of trademarks and their use. For other products as well, the use of trademarks may be encumbered for reasons related to health or consumer protection. But for no other product are trademarks prevented from being used simply because they are trademarks or because they belong to a particular category of trademarks such as figurative marks. Never in the past has it been argued that such a blunt approach was necessary to protect, for example, health. This confirms the error in the Panel's

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<sup>1</sup> In line with the requirements of the Working Procedures of the Appellate Body, the total number of words of the Appellant Submission (including footnotes but excluding the Executive Summary) is = 154,529; and the total number of words of the Executive Summary is = 8,021.

approach. The Panel's failure to read the term "unjustifiably" in its trademark-specific context constitutes an error of law and legal interpretation.

- Alternatively, at a minimum, the Panel should have read the term "unjustifiably" as referring to measures that are more trademark encumbering than "necessary" by including an analysis of potentially less trademark-restrictive alternatives. If a less trademark encumbering requirement provides an equivalent contribution to the legitimate objective, such alternative must be preferred. The Panel's novel and intention-based "good reasons"-approach does not include as part of the legal standard the need to prefer less trademark encumbering alternatives. Therefore, it is not consistent with the principle of Article 8.1 of the TRIPS Agreement relating to the adoption of measures "necessary" to protect health. It thus constitutes an error of law and legal interpretation.
- Related to this error of interpretation relating to Article 20 and Article 8.1 of the TRIPS Agreement is the Panel's erroneous finding that paragraph 5 of the Doha Declaration on TRIPS and Public Health constitutes a "subsequent agreement" in the sense of Article 31.3(a) of the Vienna Convention on the Law of Treaties that must be taken into consideration as part of the context of the term "unjustifiably" in Article 20 of the TRIPS Agreement. Paragraph 5 of the Doha Declaration is not a relevant subsequent agreement for purposes of interpreting the term "unjustifiably" in Article 20 of the TRIPS Agreement. Paragraph 5 of the Doha Declaration merely confirms the general interpretive rule of reading all provisions of the TRIPS Agreement in the light of the objectives and principles of the Agreement. Therefore, it does not "bear specifically" on the interpretation and application of the respective term or provision and cannot be said to "clearly express a common understanding, and an acceptance of that understanding among Members" with regard to the meaning of the term "unjustifiably" in Article 20 of the TRIPS Agreement. The Panel's consideration of paragraph 5 of the Doha Declaration as a "subsequent agreement" constitutes another error of law that materially affected its analysis under Article 20 of the TRIPS Agreement.

4. Second, assuming *arguendo* that the Panel's "justifiability" standard based on whether there are "good reasons" sufficient to encumber the use of a trademark was correct, the Panel's application of that legal standard to the facts of the case in the context of its three step test reflects additional errors of law. These errors undermine the Panel's analysis of the term "unjustifiably" in the context of the facts of this case and thus vitiate its findings under Article 20 of the TRIPS Agreement. In particular:

- The Panel erred by failing to properly determine the nature and extent of the encumbrance on the basis of the impact of the measures on the distinguishing function of the trademark. The Panel erroneously focused on the effect of the measures on the "economic value" of the trademarks and its considerations relating to the alleged "mitigating" factors are thus in error.
- The Panel erred in its application of Article 20 to the facts of this case which concerned both tobacco products and their packaging. The Panel's reasoning fails to take into account important differences in terms of the application of the measures to, in particular, cigarette sticks (i.e. the product itself). The Panel attached particular weight in its justifiability analysis to the fact that the encumbering requirements' effects on trademarks were mitigated by the facts that word marks could still be used, albeit in a standardised form and font. But this is not correct in so far as the actual product (i.e. cigarette sticks) is concerned since no word mark may be used on the product under plain packaging. The Panel's failure to apply its reasoning to cigarette sticks invalidates its findings in so far as they apply also to the product.
- The Panel erred in its examination of the available alternatives as it failed to properly consider whether the proposed alternatives that Honduras presented were less *trademark* encumbering than plain packaging while providing an *equivalent* contribution. The Panel's approach reflects two important errors of law. First, the Panel erroneously assumed that the test under Article 20 was exactly the same as the test under Article 2.2 of the TBT Agreement. However, the TBT Agreement concerns "trade" restrictiveness, while the TRIPS Agreement relates to "trademark"- encumbrance. Second, the Panel erred in its interpretation of what constitutes an "equivalent" contribution effectively requiring an "identical" contribution by the alternative

measures or even requiring that the proposed alternatives must be "*manifestly better* in contributing towards Australia's public health objectives".<sup>2</sup>

- The Panel erroneously relied on the recommendation in the WHO Framework Convention on Tobacco Control ("FCTC") Guidelines to consider adopting plain packaging when it concluded that that there existed "good reasons sufficient to support" the extreme restriction on the use of trademarks by plain packaging. The Panel effectively disregarded the non-binding nature of these recommendations. In addition, the Panel completely failed to examine the legal relevance of the FCTC and its Guidelines in the context of this dispute. The FCTC or its Guidelines do not apply to three of the four complaining parties since Indonesia and Dominican Republic are not parties to the FCTC and Cuba has not ratified the FCTC. The Panel therefore erred in law by giving undue contextual weight to the FCTC and the FCTC Guidelines when examining the "justifiability" of the plain packaging measures under the legal standard it developed.

5. Honduras therefore requests the Appellate Body to reverse the Panel's findings, in particular, in paragraphs 7.2393-7.2431, and paragraphs 7.2604-7.2605, and to declare moot and of no effect the Panel's findings in paragraphs 7.2606 and 8.1(e) that Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement.

### **III. CLAIM 2: THE PANEL'S ANALYSIS OF ARTICLE 16.1 OF THE TRIPS AGREEMENT IS IN ERROR AS IS ITS FAILURE TO APPLY THE LAW TO THE FACTS OF THIS CASE**

6. Honduras submits that the Panel's interpretation of Article 16.1 of the TRIPS Agreement on the "rights conferred" to trademark owners is in error and that its failure to apply the law to the facts constitutes an error of law. The Panel's false exercise of judicial economy also constitutes a violation of Article 11 of the DSU.

7. First, the Panel fails to conduct a holistic interpretation of Article 16.1 that takes into consideration the context of this provision as well as its object and purpose. In particular, the Panel erred in law by finding that Article 16.1 does not protect distinctiveness and that Article 16.1 is not engaged if there is no risk of confusion, for example because of the government's deliberate weakening of the trademark. Honduras submits that Article 16.1 provides private parties with a means to an end. The "rights conferred" are guaranteed in order to allow the trademark owner to protect the distinctiveness of the trademark so that it can perform its important function in the course of trade, allowing the trademark owner to develop goodwill based on that trademark. The Panel's finding that Article 16.1 does not protect distinctiveness divorces the means from its end, and is in error.

8. Furthermore, the Panel erred in finding that the right to prevent unauthorised use of the trademark is not adversely affected if there is less or no likelihood of confusion as a result of regulation that deprives the consumer of familiarity with the mark. The scope of mandatory rights defined in Article 16.1 by reference to the concept of "likelihood of confusion" is not tied solely to the existence of actual marketplace confusion. The Panel's conclusion that Article 16.1 does not provide a so-called "right to confusion" is a caricature of Honduras' argument rather than an assessment of it. The "likelihood of confusion"-test is a normative benchmark that determines the boundaries of that sphere, similar to the role fulfilled in Article 16.3 for well-known marks by the "interest"-test. Plain packaging significantly reduces that sphere of exclusivity outside the control of the trademark owner.

9. Whether this deliberate weakening of the rights conferred is justified may be a matter for discussion under Article 17 of the TRIPS Agreement and must be assessed on the basis of the terms of this provision which permits "limited exceptions" to the rights conferred. However, that is not what the Panel did as it erroneously found that a measure that deliberately seeks to reduce the strength of the mark and the goodwill developed on the basis of the mark does not even engage Article 16 of the TRIPS Agreement. The Panel finds that "the negative Article 16.1 right to prevent infringing uses does not extend to an entitlement to maintain or extend the distinctiveness of an individual trademark, which inevitably fluctuates according to market conditions and the impact of regulatory measures on those market conditions".<sup>3</sup> That is correct but that does not mean that a

<sup>2</sup> Panel Report, para. 7.2601. (emphasis added)

<sup>3</sup> See, Panel Report, para. 7.2015.



Member can deliberately reduce the distinctiveness of the trademark by prohibiting its use. In fact, and demonstrating the failure of the Panel to read Article 16.1 in its context, the Panel itself finds that the TRIPS Agreement (Article 20) prevents Members from imposing certain requirements including a prohibition on the use of trademarks, unless it can be justified based on "good reasons". Honduras considers that while the distinctiveness of the trademark may fluctuate according to market conditions and the impact of regulatory measures on those market conditions, it is clear that this does not mean that a Member is entitled to deliberately seek to reduce the distinctiveness of the trademark by imposing encumbering requirements such as the prohibition on the use of trademarks.

10. A good faith reading of Article 16.1 in the context of TRIPS Section 2 on trademarks and Article 20 of the TRIPS Agreement and in the light of the object and purpose of this provision and of the TRIPS Agreement as a whole reveals the flaws in the Panel's formalistic interpretation of Article 16.1. The Panel failed to even begin to examine many of the terms used in Article 16.1. The Panel's narrow textual reading of parts of this provision that does not take into consideration the context and object and purpose of the words as used in Article 16.1 constitutes an error of law and legal interpretation.

11. The prohibition on the use of the trademark unduly restricts the trademark owner's private right to prevent unauthorised use of similar signs on similar products. Whether this restriction is "limited" and thus permitted by Article 17 is the relevant question the Panel failed to examine.

12. Second, the Panel errs in its application of the law to the facts as it completely and deliberately fails to address the relevant question at hand. The TRIPS Agreement imposes certain disciplines on Members and requires them to confer minimum private rights to intellectual property owners, including trademark owners. The relevant question that the Panel failed to even examine is whether a measure that prohibits the use of the trademark on the lawfully available product reduces the distinctiveness of the trademark and thus its scope of protection such that the level of protection falls below the minimum level that Members are required to guarantee under Article 16 of the TRIPS Agreement. The Panel itself considers this to be the essential question, but then refuses to examine it. By failing to apply the law to the facts, the Panel errs in law and as a result of this false exercise of judicial economy also fails to comply with its obligation under Article 11 of the DSU.

13. For these reasons, Honduras requests the Appellate Body to reverse the Panel's relevant findings in paragraphs 7.1966-7.2030, 7.2031-7.2032, and 7.2051, and therefore to reverse and declare moot and of no legal effect the Panel's finding paragraph 8.1(d) that Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 16.1 of the TRIPS Agreement.

#### **IV. CLAIM 3: THE PANEL'S INTERPRETATION OF THE TERM "TRADE-RESTRICTIVE" IN ARTICLE 2.2 OF THE TBT AGREEMENT AND ITS APPLICATION TO THE FACTS OF THIS CASE IS IN ERROR**

14. Although Honduras agrees with the ultimate conclusion that the plain packaging measures are trade restrictive, the Panel's interpretation of the term "trade-restrictive" in Article 2.2 of the TBT Agreement and its application to the facts of this case is in error. In particular, the Panel makes two separate but related errors of law.

15. First, the Panel erroneously rejects the notion that a modification or distortion of the conditions of competition and a restriction of competitive opportunities for imported products is a "trade" distortion. The Panel confirms that the plain packaging measures reduce product differentiation and it acknowledges that plain packaging modified imported products' conditions of competition and affected their competitive opportunities. It also acknowledges that there is evidence that shows that plain packaging has led to "down-trading" in favour of lower value products. But, erroneously, it does not consider that this evidence of the measures' effect on the conditions of competition and competitive opportunities suffices to establish a restriction on trade. The Panel unduly considered that trade restrictiveness is not determined by the extent to which the measures modify the conditions of competition and limit competitive opportunities for imported products, and instead required evidence of a discriminatory modification of competitive opportunities to the detriment of imported products. The Panel confused the requirements of Articles 2.1 and 2.2 of the

TBT Agreement and unduly required evidence of discrimination to determine the trade-restrictive nature of a technical regulation.

16. Second, the Panel erroneously finds that with respect to non-discriminatory measures, it does not suffice to point to the measures' competition-distorting nature. According to the Panel, for non-discriminatory measures, evidence must be adduced of the actual effect of the measures on prices and sales in order to demonstrate that this distortion amounts to a restriction on trade. In so doing, the Panel effectively introduces a "trade effects" test for measures that restrict trade but that are not otherwise discriminatory. This is another error of law since it is well established that both Article III of the GATT 1994 (on "National Treatment") and Article XI of the GATT 1994 (on the "Elimination of Quantitative Restrictions") protect competitive opportunities and equality of conditions of competition, without the need to demonstrate actual trade effects. These key GATT 1994 provisions are functionally equivalent to Articles 2.1 and 2.2 of the TBT Agreement respectively. The Panel erroneously imposed a higher evidentiary burden of demonstrating actual trade effects with respect to "non-discriminatory" technical regulations. The Panel's distinction between "discriminatory" and "non-discriminatory" measures for purposes of determining the meaning of the term "trade-restrictive" and the evidence to be adduced is baseless and constitutes an error of law. In error is also the Panel's related requirement that it be demonstrated that the plain packaging measures actually reduced prices and sales of the product.

17. Honduras therefore requests the Appellate Body to modify and, where relevant, reverse the Panel's findings in paragraphs 7.1166-7.1168, 7.1196-7.1197, and 7.1255 – and thus to declare moot and of no effect the Panel's findings in paragraph 8.1(a) that Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.2 of the TBT Agreement.

#### **V. CLAIM 4: THE PANEL ERRS IN LAW IN ITS APPLICATION OF THE LEGAL STANDARD ON THE DEGREE OF CONTRIBUTION OF THE TPP MEASURES**

18. The Panel may have correctly articulated the legal standard for determining the degree of contribution of the challenged measures to the fulfilment of the legitimate objective, but it fails to properly apply this standard to the facts of the case. The failure to properly apply the law to the facts is an error of law, even if aspects of the Panel's analysis also support a claim of a failure to make an "objective assessment" of the matter. Honduras' claim of error of law concerns four separate but related claims concerning the findings of the Panel in respect of the determination of the degree of contribution of the plain packaging measures to the fulfilment of the legitimate objective.

19. First, the Panel correctly states that it is to examine the actual contribution of the measures "to the fulfilment of the objective of reducing the use of tobacco products". However, the Panel errs in its application of this standard to the facts before it since it does not in fact examine the actual contribution of the measures to the legitimate objective of "reducing the use of tobacco products". Instead, it examines the contribution of the measures to the specific "mechanisms" of reducing appeal, increasing the effectiveness of health warnings and the reduction of the ability of tobacco packaging to mislead consumers.<sup>4</sup>

20. Second, despite its statement that it must examine the "actual contribution" of the measures, the Panel did not focus on the "actual impact" of the measures on the use of tobacco products. Instead it included baseless speculation about an uncertain future impact of the measures "over time" in light of uncorroborated statements about perceptions and intentions and without any qualitative or quantitative projections supported by sufficient evidence.<sup>5</sup>

21. Third, the Panel correctly notes that the "broader context [of tobacco control in Australia] does not remove or reduce the need to identify the contribution that the challenged measures *themselves* make to Australia's objectives".<sup>6</sup> However, it subsequently fails to correctly apply this test as it no longer focuses on the "contribution that the challenged [plain packaging] measures themselves"

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<sup>4</sup> This is clear from its findings which discuss the non-behavioural evidence at length (paragraphs 7.980-7.986) before drawing unsupported conclusions on the behavioural effect of the measures in one paragraph (paragraph 7.1025).

<sup>5</sup> Panel Report, para. 7.1044.

<sup>6</sup> Panel Report, para. 7.506. (emphasis added)

make. Instead it determines the degree of contribution of the measures *in combination with* and as a component of a broader suite of complementary tobacco control measures. This is clear from its finding that "the evidence before us supports the view that, as applied in combination with the comprehensive range of other tobacco control measures maintained by Australia and not challenged in these proceedings, including a prohibition on the use of other means through which branding could otherwise contribute to the appeal of tobacco products and to misleading consumers about the harmful effects of smoking, the TPP measures are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products".<sup>7</sup>

22. Fourth, the Panel errs in its application of the legal standard it set for itself for examining the evidence. This claim relates to a number of findings the Panel made which are not in line with the legal standard it set for itself in this respect.

23. For example, the Panel correctly articulates the appropriate standard for examining the evidence relating to the measures' contribution noting that it has a "duty... to 'evaluate the relevance and probative force of each piece thereof'".<sup>8</sup> However, the Panel fails to apply this standard to the facts and evidence of the case since it never properly evaluates the relevance and "probative weight" of the different pieces of evidence effectively giving equal weight to all of the evidence. Its "totality of the facts" approach includes evidence that is neither probative nor relevant such as the pre-implementation studies which the Panel itself considers to have clear "limitations".

24. Furthermore, the Panel correctly articulates the relevant approach to the assessment of "scientific evidence" when it states that "[t]o the extent that scientific evidence is relied upon, our assessment may include in particular a consideration of whether such evidence 'comes from a qualified and respected source', whether it has the 'necessary scientific and methodological rigor to be considered reputable science' or reflects 'legitimate science according to the standards of the relevant scientific community', and 'whether the reasoning articulated on the basis of the scientific evidence is objective and coherent'".<sup>9</sup> However, it fails to correctly apply this legal standard for approaching scientific evidence to the facts of the case since even evidence that clearly did not meet the standard of scientific and methodological rigor was included in the Panel's analysis, for example because it was the "only pre-implementation study submitted in these proceedings that sought to investigate the impact of tobacco plain packaging on cigars and cigarillos" and that the Panel would "therefore take its conclusions into account in our subsequent analysis".<sup>10</sup>

25. Finally, and despite its repeated statements about its approach to the econometric evidence that would not involve the Panel undertaking its own econometric analysis, it did in fact do just that. The Panel conducted its own (flawed) econometric assessment of the evidence as it developed certain calculations and estimation methods that were never discussed with the parties and that remain unexplained even in the Panel's own final report.<sup>11</sup>

26. Honduras acknowledges that there may be an overlap with the claims it is making under Article 11 of the DSU relating to the lack of objective assessment of the matter. However, Honduras requests that the failure to correctly apply the legal standard relating to the determination of the degree of contribution of the measures to the facts of the case be considered as a stand-alone claim of violation since it constitutes an error of law, irrespective of whether related errors of appreciation of the evidence by the Panel may also be qualified as failure to "objectively" assess the matter.

27. Honduras therefore requests the Appellate Body to reverse the Panel's findings in paragraphs 7.1024-7.1044, 7.1724-7.1732, and 7.2604-7.2606 of the Panel Report, and thus to declare moot and of no effect the Panel's findings in paragraph 8.1(a) that Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.2 of the TBT Agreement and in paragraph 8.1(e) that Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement.

<sup>7</sup> Panel Report, para. 7.1043.

<sup>8</sup> Panel Report, para. 7.517.

<sup>9</sup> Panel Report, para. 7.516.

<sup>10</sup> Panel Report, para. 7.622.

<sup>11</sup> Panel Report, Appendix C, para. 107; Appendix D, paras. 44, 106, 109-110; Appendix E, paras. 29-54.

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**VI. CLAIM 5: THE PANEL ERRS IN LAW IN ITS INTERPRETATION AND APPLICATION OF ARTICLE 2.2 OF THE TBT AGREEMENT WITH RESPECT TO THE AVAILABILITY OF LESS TRADE-RESTRICTIVE ALTERNATIVE MEASURES**

28. The Panel's findings relating to the proposed "less trade restrictive alternative measures" reflect a number of errors of law and legal interpretation.

29. First, the Panel fails to examine whether the alternative measures are less "trade restrictive" based on a correct interpretation of this term. Instead, the Panel erroneously concludes that the proposed alternative measures are equally trade restrictive because they are at least equally effective in reducing smoking. The Panel should have examined the restrictive effect of the proposed alternatives on the conditions of competition of imported products in order to determine whether the proposed alternatives were "less trade restrictive". The Panel's failure to do so vitiates its findings on alternative measures.

30. Second, the Panel correctly articulates the legal standard for determining whether the alternative measures provide an "equivalent" (but not necessarily an "identical") contribution and correctly finds that "a proposed alternative measure may achieve an equivalent degree of contribution in ways different from the technical regulation at issue".<sup>12</sup> However, the Panel errs in its application of the law to the facts of this dispute.

31. In particular, (a) the Panel fails to examine the degree of contribution of the proposed alternative measures in the light of the legitimate objective actually found to exist; (b) the Panel erroneously requires that the alternative measures provide an *identical* contribution as a "substitute" rather than an "equivalent" contribution; (c) the Panel errs by engaging in an asymmetrical comparison that imposes a greater degree of contribution on the alternatives than required by the "equivalence" test.

32. The Panel's finding that none of the proposed alternative measures are capable of operating as a substitute for plain packaging is based on the erroneous comparison of the alleged contribution of plain packaging *in combination with the enlarged GHWs*, on the one hand, with the alternative measure as a substitute for *both* the plain packaging measures and the enlarged GHWs. This is incorrect since the enlarged GHWs were never part of the dispute. To the extent that the Panel was justified in considering the combined effect of the plain packaging measures with the enlarged GHWs, it should also have examined the contribution of the alternative measures *in combination with* the large GHWs covering 75% of the front of the pack and 90% of the back.

33. In addition, and related to the above errors, the Panel errs in law when applying a different standard for "equivalence" in the context of an alleged "suite of measures" and in making its findings on the basis of an alleged lack of "synergies".

34. Honduras therefore requests the Appellate Body to reverse the Panel's findings in paragraphs 7.1464, 7.1468-7.1471, 7.1531, and 7.1542-7.1545 – and thus to declare moot and of no effect the Panel's findings in paragraph 8.1(a) that Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.2 of the TBT Agreement as well as the related findings in paragraphs 7.2606 and 8.1(e) that Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement.

**VII. CLAIM 6: THE PANEL FAILS TO CONDUCT AN "OBJECTIVE ASSESSMENT" OF THE MATTER, INCLUDING THE EVIDENCE ON THE TPP MEASURES' CONTRIBUTION TO THE OBJECTIVE OF REDUCING THE USE OF TOBACCO PRODUCTS, IN VIOLATION OF ARTICLE 11 OF THE DSU**

35. The Panel's review of the evidence relating to the degree of contribution of the plain packaging measures to the fulfilment of the legitimate objective of reducing smoking does not reflect the required "objective assessment" of the matter and the Panel thus acted in violation of Article 11 of the DSU.

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<sup>12</sup> Panel Report, para. 7.1369.

36. The Panel failed to make an objective assessment of the facts, as required under Article 11 of the DSU, *inter alia*, because:

- The Panel failed to provide a reasoned and adequate explanation of how the facts supported the determination made that "plain packaging has resulted in a reduction in smoking prevalence and in consumption of tobacco products";
- The Panel failed to examine the evidence in an even-handed manner, applying a double standard of proof;
- The Panel ignored material pieces of evidence submitted by the complaining parties; and
- The Panel failed to respect the basic principles of due process and procedural fairness by involving a "ghost expert" which developed criticisms of the parties' evidence that the parties were never given an opportunity to comment on and which are never explained in the report thus shielding them from proper scrutiny. The Panel could have, and in this case should have appointed an expert of its own in consultation with the parties as provided for in Article 14.2 of the TBT Agreement and Article 13 of the DSU.

37. These failures of the Panel, taken individually and together, are of such a pervasive nature as to cast doubt on the objectivity of the Panel in the context of this dispute which related to a controversial product and a well-intended but unlawful, ineffective, and disproportionate measure. The Panel thus failed to make an objective assessment of the evidence on the degree of contribution of the plain packaging measures in violation of its obligation under Article 11 of the DSU.

**VII.1 The Panel fails to provide a reasoned and adequate explanation of how the facts before it supports a conclusion that the TPP measures were apt to, and do, make a meaningful contribution to their legitimate objective**

38. The Panel makes the ultimate finding that the TPP measures are not more trade restrictive than necessary because, *inter alia*, they "are apt to, and do make a meaningful contribution" to their public health objective by reducing the use of, and exposure to, tobacco products in Australia.<sup>13</sup> However, a review of the facts before the Panel, when examined in light of the evidentiary standard and approach adopted by the Panel in this dispute, reveals that there simply is no basis in the facts to support this conclusion. The Panel has thus failed to provide the required reasoned and adequate explanation that the facts support the determination made. In particular:

- The Panel's own limited findings on actual behaviour do not support this conclusion;
- The Panel's own findings on the proximal and distal outcomes (i.e. on perceptions, attitudes and intentions) do not warrant such a conclusion, even assuming that these proximal and distal outcomes are informative of actual behaviour; and
- The Panel's own findings on the literature and behavioural science theories do not support this finding, even assuming the literature and underlying surveys and theories are informative of actual behaviour.

39. There was simply no positive evidence in the sense of relevant and probative evidence showing that the TPP measures actually contributed to their objective. Relatedly, the Panel failed to provide "reasoned and adequate explanations" and "coherent reasoning" for its unsupported findings.

40. The Panel also fails to explain how it is possible that it finds no evidence of a contribution to the "distal" outcomes such as quitting attempts or cognitive processing of the risks of smoking after three years of plain packaging but nevertheless concludes that there is evidence that less people smoke and that people smoke less because of plain packaging. The Panel never acknowledges, let alone explains the gap in the analytical framework which was proposed by Australia and which was apparently accepted by the Panel. The Panel bases its finding on actual contribution on the econometric analysis presented by Australia's expert of one of many datasets without explaining this

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<sup>13</sup> Panel Report, para. 7.1725(b).

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conclusion in the light of plausible alternative explanations and contradictory facts it has itself established.

41. Furthermore, the Panel states that it needs to evaluate the relevance and "probative value" of the different pieces of evidence but in fact fails to do as it gives equal weight to all evidence as part of its flawed "totality of the facts" approach. In particular, the Panel fails to provide an adequate explanation for why it includes certain pre-implementation studies that are so obviously flawed that they should not have been included and relies on studies and behavioural theories even when the facts do not support them. The Panel fails to provide an explanation of why such studies and theories are relevant as part of the totality of facts if they have not been supported by the empirical evidence that the Panel itself considered essential for taking these studies into account.

42. In addition, the Panel asserts that "the impact of the TPP measures may evolve over time",<sup>14</sup> but fails to support this speculative assertion with the necessary "quantitative projections into the future or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence" that it itself acknowledged to be required.<sup>15</sup> Taking into consideration that the evidence submitted covered a period of almost three years of a measure that was planned to have met its objective over a six year period (i.e. reducing prevalence to 10% by 2018), and in light of the fact that there was no basis to assume that the measures' contribution would become visible only over time, the unsupported suggestion that the measures' contribution would further evolve over time remains unexplained and is pure speculation.

43. The Panel's finding on cigars are particularly disconcerting since there is a close to total lack of evidentiary basis for the Panel's conclusions that the plain packaging measures are apt to, and actually do, contribute to the reduction in the use of cigars. The Panel's conclusions relating to all tobacco products, including cigars, are not supported by the facts on the record and there is no reasoned and adequate explanation of the Panel's findings on cigar smoking.

44. At a more granular level, the Panel jumps to conclusions without any apparent explanation, let alone an adequate and reasoned explanation of why it disregards certain pieces of evidence and considers others to be probative. Therefore, even the intermediate findings that the Panel makes are not the result of a reasoned and adequate explanation. For example, it merely states 23 times that it conducted a "careful review" before simply repeating the arguments of Australia's experts without reflecting, let alone addressing, the different rebuttal arguments made by the experts of the complainants with respect to the probative nature of the evidence presented.

45. The Panel notes a number of limitations about the reliability and relevance of numerous pieces of evidence relied on by Australia but still takes this evidence into account as part of its "totality of facts" approach. It fails to explain which of the many pieces of evidence examined it considered to be relevant and probative or what value it attaches to evidence that ostensibly fails to meet the standard of "scientific evidence" that it articulates. The Panel's analysis of the evidence is not "critical and searching" as it simply notes the weaknesses of the evidence in isolation without doing anything with these weaknesses. It fails to examine the evidence in a holistic manner and it never conducts a critical analysis of the entirety of the evidence considered in combination. Nor does the Panel provide a reasoned and adequate explanation why the alleged flaws in the evidence submitted by the complainants on consumption and prevalence were of such nature that it justified disregarding these analyses completely. The Panel accepts all of Australia's evidence, even if it has acknowledged flaws and limitations but "zeroes" out all of the complainants' evidence as soon as it allegedly is not perfect without providing the required adequate explanation.

## **VII.2 The Panel disregards and thus misrepresents material pieces of evidence presented by the complainants**

46. The Panel disregards and misrepresents the complainants' evidence as it completely omits the important rebuttal points made by its experts to the criticism of Australia which the Panel effectively simply adopts as its own. In addition, the Panel quotes the conclusions of the experts out of their context, highlights alleged admissions without even reflecting the explanations of the experts that put these alleged admission in their proper context. The extent to which the Panel disregarded and

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<sup>14</sup> Panel Report, para. 7.1044.

<sup>15</sup> Panel Report, para. 7.982.

thus distorted the complainants' expert evidence on contribution is pervasive, as evidenced in an Annex to this submission.

47. Honduras notes in particular the unexplained disregard by the Panel of the evidence presented by Professor Klick both in terms of demonstrating the lack of contribution of the measures and for purposes of rebutting the criticisms expressed by Australia's experts related to his analysis and evidence which includes the only "ideal" longitudinal pre/post analysis that was presented in this dispute. By not acknowledging let alone addressing the points made by the complainants' experts to rebut the criticisms of their own evidence or for purposes of criticising Australia's evidence, the Panel failed to undertake an objective assessment that does not skew the analysis in favour of either of the parties.

### **VII.3 The Panel's analysis lacks even-handedness and reflects a double standard of proof**

48. The Panel's assessment of the facts reveals a lack of even-handedness and the application of a double standard of proof at various levels.

49. First, the Panel's "totality of the facts" approach operated as a technique of wiping out the acknowledged individual flaws of Australia's pre-and post-implementation evidence which the Panel considered to form a "body of evidence". In contrast, each individual concern, including numerous purely hypothetical or possible minor concerns relating to the evidence presented by the complainants formed the basis for completely disregarding the complainants' evidence. The many expert reports prepared by high-calibre experts recognised as such in their respective fields and related evidence presented by the complaining parties was never considered to form a "body of evidence" because of alleged minor individual flaws affecting such evidence, thus "zeroing" much of the complainants' evidence. The double standard is clear.

50. Second, the Panel permitted Australia to allocate the combined effects of plain packaging and GHWs to the plain packaging measures while requiring the complainants to effectively demonstrate that neither provided any contribution whatsoever, even though the complainants did not challenge the large GHWs. This is most evident in the context of the Panel's analysis of the proposed alternative measures which the Panel refused to examine in combination with the GHWs. In so doing, the Panel effectively required that the alternative measure provide not only an equivalent contribution to plain packaging but in fact an equivalent contribution to plain packaging in combination with the enlarged GHWs. If the Panel considered that it was not possible to separate the effects of plain packaging from the effects of the enlarged GHWs that were introduced at the same time, an even-handed assessment would also have examined the alternatives assuming they would be applied in combination with the enlarged GHWs. The Panel failed to undertake such an objective and even-handed analysis.

51. Third, the Panel rejects the complainants' evidence and a number of its econometric models mainly because they reveal that under certain conditions the evidence shows a statistically significant increase in smoking rather than a decrease. The Panel cannot accept a conclusion that is not consistent with the conclusion it expects to find. Furthermore, the Panel errs in its appreciation of the concept of "statistical significance", and as a result blames the complainants for failing to establish with certainty that the measures are not working, while not requiring similar certainty from Australia. However, it does not allow the complainants to conservatively reach this conclusion based on an evident effect in the opposite direction. The Panel is consistently giving the benefit of the doubt to Australia.

52. Finally, the Panel's ghost expert identified certain "robustness" concerns relating to the evidence submitted by the complaining parties such as the problem of "multi-collinearity" for example. The Panel rejects a lot of the complainants' evidence on the basis of this newly developed concern that Australia never raised. In addition to the fact that the Panel was thus clearly making the case for Australia, it also and importantly fails to examine if the same "robustness" concern does not also affect the evidence of Australia's experts. The Panel is deliberately looking for flaws in the complaining parties' evidence but omits to examine, let alone apply a similarly strict approach to Australia's evidence.

53. In sum, the Panel's treatment of the evidence reflects a "double standard of proof" in its consideration of the qualitative and quantitative evidence. The Panel effectively gives a zero to every

piece of evidence presented by the complainants that it considers not to be perfect; however, in contrast, the Panel accepts the combined presentation of obviously flawed pieces of evidence presented by Australia as probative of a certain degree of contribution by the plain packaging measures even if each of these pieces of evidence individually does not meet the standard set by the Panel in terms of scientific and methodological rigour. It uses the combined effect of plain packaging in combination with the enlarged GHWs as the starting point and assigns the combined effect to plain packaging while not assigning any possible effects of GHWs to the measures that are proposed as alternatives to plain packaging for example. The Panel raises novel robustness concerns with respect to the evidence presented by the complainants without even examining if the same robustness concerns apply equally to the evidence of Australia. This difference in approach is evident and is not in line with the requirement to conduct an even-handed examination. The double standard of proof is clear.

#### **VII.4 The Panel fails to respect the due process rights of the parties**

54. The Panel conducted its own analysis of the very technical evidence that was submitted even though, objectively speaking, it did not possess the necessary technical skills for doing so. The Panel did not share with the parties any of the questions or concerns it had with respect to the technical evidence that was submitted and never confronted the parties with its own alternative analysis which was critical to its conclusions on the evidence. The Panel did not appoint an expert of its own in consultation with the parties in line with the authority given to it under Article 14.2 of the TBT Agreement and Article 13 of the DSU. Instead, it relied on a ghost expert to re-do the analysis of the parties and to find alleged flaws that even the parties did not identify. In addition, it shielded such criticisms from scrutiny by the parties during the proceeding and even to date by not disclosing the manner in which it reached certain conclusions based on its "re-working" of the "back-up" data provided by the parties. In so doing, the Panel failed to respect the parties' due process rights.

55. Honduras considers that the Panel's discretion to appoint experts under Article 13 of the DSU and Article 14.2 of the TBT Agreement is not boundless. If, as was the case here, the arguments are of such a technical and fundamental nature, the Panel was effectively under a requirement to appoint an expert. Furthermore, the failure of the Panel to do so meant that the parties were not in a position to respond to a number of the (misguided) criticisms that the Panel independently developed through its ghost expert. This failure to give the parties an opportunity to address new points raised for the first time in the interim report, and that were never included in any of the more than 200 questions the Panel posed, adversely affects the fundamental due process rights of in particular the complainants. In developing these new points of criticism, the Panel was effectively making the case for Australia, and the Panel was doing so in secret with the assistance of a ghost expert rather than by appointing an expert of its own through a transparent and objective process.

56. These errors, when examined individually as well as in combination with each other, demonstrate the lack of objective assessment of the Panel's assessment of the evidence relating to the degree of contribution of the measures, thus violating Article 11 of the DSU. For that reason as well, the Panel's findings on the degree of contribution should be reversed.

57. Honduras therefore requests the Appellate Body to reverse the Panel's findings on the evidence on the degree of contribution of the measures as reflected in the Appendix and in paragraphs 7.1024-7.1045 of the Panel Report as such findings were not the result of an objective assessment of the matter by the Panel in violation of Article 11 of the DSU and thus to declare moot and of no effect the Panel's findings in paragraph 8.1(a) that Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.2 of the TBT Agreement and the related findings in paragraphs 7.2606 and 8.1(e) that Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement.

#### **VIII. CONCLUSION**

58. For the reasons stated in Honduras' Appellant Submission, and based on the errors of law and legal interpretation as well as the lack of objective assessment that vitiate the relevant findings of the Panel, Honduras respectfully requests the Appellate Body to reverse and declare moot and of no effect the Panel's findings as set out in this submission by:



- *finding* that the Panel erred when it found in paragraph 8.1(e) that Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement;
- *finding* that the Panel erred when it found in paragraph 8.1(d) that Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 16.1 of the TRIPS Agreement;
- *finding* that the Panel erred when it found in paragraph 8.1(a) that Honduras has not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.2 of the TBT Agreement; and
- *finding* that the Panel failed to make an objective assessment of the matter in violation of Article 11 of the DSU.

**ANNEX B-2****EXECUTIVE SUMMARY OF THE DOMINICAN REPUBLIC'S APPELLANT'S SUBMISSION****INTRODUCTION**

1. On 1 December 2012, Australia introduced the tobacco plain packaging ("TPP") measures. These measures ban all design features on tobacco retail packaging and tobacco products themselves, and branding of any kind on cigarette sticks, in an attempt to reduce smoking.
2. The Dominican Republic did not lightly decide to challenge the TPP measures. Nor has it lightly decided to maintain that challenge on appeal. The Dominican Republic recognizes that any legal challenge to a tobacco control measure will be met with scepticism.
3. Yet, the value of WTO dispute settlement is that the adjudicator must make its decision on an objective basis. Over several decades, panels and the Appellate Body have rightly earned a reputation for basing decisions on a transparent and rigorous review of reliable evidence, with judges of the International Court of Justice ("ICJ") praising the WTO as establishing "best practice".<sup>1</sup>
4. In bringing this dispute to the WTO, the Dominican Republic did not seek to constrain Australia's legitimate right to protect public health by reducing smoking. Indeed, before the Panel, the Dominican Republic showed that the TPP measures do not achieve their objective to reduce smoking and proposed that Australia could adopt alternative, stringent tobacco control measures with a proven track record. In particular, Australia could raise the minimum legal purchase age ("MLPA") to 21 years and it could increase taxes. As the Panel acknowledged, these measures are universally accepted, including by the World Health Organization, to be effective at reducing smoking, particularly among young people.
5. Whilst respecting Australia's prerogative to take measures to reduce smoking, the Dominican Republic turned to the WTO in an effort to preserve the competitive opportunities that could flow from the display of trademarks, geographical indications ("GIs"), and other design features on the residual parts of the packaging, left after respecting the Graphic Health Warning ("GHW") requirements.
6. The Panel agreed that these features create competitive opportunities through brand differentiation, which "engenders consumer loyalty and increases consumers' willingness to pay".<sup>2</sup> As the Panel found, "the TPP measures limit the opportunity for tobacco manufacturers to compete on the basis of such brand differentiation".<sup>3</sup>
7. It is well-known that many developing countries resisted the legal protections for intellectual property that developed nations insisted upon in the Uruguay Round negotiations, skeptical of the benefits that the protection of such rights could bring to their economies.
8. Yet, the protection of trademarks and GIs has taken on considerable importance to the Dominican Republic now that it has transformed itself from an exporter of unprocessed tobacco leaf into the world's leading producer and exporter of premium branded cigars. This remarkable transformation occurred in no small part due to the ability of its producers to develop well-known brands with a reputation for quality and consistency.
9. The Panel rejected each of the Dominican Republic's claims in its Report in *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* ("Panel Report").<sup>4</sup>

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<sup>1</sup> *Pulp Mills Case*, Joint Dissent of Judges Al-Khasawneh and Simma, para. 16.

<sup>2</sup> Panel Report, para. 7.1167.

<sup>3</sup> Panel Report, para. 7.1167.

<sup>4</sup> Panel Report, para. 8.1.

10. The Dominican Republic is disappointed with the Panel's findings. The Dominican Republic had always recognized that a dispute of this type could be influenced by adverse attitudes about the product. Yet, the Dominican Republic trusted that a WTO panel would undertake its assessment with the usual standards of objectivity for which the WTO dispute settlement system is justly renowned. The Dominican Republic's disappointment stems from its conviction that the Panel did not act with such objectivity.

11. The claims that the Panel lacked objectivity are important not only to the Dominican Republic, but also, in its view, to the WTO system. The Dominican Republic remains of the view that the value of the WTO, as a forum for dispute settlement, lies in its willingness and capacity to undertake an objective review of difficult and sensitive international disputes. This appeal is designed to preserve that systemic value.

12. The claims of lack of objectivity focus, in part, on the *process* that the Panel followed in summarily rejecting the Dominican Republic's econometric evidence. The Panel developed and executed its own detailed econometric tests; it wrote its own computer code to operate the tests and then ran the tests on the data for itself; and it referred to the results of its work as "evidence".<sup>5</sup> The Dominican Republic had *no opportunity to be heard* on considerations that were decisive in rejecting its evidence. This manner of proceeding is not consistent with the dictates of objectivity – fair and independent decision-making consistent with due process.

13. Other claims of lack of objectivity concern the Panel's inconsistent treatment of the evidence and incoherent reasoning. To illustrate, the Panel rejected the Dominican Republic's evidence because it was affected by a particular issue, yet it accepted Australia's evidence, even though it was affected by the same issue. In reaching such conclusions, the Panel failed to reconcile contradictory parts of its own reasoning, and also failed to reconcile its reasoning with contradictory evidence in its record.

14. The Panel, in this case, has strayed beyond the realms of fair and independent adjudication not once or twice, but repeatedly. Below, in this introduction, we set out two examples that provide a snapshot of the lack of objectivity that runs throughout the Panel's assessment. In the sections that follow, we provide an overview of the remaining claims.

15. Alongside appeals regarding the Panel's objectivity, the Dominican Republic makes distinct appeals regarding the interpretation and application of the law. The Panel found that, by design, the TPP measures restrict competitive opportunities that "engender [...] consumer loyalty and increase [...] consumers' willingness to pay".<sup>6</sup> However, for the Panel, these restrictions do not amount to a "restriction" on international trade under Article 2.2 of the Agreement on Technical Barriers to Trade ("TBT Agreement").

16. It suggests that this is because the TPP measures are non-discriminatory. For such measures, the complainant must prove the actual "effects" of the alleged restriction, taking account of the impact on both consumers and suppliers, and their respective responses to the measures. The Panel's finding is contrary to long-standing case law that WTO obligations protect *competitive opportunities* and that a complainant need not prove actual *trade effects* in the marketplace.

17. The Dominican Republic proposed less restrictive alternative measures, including raising the MLPA to 21 years, and increasing taxes. The Panel found that these alternatives would not be less trade-restrictive than the TPP measures and would not make an equivalent contribution to Australia's objective, under Article 2.2 of the TBT Agreement. This is despite the fact that the Panel considered that these two alternatives were just as effective in *reducing smoking*, which is Australia's objective, and the fact that they would not reduce the competitive opportunities that arise from differentiating tobacco products with branding. The alternatives did not, however, make an equivalent contribution to the TPP measures because they did not work through the same *means or mechanism* as the TPP measures, namely, by reducing the appeal of tobacco packaging and products. However, according to well-established case law, the equivalence of a contribution must be assessed in light of a measure's *objective*, and not the *mechanism* it uses to achieve that objective. The Panel has wrongly confused the *means* and the *end*.

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<sup>5</sup> Panel Report, Appendix C, para. 107.

<sup>6</sup> Panel Report, para. 7.1167.

18. The TPP measures prohibit the display of word marks on cigarette sticks, whereas they permit the display of word marks on tobacco packaging and cigar sticks. The Dominican Republic claimed that the prohibition on the use of word marks on cigarette sticks was contrary to Article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"). The Panel failed to examine this part of the Dominican Republic's claims, thereby failing to respect its terms of reference.

19. Finally, the Dominican Republic has also exercised care in asking the Appellate Body to complete the analysis. For the most part, should the Appellate Body uphold a ground of appeal, the Dominican Republic does not ask the Appellate Body to complete the analysis. The Dominican Republic recognizes that the Appellate Body is generally cautious in so doing and requires a clear record of uncontested facts or factual findings. For the most part, there is no such record to which the Dominican Republic could, in good faith, direct the Appellate Body.

#### **A. Example (1): the Panel's own development of a "non-stationarity" test**

20. The first example concerns one of the detailed econometric criteria that the Panel developed on its own, namely "non-stationarity", which the Panel used to reject certain of the complainants' econometric evidence. For the time being, we leave to one side the substance of what this econometric concept means, and focus simply on the Panel's *process*.

21. Before reading the Panel Report, the Dominican Republic's team of government officials and outside lawyers had never heard of the term "non-stationarity", and had no idea what it meant. The reason is that the concept of "non-stationarity" had never been discussed with the parties during the briefing phase of the panel proceedings, which lasted one and a half years. The concept did not arise in the parties' 50-plus submissions to the Panel or in the 20-plus expert econometric reports submitted by the parties. The Panel met twice with the parties and their experts, and the Panel posed a total of 207 written questions to the parties. Yet, the Panel did not, at any time, ask a single question about "non-stationarity". For its part, Australia had never suggested that the Dominican Republic's econometric evidence was flawed because of "non-stationarity", even though it made many submissions on that evidence and identified many other econometric criticisms.

22. Yet, the Panel rejected the Dominican Republic's econometric evidence – but not Australia's – because of "non-stationarity" concerns that the Panel had identified by itself, using an econometric test that the Panel had developed and executed *on its own, without giving the parties any opportunity whatsoever to comment*.

23. As a result, the Dominican Republic was deprived of an opportunity to comment on important issues such as: the relevance of this test to the facts, how the test should be applied, how the results of the test should be interpreted, and whether the models could easily be adjusted to resolve a perceived "non-stationarity" problem. Suffice it to say that these issues are consequential.

24. *First*, "non-stationarity" and its partner "stationarity" are not always relevant in econometric analysis. The relevance of the test and the interpretation of the results depend on the circumstances.

25. *Second*, if the circumstances suggest that non-stationarity might indeed be relevant, there is no standard way to test for it. Among the many tests available, three different tests are often used to test for non-stationarity, with the different tests potentially leading to different results. To run any one of the tests, a researcher must write computer code that will implement the test, and the researcher must then allow a computer to run the test on the dataset.

26. *Third*, after running the tests, a researcher must decide how to interpret the results generated to decide if they indicate a "non-stationarity" problem or not. To assist with interpreting the results, a researcher may need to run additional econometric tests, using new computer code, to establish whether there is, in fact, a "non-stationarity" issue.

27. The way in which the Panel developed and executed the "non-stationarity" tests, including for example the computer code it used, and the results its test generated, are not described in the Panel Report, and are not part of the Panel's record.

28. The Dominican Republic is shocked that a WTO panel would deem it appropriate to take it upon itself to develop and execute a detailed econometric test along these lines, and reject one party's evidence on that basis, *without any input whatsoever from the parties*.

29. This is not simply a question of who did the underlying work and whether they were properly appointed to do so. It is rather a fundamental denial of due process rights, which lie at the heart of any fair and independent dispute resolution system. It is simply not fair and independent for an adjudicator to: develop and execute an econometric test on its own, without the issue ever being raised by any party; use that test to reject one party's evidence; and, deprive that party of any opportunity to comment on the adjudicator's own test.

30. The same two ICJ judges who praised the WTO for establishing "best practice" in its treatment of evidence rebuked the ICJ for its reliance on "ghost experts". They observed that recourse to "ghost experts" deprives the adjudicative process of "transparency, openness, procedural fairness, and the ability for Parties to comment upon or otherwise assist the Court in understanding the evidence before it".<sup>7</sup> The ICJ's use of "ghost experts" has also drawn considerable criticism in academic literature for the same reasons.<sup>8</sup>

31. At the same time that the Panel deprived the Dominican Republic of its due process rights, it "made the case" for Australia. It developed and executed a detailed econometric test that Australia had never even mentioned, much less asserted as part of its "case". Yet, the Panel's own econometric test became an important part of its finding that the TPP measures were not inconsistent with Australia's WTO obligations. In using its own econometric test in this way, the Panel has strayed far beyond reasonable, fair, and independent adjudication.

32. The Panel seems to assume that Australia's econometric models do not have a "non-stationarity" problem because of the modeling technique used. However, the Panel does not indicate whether it tested that assumption by applying the same "non-stationarity" test to Australia's models. When the three different "non-stationarity" tests commonly used are applied to Australia's models, they generate the same results as they do when applied to the Dominican Republic's evidence. Yet, the Panel accepted Australia's models, at the same time it rejected the Dominican Republic's. This unexplained inconsistent treatment of the evidence underscores the fundamental due process issue.

33. Had the Dominican Republic been granted its due process right to comment on "non-stationarity" in the econometric evidence:

- it could have addressed issues, such as:
  - the relevance of this concept;
  - how to test for it, including how to run follow-up testing; and,
  - how to write appropriate computer code to run the test;
- it could have provided evidence, with computer code, testing its own and Australia's evidence for "non-stationarity", ensuring that all of the materials and results constitute evidence of record; and,
- it could have addressed:
  - how to interpret the results of testing;
  - whether follow-up testing is needed and, if so, how to conduct that testing, and the results of that testing;
  - how to adjust models to account for "non-stationarity"; and,
  - whether the overall modeling results are valid, despite possible "non-stationarity" issues.

34. For both the Dominican Republic's and Australia's models, the results of Dominican Republic's "non-stationarity" testing using the three commonly-used methods suggest – in both cases – that follow-up testing is needed to establish if there is a non-stationarity issue. The results of that follow-up testing suggest, in both cases, that non-stationarity is not an issue. It is impossible for the

<sup>7</sup> *Pulp Mills Case*, Joint Dissent of Judges Al-Khasawneh and Simma, para. 14.

<sup>8</sup> See e.g. Kate Parlett, "Parties' Engagement with Experts in International Litigation", *Journal of International Dispute Settlement*, 2018, 1-13, p. 6

Dominican Republic to know whether the Panel conducted any follow-up testing and, if so, how it ran that follow-up testing, and what the results of that testing were.

35. The Dominican Republic does not ask the Appellate Body to decide if the evidence is, or is not, affected by "non-stationarity". The appeal focuses on the Panel's process in assessing "non-stationarity", which was conducted in a vacuum, without respecting the Dominican Republic's due process right to be heard. Had the Dominican Republic been given an opportunity to comment on "non-stationarity", it could have addressed all these issues.

36. The Panel's shocking approach to "non-stationarity" may be contrasted with the approach taken to the same issue by the Arbitrator in *US – COOL*.<sup>9</sup> In that case, as the Dominican Republic's team has subsequently learned, the Arbitrator explored "non-stationarity" with the parties: it asked them questions about the issue; it allowed them to submit evidence on the topic; it allowed them to adjust models to resolve perceived concerns over "non-stationarity"; and it even relied on econometric models with a "non-stationarity" problem because the problem did not render the model results invalid. In short, the Arbitrator respected due process, and acted with fairness and independence.

### **B. Example (2): the Panel's contradictory reliance on a consumption model that was by Australia's own account "nonsensical"**

37. A second example of a lack of objectivity illustrates the inconsistent treatment of the evidence, coupled with incoherent and inadequate reasoning. In assessing whether the TPP measures reduced smoking, the parties and the Panel agreed that it was important to take into account the impact on smoking of increases in Australia's excise taxes. It is universally accepted that, *when taxes increase, smoking declines*.

38. In the relevant period, Australia raised excise taxes several times. With the agreement of the parties, the Panel found that any econometric assessment of whether the TPP measures had reduced smoking must control for excise tax increases.<sup>10</sup> This "tobacco costliness" control seeks to ensure that the TPP measures are not wrongly credited with a drop-in smoking that is, in reality, attributable to an excise tax increase.

39. With respect to the Dominican Republic's models, the Panel applied this control strictly. It uniformly rejected Dominican Republic models where the tobacco costliness control did not show a statistically significant decline in smoking in response to increased costliness.<sup>11</sup>

40. The Panel did not apply the same strict standard to Australia's econometric models. Late in the proceedings, Australia submitted a model that purported to show that the TPP measures had led to a reduction in cigarette consumption. Australia's model tried to control for each of the three large excise tax increases that took place in the relevant period, including an increase of 12.5 percent in December 2013. However, Australia's model found that this tax increase had led to a statistically significant increase in cigarette consumption.

41. In other words, according to this model, *people bought more cigarettes when tobacco taxes went up by 12.5 percent*. Earlier in the proceedings, Australia's own expert had rightly described such a modeling result as "nonsensical".<sup>12</sup>

42. Because Australia's evidence was filed late in the proceedings, the Dominican Republic was granted special leave to explain this "nonsensical" result in Australia's model. The Dominican Republic explained that this result drove the model's finding that the TPP measures reduced consumption. In short, the TPP measures were wrongly credited with a drop-in smoking that was attributable to the 12.5 percent excise tax increase. The Dominican Republic thus brought to the Panel's attention an issue which the Panel found of fundamental importance when it addressed the Dominican Republic's evidence, namely, whether a model is able to detect (correctly) the impact of tobacco costliness.

<sup>9</sup> Decision by the Arbitrator, *US – COOL (Article 22.6 – US)*, paras. 5.61 and 6.37.

<sup>10</sup> Panel Report, Appendix C, paras. 103-105.

<sup>11</sup> Panel Report, Appendix C, paras. 103-105.

<sup>12</sup> Chipty Rebuttal Report, (Exhibit AUS-535) (SCI), para. 39.

43. How did the Panel assess Australia's "nonsensical" evidence, and the Dominican Republic's rebuttal? The Panel found that the TPP measures had led to a decline in cigarette consumption. The *only* evidence cited by the Panel to support this finding was Australia's consumption model with the "nonsensical" finding that a 12.5 percent tax increase had led to a statistically significant increase in cigarette consumption.<sup>13</sup>

44. In doing so, the Panel never even *mentioned* that Australia's model produced a "nonsensical" result, even though the Dominican Republic had alerted the Panel to this result in a special submission devoted exclusively to this issue. The Dominican Republic's submission was not mentioned, let alone addressed.

45. In contrast, the Panel certainly mentioned *each* instance in which a Dominican Republic model failed to find a statistically significant decline in smoking in response to increased taxes/costliness. Any such evidence from the Dominican Republic was uniformly rejected. The Panel, however, entirely failed to reconcile this contradictory treatment of Australian and Dominican Republic models.

46. The Panel's assessment of Australia's "nonsensical" model also strays beyond the realms of reasonable, independent, and fair adjudication.

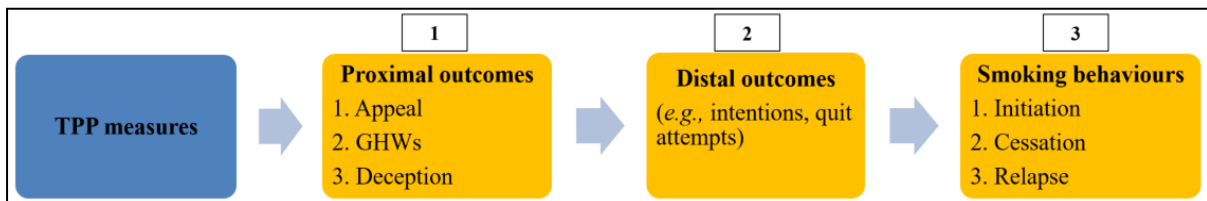
47. These are just two examples of the Panel's failure to conduct an objective assessment, but they illustrate the Panel's lack of objectivity in assessing the facts, which consistently redounded to Australia's advantage. In the next sections, the Dominican Republic explores these examples in more detail, together with many other instances of the Panel's lack of objectivity.

48. In the sections that follow, we provide a summary of the Dominican Republic's claims in relation to the Panel's assessment, under Article 2.2 of the TBT Agreement, of the contribution of the TPP measures to Australia's objective; the trade-restrictiveness of the TPP measures; and, the availability of less trade-restrictive alternatives. We then address our claims related to the Panel's findings under Article 20 of the TRIPS Agreement.

## II. THE PANEL ERRED IN FINDING THAT THE TPP MEASURES CONTRIBUTE TO AUSTRALIA'S OBJECTIVE

49. The Dominican Republic appeals the Panel's finding that the TPP measures are apt to, and do, contribute to Australia's objective of reducing the use of, and exposure to, tobacco products.<sup>14</sup>

50. As the Panel explained, "the TPP measures [were] intended to operate on the basis of a 'causal chain model'", acting first on "*proximal*" outcomes, including the appeal of tobacco packaging, then on more "*distal*" outcomes, such as quit-related intentions, and, finally, on *actual* smoking behaviours, as depicted in the "causal chain" below.<sup>15</sup>



51. The fulfilment of the objective of the TPP measures was "predicated on their ability to influence *smoking behaviours*" themselves. Accordingly, the Panel highlighted the importance of assessing the actual impact of the TPP measures on *smoking behaviours* in Australia based on evidence from the period after the implementation of the measures ("post-implementation" evidence).<sup>16</sup>

52. In light of the predicted "causal chain", the Panel also assessed two additional categories of evidence: the *anticipated* impact of the TPP measures based on evidence from the period *before* the implementation of the TPP measures ("pre-implementation evidence"); and, the *actual* impact of the

<sup>13</sup> Panel Report, Appendix D, para. 117; and Chifty Third Rebuttal Report, (Exhibit AUS-605), p. 53.

<sup>14</sup> Panel Report, para. 7.1043. See also Panel Report, para. 7.1025.

<sup>15</sup> Panel Report, para. 7.488.

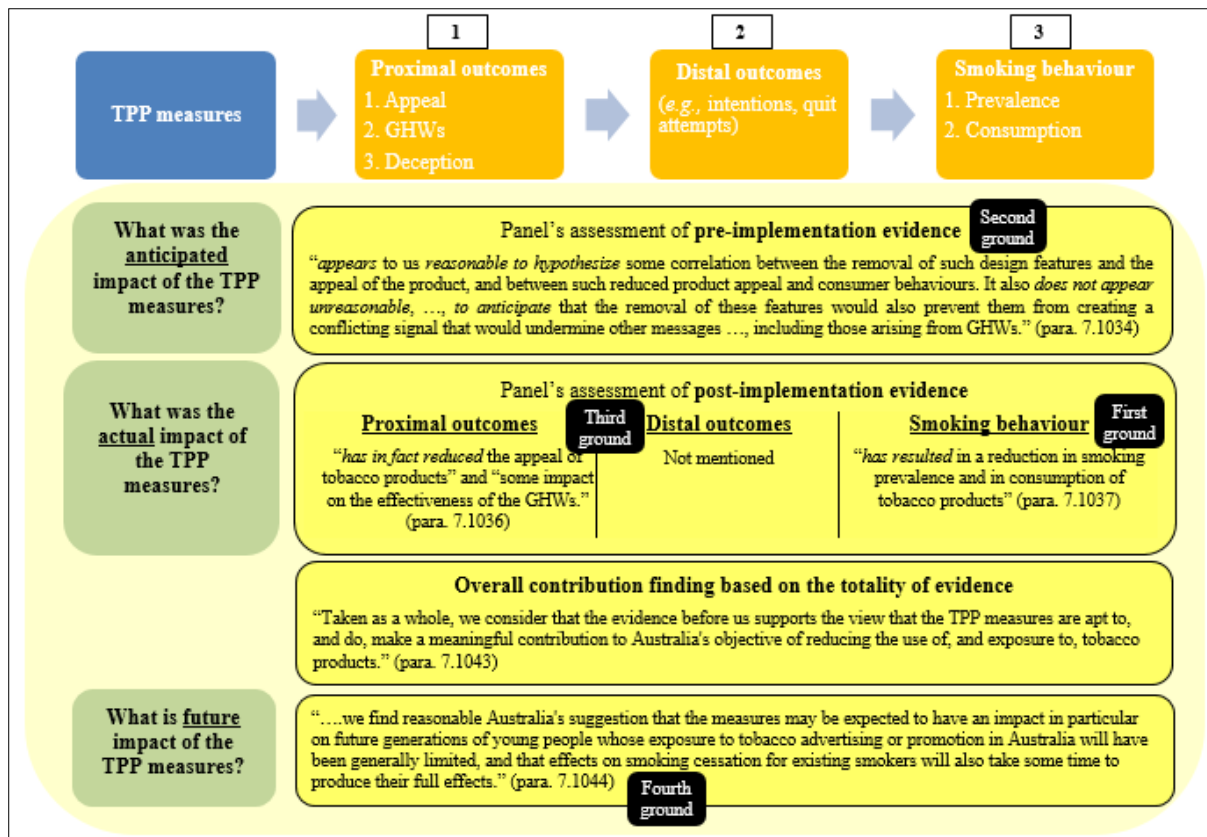
<sup>16</sup> Panel Report, para. 7.495. (emphasis in the original)

TPP measures on *proximal and distal outcomes* based on post-implementation evidence regarding these outcomes.<sup>17</sup>

53. Based on its assessment of these three categories of evidence, the Panel reached its overall conclusion that "the evidence before us, taken in its totality, supports the view that the TPP measures, [...], are apt to, and do in fact, contribute to Australia's objective of reducing the use of, and exposure to, tobacco products".<sup>18</sup> Having reached this finding, the Panel also considered that it was "reasonable" to expect that the TPP measures may be expected to have an impact in the future.<sup>19</sup>

54. In the sections that follow, the Dominican Republic summarizes its claims regarding each of these categories of evidence. To facilitate, the Panel's findings with respect to each category, and the corresponding ground of appeal, are visualized in Figure 1, below.

**Figure 1: The structure of the Dominican Republic's appeal**



**A. The Panel erred in assessing post-implementation evidence on the actual impact of the TPP measures on smoking behaviours**

55. The Dominican Republic's first ground of appeal concerns the Panel's failure to make an objective assessment of the *post-implementation* evidence concerning the *actual* impact of the TPP measures on cigarette and cigar smoking *prevalence and consumption*.

<sup>17</sup> See e.g. Panel Report, 7.983. The post-implementation evidence shows the combined effects of the TPP measures and the enlarged GHWs, because they were introduced on the same day (i.e. 1 December 2012).

<sup>18</sup> Panel Report, para. 7.1025. See also paras. 7.1037, 7.1039, 7.1043, 7.1045.

<sup>19</sup> Panel Report, para. 7.1044.



56. The Dominican Republic and Australia presented competing post-implementation evidence on the actual impact of the TPP measures on cigarette and cigar smoking behaviours – i.e. prevalence and consumption – in Australia.

57. The Panel rejected the Dominican Republic's evidence that the TPP measures had *not* affected prevalence and consumption for cigarettes and cigars because of perceived flaws in that evidence. It accepted Australia's evidence that the TPP measures had (i) reduced cigarette and cigar smoking prevalence; and (ii) reduced cigarette consumption.<sup>20</sup> The Panel found that the evidence did not allow it to reach a conclusion regarding cigar consumption.<sup>21</sup>

58. In reaching this finding, the Panel failed to make an objective assessment under Article 11 of the DSU in relation to the evidence on the *benchmark rate* of decline in smoking (i.e. the trend), and to the *robustness criteria* used by the Panel to assess the parties' evidence.

## 1. The Panel's errors related to the benchmark rate of decline

### a. The Panel erred in its assessment of the benchmark rate of decline for cigarette smoking prevalence

59. The parties agreed that there was a declining trend in smoking prevalence in Australia before the introduction of the TPP measures that continued after their introduction.<sup>22</sup> The parties also agreed that it was necessary to control for this pre-existing "benchmark rate of decline" (trend) in estimating the impact of the TPP measures using econometric models.<sup>23</sup>

60. The Dominican Republic's experts demonstrated that the benchmark rate of decline *accelerated* after 2006, and controlled for this acceleration by including a trend break in 2006.<sup>24</sup> Australia's expert asserted that the benchmark rate of decline in smoking was unchanged between 2001 and 2015, and used a single *constant* linear trend in her models.<sup>25</sup>

61. This disagreement about the correct benchmark rate of decline was important, because it had a decisive impact on the parties' estimates of the actual impact of the TPP measures on smoking prevalence in Australia. For example, when the accelerated post-2006 rate of decline is applied to Australia's prevalence models, these models no longer show a reduction in smoking prevalence attributable to the TPP measures.<sup>26</sup>

62. The Panel agreed that it was important to account for the long-standing declining trend in smoking to avoid attributing to the TPP measures a decline resulting from the trend.<sup>27</sup> It decided to proceed in a three-step analysis of cigarette smoking prevalence, examining: first, "whether smoking prevalence has decreased following the implementation of the TPP measures";<sup>28</sup> second, "whether the reduction of smoking prevalence has accelerated following [TPP] implementation";<sup>29</sup> and, third, whether any acceleration identified in step 2 was attributable to the TPP measures.<sup>30</sup>

63. At each of these three steps, without acknowledgment or explanation, the Panel adopted a *different* benchmark rate of decline, with the rate used progressively *decelerating* at each step (i.e. becoming *flatter*):

<sup>20</sup> Panel Report, Appendix C, paras. 55, 102, 103-108, 111, 118, 119 and 123(c); and Appendix D, paras. 44, 106-108 and 109-114, 137(c).

<sup>21</sup> Panel Report, Appendix D, para. 137(d).

<sup>22</sup> Chipty Second Rebuttal Report, (Exhibit AUS-591), para. 11; and IPE Third Updated Report, (Exhibit DOM-375), paras. 32-40.

<sup>23</sup> Chipty Third Rebuttal Report, (Exhibit AUS-605), para. 39; and IPE Third Updated Report, (Exhibit DOM-375), para. 40.

<sup>24</sup> See e.g. IPE Third Updated Report, (Exhibit DOM-375), paras. 49, 55, 59 and 65.

<sup>25</sup> Chipty Third Rebuttal Report, (Exhibit AUS 605), paras. 3(d), 35.

<sup>26</sup> IPE Third Updated Report, (Exhibit DOM-375), Table 2.1-2.

<sup>27</sup> Panel Report, Appendix C, para. 41.

<sup>28</sup> Panel Report, Appendix C, para. 5.

<sup>29</sup> Panel Report, Appendix C, para. 5.

<sup>30</sup> Panel Report, Appendix C, para. 5.

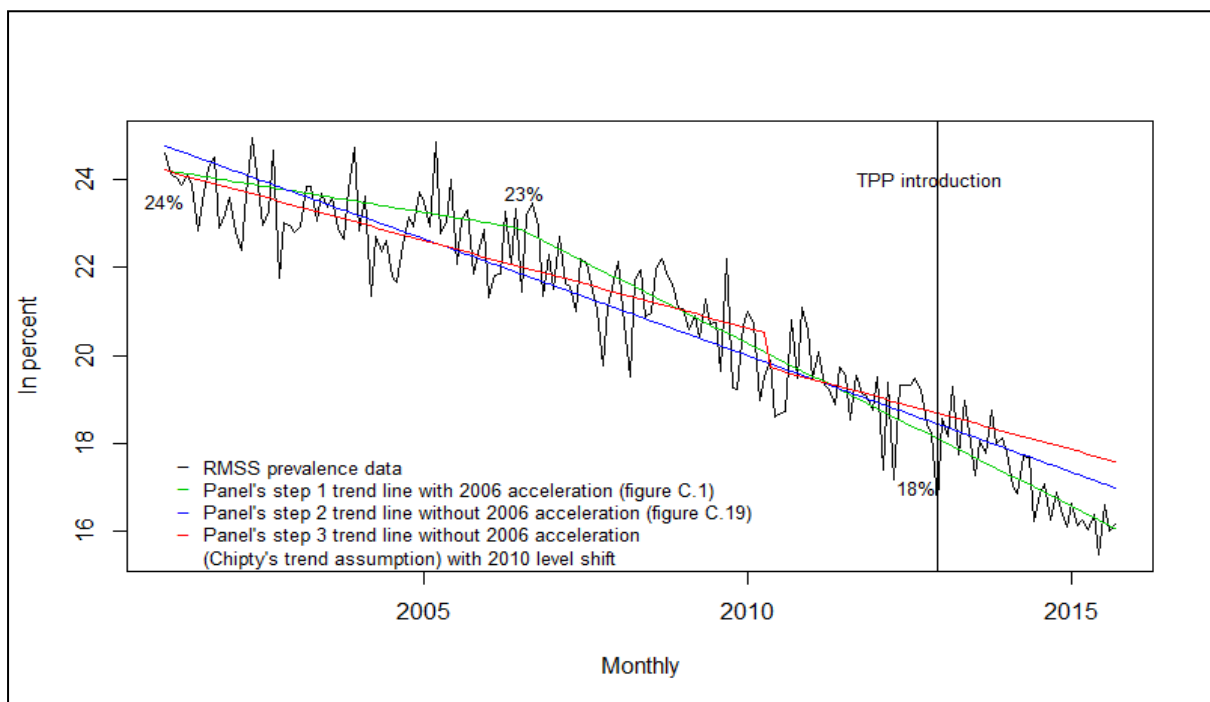
- In step 1, the Panel *agreed* with the Dominican Republic that the rate of decline had accelerated in 2006.
- In step 2, the Panel applied a different – *flatter* – benchmark rate of decline that fails to account for the 2006 acceleration in the rate of decline found in step 1.

The Panel's step 2 trend line was presented in Figure C.19, which was developed by the Panel itself and is not part of the Panel record.<sup>31</sup> On interim review, Australia informed the Panel that the Panel had wrongly attributed this figure to Australia's expert. The Dominican Republic has been unable to reproduce this figure.

- In step 3, the Panel adopted a third benchmark rate of decline, this time the one used by Australia's expert, which was *even flatter* than the rate used in step 2, and also failed to account for the 2006 acceleration in the rate of decline found in step 1.

64. In Figure 2, the Dominican Republic shows the three different trend lines used by the Panel:

**Figure 2: Benchmark rate of decline found in steps 1 to 3**



65. The flatter the trend line used immediately before the TPP measures were implemented (black vertical line), and the higher the prevalence rate at that time (the intercept of the trend lines and the vertical black line), the more likely it is to find a TPP effect by comparison with the actual data in the post-implementation period.

66. Thus, the Panel's progressive flattening of the rate of decline made it more likely that it would find, in step 2, that the rate of decline in cigarette smoking prevalence accelerated after introduction of the TPP measures; and, more likely that it would find, in step 3, that the TPP measures had contributed to reducing cigarette smoking prevalence. As noted, had the Panel consistently used the green trend line, found in step 1, it would have found no TPP effects. In its finding on the trend lines, the Panel did not conduct an objective assessment of the evidence under Article 11 of the DSU.<sup>32</sup>

67. *First*, as a result of the Panel's failure, in steps 2 and 3, to adopt the benchmark rate of decline that it established in step 1, the Panel's reasoning was "internally incoherent".<sup>33</sup> The Panel's findings

<sup>31</sup> Panel Report, Appendix C, Figure C.19.

<sup>32</sup> Appellate Body Report, *US – Continued Zeroing*, para. 338.

<sup>33</sup> Appellate Body Report, *Argentina – Import Measures*, footnote 543 to para. 5.179.

in steps 2 and 3 "[did] not follow logically" from its finding, in step 1, that the rate of decline had accelerated in 2006.<sup>34</sup> The Panel did not acknowledge or explain this incoherence in its Report.

68. *Second*, the Panel did not, in step 2, "provide reasoned and adequate explanations" for its findings.<sup>35</sup> Instead, it made findings that "lack a basis in the evidence contained in the panel record", adducing its own evidence in Figure C.19, that it initially attributed – incorrectly – to Australia.<sup>36</sup> Neither the Panel Report nor the Panel Record explain how the Panel produced Figure C.19.

69. The Panel also compromised the Dominican Republic's due process rights because it did not "explore" Figure C.19 with the parties.<sup>37</sup> Had the Dominican Republic been allowed to comment, it would have explained that Figure C.19 is mis-specified because it fails to account for the trend acceleration in 2006, as the Panel found in step 1. Finally, in relying on its *own* evidence in step 2, the Panel "ma[d]e the case" for Australia.<sup>38</sup>

***b. The Panel erred in its assessment of the benchmark rate of decline for smoking prevalence in relation to cigars***

70. In their econometric models relating to cigar smoking prevalence, the parties also controlled for the benchmark rate of decline in smoking. The Dominican Republic's expert explained that, for cigar smoking, the data not only shows an *acceleration* of a downward trend in 2006 (similar to cigarette smoking prevalence), but also a directional change in the trend in 2006: it went from an *upward* sloping trend until 2006 (an *increasing* rate of smoking), to a *downward* sloping trend thereafter (a *decreasing* rate of smoking). The Dominican Republic's expert controlled for this trend break in 2006. Australia's expert did not and, instead, used a constant linear trend from 2001-2015.<sup>39</sup>

71. As with cigarette prevalence, this difference was critical to the Panel's finding, based on Australia's model, that the TPP measures had reduced cigar smoking prevalence.<sup>40</sup> In reaching this finding, the Panel failed to objectively assess the benchmark rate of decline, in violation of Article 11 of the DSU.

72. *First*, the Panel failed to engage with evidence that was relevant to its reasoning, and of importance to the Dominican Republic's case. The Dominican Republic provided evidence showing that Australia's model was mis-specified because it failed to account for the "obvious and marked" 2006 trend break.<sup>41</sup> However, the Panel accepted Australia's results without addressing the Dominican Republic's evidence.

73. *Second*, the Panel's treatment of the parties' competing evidence was "internally inconsistent".<sup>42</sup> In the context of cigarette smoking prevalence, the Panel *rejected* the complainants' models if they did not find a statistically significant effect of the trend on prevalence, because it considered this result "at odds" with the agreed existence of a pre-TPP decline in prevalence.<sup>43</sup> In contrast, in the context of cigar smoking prevalence, the Panel *accepted* Dr Chipty's model even though it did not find a statistically significant effect of the trend.<sup>44</sup> The Panel provided no explanation for this inconsistency.

<sup>34</sup> Appellate Body Report, *Colombia – Textiles*, paras. 5.27 and 6.2.

<sup>35</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, footnote 618 to para. 293.

<sup>36</sup> Panel Report, Appendix C, Figure C.19; and Appellate Body Report, *EC and certain member States – Large Civil Aircraft, (Article 21.5 – US)*, para. 5.146.

<sup>37</sup> Appellate Body Report, *US – Large Civil Aircraft* (2nd complaint), para. 1137.

<sup>38</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.221; Appellate Body Report, *EC – Fasteners (China)*, para. 566; and Appellate Body Report, *US – Continued Zeroing*, para. 343.

<sup>39</sup> IPE, Updated Report, (Exhibit DOM-303); IPE Third Updated Report, (Exhibit DOM-375); IPE Summary Report, (Exhibit DOM-379), paras. 115-119; and Chipty Surrebuttal Report, (Exhibit AUS-586), paras. 58-60.

<sup>40</sup> Panel Report, paras. 7.972(c), 7.986, 7.1037; and Appendix C, paras. 122, 123(c).

<sup>41</sup> IPE Third Updated Report, (Exhibit DOM-375), para. 83.

<sup>42</sup> Appellate Body Report, *Argentina – Import Measures*, footnote 543 to para. 5.179.

<sup>43</sup> Panel Report, Appendix C, para. 116.

<sup>44</sup> Panel Report, Appendix C, paras. 120-122; and Chipty Surrebuttal Report, (Exhibit AUS-586),

## **2. The Panel's errors related to robustness criteria used by the Panel to assess the parties' evidence**

74. The second category of error in the Panel's assessment of the post-implementation evidence on the actual effects of the TPP measures on prevalence and consumption relates to the robustness criteria it used to assess the parties' econometric evidence. The Panel's errors do not arise from the *selection* of robustness criteria, but from its failure to *apply* those criteria *objectively*. The Panel's assessment lacked objectivity for a catalogue of reasons, including a failure to respect the Dominican Republic's due process rights and a failure to apply the criteria in a coherent and even-handed manner.

75. The Panel's failure to make an objective assessment applies to robustness criteria that the Panel developed and executed itself, *without* giving the parties any opportunity to comment, as well as to criteria that were the subject of some exchange with the parties.

### **a. The Panel's errors related to robustness criteria not debated with the parties**

76. The Panel failed to make an objective assessment regarding two robustness criteria that the Panel developed and executed itself, without any involvement of the parties. The first robustness criterion that the Panel developed itself concerns the econometric concept of "non-stationarity". The Dominican Republic has already addressed "non-stationarity" in the introduction above.

77. The second robustness criterion that the Panel developed itself concerns the econometric concept of "multicollinearity". The Panel defined multicollinearity as arising "when two (or more) explanatory variables convey the same information".<sup>45</sup>

78. Instead, the Panel itself identified multicollinearity as an issue, without the parties ever raising it. The Panel developed and executed testing for multicollinearity on its own (using the so-called "variance inflation factor" ("VIF") test statistic); it wrote and ran computer code to implement its chosen test; and, it interpreted the results, and determined the consequences of those results. The Panel referred to the results of its work as "evidence", although none of this "evidence" is part of the Panel's record.

79. The Panel undertook all of this work in a vacuum, without giving the parties any opportunity to comment.

80. The Panel found that the Dominican Republic's models were affected by multicollinearity, and rejected them on this basis.<sup>46</sup> It asserted that Australia's models were not affected by multicollinearity and relied on them. For similar reasons to those given regarding non-stationarity, the Panel failed to make an objective assessment under Article 11 of the DSU in assessing multicollinearity.

81. *First*, the Panel violated the Dominican Republic's due process rights by failing to afford it "a meaningful opportunity to comment".<sup>47</sup> Had the Dominican Republic been granted an opportunity to comment, it could have addressed, for example, the *circumstances* in which multicollinearity is problematic; *how to test* for multicollinearity; and, *whether multicollinearity was a problem* in the parties' models.

82. *Second*, the Panel treated the "same class of quantitative evidence" inconsistently.<sup>48</sup> The Panel found Australia's prevalence models to be unaffected by multicollinearity, although it gave no supporting information.<sup>49</sup> It said nothing at all about whether Australia's consumption models are affected by multicollinearity. There is also nothing in the Panel record to confirm whether and how the Panel tested Australia's models.

83. The Dominican Republic has replicated the Panel's analysis of multicollinearity, using the VIF test statistic. The results show that several of Australia's prevalence and consumption models

<sup>45</sup> Panel Report, Appendix B, para. 116.

<sup>46</sup> Panel Report, Appendix C, para. 107.

<sup>47</sup> Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.177.

<sup>48</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 294-295.

<sup>49</sup> Panel Report, Appendix C, para. 120.

are affected by multicollinearity. Australia's models thus "suffered from the same limitation" that led the Panel to reject the Dominican Republic's models.<sup>50</sup> Had the Dominican Republic been granted its due process rights, it could have presented this analysis to the Panel.

84. *Third*, the Panel failed to provide "reasoned and adequate explanations" for its finding.<sup>51</sup> With the Panel Report in hand, the Dominican Republic is uncertain how the Panel assessed multicollinearity – for example, whether and how it tested Australia's models, and, if so, what the results were.

85. *Fourth*, the Panel "ma[d]e the case" for Australia.<sup>52</sup> Australia never mentioned, much less asserted, multicollinearity as part of its "case". By developing testing for multicollinearity, which was used to reject the Dominican Republic's models, the Panel developed its own line of evidence and argument that served Australia's case.<sup>53</sup>

#### ***b. The Panel's errors related to robustness criteria debated with the parties***

86. In relation to the evidence on smoking prevalence and consumption, the Panel also failed to assess objectively robustness criteria that had been the subject of some exchange with the parties. The Panel erred in its application of four criteria relating to: tobacco costliness, reweighting, endogeneity, and the proportionality assumption. Tobacco costliness was addressed as an example in the introduction above.

##### ***i. Reweighting***

87. When a researcher uses survey data to estimate the impact of a policy intervention on a population (like the TPP measures on the Australian population), s/he must ensure that the dataset is representative of the underlying population. As demographic changes to the underlying population occur, data providers periodically *reweigh* the surveyed sample to ensure that it remains representative, and a researcher must control for these reweighting events.

88. The Panel recognized the importance of reweighting for correctly estimating the actual impact of the TPP measures on smoking prevalence in the Roy Morgan Single Source ("RMSS") dataset.<sup>54</sup> The Panel also found that the parties controlled for reweighting events in the RMSS dataset.<sup>55</sup> However, the Panel rejected the robustness of the Dominican Republic's controls for those reweighting events in the RMSS dataset, while accepting the robustness of Australia's. In so doing, the Panel failed to undertake an objective assessment of the matter.

89. The Panel's finding that Australia's evidence was "robust" to reweighting involved inconsistent treatment of the parties' evidence.<sup>56</sup> The Panel's errors relate to the fact that the Panel found that Australia's evidence was robust to reweighting, despite the fact that the models on which Australia relied, and which were accepted by the Panel, were affected by issues that the Panel found problematic when present in the Dominican Republic's evidence.

90. *First*, the Panel accepted Australia's evidence when Australia's expert, Dr Chipty, relied on a model submitted by the Dominican Republic's expert, Professor List, that controlled for reweighting events. The Panel had rejected the robustness of the *very same model* when presented by Professor List.

91. *Second*, the Panel accepted Dr Chipty's evidence relying on Professor List's model that controlled for reweighting, despite the fact that Dr Chipty relied on an intermediate specification that did not control for the declining trend in smoking. However, the Panel elsewhere insisted that the complainants' models were not acceptable if they did not control for the declining trend in smoking.

<sup>50</sup> Appellate Body Report, *US – Upland Cotton* (Article 21.5 - Brazil), para. 292.

<sup>51</sup> Panel Report, Appendix C, para. 107.

<sup>52</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.221.

<sup>53</sup> Panel Report, Appendix C, para. 107.

<sup>54</sup> Panel Report, Appendix C, para. 108.

<sup>55</sup> Panel Report, Appendix C, para. 108.

<sup>56</sup> Panel Report, Appendix C, para. 120.

92. *Third*, the Panel treated the parties' evidence inconsistently in relation to multicollinearity. On the one hand, the Panel rejected the Dominican Republic's models when they controlled for reweighting, on the view that reweighting increased multicollinearity.<sup>57</sup> On the other hand, the Panel accepted Dr Chipty's models when she controlled for reweighting, despite the fact that all of her models were also affected by multicollinearity, and that, for each model, reweighting increased multicollinearity.

93. Moreover, the Panel's reasoning regarding the treatment of reweighting events in the parties' evidence was "internally incoherent".<sup>58</sup> The Panel "recognize[d] the importance of attempting to control" for reweighting, and considered it important that Australia's prevalence results were "robust" to controlling for reweighting.<sup>59</sup> However, the Panel ignored that Dr Chipty's models did not "attempt [...] to control" for all four reweighting events in the RMSS dataset.

## ii. Endogeneity

94. As one of the criteria used to assess the econometric robustness, the Panel assessed whether the models are affected by "endogeneity". Endogeneity can arise where the TPP measures (indirectly) affect smoking by impacting other variables (such as price) that are included as controls in the models.<sup>60</sup> The Panel expressed concern that, were such an "indirect" effect on smoking to occur (i.e. TPP measures → change in price → change in smoking), it would not be attributed to the TPP measures but to the price.

95. The issue of endogeneity relates, therefore, to the way the parties' models controlled for tobacco costliness. The parties disagreed how to control for tobacco costliness in their prevalence and consumption models. Three different approaches were discussed: (i) *price* (using retail prices, which account for tax and non-tax changes in price); (ii) *tax levels* (which account for all tax changes, but not for non-tax changes in price); and, (iii) *tax dummies* (which account solely for the three major tax hikes adopted by Australia in 2010, 2013, and 2014).

96. The Panel explained that the price control has the advantage of "account[ing] implicitly for all the factors that affect tobacco price, including the excise tax increases but not only that", but, unlike tax levels and tax dummies, potentially raises an endogeneity problem (because the TPP measures may affect price).<sup>61</sup>

97. The Panel, therefore, rejected the Dominican Republic's models which used a price control. It accepted Australia's models because, by using tax dummies, they avoided a potential endogeneity problem.<sup>62</sup> In so doing, the Panel failed to make an objective assessment of the matter, in violation of Article 11 of the DSU.

98. The Panel treated the "same class of quantitative evidence" in an internally inconsistent way.<sup>63</sup> *First*, the Panel credited Australia, but not the Dominican Republic, for avoiding endogeneity in any models that used a non-price control (i.e. tax dummies or tax levels).<sup>64</sup> The Dominican Republic submitted several models that used tax dummies and tax levels, but these were also rejected. *Second*, the Panel dismissed the Dominican Republic's evidence that used a price control – but not Australia's – because of a potential endogeneity problem.<sup>65</sup> Australia submitted model specifications that used price (instead of tax dummies or tax levels), and the Panel relied on them.<sup>66</sup>

99. The Panel also failed to provide "reasoned and adequate explanations" for its finding that the Dominican Republic's experts did not address "the potential impact of the TPP measures on prices".<sup>67</sup> To the contrary, for endogeneity reasons, the Dominican Republic's experts presented models that

<sup>57</sup> Panel Report, Appendix C, para. 108.

<sup>58</sup> Appellate Body Report, *Argentina – Import Measures*, footnote 543 to para. 5.179.

<sup>59</sup> Panel Report, Appendix C, para. 108.

<sup>60</sup> Panel Report, Appendix C, para. 120; and Appendix D, para. 115.

<sup>61</sup> Panel Report, Appendix C, para. 106.

<sup>62</sup> Panel Report, Appendix C, paras. 107 and 120; and Appendix D, paras. 106 and 115.

<sup>63</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 294.

<sup>64</sup> Panel Report, Appendix D, para. 115.

<sup>65</sup> Panel Report, Appendix D, para. 115.

<sup>66</sup> Chipty Second Rebuttal Report, (Exhibit AUS-591), Table 5, Row [B]; and List Third Supplemental Report, (Exhibit DOM/IDN-7), Table 5.

<sup>67</sup> Panel Report, Appendix C, para. 107.

used tax dummies and tax levels – and not price – and still found no TPP effect on smoking. As the experts explained, these results demonstrated that the TPP measures did not affect smoking through price, and that models using a price control were not affected by endogeneity.<sup>68</sup> The Panel did not reconcile its statement that the Dominican Republic did not address "the potential impact of the TPP measures on prices" with this evidence and argument.

### iii. Proportionality assumption

100. In cigarette consumption models, the Panel also considered how to control for tobacco costliness. The Dominican Republic had presented models that used tax levels (and price) as a control, while Australia used only tax dummies. The Panel acknowledged that when tax levels – instead of tax dummies – are used, there is no TPP effect on consumption, even in Australia's models.<sup>69</sup> Tax levels accounted for all tax increases, whereas tax dummies accounted for only 59 percent of those increases.

101. However, the Panel concluded that the use of tax levels was inappropriate. Tax levels *assume proportionality* between the *size* of a given tax increase and the *impact* of that increase on tobacco consumption.<sup>70</sup> The Panel accepted Dr Chipty's assertion that this so-called "proportionality assumption" did not hold in this case.

102. The Panel, therefore, rejected the Dominican Republic consumption models that used tax levels.<sup>71</sup> In so doing, the Panel failed to provide "reasoned and adequate explanations" for this finding, in violation of Article 11 of the DSU.<sup>72</sup>

103. Dr Chipty's assertion that the proportionality assumption did not hold was based on her own cigarette consumption model. However, as the Dominican Republic explained above, this model produced "*nonsensical*" results, showing that a 12.5 percent increase in tax, in 2013, led to a *statistically significant increase* in consumption.

104. The Panel did not "explain how it reconciled" its acceptance of Dr Chipty's assertions regarding the proportionality assumption, using her "*nonsensical*" consumption model with the Dominican Republic's contrary "rebuttal arguments and evidence". These showed that Dr Chipty's assertions that the proportionality assumption did not hold were a direct consequence of her "*nonsensical*" tax result.<sup>73</sup>

## **B. The Panel failed to make an objective assessment of the pre-implementation evidence on the anticipated impact of the TPP measures**

105. The Dominican Republic's second ground of appeal concerns the Panel's failure to assess objectively the *pre-implementation* evidence concerning the *anticipated* impact of the TPP measures. For several reasons, taken individually and collectively, the Panel acted inconsistently with Article 11 of the DSU.

106. The pre-implementation evidence sought to *predict* the *potential* effects of the TPP measures. The evidence included the pre-implementation "TPP literature", along with research based on behavioural theory, expert opinion, and industry documents.

### **1. The Panel failed to make an objective assessment of the matter in relation to the evidence and argument on the appeal of tobacco products prior to the implementation of the TPP measures**

107. The parties presented evidence and argument on whether the TPP measures could be *expected* to have an effect on the appeal of tobacco products, and, if so, whether a change in appeal could be *expected* to carry through to actual smoking behaviours. To recall, reduced pack appeal was one of three "proximal outcomes" ("mechanisms") through which Australia's TPP measures were

<sup>68</sup> IPE Third Updated Report, (Exhibit DOM-375), para. 64.

<sup>69</sup> Panel Report, Appendix D, para. 116.

<sup>70</sup> Panel Report, Appendix D, paras. 106 and 116.

<sup>71</sup> Panel Report, Appendix D, para. 106; Panel Report, Appendix D, para. 116.

<sup>72</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, footnote 618 to para. 293.

<sup>73</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 918.

hypothesized to influence more distal outcomes (e.g. quit-related intentions) and ultimately smoking behaviours.<sup>74</sup>

108. The context for the parties' arguments was Australia's so-called "dark market", in which traditional advertising of tobacco products was prohibited,<sup>75</sup> and large GHWs were displayed on packaging, both *before* and *after* the TPP measures were implemented.<sup>76</sup>

109. According to Australia, the TPP measures would reduce appeal and, ultimately, reduce smoking, by reducing consumers' "positive perceptions" of tobacco products, especially in a dark market.<sup>77</sup>

110. The Dominican Republic explained that Australia's assertion depended on the existence of *positive* perceptions before the TPP measure were introduced. However, data collected by Australian anti-tobacco entities demonstrated the exact opposite: before the TPP measures were introduced, Australian youth and adults had *negative* perceptions regarding partially branded Australian packs, with large GHWs.<sup>78</sup>

111. The Dominican Republic also demonstrated that the relationship that Australia predicted between pack appeal and smoking behaviours was not supported by pre-implementation consumer behavior: brands described as *highly appealing* to Australian youth had *no* Australian consumers, while the *most smoked* brands in Australia were among the *least appealing* to young and adult Australians.<sup>79</sup>

112. The Panel predominantly assessed pre-implementation evidence that was *not* specific to Australia. It concluded that tobacco packaging "may be used, and has in fact been used, to *generate positive perceptions* of tobacco products", and that plain packaging would reduce the appeal of tobacco products.<sup>80</sup> The Panel also found that it was "reasonable to *hypothesize* some correlation" between reduced appeal and smoking behaviours in a context where packaging provided the "only opportunity to convey a *positive perception*".<sup>81</sup> In reaching these findings, the Panel failed to make an objective assessment in at least two ways.

113. *First*, despite making over 20 intermediate findings about supposed *positive* consumer perceptions of tobacco packaging, the Panel nowhere engaged with the Dominican Republic's evidence that: (1) before the TPP measures, Australians already had *negative* perceptions about partially branded packs with large GHWs; and (2) there was no relationship between brand appeal and smoking in Australia.<sup>82</sup>

114. *Second*, the Panel's reasoning was "incoherent". In finding that plain packaging would succeed by changing *positive* perceptions about tobacco packaging, the Panel emphasized the importance of the Australian context.<sup>83</sup> However, the Panel failed to reconcile this finding with the *only* evidence on the record addressing perceptions about tobacco packaging in the *Australian* context prior to the

<sup>74</sup> See section II, above.

<sup>75</sup> Panel Report, footnote 1338 to para. 7.450; for advertising, see Panel Report, 2.56-2.60 and 2.67.

<sup>76</sup> GHWs covered 30 percent of the front face and 90 percent of the back face of tobacco packaging prior to the TPP measures, and 75 percent and 90 percent, respectively, afterwards (Panel Report, paras. 2.53-2.55).

<sup>77</sup> Panel Report, paras. 7.670 and 7.848; and Australia's first written submission, paras. 152 and 182.

<sup>78</sup> Dominican Republic opening oral statement at the second substantive meeting with the Panel; Dominican Republic's comments on Australia's response to question No. 170 from the Panel following the second substantive meeting, para. 273; White et al. 2015a, (Exhibits AUS-186, DOM-235), p. ii43; and ASSAD 2011 Report, (Exhibit DOM-360), p. 115 and 257.

<sup>79</sup> Dominican Republic's comments on Australia's response to question No. 160, para. 280; Dominican Republic's response to Panel question No. 108, paras. 143 and 144, referring to Parr et al. (2011a), (Exhibits AUS-117, JE-24(49)), p. 43 and White and Bariola (2012), (Exhibit DOM-227), p. 19; Dominican Republic's second written submission, para. 254; and Dominican Republic's comments on Australia's response to question No. 160, para. 280.

<sup>80</sup> Panel Report, paras. 7.663 (emphasis added), 7.682, and 7.778.

<sup>81</sup> Panel Report, para. 7.1034 (emphasis added).

<sup>82</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 918-920.

<sup>83</sup> Panel Report, para. 7.1034.



TPP measures, which was the Dominican Republic's evidence that partially branded packs, with large GHWs, already conveyed *negative* perceptions.

## **2. The Panel failed to assess objectively whether the "anticipated effects" of the TPP measures were confirmed by the "actual effects"**

115. The parties agreed that it was essential to assess whether the effects *anticipated* in the pre-implementation evidence were borne out by *actual* effects in the post-implementation period.<sup>84</sup> The parties disagreed, however, on whether the predictions in the pre-implementation evidence were confirmed in the post-implementation evidence.

116. Australia submitted that the pre-implementation TPP literature correctly predicted the actual effects of the TPP measures in Australia. The Dominican Republic submitted that this literature "vastly overstated" the effects actually arising from the TPP measures. The Panel failed to make an objective assessment of the parties' evidence and argument.

117. The Panel assessed whether the predicted impact was borne out by the actual impact *only* with regard to the *appeal* of tobacco products. The Panel found that the actual effects on appeal "*confirm[ed]*", rather than *discredit[ed]*" the predicted effects.<sup>85</sup> On the other hand, the Panel did *not* similarly verify whether the predicted impact on other proximal outcomes (GHWs, and deception) and on distal outcomes (e.g. quit intentions, quit attempts) were confirmed in the actual effects of the TPP measures. More generally, the Panel did not address whether the actual effects confirmed the hypothesis that the TPP measures would set in motion the predicted chain of effects (proximal outcomes → distal outcomes → smoking behaviour).

118. The Panel's failure to adopt a "coherent" approach to its assessment of this causal chain is particularly problematic because the Panel failed to verify precisely those variables, including variables closer to smoking behaviour (i.e. distal outcomes), for which the predicted effects were not confirmed in the post-implementation evidence.

## **3. The Panel failed to make an objective assessment of the cigar-specific evidence**

119. The Parr et al 2011b study, commissioned by Australia, was the only pre-implementation study to examine the anticipated impact of plain packaging on cigar smoking.<sup>86</sup> This study suffered from serious methodological flaws, some of which the authors themselves admitted.<sup>87</sup>

120. The Panel acknowledged the study's scientific flaws, yet relied on the study.<sup>88</sup> In so doing, the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU.

121. *First*, the Panel failed "to provide reasoned and adequate explanations" for accepting Parr et al. 2011b.<sup>89</sup> The Panel stated that the authors provided "relevant" reasons for the flaws in their study, which all related to practical considerations, such as time constraints.<sup>90</sup> The Panel failed, however, to explain why practical considerations, or the admission of such flaws, can overcome scientific flaws. The evidence remains flawed in terms of scientific method.

122. *Second*, the Panel treated competing evidence inconsistently.<sup>91</sup> For instance, the Panel accepted Parr et al. 2011b despite significant confounding factors in the study. The Panel was satisfied because these confounding factors resulted from practical considerations. Yet, the Panel rejected evidence submitted by the complainants when practical considerations led to confounding factors.

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<sup>84</sup> Dominican Republic's comments on Australia's response to Panel question No.196, para. 573.

<sup>85</sup> Panel Report, para. 7.954. (emphasis added)

<sup>86</sup> Panel Report, para. 7.622.

<sup>87</sup> Panel Report, para. 7.621. (emphasis added)

<sup>88</sup> Panel Report, footnote 1809 to para. 7.659.

<sup>89</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, footnote 618 to para. 293.

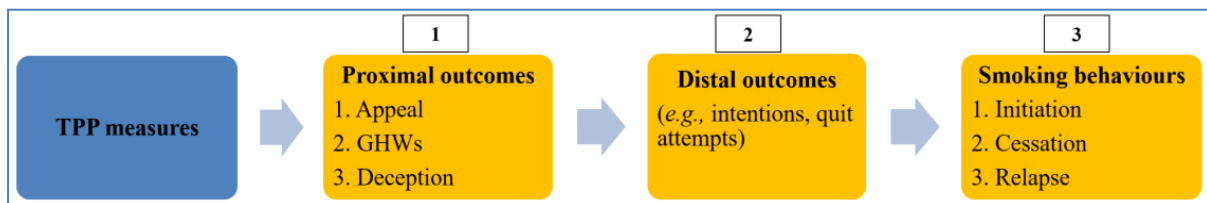
<sup>90</sup> Panel Report, para. 7.622.

<sup>91</sup> Appellate Body Report, *Argentina – Import Measures*, footnote 543 to para. 5.179.

### C. The Panel erred in assessing the post-implementation evidence on the actual impact of the TPP measures on proximal and distal outcomes

123. The Dominican Republic's third ground of appeal concerns the Panel's failure to make an objective assessment of the *post-implementation* evidence concerning the *actual* impact of the TPP measures on *proximal and distal* outcomes.

124. In addition to providing post-implementation evidence on the actual impact on smoking prevalence and consumption, the parties submitted post-implementation evidence on the impact of the TPP measures on *proximal* outcomes (i.e. appeal, GHWs, and deception mechanisms) and *distal* outcomes closer to smoking behaviour (e.g. intentions, quit attempts).



125. The parties considered this evidence relevant to show whether the TPP measures had set in motion the causal chain through which the Panel expected the measures to reduce smoking (proximal outcomes → distal outcomes → smoking behaviour). Australia had, for instance, funded a National Tobacco Plain Packaging Tracking Survey ("NTPPTS"), which was designed to evaluate whether the TPP measures were bringing about changes at each step in the causal chain. A series of papers were published regarding the NTPPTS and other post-implementation datasets in which the authors concluded that the TPP measures were working as intended through the causal chain.

126. At the Panel's request, the Dominican Republic was given access to the NTPPTS dataset and certain other data, as well as computer codes used by the authors of the published papers.<sup>92</sup> Based on the data provided, the Dominican Republic showed that the TPP measures had not set in motion the predicted causal chain, and that the published TPP papers "provide an inaccurate picture of the empirical evidence", including "greatly underreporting" results that showed no impact of the TPP measures.<sup>93</sup>

127. Yet, the Panel concluded that the TPP measures (combined with enlarged GHWs) have "in fact reduced the appeal of tobacco products" and had "some impact on the effectiveness of GHWs".<sup>94</sup> In its conclusion, the Panel made no reference to the evidence on other proximal outcomes or the distal outcomes – of which there were many – for which there were no positive TPP effects.

128. For a variety of reasons, individually and collectively, the Panel failed to make an objective assessment, as required by Article 11 of the DSU.

#### 1. The Panel findings on proximal and distal outcomes are incoherent

129. The Panel's findings in relation to proximal and distal outcomes were incoherent. *First*, the Panel made findings that were incoherent with its findings that it was necessary to assess the successive links in the causal chain, and that it was not sufficient to consider proximal outcomes alone.<sup>95</sup>

130. The Panel, and the parties, recognized the need to adopt a holistic approach to assessing the evidence on each successive link in the causal chain.<sup>96</sup> The Panel specified that proximal outcomes "*alone would not be sufficient* to draw conclusions about the contribution of the TPP measures to

<sup>92</sup> Panel paras. 1.78-1.100.

<sup>93</sup> Ajzen et al. Data Report, (Exhibit DOM/IDN-2), para. 9.

<sup>94</sup> Panel Report, 7.1036.

<sup>95</sup> Panel Report, footnote 2303 to para. 7.843 and para. 7.564.

<sup>96</sup> See e.g. Panel Report, paras. 7.488, 7.491, 7.519, 7.580, 7.610, 7.648, 7.684, and 7.1030.

their public health objective", and that the impact of the TPP measures "depends on successive 'links in the [causal] chain'".<sup>97</sup>

131. However, the Panel did not carry out a holistic assessment of the links in the causal chain. It instead adopted an atomistic assessment of each individual proximal and distal outcome. In reaching its overall finding, it then relied on the limited evidence of "positive" outcomes, and did not take into account the remaining evidence of "negative" outcomes that showed no TPP effects. This "positive" evidence concerned certain proximal outcomes (appeal and a few GHW outcomes). However, this "positive" evidence was not considered holistically with the "negative" evidence for other proximal outcomes (other GHW outcomes, deception, smoking enjoyment) and for all distal outcomes. This remaining evidence showed that the limited positive effects on proximal outcomes had *not* carried through to any other outcomes, including those closer to smoking.<sup>98</sup> As the "enjoyment" outcome showed, consumers found their pack less appealing, but *they still enjoyed smoking just as much*.

132. *Second*, the Panel's summary of the impact of the TPP measures on distal outcomes is not faithful to the Panel's own findings. The Panel failed to acknowledge that, for the two distal outcomes for which an initial TPP effect was found (i.e. calls to the Quitline and avoiding plain packs), that effect wore out within a year.

## 2. The Panel erred in assessing the robustness of the parties' evidence

133. The pattern of the Panel's errors with respect to its assessment of the evidence on proximal and distal outcomes mirrors the errors relating to its assessment of the evidence on prevalence and consumption, discussed above. As with its assessment of prevalence and consumption, the Panel failed to adopt a *process* that respected the parties' due process rights, and it failed to assess the evidence in a coherent and even-handed manner.

134. For instance, the Panel failed to make an objective assessment of the parties' evidence on calls to the Quitline. Without posing any question during the proceedings, the Panel identified several flaws in the analysis by the Dominican Republic's expert, Ajzen et al, of calls to the Quitline. The parties did not raise, or have any opportunity to address, the critiques identified by the Panel. For example, the Panel developed its own graphical analysis, incorrectly presenting Ajzen et al's econometric model. The parties were never able to comment on this analysis, which suffers from an obvious flaw. Had the Dominican Republic been granted its due process rights, it could have addressed the Panel's critique.<sup>99</sup>

135. The Panel also treated the parties' evidence inconsistently by not addressing whether the published TPP paper on which Australia relied (Young et al 2014) was subject to the "same [perceived] limitation[s]" as Ajzen et al.<sup>100</sup> In fact, Australia's evidence displays the same perceived flaws that the Panel identified in Ajzen et al. Yet, the Panel accepted Young et al 2014, without any critique.

136. Finally, the Panel "made the case" for Australia. Australia did not assert, as part of its case, that Ajzen et al was affected by any of the critiques identified by the Panel.

## 3. The Panel failed to make an objective assessment in finding that the datasets are less suited to measuring the impact on distal outcomes

137. At the outset of the proceedings, Australia relied on published TPP papers examining Australia's datasets (e.g. NTPPTS) to assert that the TPP measures were working though the "causal chain" as intended in respect of proximal and distal outcomes.<sup>101</sup>

138. However, given access to the datasets and the computer code used by the authors of the TPP papers, Ajzen et al found that the TPP measures led to very few changes in distal outcomes, and that none of these changes lasted even a year. Australia's data, therefore, showed that

<sup>97</sup> Panel Report, paras. 7.564 (emphasis added), 7.693, and 7.699.

<sup>98</sup> Panel Report, paras. 7.963(b), 7.1036 and 7.1043; Appendix A, paras. 30-31, 68, 84, and 86(b); and, Appendix B, paras. 40, 59, 71-72, 75, 91, 100, 103, and 120.

<sup>99</sup> Appellate Body Report, *US – Continued Zeroing*, para. 347. (emphasis added)

<sup>100</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5)*, para. 292.

<sup>101</sup> Ajzen et al. Data Report, (Exhibit DOM/IDN-2).

TPP measures had failed to set in motion the predicted causal chain.<sup>102</sup> In response, Australia asserted that its datasets were not actually suited to assessing distal outcomes.<sup>103</sup>

139. The Panel did not explicitly address the suitability of the datasets. However, in reaching a conclusion on distal outcomes, it said that the NTPPTS data "may [...] be more suited" to analysing proximal outcomes "than more distal outcomes", in part because survey questions were not put to "recent quitters".<sup>104</sup> This finding is not based on an objective assessment of the matter, as required by Article 11 of the DSU.

140. *First*, the Panel failed to engage with the Dominican Republic's contrary evidence showing that the datasets were not "less suited" to assessing distal outcomes.<sup>105</sup> The Dominican Republic pointed out that Australia's dataset designers decided to measure, and the authors of the TPP papers decided to report on, the TPP impact on distal outcomes. Neither the designers nor the authors – who overlapped – ever suggested that the datasets were not suited to assess distal outcomes. The Dominican Republic also showed that the suitability of the datasets was confirmed by the empirical evidence.

141. *Second*, the Panel's reasoning is internally incoherent. The Panel explained that the datasets were unreliable because questions on distal outcomes "were not asked to 'recent quitters'", which necessarily assumes that the TPP measures induced increased quitting within the first year of implementation (the survey period).<sup>106</sup> However, the Panel elsewhere accepted that the TPP measures had *no* positive impact on quitting in the first year of implementation.<sup>107</sup>

#### 4. The Panel failed to make an objective assessment regarding cigar-specific evidence

142. Only one paper – by Miller et al 2015 – examined the post-implementation impact of the TPP measures on cigar smoking.<sup>108</sup> Australia relied on Miller et al 2015 as affirmative evidence of such an impact.<sup>109</sup>

143. However, Ajzen et al identified serious methodological shortcomings in the study. They also explained that the results, even if taken at face value, show that the TPP measures had failed to produce the anticipated effects on cigar smoking.<sup>110</sup>

144. The Panel accepted Miller et al 2015 because: the study *acknowledged* the methodological shortcomings; it was the only paper addressing the impact of the TPP measures on cigar smokers; and it was *unclear* to what extent a different methodology would have changed the results of the study.<sup>111</sup> In so finding, the Panel erred under Article 11 of the DSU.

145. *First*, the Panel treated competing evidence inconsistently. On one hand, for Miller et al 2015, the Panel used the following as reasons to *accept* the study: the authors' acknowledgement of shortcomings, ambiguity in the consequences of changing methodology, and the absence of other relevant data.<sup>112</sup> On the other hand, in assessing the complainants' evidence, the Panel used similar considerations as reasons to *reject* the robustness of evidence.<sup>113</sup>

<sup>102</sup> Dominican Republic's comments on Australia's response to Panel question No. 198, paras. 394 and 713.

<sup>103</sup> Australia's response to Panel question No 196, para. 237.

<sup>104</sup> Panel Report, Appendix B, para. 118.

<sup>105</sup> Australia's response to Panel question No 196, para. 237.

<sup>106</sup> Panel Report, Appendix B, para. 118; and Ajzen et al. Second Data Rebuttal Report, (Exhibit DOM/IDN-8), para. 14.

<sup>107</sup> Panel Report, Appendix A, footnote 163 to para. 101; and Appendix D, footnote 50 to para. 46, and paras. 90, 111, and 113.

<sup>108</sup> Panel Report, para. 7.622.

<sup>109</sup> Australia's first written submission, paras. 82, 173, 184, 197, and footnote 618 to para. 439.

<sup>110</sup> Dominican Republic's second written submission, paras. 457-462; Ajzen et al. Data Report (Exhibit DOM/IDN-2), paras. 251-262.

<sup>111</sup> Panel Report, Appendix A, paras. 32 and 71; and, Appendix B, paras. 40 and 76.

<sup>112</sup> Panel Report, Appendix A, paras. 32 and 71; *see also* para. 72; and, Appendix B, paras. 40 and 76.

<sup>113</sup> Panel Report, para. 7.955; Appendix A, para. 69; Appendix B, paras. 38, and 115-116; Appendix D, para. 114; and Appendix E, paras. 30-31.

146. *Second*, the Panel failed to provide reasoned and adequate explanations, and failed to engage with the Dominican Republic's evidence, in its assessment of Ajzen et al and Miller et al 2015. In one instance, the Panel explicitly cited Ajzen et al as the basis for findings that were, in fact, *contradictory* to the evidence presented by Ajzen et al.<sup>114</sup> The Panel also failed to address, in its assessment of the impact of the TPP measures on cigar smoking, the Dominican Republic's evidence that the TPP measures had no impact on certain distal outcomes.<sup>115</sup> The Panel's failure to engage with this evidence had "an explicit bearing on the objectivity of [its] factual assessment".<sup>116</sup>

## **5. The Panel erred in relation to the evidence on the correlation between the appeal of tobacco products and smoking behaviours**

147. Both the Dominican Republic and Australia presented *post-implementation* evidence on the existence of a correlation between the appeal of the tobacco products and smoking behaviours, as discussed above. In the absence of such a correlation, a reduction in the appeal of tobacco products cannot cause a change in smoking behaviours.

148. Australia relied on data analysis in one of the TPP papers, by Brennan et al 2015, to assert that a correlation existed.<sup>117</sup>

149. With access to the authors' data and computer code, Ajzen et al re-analysed Brennan et al, and found that it did not correct for systematic bias towards finding false positives.<sup>118</sup> Ajzen et al then corrected for this bias, and found that there was no correlation.<sup>119</sup>

150. While the Panel accepted Brennan et al's results, it did not discuss Ajzen et al's criticisms of the paper, in particular the systematic bias towards finding false positives.<sup>120</sup> Instead, the Panel separately criticized Ajzen et al's analysis on the basis that it detected "*only one or two*" statistically significant explanatory variables, and could therefore be subject to multicollinearity.<sup>121</sup> The Panel failed, once again, to make an objective assessment of the parties' evidence and argument.

151. *First*, the Panel compromised the Dominican Republic's due process rights by applying econometric criteria that it did not "explore" with the parties.<sup>122</sup> The Panel determined, on its own initiative, and without providing the parties with an opportunity to comment, that *the number of statistical significant control variables*, and *multicollinearity*, were pertinent to assessing Ajzen et al.<sup>123</sup>

152. *Second*, the Panel treated the parties' evidence inconsistently. It criticized Ajzen et al for perceived flaws related to the number of statistically significant control variables and multicollinearity, yet accepted analysis by Brennan et al 2015, which was subject to exactly the "*same limitation[s]*".<sup>124</sup>

153. *Third*, the Panel failed to provide reasoned and adequate explanations for its assertion that Ajzen et al is affected by an insufficient number of statistically significant control variables and by multicollinearity. Even with the Panel Report in hand, the Dominican Republic is left to guess the basis for the Panel's criticisms, including any basis in the economic literature.

<sup>114</sup> See Panel Report, Appendix A, para. 71 (emphasis added); and Ajzen et al. Data Report, (Exhibit DOM/IDN-2), para. 257. The Panel's findings can also not be based on Miller et al. for the simple reason that these authors failed to reports these results.

<sup>115</sup> See Panel Report, Appendix B, paras. 40 and 120(e); and Ajzen et al. Data Report, (Exhibit DOM/IDN-2), para. 257; and Dominican Republic's second written submission, paras. 457-462.

<sup>116</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442.

<sup>117</sup> Australia's first written submission, para. 204.

<sup>118</sup> Ajzen et al. Data Report, (Exhibit DOM/IDN-2), para. 75(e); and Ajzen et al. Second Data Rebuttal Report, (DOM/IDN-8).

<sup>119</sup> Ajzen et al. Data Report, (Exhibit DOM/IDN-2), para. 203.

<sup>120</sup> Panel Report, Appendix B, para. 116.

<sup>121</sup> Panel Report, Appendix B, para. 116.

<sup>122</sup> Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1137.

<sup>123</sup> Panel Report, Appendix B, para. 116; and Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1137.

<sup>124</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5)*, para. 292 (emphasis added).

154. *Fourth*, and finally, the Panel "made the case" for Australia. Australia "did not claim before the Panel" that the complainants' econometric models should be assessed on the basis of the number of statistically significant control variables and of multicollinearity.<sup>125</sup> It never mentioned these criteria as part of its case.

#### **D. The Panel erred in assessing the evidence on the potential future impact of the TPP measures**

155. The Dominican Republic's fourth ground of appeal concerns the Panel's failure to make an objective assessment of the evidence on the potential future impact of the TPP measures on smoking behaviours.

156. At the outset of the proceedings, Australia argued that it was too soon to evaluate the actual impact of the TPP measures on prevalence and consumption, because such effects would only materialize, or be detectable, at some point in the future.<sup>126</sup> Australia subsequently changed its position when its expert, Dr Chipty, claimed to find that the TPP measures had already had an actual impact on smoking behaviour.<sup>127</sup>

157. At the same time, Australia maintained that the greatest effect on smoking behaviour would occur "in the long term".<sup>128</sup> Australia advanced two hypotheses: the first is that TPP effects on youth initiation will be delayed ("delayed initiation" argument); and, the second is that TPP effects on cessation will be delayed ("delayed cessation" argument).

158. The Dominican Republic demonstrated that Australia's two hypotheses were not "tested and supported by sufficient evidence".<sup>129</sup> The "delayed initiation" theory relied on an assumption that Australian youth had *positive* perceptions of tobacco packaging before the introduction of the TPP measures, which the Dominican Republic had shown to be false.<sup>130</sup> The "delayed cessation" theory relied on an assumption that the TPP measures had caused an increase in quit attempts, which the Dominican Republic had also shown to be false.<sup>131</sup> Further, the evidence that certain TPP effects had worn out in less than a year contradicted Australia's hypothesis that the TPP effects would strengthen over time.<sup>132</sup>

159. The Panel did not consider any of this evidence and argument in its assessment of potential future contribution. Instead, it merely stated that it considered "*reasonable*" Australia's "*suggestion*" that the TPP measures may have delayed initiation and cessation effects, and may, therefore, contribute to Australia's objective in future.<sup>133</sup> In so doing, the Panel erred in two ways.

160. *First*, the Panel incorrectly applied the legal standard for assessing a "future" contribution under Article 2.2 of the TBT Agreement. The Appellate Body has underscored that panels must establish a measure's potential future contribution on the basis of "quantitative projections in the future, or *qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence*".<sup>134</sup> In this case, the Panel failed to address any evidence to establish that Australia's hypotheses were properly "tested and supported by sufficient evidence".<sup>135</sup>

<sup>125</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.221.

<sup>126</sup> Australia's first written submission, para. 670.

<sup>127</sup> See e.g. Australia's second written submission, para. 509; response to Panel question No. 196, para. 238. See also Integrated executive summary of the arguments of the Dominican Republic, Annex B-1, paras. 55-71.

<sup>128</sup> Australia's second written submission, paras. 6, 495 and 498.

<sup>129</sup> Dominican Republic's second written submission, paras. 379-380.

<sup>130</sup> See Section above, related to the evidence on consumer perceptions.

<sup>131</sup> Dominican Republic's second written submission, para. 500; Ajzen et al. Data Report, (Exhibit DOM/IDN-2), p. 42, Table 5A.

<sup>132</sup> Dominican Republic's second written submission, para. 483.

<sup>133</sup> Panel Report, para. 7.1044.

<sup>134</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151 (emphasis added); and Panel Report, para. 7.982.

<sup>135</sup> Panel Report, para. 7.982; and Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151 (emphasis added).

161. *Second*, the Panel erred under Article 11 of the DSU. Specifically, the Panel failed to engage with the Dominican Republic's evidence on Australia's hypothesized future TPP effects. This evidence refuted the premises of Australia's hypotheses and was, therefore, highly relevant to the Panel's assessment. The Panel offered no explanation to show how the asserted "reasonableness" of Australia's "suggestion" of future effects was grounded in anything more than speculation.<sup>136</sup>

### **III. THE PANEL'S FINDINGS ON THE TRADE-RESTRICTIVENESS OF THE TPP MEASURES DERIVE FROM ERRONEOUS APPLICATION OF ARTICLE 2.2 OF THE TBT AGREEMENT, AND FAILURE TO MAKE AN OBJECTIVE ASSESSMENT UNDER ARTICLE 11 OF THE DSU**

162. Before the Panel, the Dominican Republic explained that Article 2.2 prohibits technical regulations that are "more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfillment would create". As the Appellate Body has explained, a measure is trade-restrictive if it has a limiting effect on international trade,<sup>137</sup> including by limiting "competitive opportunities" of imported products as revealed through the design, structure and expected operation of a measure.<sup>138</sup> In this section, the Dominican Republic summarizes the Panel's errors in its assessment of the trade-restrictiveness of the TPP measures.

#### **A. The Panel erred in applying the concept of "trade-restrictive" under Article 2.2 of the TBT Agreement**

##### **1. The Panel erroneously applied Article 2.2 of the TBT Agreement in finding that a limitation on competitive opportunities was not a sufficient basis to constitute trade-restrictiveness**

163. Before the Panel, the Dominican Republic explained that a measure is "trade-restrictive" under Article 2.2 of the TBT Agreement if it has a "limiting effect" on "competitive opportunities" for imported products.<sup>139</sup> Consistent with this standard, the Dominican Republic explained that the TPP measures are trade-restrictive because they require all tobacco products to be sold as "undifferentiated commodity products that appear to be virtually identical to any other tobacco product on the Australian market".<sup>140</sup> Thus, *by their design and structure alone*, the TPP measures restrict the competitive opportunities enabled by product differentiation.<sup>141</sup> Evidence of actual trade effects is *supplementary* and *not* necessary to find trade-restrictiveness.<sup>142</sup>

164. The Panel agreed, in principle, that a limitation on competitive opportunities may be shown through a qualitative assessment of the design and operation of the measures, and need not "be based on actual trade effects".<sup>143</sup> The Panel also agreed that the TPP measures "limit the opportunity for tobacco manufacturers to compete on the basis of [...] brand differentiation", which has a detrimental impact on consumers' "loyalty" and "willingness to pay".<sup>144</sup>

165. However, despite acknowledging that, by their very design, the TPP measures limit competitive opportunities, the Panel found that this was not sufficient to demonstrate trade-restrictiveness. Instead, the Panel found that it must be shown, using "appropriate evidence", "*how* such effects on the conditions of competition on the market give rise to limiting effects on international trade in tobacco products".<sup>145</sup> This finding relied on an improperly narrow conception of "competitive opportunities" as relating exclusively to price-related (perfect) competition.

166. The Panel further erred in applying Article 2.2 of the TBT Agreement by improperly distinguishing between an assessment of the trade-restrictiveness of discriminatory versus non-discriminatory measures, which is inconsistent with case law under Article 2.2. The Panel effectively

<sup>136</sup> Panel Report, para. 7.1044.

<sup>137</sup> Appellate Body Report, *US – COOL*, paras. 375 and 477. See also Panel Report, *US – Tuna II (Mexico)*, para. 7.455.

<sup>138</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

<sup>139</sup> Panel Report, para. 7.1049.

<sup>140</sup> Panel Report, para. 7.1104.

<sup>141</sup> Panel Report, para. 7.1107.

<sup>142</sup> Panel Report, para. 7.1049.

<sup>143</sup> Panel Report, para. 7.1076; see also Appellate Body Report, *Argentina – Import Measures*, para. 5.217 (referring to the Appellate Body Reports, *China – Raw Materials*, paras. 319-320).

<sup>144</sup> Panel Report, para. 7.1167. (emphasis added) (internal footnote omitted)

<sup>145</sup> Panel Report, paras. 7.1168. (emphasis in the original)

found that, while discriminatory measures *do not* require evidence of trade effects to demonstrate trade-restrictiveness, non-discriminatory measures *do*.<sup>146</sup>

## **2. The Panel erroneously applied Article 2.2 of the TBT Agreement by requiring that the data on cigarette sales "exclusively" show the form of trade-restrictiveness alleged by the Dominican Republic**

167. The Dominican Republic presented evidence of actual trade effects of the TPP measures, notwithstanding that such evidence was not necessary because the TPP measures restrict competitive opportunities by design.<sup>147</sup> Specifically, the Dominican Republic presented evidence of "downtrading", i.e. a substitution of high-end products to low-end products due to consumers' diminished loyalty and willingness to pay.<sup>148</sup> The Panel rejected this as evidence of trade-restrictiveness, because it found the complainants had not demonstrated that the reduction in the ratio of high-end to low-end cigarettes was *exclusively* the result of downtrading caused by the TPP measures.<sup>149</sup> Such a rigid causation requirement constitutes a misapplication of Article 2.2.<sup>150</sup>

## **3. The Panel erred in application of Article 2.2 of the TBT Agreement by requiring consideration of possible actions by suppliers to counteract the trade-restrictive effects of the TPP measures on consumers**

168. The Panel further erred in its application of Article 2.2 of the TBT Agreement by treating the commercial response of suppliers to the TPP measures as a necessary aspect of an analysis of trade-restrictiveness. In particular, the Panel reasoned that, because suppliers might be able to adjust their commercial strategy to offset the trade-restrictive impact of the TPP measures, this could prevent a finding of trade-restrictiveness.<sup>151</sup> However, in establishing trade-restrictiveness, a complainant is not required to demonstrate that suppliers cannot take steps to overcome a measures' limitations on competitive opportunities.<sup>152</sup>

## **B. The Panel failed to make an objective assessment, under Article 11 of the DSU, of the parties' evidence and argument on the actual trade effects of the TPP measures**

169. The Dominican Republic submitted evidence showing that the TPP measures led to downtrading. The Panel agreed that the TPP measures contributed to the reduction in the ratio of high-end to low-end cigarettes in Australia. However, the Panel found this *did not* demonstrate actual trade effects, on the basis of the Panel's own "graphical analysis".<sup>153</sup> The Panel found that its own "graphical analysis" "implied" that "at least part" of this reduction in ratio was due to the overall reduction in sales – i.e. to quitting – and *not* to switching to low-end products.<sup>154</sup> However, neither the complainants nor Australia submitted the "graphical analysis" on which the Panel relied. Instead, this material was produced by the Panel on its own initiative. The Panel failed to make an objective assessment under Article 11 in the following three respects.

170. *First*, in denying the Dominican Republic an opportunity to comment on the Panel's graphical analysis, and its interpretation thereof, the Panel compromised the Dominican Republic's due process rights. *Second*, the Panel failed to provide "reasoned and adequate explanations" for the inferences it drew from its own graphical analysis, which are incorrect. *Third*, by rejecting the complainants' evidence based on the Panel's own graphical analysis, the Panel "made the case" for Australia.

<sup>146</sup> See Panel Report, paras. 7.1168.

<sup>147</sup> See Dominican Republic's first written submission, para. 978; second written submission, para. 938; and comments on Australia's response to Panel question No. 151.

<sup>148</sup> Panel Report, para. 7.1197.

<sup>149</sup> See Panel Report, Appendix E, para. 56(c); *see also* Appendix E, para. 55.

<sup>150</sup> See Appellate Body Report, *US – Tuna II (Mexico)*, para. 236-239.

<sup>151</sup> Panel Report, paras. 7.1201, 7.1221, 7.1218 and 7.1181.

<sup>152</sup> See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 117.

<sup>153</sup> Panel Report, Appendix E, para. 55.

<sup>154</sup> Panel Report, Appendix E, para. 55.



#### **IV. THE PANEL'S ANALYSIS OF THE LESS TRADE-RESTRICTIVE ALTERNATIVES PROPOSED BY THE DOMINICAN REPUBLIC REFLECTS ERRORS IN APPLICATION OF ARTICLE 2.2 OF THE TBT AGREEMENT, AND FAILURES TO MAKE AN OBJECTIVE ASSESSMENT UNDER ARTICLE 11 OF THE DSU**

171. Section IV.A summarizes the Panel's multiple errors in assessing two of the alternatives that the Dominican Republic argued would be less trade-restrictive, and make an equivalent contribution, to Australia's objective. These were: (1) an increase in the minimum legal purchase age of tobacco products from 18 to 21 ("MLPA increase") and (2) an increase in excise taxation of tobacco products ("tax increase").

##### **A. The Panel erred in evaluating the trade-restrictiveness of the proposed alternatives**

172. The Dominican Republic explained that, in addition to a volume based-restriction, the TPP measures entailed an *additional type of trade-restriction* arising from the elimination of competitive opportunities associated with the ability to differentiate products through branding. By contrast, the Dominican Republic's proposed alternatives would restrict trade *only* by reducing sales volumes. Thus, the Dominican Republic explained that the challenged measures are *more* trade-restrictive than the proposed alternatives.<sup>155</sup>

173. Earlier in its findings, the Panel rejected the Dominican Republic's argument that the TPP measures' limitation on the competitive opportunities associated with branding constitutes a trade-restriction, and found that the TPP measures were trade-restrictive *only* by virtue of their impact on the *volume* of trade. Recalling these findings, the Panel concluded that, to the extent that the Dominican Republic's proposed alternatives made an equivalent contribution to Australia's objective, they would reduce trade volumes to a commensurate degree. The Panel was, therefore, not persuaded that the complainants had demonstrated that an MLPA increase or tax increase would be *less* trade-restrictive.<sup>156</sup>

174. However, the Panel had erred in assessing the trade-restrictiveness of the TPP measures. Accordingly, when assessing whether the proposed alternatives were *less* trade-restrictive than the TPP measures, the Panel's benchmark – the degree of trade-restrictiveness of the TPP measures – was improper. The Panel thus erred in finding that the increased MLPA and tax increase alternatives were not less trade-restrictive than the TPP measures.

175. In addition, the Panel erred in evaluating the MLPA increase. In making this evaluation, the Panel took into account the "future effects" of the *trade-restrictiveness* of an MLPA increase.<sup>157</sup> However, when assessing the *contribution* of an MLPA increase to Australia's objective, the Panel *failed* to take into account the "future effects" of an MLPA increase. Thus, the Panel provided "incoherent" reasoning, inconsistently with Article 11 of the DSU.

##### **B. The Panel erred in evaluating the contribution of the proposed alternatives**

176. Before the Panel, the Dominican Republic argued that an MLPA increase and a tax increase would contribute to Australia's objective by banning youth access, and lowering financial access, to tobacco products. The Panel found that, while these measures were apt to contribute to Australia's objective, they would not make an *equivalent* contribution to Australia's objective, because absent the TPP measures, the effects of tobacco packaging would not be addressed "at all", which would weaken the "synergies" in Australia's tobacco control policy.<sup>158</sup> This finding resulted from errors under Article 11 of the DSU, as well as an erroneous application of Article 2.2 of the TBT Agreement.

##### **1. The Panel's errors under Article 11 of the DSU**

177. Elsewhere in its reasoning, the Panel agreed that other elements of Australia's tobacco control policy – including the GHW, point of sale bans, and existing laws against misleading tobacco packaging – addressed the effects of tobacco packaging. The Dominican Republic also submitted argument and evidence to this effect. Thus, the Panel's finding that, without the TPP measures,

<sup>155</sup> See Dominican Republic's response to Panel question No. 151.

<sup>156</sup> Panel Report, para. 7.1417 (MLPA increase) and para. 7.1495 (tax increase).

<sup>157</sup> Panel Report, para. 7.1413.

<sup>158</sup> Panel Report, para. 7.1459, 7.1462, 7.1526-7.1531.

tobacco packaging as a means of communication would not be addressed "at all", is simply incorrect. The Panel failed to provide reasoned and adequate explanations and coherent reasoning, and failed to engage with the Dominican Republic's argument and evidence.

178. In assessing the "future effects" of an MLPA increase, the Panel also provided "incoherent" reasoning. When the potential future effects of a measure worked in favor of Australia, the Panel took them into account. But, when the potential future effects worked in favor of the Dominican Republic, the Panel did not.

## **2. The Panel's errors in the application of Article 2.2 of the TBT Agreement**

### **a. The Panel erred in rejecting the proposed alternatives on the basis that they contributed to Australia's objective using different means than the TPP measures**

179. The Panel accurately articulated the standard under Article 2.2 of the TBT Agreement, finding that "a proposed alternative may achieve an equivalent *degree* of contribution *in ways different* from the technical regulation at issue, and that *what is relevant is the overall degree of contribution that the technical regulation makes to the objective pursued*".<sup>159</sup>

180. However, in evaluating the facts, the Panel found that, in order to make a contribution equivalent to that of the challenged measures, the proposed alternatives *must* address "*the aspect of the problem* that the challenged measures seek to address".<sup>160</sup> Thus, for the Panel, alternatives working through a different mechanism could never make the *degree of contribution*, because they would "*necessarily leave in place* those aspects of tobacco product and retail packaging that the TPP measures address".<sup>161</sup> Essentially, the Panel rejected any alternatives that work through a mechanism different than the TPP measures. This approach is not consistent with the legal standard under Article 2.2, as articulated by the Panel itself.

### **b. The Panel erred in its application of Article 2.2 of the TBT Agreement when assessing the presence of synergies on a one-sided basis**

181. A key aspect of the Panel's reasoning was that "synergies" *may* be lost if the TPP measures were replaced with the proposed alternatives.<sup>162</sup> By "synergies", the Panel referred to a situation where the TPP measures make another, existing tobacco control measure more effective in reducing smoking. However, the Panel took into account *only* the *loss* of synergies that could arise from replacing the TPP measures; the Panel did not take into account synergies that could be *gained* from implementing the proposed alternatives, despite evidence of such synergies.<sup>163</sup> The Panel therefore failed to assess the proposed alternatives in the same way it assessed the TPP measures.

## **V. THE PANEL'S ANALYSIS OF THE DOMINICAN REPUBLIC'S CLAIMS UNDER ARTICLE 20 OF THE TRIPS AGREEMENT FAILED TO FULFIL THE REQUIREMENTS OF ARTICLE 7.1 OF THE DSU, AND FAILED TO AMOUNT TO AN OBJECTIVE ASSESSMENT OF THE MATTER UNDER ARTICLE 11 OF THE DSU**

182. The Dominican Republic argued that the TPP measures impose "special requirements" that "unjustifiably encumber[]" the "use of a trademark in the course of trade", under Article 20 of the TRIPS Agreement.<sup>164</sup> In assessing this claim, contrary to Articles 7.1 and 11 of the DSU, the Panel completely failed to assess the justifiability of the encumbrance required by a distinct aspect of the TPP measures, namely the TPP measures' prohibition on word marks on cigarette sticks. Further, the Panel's findings under Article 20 of the TRIPS Agreement derived from its erroneous findings under Article 2.2 of the TBT Agreement on the contribution of the TPP measures and on the Dominican Republic's proposed alternative measures.<sup>165</sup>

<sup>159</sup> Panel Report, para. 7.1454 (emphasis added), citing Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215.

<sup>160</sup> Panel Report, para. 7.1731.

<sup>161</sup> Panel Report, para. 7.1526. (emphasis added)

<sup>162</sup> See Panel Report, para. 7.1528.

<sup>163</sup> See Dominican Republic's comments on Australia's response to Panel question No. 148, para. 111.

<sup>164</sup> See Dominican Republic's second written submission, para. 549.

<sup>165</sup> See Panel Report, paras. 7.2592-7.2593, 7.2600.

**ANNEX B-3****EXECUTIVE SUMMARY OF AUSTRALIA'S APPELLEE'S SUBMISSION**

1. This dispute involves challenges to Australia's tobacco plain packaging measures ("the TPP measures"), which operate to prevent the tobacco industry's well-documented exploitation of product and packaging design features to influence consumer behaviour, particularly the behaviour of young people. Australia implemented these measures on the basis of three decades of evidence and an explicit recommendation in the Guidelines to the World Health Organization ("WHO") Framework Convention on Tobacco Control ("FCTC").

2. The four original complainants instituted this dispute to challenge Australia's TPP measures, and the Panel rejected their claims in full. Two of the original complainants have accepted the findings and conclusions of the Dispute Settlement Body ("DSB"), and those reports have been adopted. Only the Dominican Republic and Honduras have appealed the report of the Panel in their respective disputes.

3. In challenging the Panel's findings and conclusions on appeal, neither the Dominican Republic nor Honduras advances any credible claim that the Panel erred in its legal interpretations of the relevant provisions of the covered agreements, or in their application. With respect to the TRIPS Agreement, Honduras pursues on appeal only two of its ten original claims, arguing that the Panel incorrectly interpreted and applied Article 16.1 and Article 20 of the TRIPS Agreement. The Dominican Republic does not even advance its own arguments on these points, but merely incorporates by reference Honduras' claims of error into its appeal. With respect to Article 2.2 of the TBT Agreement, both appellants acknowledge that the Panel "correctly articulated the legal standard that applies under the TBT Agreement",<sup>1</sup> yet proceed nonetheless to advance a claim of "legal error" on the part of the Panel.

4. Instead of advancing credible legal claims, the appellants have brought an unprecedented challenge to the factual findings of a panel under Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). The appellants' claims that the Panel did not undertake an objective assessment of the matter before it relate overwhelmingly to the Panel's factual findings in support of its conclusion that the complainants failed to demonstrate that the TPP measures are not apt to contribute to Australia's legitimate public health objective.

5. The appellants' contentions are, however, utterly belied by the depth and thoroughness of the Panel's 1,266 page report.<sup>2</sup> Instead of rushing to judgment, as the appellants contend, the Panel engaged in a comprehensive review of over 5,000 pages of party submissions, over 1,600 exhibits, and over 80 expert reports.<sup>3</sup> In Australia's view, it is fair to say that the Panel Report before the Appellate Body represents the most far-reaching assessment of an evidentiary record in the history of the DSB, encompassing, *inter alia*, complex issues of public health, behavioural theory, marketing, and econometrics.

6. The attack on the Panel's findings of fact under Article 11 of the DSU far exceed the scope of any prior challenge to a panel's exercise of its fact-finding function. Having failed to persuade the Panel that the TPP measures are not apt to contribute to Australia's legitimate public health objective, the appellants have used their right to appellate review under Article 17.6 of the DSU to try to discredit the *manner* in which the Panel evaluated nearly every piece of contested evidence, especially the available quantitative evidence of contribution in the limited period following the implementation of the TPP measures. The appellants' attacks upon the objectivity of the Panel in

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<sup>1</sup> Honduras' appellant's submission, para. 11. See also Dominican Republic's appellant's submission, para. 1245.

<sup>2</sup> The Panel Report consists of 889 pages in the main body of the Report, plus 152 pages of analysis of the post-implementation evidence and 226 pages of annexes.

<sup>3</sup> The expert reports submitted by the parties included nearly 30 reports addressing complex econometric analyses of data; nearly 25 reports on public health, psychology and behavioural theory; seven literature reviews commissioned by the complainants; eight reports on marketing theory; four reports on illicit trade and market conditions; and six reports on alternative measures and regulatory compliance.

evaluating this evidence are completely unfounded and, more broadly, implicate grave systemic concerns about the use of appellate review to re-litigate a panel's findings of fact.

## I. THE CONTEXT OF THIS APPEAL

7. Australia implemented the TPP measures as the next logical step in its comprehensive approach to tobacco control, on the basis of over three decades of research. The evidence supporting this decision has been reviewed by pre-eminent bodies such as successive United States Surgeons General, the United States National Cancer Institute, the United States Institute of Medicine, and the WHO, as well as subsequent reviews by independent experts commissioned by governments and national courts.

8. The evidence overwhelmingly confirmed: (i) the importance to the tobacco industry of recruiting youth and adolescents to sustain their business model; (ii) that the tobacco industry by its own admission has, over the course of decades, used tobacco packaging as a medium for advertising and promoting tobacco products; (iii) that in a dark market like Australia, where all other forms of tobacco advertising and promotion are banned, the tobacco industry has openly admitted that the tobacco pack operates as a mobile "billboard"; and (iv) that the appearance of tobacco packaging, including the appearance of the product itself, is capable of affecting smoking-related behaviours including initiation by young people, cessation and relapse.

9. The complainants came to the panel proceedings in full knowledge of these conclusive findings. They therefore assumed the burden of demonstrating a series of *counter-intuitive* propositions in an attempt to establish that the TPP measures are not "apt" to contribute to Australia's objective. The complainants first made these arguments by attacking the extensive *qualitative* evidence before the Panel, arguing that:

- the pre-implementation evidence, as contained in numerous studies published in peer-reviewed journals, was not of "a quality or methodological rigour" sufficient to provide a reliable basis for implementing the TPP measures;
- tobacco packaging is *not* a form of advertising or promotion, despite tobacco industry documents confirming that it is, and has been used as such over decades;
- even if tobacco packaging *is* a form of advertising or promotion, it cannot serve this function in the context of Australia's dark market; and
- even if branding on tobacco packaging influences consumer behaviour, this influence is limited to *existing* consumers' choices to smoke one brand over another (secondary demand) as opposed to attracting *new* smokers to initiate smoking (primary demand).

10. Perhaps recognising that these arguments would not be sufficient to discharge their burden in the face of the clear qualitative evidence supporting tobacco plain packaging, the complainants contended that the TPP measures could only be considered capable of contributing to Australia's objective if they had made a *quantifiable* contribution to this objective in the limited period since their implementation. To this end, the complainants sought to shift the focus of the dispute away from the design, structure, and operation of the TPP measures and toward complex econometric and statistical analyses of data gathered in the short period of time following the implementation of the measures in December 2012. The complainants' approach to these analyses evolved over the course of the proceedings, with new theories being presented to the Panel to substitute for those Australia had refuted.

11. The complainants first argued that the TPP measures had "backfired" by causing an *increase* in the proportion of the population who smoke (prevalence) and total cigarette sales volumes (consumption). In the face of corrective analyses by Australia's experts, this line of argument was not pursued by the complainants in later stages of the proceedings. The complainants then pivoted to argue that the econometric evidence submitted by their experts proved definitively that *no part* of the observed declines in prevalence and consumption could be *attributed* to the measures' effects.

12. Based on its thorough assessment of these arguments, the Panel concluded that the complainants had failed to discharge their burden of proving that the TPP measures are not capable of contributing to Australia's objective.

13. With respect to the pre-implementation evidence, the Panel engaged in a detailed review of this evidence over the course of 100 pages, and concluded that the complainants had:

- failed to demonstrate that the pre-implementation evidence was so fundamentally flawed as to provide *no* support for the operation of the TPP measures;
- failed to persuade the Panel that tobacco packaging has *no* influence on smoking behaviours, particularly in a dark market like Australia;
- failed to persuade the Panel that the effects of branding on tobacco packaging are limited to secondary demand, to the exclusion of primary demand for such products;
- failed to demonstrate that the TPP measures would not be capable of reducing the appeal of tobacco products and, consequently, affect smoking behaviours;
- failed to demonstrate that existing levels of health knowledge and risk awareness in Australia were such that they could not be increased by enhancing the effectiveness of graphic health warnings ("GHWs") and, consequently, affect smoking behaviours; and
- failed to demonstrate that the TPP measures, by design, would not be capable of reducing the ability of tobacco packaging to mislead consumers and, consequently, affect smoking behaviours.

14. The Panel likewise engaged in lengthy analyses of the complainants' post-implementation evidence, as well as the associated rebuttal evidence submitted by Australia, detailing its findings in four separate appendices. Ultimately, the Panel considered that the evidence relating to the post-implementation *quantitative* evidence supported its overall conclusion that the complainants had failed to demonstrate that the TPP measures are not apt to contribute to Australia's objective, finding in particular that:

- the post-implementation evidence suggests that the introduction of tobacco plain packaging "has in fact, reduced the appeal of tobacco products, as anticipated" and suggests that plain packaging has "had some impact on the effectiveness of GHWs";<sup>4</sup> and
- the post-implementation evidence on smoking behaviours "is consistent with a finding that the TPP measures contribute to a reduction in the use of tobacco products".<sup>5</sup>

15. Despite the inordinate amount of time and number of expert reports the complainants devoted to contesting these issues during the panel proceedings, the appellants now appear to concede many of these points, which only highlights the hollowness of their case. In particular, the appellants appear to have conceded that:

- packaging *does* function as advertising and promotion, and operates to sustain primary demand for tobacco products to replace those smokers who quit or die;
- tobacco plain packaging affects consumer behaviour;
- tobacco plain packaging has reduced the appeal of tobacco products and increased the effectiveness of GHWs in precisely the manner intended; and
- the TPP measures have not backfired, and that rates of prevalence and consumption in Australia continued to *decline* following the implementation of the measures.

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<sup>4</sup> Panel Report, para. 7.636.

<sup>5</sup> Panel Report, para. 7.1037.

16. Based on these uncontested findings of the Panel, it is clear and obvious that *the TPP measures are capable of contributing to Australia's objective*.

## II. CLAIMS UNDER THE TRIPS AGREEMENT

17. The four complainants in the original disputes pursued ten separate claims under the TRIPS Agreement against the TPP measures – all of which the Panel rejected.

18. In its appeal of the Panel Report in DS435, Honduras alleges error by the Panel in respect of only two of these original claims: those under Article 16.1 and Article 20 of the TRIPS Agreement. The Dominican Republic's arguments on appeal concerning the TRIPS Agreement are limited to certain claims of error under Article 11 of the DSU.

19. In relation to its claims under Article 16.1 and Article 20 of the TRIPS Agreement, Honduras' interpretative strategy is unchanged from the panel proceedings. Honduras conflates distinct trademark-related provisions in order to contrive support for its overarching and erroneous contention that these provisions confer a "right of use" upon the owners of registered trademarks.

20. With respect to Article 16.1, the Panel properly rejected all of the complainants' claims based on its conclusion that Article 16.1 "formulates an obligation on Members to provide to the owner of a registered trademark the right to 'stop, or hinder' all those not having the owner's consent from using certain signs on certain goods or services, where such use would result in a likelihood of confusion."<sup>6</sup> The Panel found that Article 16.1 "does not formulate any other right of the trademark owner, nor does it mention the use of the registered trademark by its owner."<sup>7</sup>

21. Honduras insists that its interpretation of Article 16.1 is not based on a "positive right to use" a trademark.<sup>8</sup> At the same time, Honduras argues that a Member "fails to abide by its commitment to guarantee a minimum level of protection" under Article 16.1 when it adopts a measure that prevents the use of a mark, and thus "has so weakened the mark that almost any claim for infringement will be rejected".<sup>9</sup>

22. In this way, Honduras' appeal of the Panel's interpretation of Article 16.1 is premised on the same fundamental defect as its original arguments before the Panel, and should be rejected by the Appellate Body for the same reasons. As the Panel properly found, nothing in the text of Article 16.1 suggests that Members must "maintain market conditions that would enable the circumstances set out in this provision, including a likelihood of confusion, to actually occur in any particular situation. Rather, Members must ensure that in the event that these circumstances *do* arise, a right to prevent such use is provided."<sup>10</sup>

23. Honduras' appeal of the Panel's interpretation of Article 20 is divided into two parts. In its principal appeal, Honduras alleges that "the Panel erred by failing to adopt a trademark-specific approach".<sup>11</sup> Honduras' basic contention is that Members may *never* impose special requirements that encumber the use of trademarks for reasons relating to public health or other public policy considerations, unless the resulting encumbrance is "limited" (a term that does not appear in Article 20) or is "justified by a concern inherent in the particular trademark", such as the types of reasons that would warrant a denial of registration of the trademark in the first instance.<sup>12</sup> In Honduras' view, a prohibition on the use of a category of trademarks (such as figurative trademarks) for a particular purpose (such as to prevent the advertising and promotion of tobacco products) is unjustifiable *per se*.

24. Honduras' extreme interpretation of the term "unjustifiably" finds no support in the ordinary meaning of this term, properly interpreted in its context and in light of the object and purpose of the TRIPS Agreement (or its negotiating history). Rather, the interpretation of the term "unjustifiably" that Honduras advocates is based on an unfounded attempt to read a "right of use"

<sup>6</sup> Panel Report, para. 7.1974.

<sup>7</sup> Panel Report, para. 7.1974.

<sup>8</sup> Honduras' appellant's submission, para. 349.

<sup>9</sup> Honduras' appellant's submission, para. 429.

<sup>10</sup> Panel Report, para. 7.2000. (emphasis original)

<sup>11</sup> Honduras' appellant's submission, para. 52.

<sup>12</sup> Honduras' appellant's submission, para. 146.

into Part II, Section 2 of the TRIPS Agreement and to interpret Article 20 of the TRIPS Agreement as a "limited" exception to this "right". The Panel properly rejected Honduras' interpretative strategy, and so should the Appellate Body.

25. The second part of Honduras' challenge to the Panel's interpretation of Article 20 is formulated "in the alternative" and assumes *arguendo* that the Panel is correct that the term 'unjustifiably' in Article 20 stands for a more broadly applicable policy exception.<sup>13</sup> In that event, Honduras argues that the Panel erred by not interpreting the term "unjustifiably" "as requiring that less trademark encumbering alternative measures that provide an equivalent contribution be preferred."<sup>14</sup>

26. This second part of Honduras' interpretative appeal is equally unfounded, given the Panel effectively *did* interpret Article 20 to require an examination of proposed alternatives and *did* in fact examine the alternatives proposed by the complainants. In other words, the Panel did what Honduras alleges it was required to do.

27. In Part III.3 of its appeal, Honduras assumes *arguendo* that the Panel properly interpreted the term "unjustifiably", but claims that the Panel misapplied Article 20 to the facts of the case.

28. Honduras contends, for example, that the Panel placed "undue emphasis on the loss of economic value of the trademarks rather than focusing on the impact of the TPP measures on the use of a trademark in terms of its distinguishing function."<sup>15</sup> However, the Panel clearly stated that its examination of the nature and extent of the encumbrance would "focus on the implications of the TPP trademark requirements on a trademark's ability to distinguish goods and services of undertakings in the course of trade".<sup>16</sup> In other words, the Panel's analysis focused on precisely what Honduras claims it was required to focus on. Honduras' numerous other arguments in support of its application claims are likewise unfounded.

29. The Dominican Republic advances only one distinct claim of error in respect of the Panel's findings under Article 20 of the TRIPS Agreement. The Dominican Republic alleges that the Panel did not undertake any assessment of the Dominican Republic's claims under Article 20 concerning the prohibition on the use of trademarks on cigarette sticks, and that the Panel thereby acted inconsistently with Article 11 of the DSU.

30. It is abundantly clear from the Panel Report that the Panel did, in fact, examine the Dominican Republic's claims under Article 20 concerning cigarette sticks. As best as Australia can discern, the Dominican Republic appears to consider that the Panel was required to have a distinct subsection in its report in which it separately addressed those claims. No such requirement to this effect exists under Articles 7 and 11 of the DSU.

31. For the foregoing reasons, Australia requests that the Appellate Body reject all of the appellants' claims of error under Articles 16.1 and 20 of the TRIPS Agreement.

### **III. CLAIMS UNDER THE TBT AGREEMENT**

#### **A. Claims Under Article 2.2 of the TBT Agreement – Trade-Restrictiveness**

##### **1. The Panel Did Not Err in its Interpretation and Application of the Term "Trade-Restrictive" under Article 2.2 of the TBT Agreement**

32. At the core of the appellants' claim of error lies a disagreement as to whether any limitations on "competitive opportunities" in the marketplace, and in particular the reduced opportunity to compete on the basis of brand differentiation, sufficed to establish that the TPP measures are "trade-restrictive" under Article 2.2 of the TBT Agreement. In Australia's view, the "competitive opportunities" standard of trade-restrictiveness espoused by the appellants finds no basis in either the text of Article 2.2, properly interpreted, or in the Appellate Body's findings in prior cases. This

<sup>13</sup> Honduras' appellant's submission, para. 54.

<sup>14</sup> Honduras' appellant's submission, para. 231.

<sup>15</sup> Honduras' appellant's submission, para. 266.

<sup>16</sup> Panel Report, para. 7.2563. (emphasis added)

overly broad legal standard would read the terms "trade-restrictive" and "obstacles to international trade" out of the text of Article 2.2.

33. In *US – Tuna II (Mexico)*, the Appellate Body expressly held that the term "trade-restrictive" requires a demonstration that a technical regulation has a "limiting effect on international trade".<sup>17</sup> Contrary to the appellants' argument, the Appellate Body in *US – COOL* did not re-articulate the relevant legal standard of trade-restrictiveness as one of "competitive opportunities" for imported products. Rather, the Appellate Body found that the panel's finding that the COOL measure modified the conditions of competition to the detriment of imported products vis-à-vis domestic like products sufficed to establish that it had a limiting effect on international trade.<sup>18</sup>

34. If any limitation on "competitive opportunities" were sufficient to establish that a technical regulation is trade-restrictive, as the appellants suggest, evidence of actual trade effects would *never* be required. Virtually all technical regulations will impose, in respect of at least one market participant, a limiting condition that did not exist prior to its enactment. Thus, the Appellate Body's recognition in *US – COOL (Article 21.5 – Canada and Mexico)* that evidence of actual trade effects might be required to establish that a non-discriminatory technical regulation is trade-restrictive not only contradicts the complainants' erroneous "competitive opportunities" construct, but also confirms that the relevant legal standard is one of a "limiting effect on international trade."<sup>19</sup>

35. Accordingly, the Panel did not err in finding that any limitation on the ability to compete on the basis of brand differentiation was insufficient, without more, to establish that the TPP measures are "trade-restrictive" within the meaning of Article 2.2. In so finding, the Panel did *not* require that the TPP measures be discriminatory, as Honduras incorrectly posits. The Panel expressly observed that "a determination of 'trade-restrictiveness' is not dependent on the existence of discriminatory treatment of imported products"<sup>20</sup>, and in no instance did the Panel engage in a "comparative assessment" of the conditions of competition for imported products vis-à-vis domestic tobacco products. Neither did the Panel consider that evidence of actual trade effects was required. Rather, the Panel carefully examined both qualitative and quantitative evidence on the panel record, and expressly recognised that the "trade-restrictiveness" of the TPP measures could be established on the basis of qualitative evidence alone.

36. Moreover, it is unclear to Australia whether the Panel imposed an "exclusive cause" standard in its analysis of the downtrading evidence, as the Dominican Republic argues. However, even if the Panel did impose an exclusive cause standard, that would be immaterial and insufficient to overturn the Panel's findings under Article 2.2. This is because the alternative measures proposed by the complainants, applied cumulatively, would have *greater* downtrading effects than the TPP measures. Thus, in no circumstance would any of the alternative measures proposed by the complainants be *less* trade-restrictive than the TPP measures.

37. Finally, contrary to the Dominican Republic's suggestion, the Panel did not err in taking into account consumption (i.e. sales) data in its assessment of trade-restrictiveness. Rather than finding that any degree of trade-restrictiveness could be "mitigated" by supplier responses, the Panel appropriately relied on the *complainants'* own expert in concluding that both supply and demand factors should be taken into account in determining the trade-restrictive effects of the TPP measures in the marketplace.

## **2. The Panel Did Not Act Inconsistently with Article 11 of the DSU in Its Assessment of Trade-Restrictiveness**

38. The Dominican Republic has failed to establish that the Panel exceeded the bounds of its discretion as trier of fact under Article 11 of the DSU in finding that the TPP measures were "trade-restrictive" under Article 2.2 of the TBT Agreement.

39. The Panel neither compromised the Dominican Republic's due process rights nor "made the case" for Australia in its graphical analysis in Figure E.6. A panel has the authority under Article 11

<sup>17</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

<sup>18</sup> Appellate Body Report, *US – COOL*, para. 477.

<sup>19</sup> See Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208 and footnote 643 thereto.

<sup>20</sup> Panel Report, para. 7.1074.



of the DSU to develop its own reasoning and is not required to restrict itself to the evidence and arguments presented by the parties.<sup>21</sup> Such discretion encompasses the ability to conduct additional statistical analysis, engage with economic models and evidence, and draw inferences on the basis of the record evidence.<sup>22</sup> Moreover, the Panel is "not required to test its intended reasoning with the parties",<sup>23</sup> and any concerns the Dominican Republic might have had about Figure E.6 could have been raised in the interim review stage under Article 15 of the DSU.

40. Finally, the Dominican Republic's allegation that the Panel failed to provide a reasoned and adequate explanation for its finding amounts to a request that the Appellate Body *re-weigh* the record evidence on downtrading. Contrary to what the Dominican Republic suggests, the Panel's conclusion that downtrading was partly attributable to the overall reduction in total wholesales volume as a result of the TPP measures is *fully consistent* with the Panel's earlier finding that the TPP measures are apt to, and do in fact, contribute to their objective of reducing the use of tobacco products in Australia.

41. For all of the foregoing reasons, Australia requests that the Appellate Body reject the appellants' claims under Article 2.2 of the TBT Agreement, and Article 11 of the DSU, as they relate to the Panel's finding that the TPP measures are "trade-restrictive".

## **B. Claims under Article 2.2 of the TBT Agreement – Alternative Measures**

### **1. The Panel Did Not Err in Its Application of Article 2.2 of the TBT Agreement in Its Analysis of Alternative Measures**

42. Australia submits that the Appellate Body should summarily dismiss the appellants' claims of error in relation to the Panel's analysis of alternative measures under Article 2.2 of the TBT Agreement without addressing the substance of those claims, for two reasons.

43. First, the appellants' claim in relation to the Panel's analysis of the "trade-restrictiveness" of the alternatives is *entirely consequential* to their earlier claim that the Panel applied an erroneous legal standard in ascertaining the trade-restrictiveness of the TPP measures. Thus, if the Appellate Body upholds the Panel's legal standard of trade-restrictiveness under Article 2.2 of the TBT Agreement, it necessarily follows that the Panel did *not* err in applying that same standard when determining the trade-restrictiveness of each of the proposed alternatives.

44. Second, in the circumstances of this dispute, where the market is entirely supplied by imports, any equivalent *contribution* to reducing the use of, and exposure to, tobacco products would necessarily entail an equivalent *limiting effect* on international trade in tobacco products. Accordingly, if the Appellate Body were to uphold the Panel's interpretation of trade-restrictiveness under Article 2.2, any alternative measure that would make an equivalent contribution to the TPP measures would necessarily be *at least as trade-restrictive* as the TPP measures.

45. In any event, the complainants' claims that the Panel erred in its analysis of the contribution of alternative measures under Article 2.2 of the TBT Agreement are unfounded. Contrary to the complainants' argument, the Panel did not reject increases in the minimum legal purchase age ("MLPA") and in excise taxes because they would not operate through the same causal mechanisms as the TPP measures. Rather, the Panel properly held that an increase in the MLPA would only address the availability of tobacco products to individuals below 21 years of age, and would leave unaddressed those design features of the pack that make tobacco packaging more appealing. Moreover, the Panel correctly held that any contribution that increased excise taxes would make to Australia's objective would be *undermined* by those elements of tobacco packaging that would continue to be used to convey positive imagery or messaging, especially to adolescents and young adults. Therefore, the Panel properly held that an increase in excise taxes would not make an equivalent contribution to Australia's objective as the TPP measures.

46. The Panel was further correct in holding that neither an increase in the MLPA nor an increase in excise taxes would have any synergistic effects with other elements of Australia's comprehensive tobacco control policy, in particular enlarged GHWs. The Panel correctly found that neither of these

<sup>21</sup> Appellate Body Report, *EC – Hormones*, para. 156.

<sup>22</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 357-358 and 406.

<sup>23</sup> Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.177.

alternatives would have any effect on the communication functions of the pack, while the TPP measures have the effect of increasing the effectiveness of GHWs by increasing their salience, making them easier to see, more noticeable, and perceived as more credible and more serious.

47. Finally, Honduras is incorrect that the Panel's references to "substitute" measures implies that the Panel imposed a standard of "identical" degree of contribution, or imposed a more rigorous standard of equivalence in the context of a comprehensive suite of measures. Rather, the Panel properly sought to ascertain whether each of the alternatives made an "equivalent" contribution to Australia's objective as the TPP measures, and consistent with the Appellate Body's guidance in *Brazil – Retreaded Tyres*, considered the contribution of the TPP measures in the context of Australia's comprehensive tobacco control policy.

## **2. The Panel Did Not Act Inconsistently with Article 11 of the DSU in Its Assessment of the Alternatives**

48. Finally, the Dominican Republic has failed to demonstrate that the Panel acted inconsistently with Article 11 of the DSU in its assessment of the alternatives. The Panel's assessment of the trade-restrictiveness of an increase in the MLPA is not "internally contradictory" with the Panel's assessment of the contribution of that alternative, because the Panel did not rely on "future effects" in reaching its findings, as the Dominican Republic incorrectly posits. Rather, the Panel's findings in relation to both the element of trade-restrictiveness and the contribution of an increase in the MLPA were based on the immediate effects of this purported alternative.

49. Moreover, the Panel neither failed to engage with the Dominican Republic's evidence nor failed to provide a reasoned and adequate explanation in finding that, in the absence of the TPP measures, the communication functions of tobacco packaging would not be addressed "at all". The fact that *other* existing elements of Australia's comprehensive tobacco control policy, such as enlarged GHWs, may restrict the space available for the tobacco industry to use tobacco packaging as a means of promotion does *not* establish that an increase in the MLPA has those same effects.

50. Accordingly, the appellants have failed to establish that the Panel erred in its application of Article 2.2, or acted inconsistently with Article 11 of the DSU, in its analysis of alternative measures.

## **IV. CLAIMS UNDER ARTICLE 11 OF THE DSU REGARDING THE PANEL'S CONTRIBUTION FINDINGS**

51. The appellants' claims under Article 11 of the DSU form the core of their appeals, collectively comprising nearly 450 pages of their appellant submissions. This far exceeds the scope of any prior Article 11 challenge and constitutes an unprecedented assault on a panel's performance of its fact-finding function.

52. The appellants' assurance that they have followed "the Appellate Body's guidance" and "carefully considered whether, and in which specific instances, to challenge the lack of objectivity of the Panel's assessment of the matter" rings hollow given both the scale and nature of their Article 11 claims.<sup>24</sup> Together, the appellants have alleged, *inter alia*, that the Panel: denied them due process because they were denied any meaningful opportunity to comment on various aspects of the Panel's evaluation of the expert evidence; denied them due process by relying on the technical staff of the WTO Secretariat (disparagingly referred to as a "ghost expert") instead of appointing an expert; lacked "even-handedness" in its approach to the evidence; and failed to provide reasoned and adequate explanations for its findings. In making these far-reaching claims, the appellants' strategy appears to be to re-litigate factual issues that they lost before the Panel.

53. While the appellants' particular claims are dealt with below, Australia observes at the outset that:

- A premise of many of the appellants' claims is that the Panel was required to test all of its reasoning with the parties in order to afford due process. The Appellate Body has previously rejected this proposition.<sup>25</sup> Due process does not require that a panel "engage

<sup>24</sup> See Dominican Republic's appellant's submission, para. 33.

<sup>25</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.177.

with the parties upon the findings and conclusions that it intends to adopt in resolving the dispute", so long as the panel's approach does not "depart so radically" from the case presented that the parties were "left guessing as to what proof they would have needed to adduce."<sup>26</sup> While the appellants assert that the Panel "depart[ed] ... radically" from the evidence and arguments presented by the parties, the evidentiary record demonstrates otherwise.

- The complainants did not utilise the interim review process to raise substantive concerns about the evaluation of the evidence, as provided for under Article 15 of the DSU. Neither appellant raised concerns regarding the Panel's assessment of the factual evidence or identified errors with respect to the Panel's evaluation of the statistical or econometric evidence when they provided their written comments on the interim report, nor did either appellant request a further meeting with the Panel to discuss any aspect of that evaluation. In these circumstances, there was no failure to accord due process.
- The complainants made no request for the Panel to exercise its authority to appoint an expert or group of experts during the course of the proceedings under Article 14.2 of the TBT Agreement or Article 13.2 of the DSU. In light of this, the appellants' arguments that the Panel failed to afford them due process by not appointing an expert, and criticising the Panel for utilising the WTO Secretariat (as the "ghost expert") for technical support, as contemplated under Article 27 of the DSU, must be rejected.
- The complainants entirely ignore that they bore the burden of proving that the TPP measures are *incapable* of contributing to Australia's objective, as outlined below, and that the Panel properly scrutinised both parties' evidence for the purpose for which it was provided.
- The complainants' claims that the Panel failed to provide reasoned and adequate explanations are unfounded given that the Panel Report included over 300 pages of detailed analysis of the evidence relating to the contribution of the TPP measures.<sup>27</sup>

#### A. Legal Standard for Article 11 of the DSU

54. Under Article 11 of the DSU, a panel must "consider all the evidence presented to it, assess its credibility, determine its weight and ensure that its factual findings have a proper basis in that evidence."<sup>28</sup> The Appellate Body has repeatedly stated that "panels enjoy a 'margin of discretion' as triers of fact",<sup>29</sup> and that "[c]onsistent with this margin of discretion, ... 'not every error in the appreciation of the evidence... may be characterized as a failure to make an objective assessment of the facts.'"<sup>30</sup>

55. The appellants therefore cannot sustain their Article 11 claims unless the Appellate Body is satisfied that both of the following conditions have been fulfilled:

- First, that the Panel erred by "exceed[ing] the bounds of its discretion, as the trier of facts".<sup>31</sup> This discretionary authority includes, *inter alia*, weighing the evidence, developing reasoning independent of the parties, framing the explanation for its findings, and balancing due process rights.
- Second, that the error is so material that it "undermine[s] the objectivity of the panel's assessment of the matter before it".<sup>32</sup> That is, even if the appellants could establish that the Panel exceeded the bounds of its discretion, they would still need to demonstrate that

<sup>26</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.177.

<sup>27</sup> Including a 152-page analysis of the post-implementation evidence in Appendices A-E.

<sup>28</sup> Appellate Body Report, *Philippines – Distilled Spirits*, para. 135, quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185, in turn referring to Appellate Body Report, *EC – Hormones*, paras. 132-133.

<sup>29</sup> See Appellate Body Report, *Japan – Apples*, para. 221.

<sup>30</sup> See Appellate Body Report, *Japan – Apples*, para. 222.

<sup>31</sup> See Appellate Body Report, *EC – Aircraft (Article 21.5 – US)*, para. 5.148.

<sup>32</sup> Appellate Body Report, *US – Aircraft*, para. 992.

the Panel's errors *materially* undermined its findings, by invalidating or vitiating the basis for those findings.<sup>33</sup>

56. As explained below, none of the appellants' alleged errors, individually or cumulatively, materially undermine the Panel's ultimate legal conclusion that the complainants failed to meet their burden of proving that the TPP measures are not apt to make a contribution to Australia's legitimate objective.

## **B. The Complainants' Burden of Proof**

57. At the outset, it is pertinent to recall the proper allocation of the burden of proof in this dispute, and how that burden of proof informed the Panel's assessment of the record evidence.<sup>34</sup>

58. The complainants sought to make their *prima facie* case under Article 2.2 of the TBT Agreement by arguing, *inter alia*, that the TPP measures "*cannot contribute to their objective through the mechanisms identified in the TPP Act, and that post-implementation evidence shows that smoking prevalence has not in fact been reduced as a result of the TPP measures.*"<sup>35</sup> The complainants therefore undertook the burden of demonstrating that, based on their design, structure and intended operation, the TPP measures constituted an *unnecessary* obstacle to international trade because they were *incapable* of contributing to Australia's objective of reducing the use of, and exposure to, tobacco products. They further undertook to substantiate this allegation through quantitative evidence purportedly demonstrating that the TPP measures had in fact made *no* contribution to reducing smoking prevalence in Australia in the limited period of time following their implementation.<sup>36</sup>

59. The complainants undertook this burden in the particular circumstances of this dispute, in which it was undisputed that Australia's market for tobacco products is *entirely* sourced from imports.<sup>37</sup> In these circumstances, the degree to which the TPP measures contribute to Australia's objective of reducing the use of and exposure to tobacco products *necessarily corresponds* to the degree to which the measures have a limiting effect on international trade in tobacco products. Critically, because the TPP measures only restrict trade in tobacco products to the extent *required* to contribute to Australia's public health objective, the TPP measures are not more trade-restrictive than *necessary* and, therefore, do not violate Article 2.2. In these circumstances, the complainants sought to prove that the TPP measures were *incapable* of making any contribution to reducing the use of and exposure to tobacco products in an attempt to discharge their burden of establishing that the TPP measures constitute an *unnecessary* obstacle to international trade.

60. These circumstances – and their bearing on the Panel's analysis under Article 2.2 – also explain why the complainants sought to fundamentally redefine the concept of trade-restrictiveness to avoid having to establish a limiting effect on international trade in tobacco products. But even under their erroneous definition of trade-restrictiveness, the *prima facie* case that the complainants sought to establish is that the TPP measures are *incapable* of making any contribution to reducing the use of, and exposure to, tobacco products.

61. The Panel approached its assessment of the pre- and post-implementation evidence submitted by the parties in light of the burden of proof that the complainants undertook. In relation to the design, structure and operation of the TPP measures, the Panel explained that it was not persuaded

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<sup>33</sup> See Appellate Body Reports, *EC – Aircraft*, para. 1335; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 294; *US – COOL*, para. 323.

<sup>34</sup> Australia notes that the appellants only challenge the Panel's analysis of contribution under Article 2.2 of the TBT Agreement, and therefore discusses the proper allocation of the burden of proof under that provision. Honduras alone claims that the Panel acted inconsistently with Article 11 of the DSU in its assessment of contribution under Article 20 of the TRIPS Agreement, but does not distinguish between the arguments under that provision and under Article 2.2 of the TBT Agreement. The arguments advanced by Australia in this section apply *mutatis mutandis* in the context of Article 20 of the TRIPS Agreement as well.

<sup>35</sup> Panel Report, para. 7.485. (emphasis added)

<sup>36</sup> See, e.g. Dominican Republic's first written submission, para. 377; Dominican Republic's second written submission, para. 368; Honduras' first written submission, para. 581; Honduras' second written submission, para. 55.

<sup>37</sup> Panel Report, para. 7.1207.

that, "as the complainants argue, [the measures] would not be capable of contributing to Australia's objective".<sup>38</sup>

62. In relation to the post-implementation evidence, the Panel concluded that there was evidence that the TPP measures were having the effects "anticipated in a number of the pre-implementation studies",<sup>39</sup> and that the evidence in relation to smoking behaviours was *consistent with* the intended operation of the TPP measures.<sup>40</sup>

63. Based on the totality of the record evidence, the Panel found that "the complainants have not demonstrated that the TPP measures are *not apt* to make a contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products."<sup>41</sup>

64. Thus, crucially, and contrary to what the appellants imply in their submissions, Australia did *not* bear the burden of establishing that the TPP measures contribute to reducing the use of, and exposure to, tobacco products. Rather, the evidence submitted by Australia sought to demonstrate that the *complainants* had failed to establish their *prima facie* case that the TPP measures are incapable of contributing to Australia's public health objective. The appellants have not appealed the Panel's understanding of the complainants' burden of proof.

65. The appellants' claims under Article 11 of the DSU concerning the Panel's assessment of that evidence must therefore be viewed in light of the *complainants'* burden of establishing that the TPP measures are *incapable* of contributing to Australia's objective of reducing the use of, and exposure to, tobacco products.

### C. Materiality of Alleged Errors

66. Australia will demonstrate below that the appellants' claims under Article 11 of the DSU are without merit. However, even if the appellants could establish that the Panel "exceeded the bounds of its discretion, as the trier of facts" in relation to the alleged errors, the appellants would still need to demonstrate that the Panel's errors *materially* undermine its findings.<sup>42</sup>

67. In relation to the Panel's *overall* conclusion that the complainants had failed to discharge their burden of proving that the TPP measures were incapable of contributing to their objective, the appellants have not demonstrated that any of the errors that they have identified are material.

68. Honduras simply asserts that, "individually or in combination with one another", all of the errors that it identifies are material to the Panel's overall contribution finding. The only "materiality" argument that either of the appellants actually develops in relation to the Panel's *overall* contribution finding is the Dominican Republic's argument that this finding would not stand in the absence of the Panel's findings on prevalence and consumption. The Dominican Republic claims that if the Appellate Body were to conclude that the Panel exceeded the bounds of its discretion in its assessment of the evidence in Appendices C and D, and if the Appellate Body were to conclude that those errors materially undermine the Panel's findings in relation to the post-implementation evidence on smoking behaviour, these conclusions would invalidate the Panel's *overall* finding on contribution.<sup>43</sup>

69. There is no legal foundation for the Dominican Republic's claim, because the Dominican Republic did not even *attempt* to demonstrate that the Panel's alleged failures of objectivity in respect of the relevant evidence would *materially undermine its findings in Appendices C and D*. However, *even if* the Appellate Body were to conclude that the Panel erred in its assessment of the evidence in Appendices C and D, *and* that those errors materially undermined the Panel's findings with respect to that evidence, these errors would not be material to the Panel's *overall* contribution finding.

<sup>38</sup> Panel Report, para. 7.929. (emphasis added)

<sup>39</sup> Panel Report, para. 7.1036.

<sup>40</sup> Panel Report, para. 7.1037.

<sup>41</sup> Panel Report, para. 7.1025. (emphasis added)

<sup>42</sup> See, e.g. Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 722.

<sup>43</sup> See, e.g. Dominican Republic's appellant's submission, para. 626.

70. The Dominican Republic's argument that the disputed Panel findings concerning the effect of the TPP measures on smoking behaviours are "a *necessary, indispensable component* of its overall conclusion on the contribution of the TPP measures to Australia's objective" reflects a fundamental misunderstanding of the Panel's contribution analysis.

71. The Panel engaged in its assessment of the post-implementation evidence expressly aware of the inherent limitations of that evidence in the early period of application of the TPP measures. In particular, the Panel recognised that "certain measures to protect public health, including, as is the case here, certain measures based on behavioural responses to expected changes in beliefs and attitudes, may take some time to materialize fully or be perceptible in the relevant data."<sup>44</sup>

72. With respect to the evidence on smoking prevalence and consumption (Appendices C and D), the Panel explained that "overall", it found this evidence "*consistent with* a finding that the TPP measures contribute to a reduction in the use of tobacco products,"<sup>45</sup> but did not state that this conclusion was necessary to its overall conclusion that the complainants had failed to demonstrate that the TPP measures are not apt to contribute to Australia's objective.

73. The Panel's *overall* contribution finding reflects the Panel's consideration of the *totality* of the evidence. The Panel's finding would stand on the basis of the body of pre- and post-implementation evidence that is essentially *uncontested* on appeal. *Even if* the appellants could sustain their claims of error under Article 11 of the DSU, this finding would still leave intact:

- the pre-implementation evidence demonstrating that: (1) tobacco packaging is a form of advertising and promotion, used in the Australian market to appeal to current and potential consumers and to distract from the serious health effects of tobacco use; (2) tobacco plain packaging could be expected to reduce the appeal of tobacco products, increase the effectiveness of GHWs and reduce the ability of the pack to mislead; and (3) these effects are capable of affecting smoking behaviour, including initiation, cessation and relapse;
- the post-implementation evidence demonstrating that the TPP measures have reduced appeal and increased the effectiveness of GHWs;
- the post-implementation evidence demonstrating that prevalence and consumption have declined following the implementation of the TPP measures; and
- the post-implementation evidence demonstrating that the decline in prevalence and consumption *accelerated* following the implementation of the TPP measures.<sup>46</sup>

74. This evidence is more than sufficient to support the Panel's *overall* finding that the complainants had "not demonstrated that the TPP measures are *not apt to* make a contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products".<sup>47</sup> Accordingly, while Australia will proceed to demonstrate that the appellants' claims of error are unfounded, these claims of error are not material to the Panel's overall conclusion.

## **D. Claims Regarding the Pre-Implementation Evidence**

### **1. The Panel's Findings on the Pre-Implementation Evidence**

75. As outlined in brief above, the Panel began its contribution analysis by examining the design, structure, and operation of the TPP measures, and accepted that the evidence available to Australia prior to the implementation of the measures supported the operation of the "causal chain" model under the TPP Act. In relation to the three causal mechanisms of the TPP measures (reducing the appeal of tobacco products, increasing the effectiveness of GHWs and reducing the ability of the

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<sup>44</sup> Panel Report, para. 7.938.

<sup>45</sup> Panel Report, para. 7.1037.

<sup>46</sup> While the Dominican Republic challenges the Panel's finding that declines in smoking prevalence *accelerated* following the implementation of the TPP measures, Australia demonstrates that this claim is based on a clear misreading of the Panel's findings.

<sup>47</sup> Panel Report, para. 7.1025. (emphasis added)

pack to mislead consumers about the harmful effects of smoking), the Panel concluded on the basis of the pre-implementation evidence that:

- The complainants had not persuaded the Panel that the TPP measures would not be capable of reducing the appeal of tobacco products (the first mechanism) and thereby contribute to Australia's objective by affecting smoking behaviours such as initiation, cessation and relapse.<sup>48</sup> In reaching this conclusion, the Panel made a series of intermediate findings that: (i) branded packaging *can* act as an advertising or promotional tool, and *has* been utilised as such by tobacco companies operating in Australia's dark market;<sup>49</sup> (ii) there is a body of evidence emanating from qualified sources supporting the proposition that the plain packaging of tobacco products reduces the appeal of those products to consumers;<sup>50</sup> and (iii) the complainants had not shown that this reduction in appeal would not be capable of influencing young people's perceptions and decision-making to impact upon initiation of tobacco use, or that tobacco plain packaging would not be capable of affecting the ability of smokers to quit smoking or to remain quit.<sup>51</sup>
- The complainants had not persuaded the Panel that the TPP measures would not be capable of increasing the effectiveness of GHWs (the second mechanism) and thereby contribute to Australia's objective by affecting smoking behaviours such as initiation, cessation and relapse.<sup>52</sup> In reaching this conclusion, the Panel likewise made a series of intermediate findings that: (i) the complainants had failed to establish that GHWs could not be made *more* effective, despite the high level of knowledge or risk awareness in Australia;<sup>53</sup> (ii) there was evidence supporting the proposition that, in the presence of tobacco plain packaging, the impact and effectiveness of GHWs was increased;<sup>54</sup> and (iii) the complainants had not demonstrated that the removal of branding elements which communicate messages which compete with or detract from GHWs could not be capable of influencing smoking behaviours, including initiation and cessation.<sup>55</sup>
- The complainants had not persuaded the Panel that the TPP measures, by reducing the ability of tobacco packaging to mislead consumers about the harmful effects of smoking (the third mechanism), would not be capable of impacting smoking cessation.<sup>56</sup> In reaching this conclusion the Panel again made a series of intermediate findings that: (i) the complainants had not demonstrated that the TPP measures were not capable of reducing the ability of the pack to mislead consumers about the harmfulness of tobacco use;<sup>57</sup> (ii) the complainants had not persuaded the Panel that the TPP measures could not operate as intended to a greater extent than what was already possible under existing laws;<sup>58</sup> and (iii) the complainants had not demonstrated that the TPP measures, by reducing the ability of tobacco packaging to mislead consumers about the harmful effects of smoking, would not have an effect on smoking behaviours, such as cessation.<sup>59</sup>

76. After spending over 100 pages of its report carefully reviewing the pre-implementation evidence, the Panel concluded that the complainants had not demonstrated that the TPP measures were incapable of contributing to Australia's public health objective based on the design, structure, and operation of the measures.

## **2. The Appellants' Assertions that the Panel Acted Inconsistently with Article 11 of the DSU with Respect to the Pre-Implementation Evidence Are Unfounded**

77. The Dominican Republic claims that the Panel acted inconsistently with Article 11 of the DSU by failing to engage with evidence demonstrating that branded tobacco packaging *in Australia* was

<sup>48</sup> Panel Report, paras. 7.777, 7.778.

<sup>49</sup> Panel Report, paras. 7.655-7.662, 7.659, 7.638.

<sup>50</sup> Panel Report, paras. 7.667, 7.682, 7.683.

<sup>51</sup> Panel Report, paras. 7.774-7.778.

<sup>52</sup> Panel Report, para. 7.869.

<sup>53</sup> Panel Report, para. 7.843.

<sup>54</sup> Panel Report, para. 7.825.

<sup>55</sup> Panel Report, paras. 7.860, 7.863.

<sup>56</sup> Panel Report, para. 7.924.

<sup>57</sup> Panel Report, para. 7.904.

<sup>58</sup> Panel Report, para. 7.917.

<sup>59</sup> Panel Report, para. 7.924.

not appealing.<sup>60</sup> The Dominican Republic also claims that the Panel's reasoning was "internally incoherent", because the Dominican Republic alleges that its evidence directly contradicts the Panel's finding that tobacco packaging is used to convey positive associations to the consumers.<sup>61</sup> These claims are unsustainable.

78. The Panel expressly took into account evidence specific to the Australian market and acknowledged the Dominican Republic's argument that "even before the TPP measures were introduced, Australia's packaging had negative appeal".<sup>62</sup> Moreover, the Dominican Republic's argument regarding the internal coherence of the Panel's findings implies that the perception of tobacco products prior to the introduction of the TPP measures was *as negative as Australia could reasonably hope to achieve*. The Dominican Republic's claim that the pre-implementation evidence demonstrated that the appeal of tobacco packaging could not be further reduced in Australia is also irreconcilable with the findings of its own expert that the TPP measures *have in fact reduced the appeal of tobacco packaging in Australia*.<sup>63</sup>

79. In addition, Honduras claims that the Panel failed to conduct an objective assessment of the matter before it because it assigned probative value to the pre-implementation evidence, despite "serious limitations" in that evidence,<sup>64</sup> and maintains that the Panel erroneously concluded that any limitations in the pre-implementation evidence could be overcome when viewed in the context of the wider literature.<sup>65</sup> These claims of error must be rejected, because Honduras' assertions are squarely directed at the Panel's discretion to assess the credibility, determine the weight, and make findings on the basis of the evidence on the panel record.

80. Finally, both the Dominican Republic and Honduras claim that the Panel acted inconsistently with Article 11 of the DSU by failing to ascertain whether the pre-implementation evidence was corroborated by the post-implementation evidence.<sup>66</sup> This assertion is demonstrably false. In relation to the post-implementation "proximal" outcomes evidence, for example, the Panel found that the TPP measures have "in fact reduced the appeal of tobacco products, as anticipated in a number of the pre-implementation studies criticized by the complainants."<sup>67</sup>

81. In sum, the appellants' limited claims of error in relation to the Panel's analysis of the pre-implementation evidence are misleading and incorrect, and must be rejected.

## **E. Claims Regarding the Post-Implementation Evidence**

82. The appellants have focused the bulk of their extensive claims under Article 11 on the Panel's analysis of the empirical evidence relating to the application of the measures following their entry into force in December 2012 (i.e. the "post-implementation evidence"). Australia will address the appellants' claims in relation to the Panel's analysis of the evidence concerning "proximal" outcomes (Appendix A) and "distal" outcomes (Appendix B) in Part 0 below, and will address the appellants' claims in relation to the Panel's analysis of the evidence relating to smoking behaviours (Appendices C and D) in Part 0 below.

### **1. The Appellants' Claims Regarding Appendices A and B Are Unfounded**

83. The Panel commenced its analysis of the post-implementation evidence in Appendix A by assessing the studies that focused on the impact of the TPP measures and enlarged GHWs on non-behavioural proximal outcomes (i.e. reduced appeal of tobacco products, increased effectiveness of GHWs, and reduced ability of the pack to mislead consumers about the harmful effects of smoking). The Panel concluded that there was empirical evidence, supported by findings of the complainants' own experts, that the TPP measures have reduced the appeal of tobacco

<sup>60</sup> Dominican Republic's appellant's submission, para. 700.

<sup>61</sup> Dominican Republic's appellant's submission, para. 740.

<sup>62</sup> Panel Report, paras. 7.657, 7.436.

<sup>63</sup> Ajzen et al. Data Report (DOM/IDN-2), paras. 90 and 106.

<sup>64</sup> Honduras' appellant's submission, para. 800.

<sup>65</sup> Honduras' appellant's submission, para. 801.

<sup>66</sup> Dominican Republic's appellant's submission, para. 747-779; Honduras' appellant's submission, paras. 806-814.

<sup>67</sup> Panel Report, para. 7.1036. (emphasis added)



products and increased the noticeability of GHWs.<sup>68</sup> The Panel considered that this evidence "confirms, rather than discredits, the 'hypothesized direction'" of the TPP measures.<sup>69</sup>

84. Having made these findings, the Panel then considered the impact of the TPP measures on "distal outcomes" in Appendix B (i.e. quitting-related cognitions, pack concealment, quit attempts, etc.). Despite the inherent challenges in the data, as identified by the Panel,<sup>70</sup> the Panel nonetheless concluded that while some of the results were "limited" or "limited and mixed", the available post-implementation empirical evidence on the "distal" outcomes suggests that the TPP measures are operating as expected in terms of statistically significant effects on avoidant behaviours and increased calls to Quitline.<sup>71</sup> Furthermore, the Panel rejected the complainants' argument that, even if the TPP measures had the expected effects on antecedent behaviours (which they maintained, it had not), then these effects would be susceptible to "wear out".<sup>72</sup>

85. The appellants' claims under Article 11 of the DSU in relation to the Panel's analysis of the evidence in Appendices A and B also lack merit and should be rejected.

86. First, both appellants argue that the Panel's findings are "incoherent" or lack a "reasoned and adequate basis".<sup>73</sup> Specifically, the appellants argue that, in its holistic assessment of the evidence, the Panel relied on the "positive" evidence of "proximal" outcomes in Appendix A demonstrating that the TPP measures were having the effects anticipated in the pre-implementation studies, while "ignoring" or "zeroing out" other "limited" or "limited and mixed" evidence in Appendices A and B.<sup>74</sup>

87. What the appellants are challenging is the Panel's discretion to assess the credibility, determine the weight, and make findings on the basis of the evidence on the panel record. The appellants ignore the fact that the Panel weighed the evidence in Appendices A and B cognizant of the limitations of the post-implementation data and in relation to the complainants' undisputed burden of proving that the TPP measures are *incapable* of contributing to Australia's objective through the operation of the proposed "causal chain". The evidence in Appendices A and B was more than sufficient to support the Panel's overall finding that the complainants had not met this *prima facie* burden.

88. Second, the Dominican Republic argues that the Panel's summary of the effect of the TPP measures on distal outcomes "lacks coherence" with the Panel's own findings in Appendix B of its Report.<sup>75</sup> These arguments need not detain the Appellate Body long. Each of the Dominican Republic's allegations under this "second claim of error" relies on a selective reading of the Panel's analysis and conclusions. Once the Dominican Republic's misrepresentations are corrected, its arguments lack any foundation.

89. Third, the Dominican Republic argues that the Panel's assessment of the robustness of certain of the parties' evidence in Appendix B was inconsistent with Article 11 of the DSU. Given that these claims of error are self-evidently not material to the Panel contribution findings,<sup>76</sup> Australia does not believe that they merit further attention.

<sup>68</sup> Panel Report, para. 7.955; Panel Report, Appendix A, para. 29.

<sup>69</sup> Panel Report, para. 7.954.

<sup>70</sup> Panel Report, Appendix B, para. 118 (the Panel noted that the survey data used in the studies may be more suited to analysing the impact of the TPP measures and enlarged GHWs on "proximal" outcomes than more "distal" outcomes, especially because none of the survey datasets "track non-smokers who might have taken up smoking in the absence of the TPP measures and enlarged GHWs.").

<sup>71</sup> Panel Report, para. 7.963.

<sup>72</sup> Panel Report, para. 7.941. The Panel noted that it was not persuaded that the examples cited by the complainants to support this argument were directly transposable to the effects of the TPP measures on relevant behavioural outcomes.

<sup>73</sup> See, e.g. Dominican Republic's appellant submission, paras. 893-919; Honduras' appellant submission, paras. 755-794.

<sup>74</sup> See, e.g. Dominican Republic's appellant's submission, paras. 877-878, 881; Honduras' appellant's submission, paras. 773-775.

<sup>75</sup> Dominican Republic's appellant's submission, section II.F.3.c.

<sup>76</sup> The Dominican Republic expressly acknowledges in relation to its first "robustness claim" that "[f]rom a 'big picture' perspective, this difference [in duration of the statistically significant increase in calls to Quitline] is not material to an assessment of the success of the TPP measures." Dominican Republic's appellant's submission, para. 971. Nonetheless, the Dominican Republic devotes nearly 20 pages of its appellant submission to its argument that the Panel erred in its assessment of the Quitline calls evidence.

90. In sum, the appellants' claims under Article 11 with respect to "proximal" and "distal" outcomes are wholly lacking in merit, and should be rejected.

## 2. The Appellants' Claims Regarding Appendices C and D Are Unfounded

91. Having found that the early post-implementation evidence on proximal and distal outcomes confirmed that the TPP measures were operating "as intended", the Panel proceeded to examine the post-implementation evidence concerning rates of tobacco smoking (prevalence) and the volume of tobacco products sold (consumption). The Panel detailed its findings on prevalence and consumption in Appendices C and D, respectively.

92. Initially, the complainants sought to demonstrate that the TPP measures are not apt to contribute to Australia's legitimate objective because the measures had "backfired" by causing an *increase* in at least certain categories of prevalence and consumption. The complainants abandoned this position when the evidence established that rates of prevalence and consumption had continued to *decline* following the implementation of the TPP measures. The complainants then changed tactics and sought to prove that *no portion* of the observed declines in prevalence and consumption could be *attributed* to the effects of the TPP measures. To this end, the complainants sought to prove, first, that declines in prevalence and consumption had not *accelerated* since the implementation of the TPP measures in December 2012.<sup>77</sup> Second, the complainants submitted econometric models purporting to show that the TPP measures had not made a statistically significant contribution to the observed declines.<sup>78</sup>

93. In its assessment of the evidence on prevalence (Appendix C) and consumption (Appendix D), the Panel divided its analysis into three steps. First, the Panel examined evidence relating to whether prevalence or consumption "has decreased following the implementation of the TPP measures".<sup>79</sup> Second, the Panel examined evidence relating to whether the reduction in prevalence or consumption "has accelerated" following the implementation of the TPP measures.<sup>80</sup> Third, the Panel examined evidence relating to whether the TPP measures "have contributed to a reduction" in smoking prevalence or consumption, "by isolating and quantifying the different factors that can explain the evolution" of prevalence and consumption.<sup>81</sup>

94. With respect to the first and second steps in its analyses, the Panel found that prevalence and consumption had *declined* and the rate of decline had *accelerated* following the implementation of the TPP measures. The appellants do not challenge the first finding. Only the Dominican Republic challenges the finding of *acceleration* in the case of prevalence, but this challenge is based on a blatant mischaracterisation of the Panel's earlier findings. In Australia's view, there is no credible dispute that prevalence and consumption declined following the implementation of the TPP measures, and that the rates of decline accelerated in both cases.

95. With respect to the third step in its analyses, the Panel identified multiple flaws in the complainants' econometric models purporting to demonstrate that *no portion* of the observed declines in prevalence and consumption could be attributed to the TPP measures, as opposed to other factors that affect prevalence and consumption. Among the principal flaws that the Panel identified was the fact that many of the complainants' prevalence models suggested that *undisputed* determinants of prevalence – such as the price of tobacco products and increases in excise taxes – did not have a statistically significant effect upon rates of prevalence. The Panel identified similar flaws in the complainants' consumption models, including the fact that many of these models sought to control for tobacco prices as a separate determinant of consumption without acknowledging that the TPP measures themselves affect tobacco prices. The Panel questioned the validity and probative value of econometric evidence that produced these types of anomalous results and that contained these types of flaws, while purporting to prove that the TPP measures had made *no* contribution to the observed declines in prevalence and consumption.

96. During the course of the panel proceedings, Australia's econometric experts, principally Dr Tasneem Chipty, submitted rebuttal evidence identifying flaws in the complainants' econometric

<sup>77</sup> Panel Report, para. 7.971(b); Panel Report, para. 7.977(b).

<sup>78</sup> Panel Report, para. 7.971(c); Panel Report, para. 7.977(c).

<sup>79</sup> Panel Report, Appendix C, para. 5; Panel Report, Appendix D, para. 6.

<sup>80</sup> Panel Report, Appendix C, para. 5; Panel Report, Appendix D, para. 6.

<sup>81</sup> Panel Report, Appendix C, para. 5; Panel Report, Appendix D, para. 6.

models and further demonstrating that, once the principal flaws in these models were corrected, the model results were consistent with a negative and statistically significant contribution of the TPP measures to the observed declines in prevalence and consumption. The Panel found that Dr Chipty's modifications of the complainants' models had addressed "some" or "a number of" the concerns that the Panel had identified while reviewing those models.<sup>82</sup> So modified, and in light of all the econometric evidence on the record, the Panel considered that there was "some econometric evidence" suggesting that the TPP measures had contributed, along with enlarged GHWs, to the observed declines in prevalence and consumption.<sup>83</sup>

97. The appellants' challenges to the Panel's factual findings on prevalence and consumption relate overwhelmingly to the third step of its analyses, i.e. to the Panel's evaluation of the complainants' evidence that purported to isolate and quantify the determinants of prevalence and consumption, and thereby prove that no portion of the observed declines in prevalence and consumption could be attributed to the TPP measures. Most of the appellants' claims under Article 11 of the DSU in respect of these findings involve a challenge to the manner in which the Panel evaluated complex econometric evidence. These claims centre on issues such as the appropriate econometric controls for the effects of tobacco prices and taxes, the proper specification of time trends within econometric models, whether certain variables within the models were correlated and therefore conveyed the same information, and whether certain explanatory and dependent variables were potentially endogenous.

98. In lieu of summarising Australia's rebuttal on each and every one of these technical issues, it suffices to note that the appellants' challenges to the Panel's factual findings are based on several recurring errors by the appellants.

99. The appellants' claims are based on **mischaracterisations of what the Panel found**. A prime example of this phenomenon is the Dominican Republic's claim that the Panel failed to undertake an objective assessment of the "benchmark rate of decline" in steps 2 and 3 of its prevalence analysis. This claim is based on the premise that the Panel identified a "benchmark rate of decline" in the first step of its analysis, when in fact it did not.

100. The appellants **misapprehend the Panel's role as trier of fact**. Many of the appellants' claims presuppose that the Panel was required to act as a mere passive recipient of evidence submitted by the parties and was not allowed to engage meaningfully with that evidence. The appellants' claims ignore the Appellate Body's prior recognition that, in order to discharge its duty as the trier of fact, a panel must properly "scrutinize" econometric evidence and "reach conclusions with respect to the probative value it accords".<sup>84</sup> That is exactly what the Panel did in this dispute.

101. The appellants' claims **misapprehend the burden of proof** and the role that it played in the Panel's assessment of the statistical and econometric evidence. The Panel properly understood that the complainants submitted econometric evidence to *prove* that no portion of the observed declines in prevalence and consumption could be attributed to the TPP measures. The Panel also understood that Australia's econometric evidence was *rebuttal* evidence submitted to show that the complainants' models did not prove what they purported to prove. The appellants repeatedly mischaracterise the nature of the Panel's findings in respect of Australia's rebuttal evidence. The Panel did not find, and had no need to find, that Australia's rebuttal evidence had fully resolved *all* of the concerns that the Panel had identified in respect of the *complainants'* econometric evidence in order to conclude that the complainants' evidence, as modified by Dr Chipty, provided "some econometric evidence" in support of the conclusion that the TPP measures had contributed to the observed declines in prevalence and consumption.

102. Many of the appellants' claims overlook the well-settled principle that a panel is **not required to test its reasoning** with the parties in advance of circulating its report.<sup>85</sup> A panel does not violate due process so long as its reasoning does not "depart so radically" from issues and evidence presented to the panel that the parties were "left guessing as to what proof they would have needed to adduce."<sup>86</sup> The allegedly "new" issues raised in the Panel Report that the appellants now

<sup>82</sup> Panel Report, Appendix D, para. 115; Appendix C, para. 120.

<sup>83</sup> Panel Report, Appendix C, para. 123(c); Appendix D, 137(c).

<sup>84</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 357.

<sup>85</sup> See e.g. Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.177.

<sup>86</sup> Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.177.

challenge, such as the Panel's references to potential multicollinearity and non-stationarity in their models, were issues that emerged directly from the parties' extensive expert submissions. The appellants had more than ample opportunity to persuade the Panel of the validity and probative value of their econometric evidence, and ultimately were unable to do so.

103. The appellants' claims that they were "denied an opportunity to comment" on certain of the Panel's findings, and thereby deprived of their right to due process, overlook **the availability of interim review under Article 15.2 of the DSU**. The appellants raised none of the issues that they now identify on appeal during the interim review stage, even though every one of these issues is a type of issue that parties to other disputes have raised in prior interim reviews. To whatever extent the Panel identified issues in its interim report that the appellants could not reasonably have anticipated, the appellants had an opportunity to raise their concerns with the Panel and elected not to do so.

104. The appellants overlook the fact that the Panel evaluated the validity and probative value of their econometric evidence in light of **the constantly changing nature of the complainants' evidence**. The Panel identified numerous instances in which the complainants' experts changed their positions on important methodological issues, often with the effect of invalidating the results reported in their prior submissions. Instead of confronting the implications of flaws identified in their earlier model specifications, the complainants' experts frequently changed *other* aspects of their models, or abandoned prior models altogether, in an attempt to move the goalposts and start the debate all over again. The Panel appropriately took this consideration into account when evaluating the weight to accord to the complainants' econometric evidence.

105. Finally, many of the appellants' challenges to the Panel's factual findings on prevalence and consumption are a thinly-disguised attempt to **re-litigate factual issues or have the Appellate Body re-weigh the evidence**.

106. Each of the appellants' challenges to the Panel's findings on prevalence and consumption are unfounded for one or more of the reasons enumerated above.

107. In addition to their failure to establish a lack of objective assessment in any respect, the appellants do not even *attempt* to demonstrate, beyond sheer assertion, that any one of the alleged errors of objective assessment, or any combination thereof, was *material* to the Panel's intermediate findings on prevalence and consumption. As summarised in Part 0 above, the appellants' claims that the Panel's findings on prevalence and consumption reflect a lack of objective assessment are a key input to their challenge to the Panel's *overall* finding on contribution. The appellants have failed to establish the essential predicate of this broader challenge.

## F. CONCLUSION

108. Australia submits that the appellants' requests for reversal of the Panel's findings should be dismissed in their entirety, for the reasons outlined above.

109. The appellants' claims of legal error are specious, and their numerous claims that the Panel acted inconsistently with Article 11 of the DSU in its assessment of contribution are unfounded. As is evident from the foregoing, the appellants have failed to establish that the Panel exceeded the bounds of its discretion as the trier of fact under Article 11 of the DSU in finding that the complainants failed to demonstrate that the TPP measures are not apt to make a contribution to Australia's public health objectives.<sup>87</sup>

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<sup>87</sup> Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (11 March 2015), Australia indicates that this executive summary contains 11,767 words (including footnotes), and that this is ten percent or less of the total word count of Australia's appellee submission, which is 129,096 words.

**ANNEX C****ARGUMENTS OF THE THIRD PARTICIPANTS**

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## **ANNEX C-1**

### **EXECUTIVE SUMMARY OF ARGENTINA'S THIRD PARTICIPANT'S SUBMISSION\***

#### **I. Article 16.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).**

1. Argentina understands that the rights conferred by Article 16.1 of the TRIPS Agreement are, in essence, rights of exclusion granted to the owner of the trademark to prevent third parties from using in the course of trade identical or similar signs.

2. Consequently, Argentina understands that the Panel correctly interpreted the said article in finding that the obligation to provide protection does not extend to the obligation to maintain market conditions that permit the occurrence of certain factual circumstances provided for in that article, including the likelihood of confusion.

#### **II. Article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).**

3. Argentina considers that the Panel has properly interpreted the adverb "unjustifiably" in the context of Article 20.

4. Argentina understands that the analysis of "justifiability" under Article 20 of the TRIPS Agreement has its own specificity and differs from other standards contained in other provisions of the covered agreements.

5. Argentina shares the Panel's view, also as regards the factors taken into account when conducting the "justifiability" analysis under Article 20.

6. Argentina considers that the Panel was correct in its interpretation that the contribution of the measure analysed to the objective pursued should be comprehensively evaluated.

7. Finally, Argentina submits that Article 8 of the TRIPS Agreement offers useful contextual guidance for the interpretation of the term "unjustifiably" in Article 20. Specifically, the intention of the principles reflected in Article 8.1 is to preserve the ability of WTO Members to pursue certain legitimate societal interests, such as public health.

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\* This text was originally submitted in Spanish by Argentina.

**ANNEX C-2****EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION**

1. In its submission, Brazil highlights the importance of analyzing this dispute in the context of the WHO's Framework Convention on Tobacco Control. Brazil then comments on: the "trade restrictiveness" test under Article 2.2 of the TBT Agreement; the interpretation of "unjustifiably encumber" under Article 20 of the TRIPS Agreement; and the Members' policy space in implementing public policies.
2. Concerning the "trade-restrictiveness" test, Brazil notes that, by performing only a "trade effects" test under Article 2.2 of the TBT Agreement, the Panel established a higher threshold for the analysis of non-discriminatory measures. Brazil understands the qualitative test could be omitted only if a Panel could gather precise quantitative information concerning the trade restriction caused by a TBT measure and its effects in competitive opportunities. Brazil also views the claimant is not required to demonstrate trade effects to meet its evidentiary burden of proof.
3. Regarding the interpretation of "unjustifiably encumber" under Article 20 of the TRIPS, Brazil maintains the Panel recognized the need for the encumbrance to be proportionate to the importance of the objective pursued by finding that the reasons for the application of special requirements should provide "sufficient support" for the encumbrance. Brazil agrees that Article 20 presupposes a balancing between the owners' interest to use their trademarks and Members' ability to adopt measures for achieving societal goals.
4. Lastly, Brazil maintains that WTO Members may encumber the use of trademarks with special requirements, such as use in a special form, on the only condition that the encumbrance is justifiable. The TRIPS Agreement does not mention which kinds of motivation would legitimize the adoption of special requirements, nor defines any limit to encumber the use of a trademark other than its justifiable nature.

**ANNEX C-3****EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION**

1. The findings of the Appellate Body in this dispute will have important systemic consequences for all WTO Members. This dispute addresses the critical balance between the protection of intellectual property rights and trade facilitation, and a Member's right to take legitimate public health measures under the TRIPS Agreement and the TBT Agreement.
2. The appellants' claims that the Panel erred in its interpretation of Articles 16.1 and 20 of the TRIPS Agreement, and Article 2.2 of the TBT Agreement are without merit and should be dismissed.
3. The Panel was correct to conclude that TRIPS Article 16.1 of the TRIPS Agreement *does not* include a right to: use a trademark; preserve or strengthen the distinctiveness of a trademark; or protect an owner's ability to demonstrate that a "likelihood of confusion" exists in the context of domestic infringement proceedings. A finding otherwise, under this provision or elsewhere in the TRIPS Agreement, would lead to the untenable result of restricting or nullifying Members' ability to take legitimate public policy measures, including measures to protect public health.
4. The appellants misrepresent the Panel's findings with respect to the interpretation of the term "unjustifiably" under TRIPS Article 20. The Panel did not find that Article 20 establishes a "policy exception". The Panel properly concluded that Article 20 establishes an affirmative obligation on Members not to impose special requirements that unjustifiably encumber the use of a trademark. Further, the Panel properly found that an assessment of individual trademarks and their specific features is not required, as a matter of course, to determine whether a measure is justifiable under Article 20.
5. Canada agrees with the Panel that the test for "unjustifiably" should not be akin to an "unnecessary" test. When the ordinary meanings of "necessary" and "justifiably" are compared, it is evident that the threshold to establish that a measure is "necessary" must be higher and more stringent than the threshold to establish that a measure is "justifiable". There is no basis in the text or negotiating history to adopt a "necessary" test in Article 20. Consequently, the appellants' claim that the comparative component of the "necessity" test should be imported into Article 20 must be rejected.
6. Canada proposes additional elements to the Panel's "unjustifiably" test to ensure that the critical and deliberate balance is preserved between the protection of IP rights and a Member's right to take legitimate public policy measures. In particular, the test must include whether: the "reasons" for the requirement are legitimate; there exists a nexus or connection between the requirement and the reasons; and the requirement contributes to or is capable of contributing to the reasons. The test should *not* include a comparative analysis of the requirement at issue and the existence of alternative requirements.
7. The appellants' claims under Article 2.2 of the TBT Agreement should be dismissed as they are not substantiated by a plain reading of the Panel's findings and are without merit. The Panel's interpretation of "trade restrictiveness" is consistent with existing case law and does not constitute an error of law.
8. Canada encourages the Appellate Body to rigorously apply the standard under Article 11 of the DSU to dismiss any arguments that simply seek to have factual findings overturned on appeal<sup>1</sup>.

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<sup>1</sup> Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (11 March 2015), Canada indicates that this executive summary contains 542 words, and that this is ten percent or less of the total word count of Canada's third participant submission (including footnotes), which is 5,483 words.



## ANNEX C-4

### EXECUTIVE SUMMARY OF CHINA'S THIRD PARTICIPANT'S SUBMISSION

1. These disputes touch upon important issues concerning the balance between health interests, trade interests and intellectual property interests under the WTO covered agreements. It is undisputed that WTO Members may take appropriate measures for the purpose of protection of public health.
2. While not taking a position on the specific merits of the disputes and evidentiary assessment issues, China would like to provide its observations on legal interpretation of two provisions of covered agreement: Article 20 of Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement).
3. With respect to Article 20 of the TRIPS Agreement, the standard of "unjustifiably" under Article 20 of the TRIPS Agreement is not necessarily the same as that of "necessary" under Article 2.2 of the TBT Agreement or Article XX of the GATT 1994.
4. The "unjustifiably" test appears to be neither a test identical or similar to that under Article 2.2 of the TBT Agreement or the GATT 1994, nor an "all or nothing" test in terms of the rational connection between the measure and the policy objective. The existence of less restrictive alternatives might not, in itself, establish that the measure at issue is unjustifiable. Equally, rational connection that is de minimis might not, in itself, demonstrate the measure is justifiable.
5. With respect to Article 2.2 of the TBT Agreement, China hopes AB could clarify the relationship between Article 2.2 and Article 2.1 of the TBT Agreement and whether a higher evidentiary burden of demonstrating actual trade effects was imposed on non-discriminatory technical regulations in order to illuminate trade-restiveness.
6. China has concern on the rigid and narrow interpretation of "equivalent degree of contribution to relevant legitimate objective". China hope AB could clarify the scope of the legitimate objective here, which refers to the main policy purpose, protecting human health, or the effect of the challenged measure, reducing the attraction of the tobacco package.

**ANNEX C-5****EXECUTIVE SUMMARY OF THE DOMINICAN REPUBLIC'S THIRD PARTICIPANT'S SUBMISSION**

1. The Dominican Republic presents interpretive arguments on one issue raised in Honduras' appeal under Article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"): the Panel's failure to take appropriate account of the individual characteristics of each affected trademark in examining the nature and extent of the encumbrances, and the justifiability of the encumbrance as it relates to the affected trademarks.
2. Establishing whether trade "use" has been "unjustifiably encumbered" involves, first, an assessment of the existence of an encumbrance, and, second, an assessment of its justifiability. Both stages of this analysis must be conducted based on an assessment of "each affected trademark individually".<sup>1</sup> The Panel failed to apply Article 20 to require appropriate account be taken of each affected trademark.<sup>2</sup>
3. As Honduras explains, the context of Articles 15, 16, 17, and footnote 3 of the TRIPS Agreement confirms that Article 20 requires an individualized assessment of each specific trademark.<sup>3</sup> Under the TRIPS Agreement, all aspects of trademark regulation, including the *content, acquisition, enjoyment, and enforcement* of trademark rights, are based on individual consideration of each particular trademark. The regulation of use is equally important, as use is essential to ensure that a trademark fulfills its basic distinguishing function. As is the case for other aspects of trademark regulation, the regulation of use must take account of the individual characteristics of each affected trademark.
4. The Panel failed to do so. It found that the prohibition on stylized word marks, composite marks and figurative marks is "partly mitigated" by the continued use of non-stylized word marks. This finding collapses the legal and factual distinctions between different trademarks and different categories of trademarks that perform distinct functions. A prohibition on the use of one trademark is not lessened by the use of another. A mark whose use is prohibited cannot fulfill its basic function.
5. Similarly, the Panel erred in finding that individual assessment was unnecessary because Australia "did not *intend* to address individual trademarks".<sup>4</sup> The WTO-consistency of a measure does not hinge on a respondent's intentions. The Panel should have assessed the TPP trademark requirements by reference to their *effects* on trademarks.
6. The Panel also confuses the regulation of *trademarks* with the regulation of *products*. The encumbrance on trademarks that must be shown to be unjustifiable is not the "standardization" of tobacco products, as the Panel said.<sup>5</sup> It is a prohibition on the use of stylized word marks, composite marks and figurative marks on a particular product.

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<sup>1</sup> Honduras Appellant's Submission, paras. 140, 181.

<sup>2</sup> See *generally* Honduras Appellant's Submission, Section III.

<sup>3</sup> Honduras Appellant's Submission, para. 163. (emphases added)

<sup>4</sup> Panel Report, para. 7.2594. (emphasis added)

<sup>5</sup> Panel Report, para. 7.2594.

## ANNEX C-6

### EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION<sup>1</sup>

#### 1.1 Article 2.2 of the TBT Agreement

1. The European Union shares the concern that, in order **to ensure due process, panels are required to share factual evidence on which they rely with the parties to a dispute** in order to allow them to provide their views with regard to the value and use of this evidence. However, even if the Panel's assessment of the post-implementation evidence would be affected by a failure under Article 11 DSU, it would need to be considered to what extent the Panel could still have reached its conclusion that the TPP measure is apt to make a material contribution to its stated objectives. The European Union is rather of the view that such a conclusion would be sound. It should be possible to reach such a conclusion on the basis of considering a reasonable amount of evidence, including qualitative reasoning. For regulatory space to be meaningful, regulatory authorities must be afforded sufficient latitude to choose between different available options, without being continuously second-guessed by WTO adjudicators. They should not have to live in fear of being swamped by excessive quantities of litigant-generated "evidence", turning the regulatory process into a battle of attrition.

2. With regard the claim that the Panel erred in the **application of Article 2.2 of the TBT Agreement when assessing the contribution of the TPP measure**, the European Union notes that the Panel found the considerations by Australia that the impact of the measures can only manifest itself fully over a longer period of application to be persuasive. Rather than merely accepting that it was "reasonable" that the measures were apt to make a material contribution, the Panel was referring to the expected effect of the measures at issue *over the longer term*. It recognised that the evidence in the early period of application of the measures "may not provide a complete picture" and that its determination was "not intended to prejudge the future evolution of the contribution of the TPP measures to the reduction of the use of, and exposure to, tobacco products". Yet, it considered that the evidence on "proximal" and "distal" outcomes corroborated Australia's claim.

3. With regard to the **standard of trade-restrictiveness**, the European Union agrees that any measure regulating economic activity would likely alter the conditions of competition for all relevant products and producers. One cannot conclude from this that there is – necessarily – also a restriction of international trade. The complainants' attempt to transpose the "competitive opportunities" language from the context of *de facto* discrimination reflects an attempt to escape from the consequences of how they have framed their cases. If their real concern would have been how the measures have impacted upon them differently, then they should have brought an MFN claim. They have not done so. This has forced them into a conundrum of their own making. They must argue that the measures are *ineffective* and yet, at the same time, *trade restrictive*. That is why they seek to extend the concept of trade restrictiveness to include the manner in which the measure, allegedly, impacts them differently. This confounds the concept of *de facto* discrimination with the different concept of trade restrictiveness.

4. With regard to the complaint that the Panel would have **examined the alternative measures' contribution in light of the specific "mechanisms" by which the TPP measures operate, rather than the objectives**, the European Union considers that the Panel appropriately recognised that the TPP measure is part of a "suite of measures" addressing a multifaceted problem, seeking to achieve the more general and ultimate objective of reducing tobacco consumption. Reducing the appeal of tobacco products for youth by removing the possibility to compete based on brand image and diversification would appear to be one of the causal mechanisms by which that overarching objective is to be achieved. It seems reasonable to posit that the complex and multifaceted socio-economic objective pursued by Australia may need to be approached from all available angles, simultaneously, each measure bearing down on a particular facet of the problem. However,

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<sup>1</sup> Total words of the submission (including footnotes but excluding the executive summary) = 13451; total words of the executive summary = 1263.

if one measure would be omitted from the suite, there is every risk that a gap would open up, reducing the effectiveness of the entire suite.

5. The European Union does not consider that a **different standard of "equivalence" was imposed in case of a "suite of measures"**. The Panel stressed, in line with the Appellate Body in *Brazil – Retreaded Tyres*, that the specific elements of Australia's tobacco strategy cannot be replaced by alternatives that are a modification or improvement of existing measures that are already part of the suite of measures when these would not, in themselves, adequately address the particular causal mechanism at issue, thus leaving the suite incomplete. To the European Union, addressing specifically the effect of the images and messages conveyed by the figurative and other design features of the tobacco packaging is a particular causal mechanism, leading to the longer-term objective of an overall reduction of smoking. It may reasonably be considered a necessary element of the overall suite of measures, essential to ensure the effectiveness of the suite considered as a whole. In other words, we consider that a regulator should have the possibility, as part of an overall suite of measures, to address a specific form of competition that is proven to attract consumers.

## 1.2 Article 20 of the TRIPS Agreement

6. The Panel set out a legal standard regarding the term "unjustifiably" that resembles the justifications under Article XX of the GATT 1994 and appears to be in line with Article 20. The concept of "justifiable" is broad enough to capture the various types of justification, with their various types of nexus and ensures, as stated in Article 8.1 of the TRIPS Agreement, that there is scope within the TRIPS Agreement to accommodate measures necessary to protect public health.

7. The term "unjustifiably" implies the existence of certain objectives behind the "special requirements" as it refers to the ability to provide a "justification" or "good reason" for the relevant action or situation that is reasonable. Article 20 does not expressly identify the types of reasons that may form the basis for the "justifiability" of an encumbrance. The broad wording of Article 20 indicates that WTO Members could take into account public policy objectives; useful guidance can be found in the context of the other provisions of the TRIPS Agreement, in particular Articles 7 and 8.

8. The legal standard adopted by the Panel is not limited to providing "good reasons". It actually weighs and balances in each specific case several elements: the nature and extent of the encumbrance resulting from the special requirements; the legitimate interest of the trademark; the reasons underlying the special requirements; and whether these reasons provide sufficient support. The legal standard appears to consider also the specific concerns raised by the trademarks concerned as part of the analysis.

9. The ordinary meaning, the context and the objective and purpose of Article 20 of the TRIPS Agreement do not appear to show that Article 20 only allows encumbrances that rely on "trademark-specific concerns" and are applied in "limited manner" or "with minimal impact on its distinguishing function". The examples introduced by "such as" in Article 20 and the "special" nature of the requirements do not imply that the term "unjustifiably" has to be read as allowing only limited encumbrances. Furthermore, since the relevant "use" for the purposes of Article 20 is not limited to distinguishing the goods and services of one undertaking from those of other undertakings, the "minimal impact on its distinguishing function" appears thus not to be decisive.

**ANNEX C-7****EXECUTIVE SUMMARY OF INDONESIA'S THIRD PARTICIPANT'S SUBMISSION****I. INTRODUCTION<sup>1</sup>**

1. The Dominican Republic and Honduras ("the Appellants") challenge various aspects of the Panel's report. They seek reversal of legal interpretations by the Panel of Article 2.2 of the Agreement on Technical Barriers to Trade ("TBT Agreement"), and Articles 16.1 and 20 of the Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS Agreement"). The Appellants also believe the Panel failed to make an objective assessment of the matter in violation of Article 11 of the Understanding on the Rules and Procedures Government the Settlement of Disputes ("DSU"). They present argument and evidence showing that the Panel failed to examine the matter in an even-handed manner, applying a double standard of proof that repeatedly benefited Australia. Finally, the Appellants maintain that the Panel failed to respect their due process rights. In their written submissions they detail how the Panel rejected the complainants' evidence that Australia's tobacco plain packaging measures ("TPP measures") do not contribute to their objective using econometric tests that the Panel (a) developed on its own, (b) gave the complainants no opportunity to comment on, and (c) are not part of the Panel's record.

**II. THE PANEL ERRED IN FINDING THAT AUSTRALIA'S TPP MEASURES ARE NOT INCONSISTENT WITH ARTICLE 2.2 OF THE TBT AGREEMENT****A. The Panel Erred When Assessing The Trade-Restrictiveness Of The TPP Measures**

2. The Panel should have based its trade-restrictiveness finding on whether the challenged measures modify the conditions of competition to the detriment of imported products. Instead, the Panel embraced a "trade effects" test based on the extent to which Australia's TPP measures reduced the volume of imports. The Panel compounded its error by insisting that any trade effects be caused exclusively by the TPP measures.

3. The Appellate Body has made clear that panels should assess the trade-restrictiveness of technical regulations under Article 2.2 with reference to their limiting effect on the "competitive opportunities' available to imported products".<sup>2</sup> The concept of "trade-restrictiveness is broad" and its presence may be demonstrated without having to quantify the trade effects.<sup>3</sup>

4. The complainants presented evidence that TPP's design, structure, and expected operation restricts the competitive opportunities available to imported tobacco products. Australia admits that TPP is intended to prevent tobacco companies from using trademarks to distinguish their products and enhance competitive opportunities. Despite this, the Panel stated that "it needs to be shown *how* such effects on the conditions of competition on the market give rise to a limiting effect on international trade in tobacco products".<sup>4</sup>

5. The complainants presented evidence of trade effects. They proffered evidence (not rebutted by Australia) showing that TPP led some consumers to shift to lower-priced tobacco products.<sup>5</sup> However, the Panel still found no trade restriction on these grounds. The Panel claimed the evidence did not show that the relative increase in sales of lower-priced tobacco products was "exclusively" due to down-trading caused by the TPP measures.

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<sup>1</sup> In line with the Working Procedures of the Appellate Body, the total number of words in Indonesia's Third Participant Submission is 20,697. The total number of words in this Executive Summary is 2,051.

<sup>2</sup> Appellate Body Reports, *US – COOL*, para. 477.

<sup>3</sup> *Id.*

<sup>4</sup> Panel Report, para. 7.1168.

<sup>5</sup> *Id.*, para. 7.1197.

## **B. The Panel Erred In Assessing Whether There Were Less Trade-Restrictive Alternatives To The TPP Measures**

6. In describing how it would assess the relative contribution of less trade-restrictive alternatives ("LRAs") to Australia's objective, the Panel notes (correctly in Indonesia's view) the Appellate Body's guidance that

[w]hat is relevant in an assessment of 'equivalence' is 'the *overall* degree of contribution that the technical regulation makes to the objective pursued ... rather than any *individual isolated aspect or component* of contribution'.<sup>6</sup>

7. Unfortunately, the Panel then proceeds to assess the relative contributions of LRAs and TPP, not in terms of their overall contribution to reducing the use of and exposure to tobacco products, but rather on their contributions to TPP's "mechanisms" (i.e. reducing appeal, increasing the effectiveness of graphic health warnings ("GHWs"), and eliminating the ability of tobacco manufacturers to mislead consumers). This approach runs counter to the Appellate Body's guidance not to link equivalence to an individual aspect or component of contribution and reflects a violation of TBT 2.2.

## **C. The Panel Let Australia Show That TPP Might Work In The Future, But Complainants Had To Show That The Pre-Vetting Alternative Was Certain To Work**

8. Even though Indonesia disagrees that an LRA must contribute through the same mechanisms as TPP, the complainants included at least one alternative, pre-vetting, that did just that. The Panel agreed:

pre-vetting ... would ... achieve Australia's objective of improving public health by reducing use of, and exposure to, tobacco products through the same causal mechanisms as those employed by the TPP measures, namely reducing appeal, increasing the effectiveness of the GHWs, and reducing the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.<sup>7</sup>

9. Despite these findings, the Panel concluded that the contribution made by pre-vetting was not equivalent to the contribution made by TPP because of the *possibility* that it might make a lesser degree of contribution to Australia's objective.<sup>8</sup> The Panel speculates that pre-vetting could result in certain design elements of tobacco packaging being allowed onto the market and that allowing these products to appear on the market, even for a short period, could have adverse health effects.<sup>9</sup>

## **III. THE PANEL'S FINDINGS ON THE CONTRIBUTION OF TPP TO ITS OBJECTIVE UNDER TBT 2.2 AND TRIPS 20 ARE VITIATED BY LEGAL ERRORS AND INCONSISTENT WITH THE REQUIREMENTS OF AN OBJECTIVE ASSESSMENT UNDER ARTICLE 11 OF THE DSU**

### **A. The Panel Erred When It Conflated The Effects Of TPP With The Effects Of Enlarged GHWs**

10. The complainants argued that TPP does not make a meaningful contribution to its objective. In making this showing the complainants faced the "perfect confound".<sup>10</sup> Specifically, concurrent with its move to TPP, Australia substantially increased the size of its GHWs on packaging.

11. In order to get around this conundrum the complainants' experts assumed that *all* of the effect on smoking prevalence was attributed to TPP and *none* resulted from the GHWs. When they did, the evidence still showed that TPP did not have a sustained effect on smoking prevalence.

<sup>6</sup> *Id.*, para. 7.1368.

<sup>7</sup> *Id.*, para. 7.1664.

<sup>8</sup> *Id.*, paras. 7.1680 - 7.1683.

<sup>9</sup> *Id.*, para. 7.1680.

<sup>10</sup> "A Consideration of the Empirical Evidence on the Effect of Australia's Tobacco Plain Packaging Legislation", Prof. J. List, p. 30, 1 June 2015, Exhibit DR/IND-1.

12. Unfortunately, the Panel never addresses complainants' claim that the TPP measures do not contribute to their objective. Instead, it finds that TPP *and* enlarged GHWs contribute to Australia's objective.<sup>11</sup>

13. The failure of the Panel to address complainants' claim vitiates its findings on contribution under TBT Article 2.2. It also reflects a failure to comply with the obligation under DSU Article 11 to make an objective assessment of the matter.<sup>12</sup>

#### **B. The Panel Supported Its Findings Of Contribution On The Basis Of Assessments That Are Not Specific To Australia Or The Australian Context**

14. In order to conduct "an objective assessment of the matter before it, including the facts of the case" in accordance with DSU Article 11, a panel must interpret WTO agreements in a highly contextualized manner. It must consider the facts and "circumstances that prevail in any given case".<sup>13</sup>

15. The Dominican Republic submits that the Panel supported its finding of contribution on the basis of evidentiary assessments that are not specific to Australia or the Australian context.<sup>14</sup> Indonesia agrees.

16. The Panel based its assessment of TPP's contribution to its objective, including its impact on package appeal, effectiveness of GHWs, and the ability of the pack to mislead, on hypothetical scenarios or stale facts.

#### **C. The Panel Denied The Complainants The Opportunity To Comment On "Robustness" Criteria Applied By The Panel To Assess Complainants' Post-Implementation Evidence On Contribution**

17. The parties presented numerous studies on whether the TPP measures make a contribution to their objective. Many of these studies were based on extensive data sets and econometric models.

18. The Panel rejected the views of complainants' experts, not based on anything argued or presented by Australia, but on the basis of "robustness criteria" developed by the Panel, but never raised with the parties. Had the complainants been afforded the opportunity to comment on the robustness criteria developed by the Panel, they would have been able to address specific flaws in the way the criteria were applied and provide a rebuttal to the conclusion that the complainants' evidence was not robust.

19. The Panel's approach to assessing the robustness of the econometric evidence presented by the complainants is inconsistent with Article 11 because it failed to accord the complainants due process. The Panel did not allow complainants to comment on the criteria it used, nor its conclusion that certain evidence presented by complainants' experts could not be relied upon because it was not sufficiently robust.

#### **D. The Panel Applied Robustness Criteria To Complainants' Post-Implementation Evidence Of Contribution, But Not To Substantially Similar Evidence Presented By Australia**

20. In addition to denying complainants due process, the Panel also applied its robustness criteria in a discriminatory manner. Instead of applying them equally to data developed by the complainants and Australia, the Panel appears to have applied the criteria only to the data developed by the complainants. Had the Panel applied the same robustness criteria it used to critique complainants' data to substantially similar data presented by Australia, it would have presumably voiced similar concerns. For example, according to the Dominican Republic, Dr Chipty's work (proffered by Australia) suffers from the same robustness concerns as the Panel claims to have found with

<sup>11</sup> See, e.g., Panel Report, para. 7.1025.

<sup>12</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.233.

<sup>13</sup> Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 21.

<sup>14</sup> Dominican Republic's Appellant Submission, paras. 652-825.

evidence developed by Professors Klick and List. This lack of even-handedness is contrary to DSU Article 11.

#### **IV. THE PANEL ERRED IN FINDING THAT AUSTRALIA'S TPP MEASURES ARE NOT INCONSISTENT WITH ARTICLE 16.1 OF THE TRIPS AGREEMENT**

21. Indonesia supports Honduras' appeal of the Panel's finding that TPP does not violate Article 16.1 of the TRIPS Agreement. First, Indonesia agrees that "[a] Member that directly and deliberately seeks to reduce the strength of the mark, thereby making it impossible, over time, to demonstrate a likelihood of confusion ... violates Article 16.1 of the TRIPS Agreement".<sup>15</sup> Second, Indonesia agrees that the Panel mistakenly exercised judicial economy when it refused to examine whether TPP limits the right of tobacco trademark owners to prevent an infringing use.<sup>16</sup>

#### **V. THE PANEL ERRED IN FINDING THAT AUSTRALIA'S TPP MEASURES ARE NOT INCONSISTENT WITH ARTICLE 20 OF THE TRIPS AGREEMENT**

22. First, Article 20 prohibits Members from imposing "special requirements" that "unjustifiably encumber[]" the "use of a trademark in the course of trade". The Panel's findings in relation to Article 20 reflect an erroneous interpretation of the term "unjustifiably".<sup>17</sup> A proper interpretation would have led to the conclusion that the term "unjustifiably" qualifies the extent to which use of a *particular trademark* may be encumbered, rather than whether the requirements imposed are justifiable based on "good reasons".

23. Second, the Panel failed to consider the claims of Honduras and other complainants regarding the unjustifiability of the encumbrance caused by the prohibition of all marks on cigarette *sticks*. This prohibition entirely eliminates the ability to differentiate between cigarettes once they are removed from their packaging.<sup>18</sup> This failure on the part of the Panel to address the complainants' arguments is also a failure to "comply with the obligation under Article 11 of the DSU to make an objective assessment of the matter".<sup>19</sup>

#### **VI. CONCLUSION**

24. Indonesia wishes to thank the Appellate Body for its consideration of these views.

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<sup>15</sup> Honduras' Appellant Submission, para. 435.

<sup>16</sup> *Id.*, para. 445.

<sup>17</sup> Honduras' Appellant Submission, paras. 52-322.

<sup>18</sup> The Panel's failure to apply the law to the facts of this case as they pertain to cigarette sticks is legal error. Honduras' Appellant Submission, para. 58.

<sup>19</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.233.



**ANNEX C-8****EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION**

1. When conducting an examination of whether a trademark has been "unjustifiably" encumbered by the special requirements under TRIPS Article 20, Japan is of the view that it is essential to identify the policy objective of the challenged measure objectively and accurately at the outset. Otherwise, it would be impracticable to assess whether the measure is reasonably calibrated to contribute to its policy objective.
2. Regarding the first factor of such an examination, Japan notes that effects on the use of figurative and design aspects of trademarks by the TPP measures, and the resulting effects of the economic value of the trademarks, should be properly taken into account when evaluating the nature and extent of the encumbrance.
3. Regarding the second factor, Japan notes that policy objectives should be assessed based on the measure's objective structure, design, and architecture. This does not mean that the policy objective should be specified at the level of detail which describes the manner in which the measure achieves the policy objective. The more detailed the objective, the greater the risk that a measure will always be found to contribute to the objective and that no alternative measures could equally contribute.
4. Japan makes two points regarding the third factor. First, Japan notes that labelling regulations are generally intended, by their structure and design, to prevent consumer confusion regarding the content, qualities and characteristics of the goods at issue. It is therefore inappropriate to conclude that any or all advertising or promotion function of trademarks should be prohibited for any products with harmful effects, particularly if the trademarks do not create misunderstandings about the harmful effects. Second, Japan takes issue with the Panel's finding that the TPP measures ensured that objectives of other measures (outside its terms of reference) were not undermined. Japan considers that the proper framework to analyze the supporting effects of the measure at issue on other measures should be, first, to assess the contribution of such other measures to their own objectives.
5. Japan makes two points regarding Article 2.2 of the TBT Agreement. First, Japan submits that the examination of "trade-restrictiveness" under the second sentence of Article 2.2 should be primarily based on an examination of the measure's design, architecture, structure and operation. Qualitative analysis may suffice. Japan also notes that actual trade effects may not necessarily reveal trade-restrictiveness due to the interaction of various market factors. So long as a Member demonstrates that a modification of competitive opportunities, which is detrimental to imports, it should logically follow that there is a limiting effect on international trade.
6. Second, Japan considers that the Panel applied an incorrect standard by requiring alternative measures to "substitute" for the measures at issue. Giving weight to the unique characteristics or direct effects of the measure at issue and therefore requiring proposed alternative measures to completely substitute the challenged measure, may lead to effectively requiring a contribution that is not just "equivalent" but rather "identical" to it.

**ANNEX C-9****EXECUTIVE SUMMARY OF MALAWI'S THIRD PARTICIPANT'S SUBMISSION**

1. Malawi appreciates the opportunity to provide its views on the Panel's findings in *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*. Malawi has a deep interest in the outcomes of this dispute, and in its implications for the cardinal principles underlying the multilateral trading system.
2. Tobacco accounts for the majority of Malawi's exports by value, and supports 70 per cent of its citizens' livelihoods. Malawi is a major global producer of Burley and unmanufactured tobacco. Tobacco plain packaging measures have the potential to greatly and negatively impact Malawi's economic and trade interests by restricting trade.
3. Malawi is therefore concerned that the Panel's approach to the loss of competitive opportunities to differentiate between tobacco products appears to be at odds with the meaning of "trade-restrictiveness" under Article 2.2 of the TBT Agreement.
4. First, for the Panel, the loss of competitive opportunities was insufficient to demonstrate that the TPP measures are "trade-restrictive", absent actual trade effects. However, under Article 2.2, there is no need to consider trade effects when a measure, by design, limits significant competitive opportunities.
5. Second, the Panel concluded that while the measures may affect the overall value of tobacco imports over time, they did not have a limiting effect because the evidence "to date" did not show an effect. However, under Article 2.2, competitive opportunities are protected both now *and* in future.
6. Malawi also urges the Appellate Body to ensure that the Panel conducted an objective assessment of the facts under Article 11 of the DSU. Due process is essential to a panel's neutral balancing of Members' competing interests, and is therefore an important part of the legitimacy of the WTO's dispute settlement system. The allegations that the panel devised its own econometric tests, and used the results of its own internal testing as "evidence", warrant thorough review.

**ANNEX C-10****EXECUTIVE SUMMARY OF MEXICO'S THIRD PARTICIPANT'S SUBMISSION\***

1. Mexico has a systemic interest in the procedures for appellate review of the report issued by the Panel in this dispute. Specifically, Mexico considers certain elements in the Panel's interpretation to be inconsistent with the case law to date on technical barriers to trade. The purpose of this third participant's submission is therefore to contribute to the analysis being conducted by the Appellate Body to clarify the rights and obligations of Members with respect to the provisions in dispute.
2. The interpretation of international trade-restrictiveness in the light of the examination of "necessity" in terms of Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement) is the key to determining whether a technical regulation is permitted or prohibited under that provision.
3. Mexico believes that there are inconsistencies as regards the legal analysis carried out by the Panel of: (i) the meaning of the term "trade-restrictive" and (ii) the application of the standard to the challenged measures.
4. Regarding the term "trade-restrictive", although the TBT Committee's recommendation may be relevant in assessing the restrictiveness of trade, Mexico considers that Article 2.1 of the TBT Agreement and the interpretations regarding the assessment of a detrimental impact on competitive conditions provide relevant context for evaluating restrictiveness. Although these are provisions that establish different obligations, each one can inform the other. Thus, regardless of whether we are dealing with a discriminatory or non-discriminatory measure, Mexico believes that the change in the competitive conditions may constitute a limiting effect on trade which may be evaluated according to the design, structure and operation of the measure. Likewise, although evidence of actual trade effects may be relevant, there is no need to demonstrate the existence of actual effects on trade as the result of a technical regulation in order to determine its inconsistency with Article 2.2 of the TBT Agreement.
5. As regards application to the challenged measures, Mexico submits that the Panel did not conduct an analysis based on the design, structure and operation of the measure to determine whether there was a limiting effect on competitive opportunities resulting from the limitation of the ability to compete on the basis of trademarks. Moreover, although the Panel noted that the analysis of the measures may be qualitative, it in fact conducted an analysis of the actual effects of the measures. At the same time, in concluding that the decrease in the consumption and imports of premium tobacco products was not exclusively the result of "downtrading" the Panel appears to have considered that a certain threshold for restrictiveness had to be met. In Mexico's view, although the Panel must try to determine to what extent a measure restricts trade, that determination does not require that a particular threshold be met. In other words, it is not indispensable that the restriction should attain a particular level of limitation, but rather, that it should be possible to determine at what level or to what degree, and in what manner trade is limited. The joint assessment of whether a measure is "more trade-restrictive than necessary" requires, in addition and necessarily, an examination of other factors to help determine whether or not the measure is, in fact, an unnecessary barrier.
6. Finally, although Mexico does not dismiss the possibility that the analysis of the effects of a measure on supply could be relevant, it does not consider that because there has been an increase in prices or those prices have remained at the same level, it necessarily follows that the restrictive effects of a measure have been neutralized. Mexico believes that it is necessary to examine whether there is a genuine relationship between the measure and a detrimental impact on competitive opportunities, since there may be situations in which the measure itself leads individuals to act in a certain way.

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\* This text was originally submitted in Spanish by Mexico.

## ANNEX C-11

### EXECUTIVE SUMMARY OF NEW ZEALAND'S THIRD PARTICIPANT'S SUBMISSION

#### I. INTRODUCTION

1. This appeal is directly concerned with the legitimacy of Australia's Tobacco Plain Packaging measures ("**TPP Measures**"). More broadly, however, it is concerned with the right of WTO Members to protect public health within their countries, and the need to preserve the balance achieved in the WTO agreements between members' trade commitments and their right to regulate to address legitimate policy objectives. The appeals represent an unfounded challenge to this balance, and to the proper interpretation of the WTO agreements concerned.

#### II. ARTICLE 11 DSU

2. There are four overarching defects that run through the appellants' Article 11 claims.

3. The first is the framing of **impermissible challenges to the Panel's factual findings** as claims that the Panel breached its obligation to act with objectivity under Article 11. Of particular concern is the framing of purely factual appeals as allegations that the Panel "failed to provide a reasoned or adequate explanation of its findings", or that its findings "lack an evidentiary basis". New Zealand does not accept either of these two contentions. More importantly, however, New Zealand is concerned that, if the two suggested failings were accepted as touchstones of a breach of Article 11, the focus would shift from an assessment of the Panel's objectivity to an assessment of whether the Panel's decision was correct. This would be inconsistent with the plain meaning of Article 11<sup>1</sup>, and would transform Article 11 into a gateway to challenge the Panel's factual findings, contrary to Article 17.6 DSU.

4. The second defect is the **failure to appreciate the allocation of the burden of proof** between the parties. The appellants imply that the task of the Panel was to decide which out of the complainants or Australia had the stronger case. This is incorrect. The onus of proof was on the complainants to establish a prima facie case that, in implementing the TPP measures, Australia breached its WTO obligations. One of the ways that the complainants sought to prove their case was by arguing that the TPP measures *cannot* and *do not* contribute to the reduction in tobacco use and exposure.<sup>2</sup> Australia's objective at the Panel stage was not to prove its own case, but rather to demonstrate that the complainants had failed to establish theirs. The Panel acted in accordance with this allocation of the burden of proof and the case that the complainants set out to prove.

5. The third issue is the **incorrect characterisation of the exercise of the Panel's discretion** as a failure to act with objectivity. New Zealand is particularly concerned with the challenges brought to the Panel's discretion to choose the evidence that it relies upon in its Report, and its discretion to choose whether to instruct an expert. It is within the Panel's discretion to decide which evidence to refer to in its Report.<sup>3</sup> The fact that the Panel did not agree with the complainants' view on the weight and meaning to be attributed to the evidence does not mean that the Panel did not act objectively.<sup>4</sup> The Panel was also within its discretion to not elect to instruct an expert. The wording of Articles 13 DSU and Article 14.2 TBT are permissive, not mandatory. The Appellate Body made it clear in *EC-Sardines* that the exercise of the discretion to instruct an expert or not will not amount to a contravention of Article 11.<sup>5</sup>

6. The final issue is the **misrepresentation of the Panel's findings**. This is largely as a result of selective reproduction of particular findings. Removed from their wider context, these statements are easily misunderstood. The Appellate Body should be aware, in the Article 11 claims, of the ease

<sup>1</sup> In particular, Article 11 is concerned only with whether a Panel's decision was "objective".

<sup>2</sup> Panel Report at para. 7.485.

<sup>3</sup> Appellate Body Report, *EC - Hormones* at paras. 135 and 138.

<sup>4</sup> Appellate Body Report, *Australia - Salmon* at para. 267.

<sup>5</sup> Appellate Body Report, *EC - Sardines* at para. 302.

with which parties can create the appearance of inconsistencies in a panel's reasons through the selective and potentially misleading manner in which they are presented.

### III. LEGAL STANDARD IN DETERMINING CONTRIBUTION OF TPP MEASURES

7. Honduras argues that the Panel failed to apply the correct legal standard to assess the contribution of the TPP measures to the objective of reducing tobacco use and exposure.<sup>6</sup> New Zealand makes two key observations:

- a. First, this is an attempt to re-package the Article 11 claims as a fresh legal issue, and an inappropriate challenge to the Panel's factual findings that should not be entertained by the Appellate Body.
- b. Second, Honduras' discussion of the legal standard identified by the Panel misrepresents a number of key aspects. It overstates the weight that the Panel found should be placed on the post-implementation evidence;<sup>7</sup> understates the Panel's acknowledgment of the relevance of the wider suite of tobacco control measures;<sup>8</sup> and misquotes the Panel on the limits on its ability to carry out its own assessment of the impact of the measures.<sup>9</sup>

### IV. ARTICLES 16.1 AND 20 TRIPS

8. Honduras challenges the Panel's interpretation of Article 16.1 TRIPS. The Panel properly interpreted this provision as providing the exclusive right to prevent the use of certain signs where such use would result in the likelihood of confusion, rather than a positive right obliging WTO Members to ensure a trademark owner can use the trademark.

9. Honduras also alleges that the Panel failed to take a trademark-specific approach to its interpretation of Article 20 TRIPS, and argues that the term "unjustifiably" requires a consideration of less trademark numbering equivalent measures, similar to the "necessity" test other covered agreements. This is incorrect and would undermine the meaning of the term "unjustifiably", properly interpreted in its context and in light of its object and purpose. The Panel rightfully concluded that the complainants failed to demonstrate that any encumbrance imposed by Australia on the use of trademarks was "unjustifiable".

### V. ARTICLE 2.2 TBT AGREEMENT

10. The appellants allege that the Panel erred in its interpretation of the term "trade-restrictive" in Article 2.2 TBT Agreement. The Panel properly interpreted this provision to confirm that modification to the conditions under which all manufacturers will compete would not, in itself, be sufficient to demonstrate trade-restrictiveness. New Zealand also disagrees with the appellants that the Panel introduced a higher standard when considering the "trade restrictiveness" of discriminatory measures.

11. The appellants further contend that the Panel erred in its comparative analysis of their proposed alternative measures. This claim is entirely consequential to their claim that the Panel applied the incorrect legal standard in ascertaining the "trade-restrictiveness" of the measures. In any event, the Panel's finding that the measures do not make an equivalent contribution to Australia's legitimate objective was correct.

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<sup>6</sup> Honduras' Appellant submission at paras. 532 - 558.

<sup>7</sup> Compare Honduras' Appellant submission at para. 541 with Panel Report at para. 7.500.

<sup>8</sup> Compare Honduras' Appellant Submission at para. 553(iii) with Panel Report at para. 7.506.

<sup>9</sup> Compare Honduras' Appellant Submission at para. 553(vi) with Panel Report, Appendix A, at para. 5.

**ANNEX C-12****EXECUTIVE SUMMARY OF NIGERIA'S THIRD PARTICIPANT'S SUBMISSION**

1. Nigeria is pleased to provide its views to the Appellate Body in disputes DS435 and DS441. Tobacco is important to Nigeria's economic development, and Nigeria has an interest in the implications of plain packaging for manufacturers seeking to enter foreign markets. Nigeria believes that Australia's TPP measures may set a precedent for similar trademark restrictions on other products.
2. Nigeria asks the Appellate Body to address any failure by the Panel to conduct an objective assessment under Article 11 of the DSU. The Panel's apparent lack of objectivity does not inspire confidence in a country, like Nigeria, that aspires to greater use of the WTO's dispute settlement system.
3. Further, the Panel applied an overly burdensome trade-restrictiveness standard under Article 2.2 of the TBT Agreement. The trade-restrictiveness of a measure may be shown through its "design, architecture and revealing structure". The Panel agreed that the TPP measures, by design, limit the ability to compete on the basis of brand differentiation. However, it also required evidence of trade effects, on the grounds that the TPP measures are non-discriminatory. There is no basis for this additional requirement.
4. Nigeria is also concerned that the Panel placed an undue burden on complainants presenting evidence of trade effects. The Panel found that evidence of down-trading must show that down-trading was the exclusive cause of changes in consumption, and required evidence that producers had changed prices. Nigeria does not understand why the Panel believed that complainants must go to these lengths to show trade restriction.
5. Nigeria notes that this flawed application of the standard was also used as the basis for comparing the trade restrictiveness of the less trade restrictive alternatives and the TPP measures. Further, the Panel effectively made it impossible to identify an alternative measure, by requiring that alternatives work through the same mechanisms as the TPP measures.
6. The Panel's assessment under Article 20 of the TRIPS Agreement is also questionable. Any encumbrance on a trademark must be justifiable and relate to a problem with an individual trademark. However, the Panel required no consideration of the individual trademarks affected. The Panel also acted contrary to Articles 7.1 and 11 of the DSU by not addressing the use of word marks on cigarettes.

## ANNEX C-13

### EXECUTIVE SUMMARY OF NORWAY'S THIRD PARTICIPANT'S SUBMISSION

1. Norway disagrees with the appellants' argument that any modification of "competitive opportunities" *per se* would have an actual limiting effect on international trade and thereby violate the TBT Agreement Article 2.2. Rather, the Panel was correct in finding that "what needs to be shown [is] *how* such effects on the conditions of competition on the market give rise to a limiting effect on international trade in tobacco products".<sup>1</sup>
2. The proposed alternative measures of increased MLPA and excise taxes would not eliminate packaging as a tool for advertising and promotion, and thereby not make an equivalent contribution to the objectives of the TPP measure. Furthermore, the MLPA only targets young people and consequently is less effective than the TPP measure which is directed at all age groups. When a Member's market is supplied only by imported tobacco products, any equivalent *contribution* would also necessarily entail an equivalent *limiting effect* on international trade.
3. It is up to complainants to demonstrate that proposed alternative measures would make an equivalent contribution due to synergistic effects they would have with other aspects of comprehensive strategies implemented to fight a particular complex health problem.
4. The appellants' claim that the Panel's assessment of the TPP's contribution lacked even-handedness in violation of the DSU Article 11, failing to acknowledge that the complainants bear the burden of proof in establishing their *prima facie* case that the TPP measures do not contribute to the objective.<sup>2</sup>

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<sup>1</sup> Panel Report, para. 7.1168. (emphasis original)

<sup>2</sup> Australia's Appellee Submission, para. 491.

**ANNEX C-14****EXECUTIVE SUMMARY OF THE PHILIPPINES' THIRD PARTICIPANT'S SUBMISSION**

1. As a committed party to the Framework Convention on Tobacco Control, and as a grower, producer, and exporter of tobacco products, the Philippines has multi-dimensional interests in this case. The Philippines acknowledges Australia's public health objectives and does not address issues related to these objectives. Instead, the Philippines addresses three systemic issues under the covered agreements, which relate to the Panel's findings on contribution, trade restrictiveness and alternative measures under Article 2.2 of the TBT Agreement.
2. In relation to the **contribution** findings, panels must respect the parties' due process rights. The Philippines appreciates that a panel might obtain assistance to understand econometric evidence from unseen or undisclosed experts. However, panels must give the parties an appropriate opportunity to be heard on issues critical to its assessment. If a panel develops its own econometric "evidence"<sup>1</sup> – possibly using unseen experts – using tests not identified by the parties, the parties should have an opportunity to comment. This ensures due process and transparency – the parties are not left to "guess" what evidence is relevant. Consulting the parties also provides panels with a better foundation for their findings. In any event, panels must ensure that their findings have a transparent and verifiable basis in the panel record.
3. The Philippines recalls that **trade restrictiveness** is considered through the prism of competitive opportunities arising from the design, structure and operation of a measure. Evidence of trade effects "might be" required if a limiting effect on competitive opportunities is not established from the design of the measure. This Panel's conclusion that proof of trade effects must always be shown in the case of non-discriminatory measures seems to depart from this understanding.
4. The Philippines understands that **proposed alternative measures** must, by definition, operate through a different mechanism to achieve the same result as the measure at issue. However, the Panel seems to have adopted an unduly narrow conception, finding that the contribution of the alternative measures and the tobacco plain packaging measures cannot be "equivalent" because they work through different mechanisms.

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<sup>1</sup> Panel Report, Appendix C, para. 107.



**ANNEX C-15**

## EXECUTIVE SUMMARY OF SINGAPORE'S THIRD PARTICIPANT'S SUBMISSION

1. Singapore welcomes the opportunity to present its views in this appeal. In the written submission, Singapore addresses the following issues.<sup>1</sup>

**(a) The Panel did not err in its interpretation of the term "unjustifiably" in Article 20 of the TRIPS Agreement**

2. The Panel's finding that the unjustifiability of encumbrances under Article 20 does not require an assessment in respect of individual trademarks is correct and supported by WTO jurisprudence. The Panel was also correct in concluding that public health is a recognised societal interest that may provide a justification for encumbrances under the terms of Article 20. Singapore reiterates that the assessment of Article 20 is of unjustifiability and not necessity and therefore *does not require* one to consider available alternative measures.

**(b) The Panel did not err in its application of the term "unjustifiably" in Article 20 of the TRIPS Agreement**

3. The Panel did not err in its application of the first step of the three-step test. Honduras' allegation that there was undue emphasis on the loss of economic value of the trademarks is misplaced. The Panel also did not err in its application of the third step of the three-step test. Given that the necessity standard should not be used to determine the justifiability of the measure under Article 20, there is no need for the Panel to consider the availability of alternatives measures.

**(c) The Panel did not err in its interpretation of Article 16.1 of the TRIPS Agreement**

4. Singapore considers that the Panel's interpretation of Article 16.1 is correct. Article 16.1 provides for a right, belonging solely to the registered trademark owner, to exclude, not a right to use. The latter does *not* exist as a consequence of a right to exclude others from using the trademark. Even if trademark owners may have a legitimate interest to preserve the distinctiveness of their trademarks, this does not rise to the level of a "right" as such under Article 16.1, much less a right to use a trademark.

**(d) The Panel did not err in its assessment of trade-restrictiveness pursuant to Article 2.2 of the TBT Agreement**

5. Honduras' assertion that "the issue of trade restrictiveness requires a demonstration of a limiting effect on competitive opportunities" in every case is overly restrictive and is not supported by jurisprudence. In any event, the complainants failed to adequately establish *how* the restriction of competitive opportunities by the TPP measures would, without more, have a limiting effect on international trade. Singapore also disagrees that the Panel applied a higher standard in its analysis of whether the TPP measures are trade-restrictive by requiring a demonstration of actual trade effects. In fact, the Panel considered evidence which did *not* concern actual trade effects when it took into account the design of the TPP measures to conclude that the measures were trade-restrictive.

**(e) The Panel did not err in its interpretation and application of Article 2.2 of the TBT Agreement with respect to the availability of less trade-restrictive alternative measures**

6. Singapore agrees with the Panel that the alternative measures proposed by the complainants would not be less trade-restrictive than the TPP measures. Having determined that the TPP measures are trade-restrictive both in terms of their *intended and actual* impact on the volume

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<sup>1</sup> This Executive Summary totals 1096 words (including footnotes). Singapore's Third Party Written Submission totals 10989 words (including footnotes).

of trade in tobacco products, the Panel did not err in finding that the alternative measures would be equally trade-restrictive, to the extent that they are designed to achieve the same degree of contribution as the TPP measures. This is in view of the particular circumstances where the Australian market is supplied entirely by imported tobacco products, and the fact that the TPP measures were found to be trade-restrictive solely on the basis of their impact on the volume of trade.

7. The Panel did not err in its evaluation of the equivalence of the contribution of the alternative measures to Australia's objective. The Panel did not require the alternative measures to operate through the same "means" or "mechanisms" to reduce smoking as the TPP measures. The fact that a challenged measure is part of a broader regulatory framework, alone, should not preclude a finding that an alternative measure would make an equivalent contribution to the Member's objective, even if the alternative measure does not provide an identical contribution through the same "means" or "mechanisms" as the challenged measure. However, Singapore does not understand the Panel to have imposed or applied such a requirement.

8. On the other hand, Singapore agrees that the way in which proposed alternative measures would operate within a suite of measures and their effect on synergies within the suite of measures, *including* the creation of new synergies, would be relevant considerations. However, there is nothing in the Panel's report which warrants the assertion that the Panel disregarded the possibility of new synergies being created by the alternative measures.

**(f) The Panel did not violate Article 11 of the DSU**

9. Many of the allegations concern the Panel's assessment and treatment of conflicting evidence presented about the efficacy (or lack thereof) of the TPP measures. In essence, the appellants disagree with the Panel over the weight to be accorded to the evidence. However, a panel does not err simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it. In this case, it was reasonable and correct of the Panel to have assessed that the evidence, *taken in its totality*, supported its conclusion regarding the efficacy of the TPP measures. The burden rests with the appellants to prove their claims and not on Australia to prove otherwise.

10. There is no merit to the claim that the Panel was biased, e.g. in its approach on graphic health warnings (GHWs). A body of studies supports the proposition that plain packaging of tobacco products (independent of GHWs) would reduce their appeal to the consumer and increase the effectiveness of GHWs. The same cannot be said of the alternative measures proposed.

11. Finally, it is surprising how forcefully the appellants now make their due process allegations. Honduras never suggested or requested the Panel to consult experts pursuant to Article 13 of the DSU or Article 14.2 of the TBT Agreement. Nor did either appellant express any concern regarding the lack of due process during the interim review stage of the panel proceedings. In any event, the Panel's findings should not be lightly interfered with in the absence of compelling evidence otherwise.

**ANNEX C-16****EXECUTIVE SUMMARY OF THAILAND'S THIRD PARTICIPANT'S SUBMISSION**

1. In Thailand's view, the Panel has properly adhered to customary rules of treaty interpretation in its interpretation of the term "unjustifiably" in TRIPS Article 20, by reading the term in its context and in the light of its object and purpose as found in the Preamble and Articles 7 and 8 of the TRIPS Agreement, as well as the Doha Declaration. In this regard, Thailand would like to make two specific comments.
2. Firstly, Thailand agrees with the Panel that TRIPS Article 20 provides no legal basis to suggest that any measures, even ones with the "ultimate encumbrance"<sup>1</sup> is inherently unjustifiable.<sup>2</sup> Special requirements would be prohibited, pursuant to this provision, only if they "unjustifiably encumber[]" the use of a trademark in the course of trade.
3. Secondly, Thailand does not consider that The Panel has transposed the "trade restrictiveness" test under TBT Article 2.2 as is to the "trademark-use encumbrance" analysis under TRIPS Article 20. Rather than erroneously reading into existence a standard of "necessity" in the context of TRIPS Article 20, the Panel simply acknowledged that the availability of an alternative measure that involves a lesser encumbrance could *inform* an assessment of "unjustifiably" and thus may *call into question* whether the justification provided sufficiently support encumbrances on the use of a trademark.<sup>3</sup> Precisely how the availability of alternative measures would form part of the overall analysis should be determined on a case-by-case basis, taking into account the balance between intellectual property rights and public interests.

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<sup>1</sup> Appellant Submission by Honduras, para. 267.

<sup>2</sup> Panel Report paras 7.2441-7.2442.

<sup>3</sup> Panel Report para. 7.2598.

## ANNEX C-17

### EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION

#### I. INTRODUCTION<sup>1</sup>

1. The United States welcomes the opportunity to present its views on issues raised on appeal by Honduras and the Dominican Republic. Pursuant to the communication from the Division on July 23, 2018, the United States is providing its third participant submissions in the appeals in these two disputes as a single document.<sup>2</sup> In this document, the United States will present its views on the proper legal treatment of the *Declaration on the TRIPS Agreement and Public Health* ("Doha Declaration on TRIPS") and the claims raised in relation to Articles 7.1 and 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

2. The United States focuses on the two sets of issues identified above to address systemic concerns that arise from these appeals. A proper resolution of these two sets of issues would not disturb the ultimate conclusions of the Panel in these disputes.

#### II. CLARIFICATION REGARDING THE PANEL'S TREATMENT OF THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH

3. In its report, the Panel considered the types of reasons that would sufficiently support the application of an encumbrance on the use of a trademark so as to determine the meaning of the term "unjustifiably" in Article 20 of the TRIPS Agreement.<sup>3</sup> The Panel correctly understood that, consistent with Article 3.2 of the DSU, it should interpret the term applying customary rules of interpretation of public international law, reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention").

4. As part of its analysis, the Panel stated that paragraph 5(a) of the Doha Declaration on TRIPS "may, in our view, be considered to constitute a 'subsequent agreement' of WTO Members within the meaning of Article 31(3)(a) of the Vienna Convention."<sup>4</sup>

5. On appeal, Honduras argues that the Panel committed legal error finding that paragraph 5 of the Doha Declaration on TRIPS "constitutes a 'subsequent agreement' in the sense of Article 31.3(a) of the Vienna Convention that must be taken into consideration as part of the context of the term 'unjustifiably' in Article 20 of the TRIPS Agreement."<sup>5</sup>

6. The issue of whether statements agreed by Members may constitute a "subsequent agreement on interpretation" has raised difficulties for the functioning of some WTO committees. Rather than engage in this appeal on this issue, the Appellate Body could instead exercise judicial economy over Honduras' claim of error, which has no bearing on the appeal of the Panel's legal interpretation or conclusion.

#### III. COMPLAINANTS' CLAIMS OF ERROR UNDER THE DSU

7. Honduras and the Dominican Republic both appeal dozens of factual findings under DSU Article 11. Both appeals by Honduras and the Dominican Republic to the Appellate Body make numerous claims under Article 11 of the DSU of what clearly are alleged factual errors by the Panel. By agreement of all WTO Members, the DSU expressly limits the scope of an appeal to alleged *legal errors* by a panel, not factual errors.<sup>6</sup> The United States disagrees with these attempts to re-litigate

<sup>1</sup> This executive summary contains a total of 776 words (including footnotes), and the U.S. third participant submission contains 8573 words (including footnotes).

<sup>2</sup> See Appellate Body Procedural Ruling (23 July 2018).

<sup>3</sup> Panel Report, para. 7.2396 *et seq.*

<sup>4</sup> *Id.* at para. 7.2409 (italics added).

<sup>5</sup> Honduras Appellant Submission, para. 254.

<sup>6</sup> See DSU Article 17.6.

dozens of unfavorable factual determinations by the Panel through claims of breach of Article 11 of the DSU.

8. The Appellate Body has an opportunity in this appeal to reconsider how its originally limited approach to review the "objective assessment" of a panel has been seized by appellants to cover practically all factual determinations by a panel. Given the lack of textual basis in the DSU for appellate review of panel fact-finding, the Appellate Body could instead reassert that the proper issues for appeal are issues of law and legal interpretations covered by a panel report.<sup>7</sup>

9. In addition, the United States agrees with Australia that the Dominican Republic's claim of a breach under Article 7.1 of the DSU is unfounded. The claim appears to be an attempt to reopen the dispute by incorrectly alleging that the Panel failed to address the Dominican Republic's claim that Australia's plain packaging measures as to individual cigarette packaging breach Article 20 of the TRIPS Agreement. The Panel did address this claim, and the issue would in any event go to an erroneous legal conclusion, not a terms of reference issue. Both of these bases for appeal are seriously flawed and must be rejected.

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<sup>7</sup> *Id.* ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.").

## **ANNEX C-18**

### **EXECUTIVE SUMMARY OF ZAMBIA'S THIRD PARTICIPANT'S SUBMISSION**

1. Zambia thanks the Panel for its work and requests the Appellate Body to consider its submissions, as well as the points raised by Honduras and the Dominican Republic in their appeals.
2. Zambia raises concerns with the Panel's application of Article 2.2 of the TBT Agreement. The alternative measure should provide an equivalent "meaningful contribution", but not provide an "identical contribution" to the objective. Therefore, the Panel should not have rejected the alternative measures of Honduras and the other Complainants, since they would be as effective in reducing smoking and less trade restrictive than Australia's plain packaging rules. Further, the Panel should have analysed the "actual contribution" of the plain packaging measures as is the usual test under Article 2.2.
3. Zambia submits that the Panel's approach to interpreting the term "unjustifiably" under Article 20 of the TRIPS Agreement may not be the appropriate understanding of that provision. Instead of referring to any "good reasons" that would be sufficient to support the measure, the test ought to consider whether there is anything wrong with the specific trademark. Zambia supports the Complainants view of Article 16 of the TRIPS Agreement as providing important rights for trademarks in commerce.
4. Zambia submits that, in ignoring any contrary evidence presented by the complainants, the Panel does not appear to have examined the evidence in an even-handed manner in line with its obligations under Article 11 of the DSU.

## **ANNEX C-19**

### **EXECUTIVE SUMMARY OF ZIMBABWE'S THIRD PARTICIPANT'S SUBMISSION**

1. Zimbabwe is pleased to present its concerns to the Appellate Body with the Panel Report in this dispute, which may impact it as a developing country whose economy is dependent on agricultural commodities. Zimbabwe supports the important arguments expressed by the Appellants and respectfully requests the Appellate Body to take these arguments into account, as set out below.
  2. The Panel appears to have failed to treat the Complainants' evidence equitably and to not have balanced it objectively with the Respondent's evidence. The Panel could have been aided by appointing an independent expert under the dispute settlement rules, but it did not do that.
  3. Panel's application of Article 2.2 of the TBT Agreement does not appear to accurately reflect that WTO obligation. Zimbabwe supports arguments made by Honduras concerning the Panel's evaluation of the "trade restrictiveness" of the measures by its trade effects as opposed to its design and overall architecture; the alternative measures being required to provide an "identical" contribution to the objective rather than an "equivalent" one; and assessing the potential future contribution of the plain packaging measures instead of their actual contribution.
  4. The Panel provides an interpretation of the term "unjustifiably" in Article 20 of the TRIPS Agreement that is separated from the trademark context. Zimbabwe believes, as Honduras argues, that the Panel did not review whether there were any issues with the trademarks themselves and whether any limitations could be justified based on the analysis of each trademark.
  5. Finally, the Panel found that Article 16 of the TRIPS Agreement only confers a limited number of enforcement rights to trademark owners to oppose unauthorized use in situations where there is a risk of actual confusion in the market. Zimbabwe is concerned that this interpretation may be too limited to provide trademark owners appropriate protections under the TRIPS Agreement, particularly Article 20 of the TRIPS Agreement.
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