

BEFORE THE WORLD TRADE ORGANIZATION  
APPELLATE BODY

**Australia – Certain Measures Concerning  
Trademarks, Geographical Indications and other  
Plain Packaging Requirements Applicable to Tobacco  
Products and Packaging  
(WT/DS441/DS435)**

**Appellee Submission of Australia**

Geneva, 2 October 2018

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<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report WT/DS267/AB/RW, DSR 2008:III, p. 997
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717

## GLOSSARY OF ABBREVIATIONS AND ACRONYMS

<b>Abbreviation / Acronym</b>	<b>Full title</b>
ACL	Australian Consumer Law
Doha Declaration	Doha Declaration on the TRIPS Agreement and Public Health (adopted on 14 November 2001 at the Fourth WTO Ministerial Conference)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FCTC	World Health Organization Framework Convention on Tobacco Control
FCTC Guidelines	Guidelines for the Implementation of the World Health Organization Framework Convention on Tobacco Control
GATT 1994	The General Agreement on Tariffs and Trade, 1994
GHW	Graphic Health Warning
ITC	International Tobacco Control
MLPA	Minimum Legal Purchase Age
NPTPPTS	National Tobacco Plain Packaging Tracking Survey
Paris Convention	Paris Convention for the Protection of Industrial Property (as Revised at Stockholm in 1967)
RMSS	Roy Morgan Single Source
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TPP Act	Tobacco Plain Packaging Act 2011 (Cth)
TPP Measures	Tobacco Plain Packaging Act 2011 and Tobacco Plain Packaging Regulations 2011
TPP Regulations	Tobacco Plain Packaging Regulations 2011 (Cth)
Trade Marks Act	Trade Marks Act 1995 (Cth)
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights

<b>Abbreviation / Acronym</b>	<b>Full title</b>
Vienna Convention	The Vienna Convention on the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization

## I. INTRODUCTION

1. This dispute revolves around a Member's right to regulate the advertising and promotion of tobacco products, products so deadly and addictive that the World Health Organization ("WHO") has classified their use as a global epidemic.

2. The four original complainants instituted this dispute to challenge Australia's tobacco plain packaging measure, a measure that operates 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.<sup>1</sup> The Panel rejected their claims in full.<sup>2</sup> Two of the original complainants have accepted the findings and conclusions of the Dispute Settlement Body ("DSB"), and those reports have been adopted.<sup>3</sup> Only the Dominican Republic and Honduras have appealed the report of the Panel in their respective disputes.

3. Despite the appellants' aspersions, Australia did not implement these measures without care, thought or evidence. In fact, the body of evidence had grown over the course of three decades and was of such consistency and calibre that, in 2008, 180 countries adopted Guidelines for the Implementation of the WHO Framework Convention on Tobacco Control ("FCTC Guidelines") that explicitly recommend the adoption of tobacco plain packaging. Ironically, one of the appellants was a member of the Working Group that formulated this recommendation on the basis of "available scientific evidence and the experience of the Parties themselves in implementing tobacco control measures."<sup>4</sup>

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<sup>1</sup> The principal measures at issue in this dispute are Australia's Tobacco Plain Packaging Act 2011 ("TPP Act") and Tobacco Plain Packaging Regulations 2011 as amended ("TPP Regulations") (collectively, the "tobacco plain packaging measure" or "the TPP measure"). In this submission, Australia refers to the "TPP measures" for the purposes of consistency with the Panel Report. In essence, the TPP measures mandate a standardised, plain appearance for tobacco products and packaging by, *inter alia*, prohibiting the use of logos, brand imagery, colours and promotional text, and imposing other restrictions on the appearance of tobacco products and the shape and finish of retail packaging, while allowing the use of brand, business, company and variant names in a standardised form.

<sup>2</sup> The complainants in the panel proceedings brought separate disputes against Australia, listed as DS467 (Indonesia), DS458 (Cuba), DS435 (Honduras), and DS441 (Dominican Republic). On 5 May 2014, the WTO Director-General composed the panels in each of the disputes, appointing the same panellists and harmonising the timetable for the panel proceedings at the request of the parties. This allowed all five disputes to be heard together, though separate panel reports were issued for each dispute. For ease of reference, the appealed panel reports in DS435 and DS441 are hereinafter collectively referred to as "the Panel Report".

<sup>3</sup> The Panel reports in relation to DS467 and DS458 were adopted by the DSB on 27 August 2018. Australia notes that a fifth complainant, Ukraine, had also requested consultations with Australia on 13 March 2012, in DS434. On 28 May 2015, before the first substantive meeting of the parties, Ukraine requested that the Panel suspend its proceedings. Authority for the Panel lapsed on 30 May 2016.

<sup>4</sup> World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), (AUS-42)

(continued)

4. Notwithstanding this "available scientific evidence", the complainants elected to undertake the burden of attempting to prove that Australia had adopted the TPP measures "unjustifiably" within the meaning of Article 20 of the TRIPS Agreement, and that the TPP measures are "more trade-restrictive than necessary to fulfil a legitimate objective" within the meaning of Article 2.2 of the TBT Agreement, among other legal claims. The Panel engaged substantively with each of the complainants' legal and factual arguments, painstakingly applying the relevant legal provisions to the enormous body of evidence on the record. In its report, the Panel examined the complainants' claims and found that they had failed to establish a *prima facie* case of inconsistency with the covered agreements.

5. 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. Instead, having failed in their attempts to convince the Panel of their evidentiary case, 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 appellants had failed to demonstrate that the TPP measures are not apt to contribute to Australia's legitimate public health objective.

6. The appellants' contention that the Panel did not undertake an "objective assessment" of the evidence relating to the contribution of the TPP measures to Australia's objective is utterly belied by the depth and thoroughness of the Panel's 1,266 page report.<sup>5</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 (of which over 3,500 were filed by the complainants); over 1,600 exhibits (of which over 1,000 were submitted by the complainants); and over 80 expert reports.<sup>6</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.

7. The fundamental problem the complainants faced in seeking to persuade the Panel that the TPP measures are not apt to contribute to Australia's legitimate public health objective is the same problem the tobacco industry has faced in its challenges to tobacco plain packaging before other tribunals, and in its challenges to other types

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(noting that Honduras was a member of the working group of Parties responsible for drafting the Guidelines for Article 11).

<sup>5</sup> The Panel Report consists of 888 pages in the main body of the report, plus 152 pages of analysis of the post-implementation evidence and 226 pages of annexures.

<sup>6</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.

of advertising restrictions in the past: the proposition that reducing the ability of tobacco companies to advertise and promote their products does not contribute to a reduction in the use of tobacco products is contrary both to the overwhelming weight of scientific evidence and to common sense.

### A. The Context of this Appeal

8. The impact of tobacco advertising on consumer behaviour, including the impact of tobacco packaging as advertising, has been considered for over three decades 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.<sup>7</sup> A number of these institutes have also specifically considered the case for tobacco plain packaging. The evidence base for tobacco plain packaging has also been reviewed by independent experts commissioned by governments in connection with the consideration and adoption of other tobacco plain packaging measures, and by national courts reviewing legal challenges to tobacco plain packaging measures.

9. At the time Australia implemented the TPP measures, the weight of this evidence overwhelmingly confirmed the importance to the tobacco industry of recruiting youth and adolescents to sustain their business model. The vast majority of smokers begin smoking prior to the age of 25, and youth initiation is the key to the tobacco industry's long-term survival, to replace those who cease to use tobacco products because they have quit or died.<sup>8</sup>

10. This evidence further demonstrated the tobacco industry's admission, over the course of decades, that tobacco packaging is used as a medium for advertising and promoting tobacco products. The use of tobacco packaging to advertise and promote the product is magnified in a dark market like Australia, where all other forms of tobacco advertising and promotion are banned, and where the tobacco industry has publicly stated that the tobacco pack operates as a mobile "billboard" for its products.<sup>9</sup>

11. Finally, the evidence reviewed, collated and analysed by the world-leading authorities outlined above demonstrates that the appearance of tobacco packaging, including the appearance of the product itself, is capable of affecting smoking-related behaviours, including the decision by young people to initiate smoking.<sup>10</sup>

12. The complainants came to the panel proceedings in full knowledge of these conclusive findings, and affirmatively 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:

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<sup>7</sup> See, e.g. Panel Report, para. 7.537.

<sup>8</sup> See, e.g. Australia's first written submission, para. 62.

<sup>9</sup> See, e.g. Australia's first written submission, paras. 8, 69.

<sup>10</sup> See, e.g. Australia's first written submission, Part II.E.3.

- the pre-implementation evidence, including the 30 years of evidence outlined above, was not of "a quality or methodological rigour" sufficient to provide a reliable basis for implementing the TPP measures;
- 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).

13. 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 that objective in the limited period since their implementation.<sup>11</sup> 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 their implementation 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.

14. 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. The complainants again failed to discharge this burden, given that: (i) their experts' econometric models suffered from critical flaws and limitations that rendered them incapable of establishing this proposition; and (ii) once the principal flaws in their econometric models were corrected, the complainants' own expert evidence produced results *consistent with* the conclusion that the TPP measures are capable of contributing to Australia's objective and, in fact, have already done so.

15. In its thorough assessment of the complainants' arguments on the *qualitative*, pre-implementation evidence set out above, the Panel definitively concluded that:

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<sup>11</sup> See, e.g. Panel Report, para. 7.486.

- the complainants had not established that the "largely convergent conclusions" reflected in the pre-implementation evidence should be considered so "fundamentally flawed as to provide no support" for the proposition that tobacco plain packaging results in reduced appeal of tobacco products, increases the effectiveness of graphic health warnings ("GHWs"), and reduces the ability of the pack to mislead consumers about the health risks of tobacco use;<sup>12</sup>
- the complainants had failed to persuade the Panel that "tobacco packaging can have *no* influence on smoking behaviours", especially in a dark market like Australia;<sup>13</sup>
- the complainants had 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;<sup>14</sup>
- the complainants had not demonstrated that tobacco plain packaging would not be capable of reducing the appeal of tobacco products<sup>15</sup> and, as a result, the complainants have failed to demonstrate that tobacco plain packaging is not capable of influencing smoking behaviours such as youth initiation and smoking cessation and relapse;<sup>16</sup>
- the complainants had not demonstrated that the existing levels of health knowledge and risk awareness in Australia are such that they could not be increased by enhancing the effectiveness of GHWs;<sup>17</sup>
- the complainants have not demonstrated that there is no correlation between increases in the effectiveness of GHWs and changes in smoking behaviours such as initiation, cessation and relapse;<sup>18</sup>
- the complainants had not demonstrated that the TPP measures, by design, would not be capable of reducing the ability of tobacco packaging to mislead consumers about the harmful effects of smoking;<sup>19</sup> and
- the complainants had not demonstrated that the TPP measures, by changing the ability of packaging to mislead consumers, would not have an effect on initiation or cessation.<sup>20</sup>

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<sup>12</sup> Panel Report, para. 7.1027

<sup>13</sup> Panel Report, para. 7.1032 (emphasis in original).

<sup>14</sup> Panel Report, para. 7.1032.

<sup>15</sup> Panel Report, para. 7.777

<sup>16</sup> Panel Report, paras. 7.1032-7.1033.

<sup>17</sup> Panel Report, para. 7.845.

<sup>18</sup> Panel Report, para. 7.863.

<sup>19</sup> Panel Report, para. 7.904.

16. The Panel likewise did not simply dismiss the ever-morphing arguments of the complainants with respect to the post-implementation evidence. On the contrary, the Panel engaged in lengthy, substantive 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 TPP measures are apt to contribute to their 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". Both of these findings were recognised by a number of the complainants' own experts.<sup>21</sup>
- 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", suggesting that the measures have already resulted in a reduction in smoking prevalence and consumption of tobacco products.<sup>22</sup>

17. 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. This confirms the fundamental reason Australia, and so many other countries, have implemented or started to implement tobacco plain packaging as an important part of tobacco control.
- The appellants have also conceded that tobacco plain packaging affects consumer behaviour. By accepting the link between tobacco packaging and behavioural change, the appellants have conceded that the TPP measures – which restrict the ability of packaging to influence consumers' decision to smoke – are capable of influencing consumer behaviour.
- The appellants conceded during the panel proceedings that tobacco plain packaging has reduced the appeal of tobacco products and increased the noticeability of health warnings in precisely the manner intended. Consequently, there is no longer any dispute about the findings of the vast majority of the pre-implementation evidence, nor is there any dispute that the mechanisms through which the measures work (as explicitly set out in

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<sup>20</sup> Panel Report, paras. 7.923-7.924.

<sup>21</sup> Panel Report, para. 7.1036.

<sup>22</sup> Panel Report, para. 7.1037.

the TPP Act) are operating in the manner intended, as the Panel determined in its assessment of the post-implementation evidence in Appendix A.

- The appellants have conceded that the TPP measures have not backfired;<sup>23</sup> and that rates of prevalence and consumption in Australia continued to decline following the implementation of the TPP measures.

18. Based on the undisputed findings of the Panel, it is now uncontested that: (i) tobacco packaging acts as a form of marketing to communicate "brand identity" and attract new consumers, including young people in particular; (ii) tobacco packaging influences consumer demand for tobacco products, including young people in particular; (iii) tobacco plain packaging reduces the appeal of tobacco products and increases the effectiveness of GHWs as intended; and (iv) rates of prevalence and consumption have declined following the implementation of tobacco plain packaging. It should be clear and obvious from these uncontested findings that *the TPP measures are capable of contributing to their objectives*.

19. What, then, is the point of these appeals? Neither appellant has presented any legal claims of error on the part of the Panel. With respect to the TRIPS Agreement, Honduras alleges error by the Panel in respect of only two of its ten original claims, presenting spurious arguments 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's 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>24</sup> yet proceed nonetheless to advance a claim of "legal error" on the part of the Panel.

20. It is clear, therefore, that this dispute is overwhelmingly an attack on the Panel's findings of fact and, in particular, the findings of the Panel on the post-implementation evidence. The appellants' claims 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 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.

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<sup>23</sup> Australia's second written submission, paras. 259-260.

<sup>24</sup> Honduras's appellant's submission, para. 11. See also Dominican Republic's appellant's submission, para. 1245.

## B. Structure of this Submission

21. Within this context, Australia will address the appellants' contentions as follows.

22. In Section II below, Australia provides a **brief description of the TPP measures**, as well as the basis for the Panel's finding that the complainants failed to discharge their burden of demonstrating 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.

23. In Section III Australia rebuts the appellants' claims that the Panel erred in its interpretation and application of **Article 16.1 and Article 20 of the TRIPS Agreement**. Australia demonstrates that the Panel correctly interpreted and applied these provisions, and that Honduras's claims of error depend on its continued assertion that the trademark-related provisions set out in Part II, Section 2 of the TRIPS Agreement confer a "right of use" upon the owners of registered trademarks. Australia also demonstrates that the Dominican Republic is incorrect in asserting that the Panel failed to consider its claims under Article 20 in respect of cigarette sticks, in alleged contravention of Article 7.1 and Article 11 of the DSU.

24. In Section IV, Australia addresses the appellants' claims that the Panel erred in its interpretation and application of the term "**trade-restrictive**" under **Article 2.2 of the TBT Agreement**. Australia demonstrates that the appellants' "competitive opportunities" legal standard of trade-restrictiveness finds no basis in the text of Article 2.2, as interpreted by the Appellate Body in prior cases. Rather, the Panel properly interpreted and applied Article 2.2 by requiring a demonstration that the TPP measures have a "limiting effect on international trade". The Panel did not require that a technical regulation be "discriminatory" in order to be "trade-restrictive", nor did the Panel require evidence of actual trade effects. Australia further demonstrates that the Panel did not err in requiring that downtrading be "exclusively" attributable to the TPP measures, or in taking into account consumption and sales data in its analysis of trade-restrictiveness. Australia finally establishes that the Dominican Republic has failed to demonstrate that the Panel acted inconsistently with Article 11 of the DSU in its assessment of the downtrading evidence.

25. In Section V, Australia explains that Honduras has failed to articulate a cognisable appeal claim in relation to the Panel's interpretation and application of the element of **contribution** under **Article 2.2 of the TBT Agreement**. Honduras's claims of error in this respect are directed at the Panel's appreciation of the evidence, and therefore Honduras's failure to raise those claims under Article 11 of the DSU is dispositive.

26. Australia then turns in Section VI to the appellants' claims that the Panel erred in its comparative assessment of **alternative measures** under **Article 2.2 of the TBT Agreement**. The appellants' claim of error in relation to the Panel's analysis of trade-restrictiveness is *entirely consequential* to their earlier appeal claim that the Panel applied an erroneous legal standard in ascertaining whether and to what extent the TPP measures are "trade-restrictive" under Article 2.2. Moreover, under a proper interpretation of trade-restrictiveness, none of the appellants' proposed alternatives are less trade-restrictive than the TPP measures. It is therefore unnecessary for the

Appellate Body to address the appellants' claims that the Panel erred in its assessment of trade-restrictiveness and in its analysis of the contribution of the proposed alternatives. In any event, Australia demonstrates that the Panel did not err in its assessment of the contribution of the proposed alternatives and did not act inconsistently with Article 11 of the DSU in reaching its findings.

27. Finally, in Section VII Australia addresses the appellants' numerous claims that the Panel acted inconsistently with **Article 11 of the DSU** in its assessment of **contribution** under Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement. Australia demonstrates that 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 objective. Australia's rebuttal is divided into the following subparts:

- Following an introduction in Part A, Part B addresses the legal standard under Article 11 of the DSU. Australia demonstrates that the bounds of a panel's discretion as the trier of fact under Article 11 of the DSU encompasses the authority to assess the credibility of the evidence, determine its weight, and make findings on the basis of that evidence. A panel is entitled to develop and frame its legal reasoning, and to decide whether to consult experts.
- In Part C, Australia explains that the appellants have failed to assert valid due process claims.
- In Part D, Australia recalls that the complainants undertook the burden of demonstrating that the TPP measures are *incapable* of contributing to Australia's public health objective. Contrary to what the appellants imply in their submissions, Australia did *not* bear the burden of establishing that the TPP measures contributed to Australia's objective in the three-year period following their implementation. Both the evidence and the Panel's assessment of that evidence must be viewed in light of the *complainants'* burden.
- Parts E through G respectively set forth Australia's rebuttal to the appellants' specific claims under Article 11 of the DSU challenging the Panel's factual findings in respect of: (i) the pre-implementation qualitative evidence; (ii) the post-implementation evidence on "proximal" and "distal" outcomes (as detailed in Appendices A and B to the Panel Report); and (iii) the post-implementation evidence on prevalence and consumption (as detailed in Appendices C and D to the Panel Report). Australia explains that the Panel's finding that the complainants failed to discharge their burden of demonstrating that the TPP measures are *not apt* to contribute to Australia's public health objective is amply supported by record evidence, and that the Panel provided a reasoned and adequate explanation for its conclusion.
- In Part H, Australia rebuts the appellants' claims under Article 11 of the DSU challenging the Panel's finding that the complainants had failed to

demonstrate that the TPP measures are not apt to contribute to Australia's legitimate objective over time.

- Finally, in Part I, Australia demonstrates that even if the Appellate Body were to conclude that the Panel exceeded the bounds of its discretion in relation to certain of the appellants' alleged errors, the appellants have failed to demonstrate that these errors are material to the Panel's overall conclusion on contribution.
- In Annex 1, Australia rebuts the appellants' claims under Article 11 of the DSU challenging the Panel's factual findings concerning cigars. In its evaluation of the contribution of the measures to Australia's objective in relation to different types of tobacco products, the Panel saw "no reason to assume that a different approach would be required", and noted that none of the parties disagreed. As neither appellant has challenged the Panel's general approach to its consideration of the evidence, the appellants' claims of error in relation to cigars are immaterial to the challenged findings.
- In Annex 2, Australia rebuts Honduras's specific claims under Article 11 of the DSU pertaining to the Panel's treatment of evidence submitted by one of its experts, Professor Klick. Australia demonstrates that no aspect of the Panel's assessment of this evidence is inconsistent with Article 11.

## **II. SUMMARY OF THE TPP MEASURES AND PANEL'S FINDINGS**

### **A. The Requirements of the Tobacco Plain Packaging Measures**

28. The tobacco plain packaging requirements are set out in the TPP Act and the TPP Regulations, which came into full effect on 1 December 2012. As outlined in depth in Australia's first written submission,<sup>25</sup> and by the Panel in its report,<sup>26</sup> the TPP measures apply to all tobacco products, with the requirement for the packaging of non-cigarette tobacco products resembling as closely as practicable the plain packaging requirements for cigarettes.

29. The objectives of the measures are set out in section 3 of the TPP Act. Specifically, section 3 provides that:

#### **3 Objects of this Act**

(1) The objects of this Act are:

(a) to improve public health by:

(i) discouraging people from taking up smoking, or using tobacco products; and

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<sup>25</sup> Australia's first written submission, paras. 125-134 and Annex A.

<sup>26</sup> Panel Report, Sections 2.1.2.3 and 2.1.2.4.

(ii) encouraging people to give up smoking, and to stop using tobacco products; and

(iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and

(iv) reducing people's exposure to smoke from tobacco products; and

(b) to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control.

(2) It is the intention of the Parliament to contribute to achieving the objects in subsection (1) by regulating the retail packaging and appearance of tobacco products in order to:

(a) reduce the appeal of tobacco products to consumers; and

(b) increase the effectiveness of health warnings on the retail packaging of tobacco products; and

(c) reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.<sup>27</sup>

30. In short, the TPP measures regulate the appearance of retail packaging through:

- colour, shape and size: all retail packaging of tobacco products are required, inter alia, to be in a matt finish in a drab dark brown colour (Pantone 448C) and all decorative ridges, textures or embellishments are prohibited on the packaging other than as permitted by the regulations. The measures also mandate minimum and/maximum size dimensions for all tobacco products.
- the removal of imagery and design: the retail packaging of tobacco products must not display any signs (or "marks") or trademarks such as logos, symbols, colours or other images, except brand, business or company name, and any variant name may be displayed on the retail packaging of a particular tobacco product (in compliance with standardised font, size and colour requirements). Certain identifying marks as permitted by the TPP Regulations may also appear on the retail packaging of tobacco products, such as origin marks, calibration marks, measurement marks and trade descriptions.<sup>28</sup>

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<sup>27</sup> TPP Act (AUS-1), Section 3.

<sup>28</sup> Panel Report, Section 2.1.2.3.

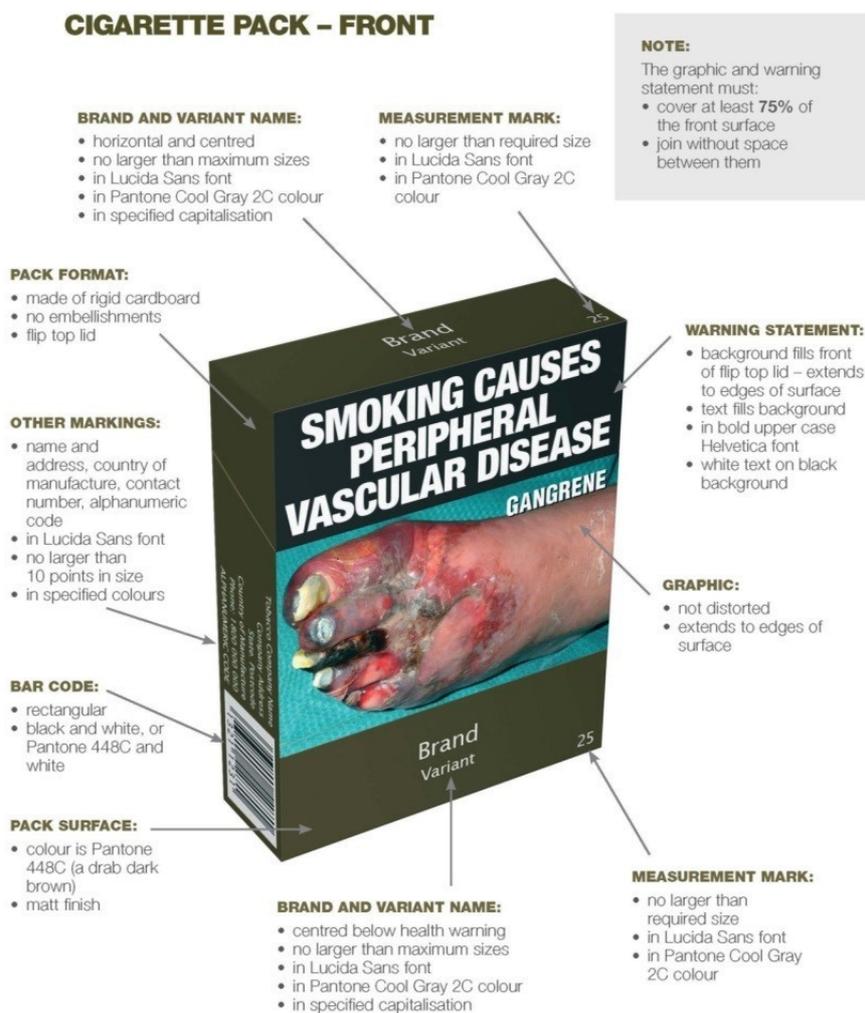
31. The measure also imposes requirements for the appearance of tobacco products themselves, stipulating that the paper casing for cigarettes must be white and that an alphanumeric code may appear only once on the cigarette, in a certain form. The measure mandates the appearance of cigars, allowing a single cigar band in drab dark brown (Pantone 448C) to be placed around the circumference of the cigar, which may include the brand, company or business name, and a variant name of the cigar; the name of the country in which the cigar was made or produced; and an alphanumeric code. Likewise, a bidi may have a single black thread around the circumference of each individual product.<sup>29</sup>

32. The following figure provides an example of plain packaging as applied to tobacco products in the Australian market.

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<sup>29</sup> Panel Report, Section 2.1.2.4.

Figure 1: TPP Act and TPP Regulations as applied to the front, top, and side of a cigarette pack<sup>30</sup>



33. The TPP measures are separate from measures enlarging GHWs, which became effective at the same time. Accordingly, from 1 December 2012, the size of GHWs was increased from 30% to 75% of the front surface for most tobacco products, remained at 90% for the back surface of cigarette packaging and increased to 75% on the back surface of packaging for most other tobacco products. Cigars sold singly have also been required to be supplied in retail packaging with health warnings since 1 December 2012.<sup>31</sup>

34. Finally, the TPP Act specifically provides that its operation will not prevent the owner of a trademark from registering or maintaining the registration of a

<sup>30</sup> Panel Report, Figure 1 (source: Australia's first written submission, Annexure A, Figure 1; Dominican Republic's first written submission, Annex I, Figure 25; and DHA Guide to Tobacco Plain Packaging, (HND-50, DOM-161).

<sup>31</sup> Panel Report, para. 2.54.

trademark under Australia's *Trade Marks Act 1995* (Cth) ("Trade Marks Act").<sup>32</sup> The TPP measures also do not affect the rights that flow from registration, including the rights of trademark owners to prevent infringement of their trademarks granted under the Trade Marks Act. Nor do they affect the rights granted to trademark owners under other statutory mechanisms or at common law in Australia. The TPP measures therefore preserve the ability of tobacco companies to continue to use trademarks to distinguish their products from those of other manufacturers in the course of trade through company, brand and variant names on tobacco retail packaging.<sup>33</sup>

## **B. Australia's Decision to Implement Tobacco Plain Packaging**

### **1. Australia's Comprehensive Approach to Tobacco Control**

35. Australia is a world leader in tobacco control, and has progressively implemented evidence-based tobacco control measures over a period of almost 50 years.<sup>34</sup> Throughout this time, Australia has recognised the fundamental importance of a comprehensive approach to tobacco control, covering all aspects of supply and demand for tobacco, applying to all tobacco products, and optimizing synergies between complementary measures.<sup>35</sup>

36. The appellants do not contest the importance of a comprehensive suite of tobacco control measures, nor do they suggest that Australia does not have a legitimate right to enact such measures to protect public health.

37. Australia's comprehensive suite of tobacco control measures has been applied broadly, and includes restrictions on the sale of tobacco products to persons under the age of 18, mandatory text and GHWs on tobacco packaging, the introduction of smoke free work places and public spaces, increased excise taxes, support for counselling services for smokers trying to quit and the use of social marketing campaigns and social media to promote anti-smoking messages.<sup>36</sup> In particular, since 1966, increasingly stringent restrictions on the advertising and promotion of tobacco products have been introduced in Australia at the Commonwealth, state and territory

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<sup>32</sup> TPP Act (AUS-1), Section 28; Panel Report, Section 2.1.2.5.

<sup>33</sup> See Australia's second written submission, paras. 210-212.

<sup>34</sup> See Australia's first written submission, para. 50.

<sup>35</sup> See Australia's first written submission, paras. 40-45. As Australia explained in its first written submission, the adoption of a comprehensive strategy of tobacco control measures leads to greater reductions in tobacco use than would otherwise result from the sum of the separate effects of individual tobacco control policies given the priming, additive and synergistic effect of these policies. Further, a failure to apply tobacco control regimes in a comprehensive manner, encompassing all tobacco products, creates a regulatory gap which, if left unaddressed, could be exploited by the tobacco industry or could allow consumers to avoid measures associated with particular tobacco products (by, for example, switching to less regulated products). See Australia's first written submission, paras. 38, 45.

<sup>36</sup> Australia's first written submission, paras. 50-51, Annex A.

level.<sup>37</sup> Working together, over time, these measures have successfully reduced the prevalence of smoking in Australia, as seen below:

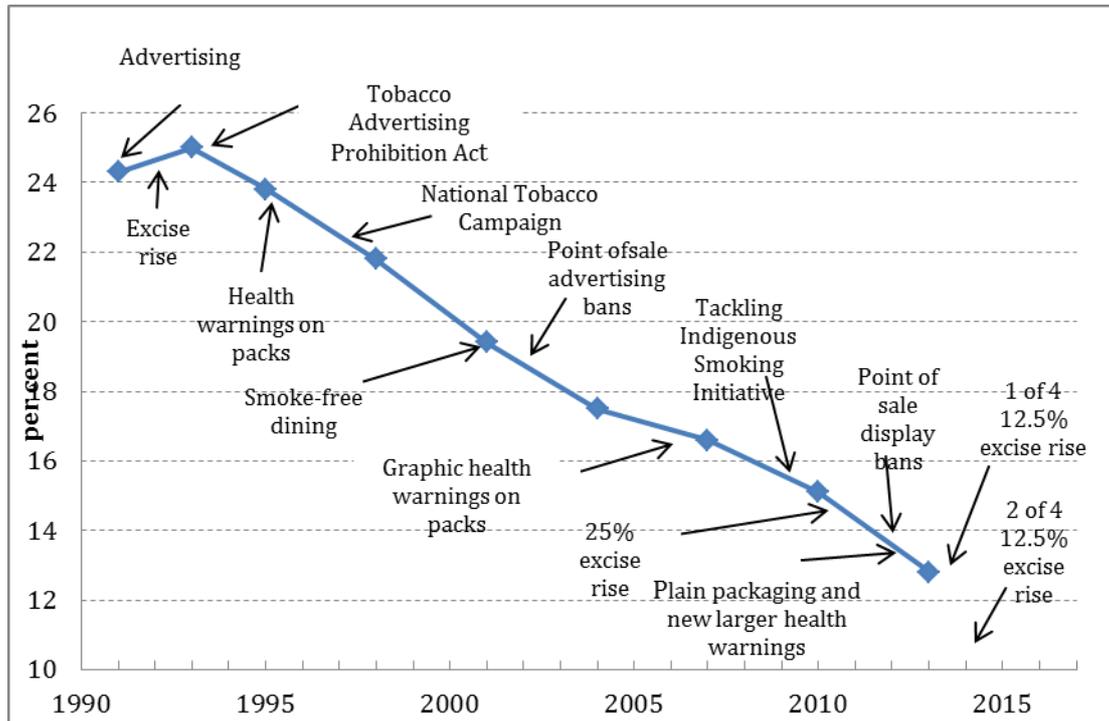


Figure 3: Smoking prevalence rates for smokers 14 year or older and key tobacco control measures in Australia from 1990-2015<sup>38</sup>

38. As Figure 3 illustrates, and as the Panel noted,<sup>39</sup> declining prevalence trends cannot be *assumed* to continue in a linear fashion without introducing new tobacco control measures and updating existing measures, as the tobacco industry adapts to and seeks to undermine them. Accordingly, the Australian Government – like governments around the world – continues to refresh and revise its tobacco control strategies to maintain and bolster their effectiveness.

39. As the tobacco industry adapted to the increasingly stringent restrictions Australia had implemented on other forms of advertising and promotion, the tobacco industry sought to use tobacco packaging as the prime vehicle to continue to influence consumer behaviour. Accordingly, the introduction of plain packaging was a logical extension of Australia's existing advertising and promotion restrictions, to complement and enhance Australia's comprehensive suite of tobacco control

<sup>37</sup> Australia's first written submission, para. 55.

<sup>38</sup> Australia's first written submission, para. 53 (Smoking prevalence rates for smokers 14 year or older and key tobacco control measures in Australia from 1990-2015. Smoking prevalence data from Australian Institute of Health and Welfare, *National Drug Strategy Household Survey Detailed Report 2013*, Drug Statistics Series No. 28 (2014) (Australian Institute of Health and Welfare Survey (2014)) (AUS-48), Online data table, Table 3.1: Tobacco smoking status, people aged 14 years or older, 1991 to 2013 (per cent)).

<sup>39</sup> Panel Report, para. 7.1729.

measures. The Panel recognised that the TPP measures were intended to work within this comprehensive framework, noting:

[W]e are mindful that the TPP measures are, by their design, not intended to operate as a stand-alone policy, but rather were implemented as part of "a comprehensive suite of reforms to reduce smoking and its harmful effects" in Australia. In our view, taking due account of this broader regulatory context of the TPP measures is essential to our understanding of the degree of contribution to Australia's objective. We have thus given due weight in our analysis to the fact that the TPP measures operate in conjunction with a number of other wide-ranging tobacco control measures, including mandatory GHWs, restrictions on advertisement and promotion, taxation measures, restrictions on the sale and consumption of tobacco products, social marketing campaigns, and measures to address illicit tobacco trade.<sup>40</sup>

## 2. The Evidence for Tobacco Plain Packaging

40. By removing the last remaining frontier for tobacco advertising in Australia through the introduction of tobacco plain packaging,<sup>41</sup> Australia sought to sever the link between tobacco product packaging and tobacco smoking behaviour, particularly for youth. This decision was based on an overwhelming body of evidence that showed that tobacco plain packaging: reduces the appeal of tobacco products; increases the effectiveness of GHWs; reduces the ability of the pack to mislead about the harmful nature of tobacco products; and, as a result of these three mechanisms, could be expected to lead to behavioural changes by consumers and potential consumers.

41. This evidence was also supported by the recommendations of the FCTC Guidelines. These Guidelines are based on "available scientific evidence and the experience of the Parties themselves in implementing tobacco control measures",<sup>42</sup> and provide recommendations for – relevantly – two articles of the WHO Framework Convention on Tobacco Control ("FCTC"), Article 11 (concerning the packaging and labelling of tobacco products) and Article 13 (concerning tobacco advertising, promotion and sponsorship).<sup>43</sup> In particular, the Guidelines for Article 11, drafted by a Working Group that included both Australia and Honduras,<sup>44</sup> explicitly recommends the introduction of tobacco plain packaging.<sup>45</sup> The likely benefits of tobacco plain

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<sup>40</sup> Panel Report, para. 7.1729.

<sup>41</sup> Panel Report, para. 7.221.

<sup>42</sup> Australia's first written submission, para. 106; Panel Report, para. 7.414.

<sup>43</sup> Panel Report, paras. 2.106-2.109.

<sup>44</sup> Australia's first written submission, para. 106. See also World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat, Information for Submission to the Panel by a Non-Party (16 February 2015) (AUS-42).

<sup>45</sup> Panel Report, para. 2.108. The Guidelines for Article 11 state: "Parties should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging)."

packaging were identified in the Guidelines, and are consistent with Australia's objective of reducing the use of, and exposure to, tobacco products.

42. Thus, at the time Australia implemented the TPP measures, and at the time the complainants brought this dispute, the measures were recommended by the FCTC and supported by evidence that came from qualified and respected sources, and that was consistent and clear in its findings that tobacco plain packaging reduces the appeal of tobacco products, increases the effectiveness of GHWs, and reduces the ability of the pack to mislead.

43. Australia documented this evidence base during the course of the panel proceedings. First, the evidence submitted by Australia and its experts showed that:

- plain packaged tobacco products are rated as substantially less attractive or appealing overall, particularly by young smokers, which alters consumers' positive perceptions of tobacco products;
- tobacco plain packaging operates to reduce appeal by significantly reducing positive taste perceptions (an important measure of product appeal and likeability), and creating negative perceptions of the taste and the experience of the tobacco product overall;<sup>46</sup> and
- tobacco plain packaging, by reducing package attractiveness overall, reduces positive perceptions of smokers and reduces the ability of tobacco packaging and brand imagery to appeal to the psychological needs of young consumers.<sup>47</sup>

44. The pre-implementation evidence showed in turn, that reduced appeal of tobacco products would directly result in lower initiation among youth, a reduction in the acceptance of tobacco products and purchase among youth, young females and a general population sample, and reduce the curiosity about, and the appeal of, tobacco use amongst youth more generally.<sup>48</sup> A reduction in appeal was also found to have a direct effect on increased avoidant behaviours, such as hiding or covering tobacco packs as well as cessation behaviours such as forgoing tobacco use around other people, thinking about reduced consumption and, ultimately, quitting.<sup>49</sup>

45. Second, evidence submitted by Australia and its experts showed that tobacco plain packaging increases the effectiveness of GHWs by:

- increasing the visual attention paid to health warnings, making them more prominent and salient;

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<sup>46</sup> Australia's first written submission, para. 155.

<sup>47</sup> Australia's first written submission, paras. 148-162.

<sup>48</sup> Australia's first written submission, paras. 163-165.

<sup>49</sup> Australia's first written submission, para. 166.

- removing the distraction caused by branding to better communicate the health effects of tobacco use;
- increasing perceptions about the believability and seriousness of health warnings; and
- increasing consumer recall of health warnings to foster a deeper understanding of the health effects of tobacco use.<sup>50</sup>

46. Australia demonstrated that, as a result of the increased effectiveness of GHWs, consumer behaviour is impacted, influencing potential consumers to resist the uptake of tobacco products, and influencing current consumers to quit smoking.<sup>51</sup>

47. Third, and relatedly, the evidence submitted by Australia and its experts showed that tobacco plain packaging reduces the ability of tobacco packs to mislead consumers (particularly young consumers) about the harmfulness of tobacco products by:

- eliminating colours, which are used to convey certain meanings such as "mildness" or "light"; and
- removing the use of unique and creative package designs, in addition to special shapes, opening styles, and filters, which have been used to convey differentiation in the harmfulness of both individual tobacco brands and varying tobacco products.<sup>52</sup>

48. By limiting the ability to use packaging design, colour and structural innovations, which are designed to mislead consumers into thinking their brand or product is somehow less harmful than other brands or tobacco products, the evidence showed that tobacco plain packaging contributes to discouraging initiation and encouraging cessation of tobacco use.<sup>53</sup>

49. Accordingly, at the time Australia introduced the TPP measures, there was significant evidence to support the view that tobacco plain packaging would have an effect on Australia's public health objective of reducing use of, and exposure to, tobacco products through the three mechanisms specified in the TPP Act.

### **C. The Panel's Findings on Contribution**

50. The Panel began its contribution analysis by examining the evidence before it relating to the design, structure, and operation of the TPP measures. The Panel explained that, by design:

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<sup>50</sup> Australia's first written submission, paras. 176-181.

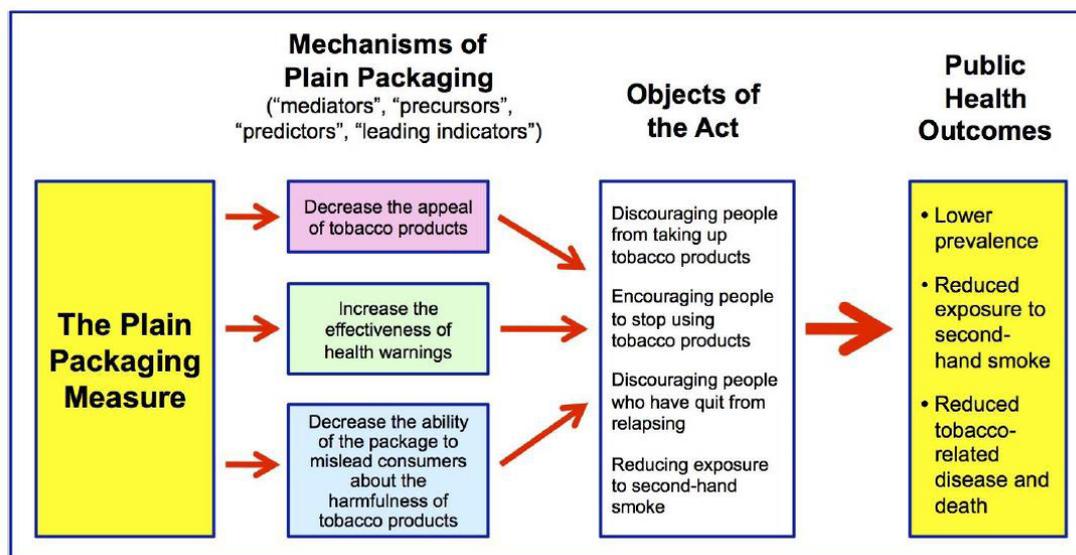
<sup>51</sup> Australia's first written submission, paras. 182-186.

<sup>52</sup> Australia's first written submission, paras. 187-195.

<sup>53</sup> Australia's first written submission, paras. 196-198.

[T]he TPP measures, by changing the packaging and appearance of tobacco products, are intended to act in the first instance on the appeal of tobacco products, the effectiveness of GHWs, and the ability of the pack to mislead consumers about the harmfulness of tobacco products (the *mechanisms*), which in turn is intended to influence smoking *behaviour*, resulting in positive public health outcomes.<sup>54</sup>

51. The Panel noted that Australia had provided the following visual depiction of this "causal chain" model:



52. The Panel first considered the evidence available to Australia prior to the implementation of the TPP measures that supported the expected operation of the "causal chain" model.<sup>55</sup> The Panel reviewed this evidence in order to assess the complainants' claim that the TPP measures would not be capable of reducing the appeal of tobacco products, increasing the effectiveness of GHWs, and decreasing the ability of the pack to mislead, as well as the complainants' contention that these "mechanisms" would be incapable of influencing smoking behaviours.

53. The Panel then considered the post-implementation evidence available at the time of its assessment in relation to the complainants' claim that the TPP measures had not had any impact on "proximal" outcomes (Appendix A) or "distal outcomes" (Appendix B), as well as the complainants' contention that no portion of the observed declines in prevalence and consumption that followed the implementation of the TPP measures could be attributed to the effects of the measures (Appendices C and D).

#### 1. The Panel's Analysis of the Pre-Implementation Evidence

54. As an initial point, the Panel considered the complainants' extensive criticisms of the body of pre-implementation evidence. The Panel first addressed the

<sup>54</sup> Panel Report, para. 7.491.

<sup>55</sup> See Part II.B.2.

complainants' contention that the body of pre-existing scientific studies evaluating tobacco plain packaging were "not of a quality or methodological rigour sufficient to provide a reliable basis to support the measures."<sup>56</sup> The Panel disagreed, and found that the record contained a body of published studies predating Australia's implementation of the TPP measures that "support[ed] the hypothesis of an effect of tobacco plain packaging on the appeal of tobacco products, the effectiveness of GHWs, and the ability of packs to mislead the consumer about the harmful effects of smoking, as well as on some smoking-related behaviours."<sup>57</sup>

55. With respect to the TPP measures' impact on the appeal of tobacco products, the Panel made three primary conclusions:

- First, the Panel agreed with Australia that branded packaging can act as an advertising or promotional tool in relation to tobacco products, and concluded that "this has in fact been considered to be the case by tobacco companies operating in the Australian market, even in the presence of significant restrictions on advertising in the period leading to the entry into force of the TPP measures."<sup>58</sup>
- Second, the Panel concluded that, notwithstanding the potential limitations of individual studies, there is "a body of studies, emanating from qualified sources, supporting the proposition that plain packaging of tobacco products would reduce their appeal to the consumer."<sup>59</sup>
- Third, the Panel found that tobacco plain packaging could be expected to influence consumer behaviour. Specifically, the Panel concluded that: (i) the complainants had not demonstrated that tobacco packaging "could not play a role in influencing the decision to smoke, and specifically on smoking initiation, in particular among adolescents and young adults, by virtue of the positive perceptions and associated product appeal created by such packaging";<sup>60</sup> and (ii) that the complainants had not demonstrated that tobacco plain packaging could not influence smoking cessation or relapse by acting on the ability of the pack to act as a conditioned cue for smoking.<sup>61</sup>

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<sup>56</sup> Panel Report, para. 7.520. The Panel noted that these 68 studies did not cover the entire field of studies relied upon by Australia during the proceedings, and also covered studies that Australia did not expressly rely upon in support of its argument that the TPP measures contribute to their public health objective. *Ibid.* para. 7.540.

<sup>57</sup> Panel Report, para. 7.640.

<sup>58</sup> Panel Report, para. 7.659.

<sup>59</sup> Panel Report, para. 7.682.

<sup>60</sup> Panel Report, para. 7.747.

<sup>61</sup> Panel Report, para. 7.774.

56. Overall, with regard to the pre-implementation evidence on the effect of package appeal on smoking-related behaviours and intentions, the Panel concluded that:

In light of the above, we are not persuaded that the complainants have shown that the TPP measures would not be capable of reducing the appeal of tobacco products, and thereby contribute to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.

Rather, we find that credible evidence has been presented, emanating from recognized sources, that plain packaging of tobacco products may reduce their appeal, by minimizing the ability of various branding features to create positive associations with tobacco products that could have an influence on smoking behaviours, including smoking initiation, cessation and relapse.<sup>62</sup>

57. With respect to the TPP measures' impact on the effectiveness of GHWs, the Panel likewise made three primary conclusions:

- First, the Panel concluded that "a number of studies, emanating from qualified sources and favourably reviewed in external reviews" supported the proposition that "in the presence of plain packaging, GHWs on tobacco products are considered easier to see, more noticeable, perceived as being more credible and more serious, attract greater visual attention, are less subject to distractions caused by other packaging elements, and are read more closely and thought about more."<sup>63</sup>
- Second, the Panel concluded that the complainants had not demonstrated that the existing levels of health knowledge and risk awareness in Australia are such that they could not be *increased* by enhancing the effectiveness of GHWs.<sup>64</sup>
- Third, the Panel concluded that complainants had not demonstrated that there is no correlation between increases in the effectiveness of GHWs and changes in smoking behaviours such as initiation, cessation and relapse.<sup>65</sup> In particular, the Panel found that: (i) the removal of branded elements of tobacco packaging "would remove, or at least significantly reduce, the competition (both in terms of attention, and between different goals) between the negative message conveyed by the GHW, and branded elements of the package";<sup>66</sup> and (ii) that the "type of impact that plain packaging is intended to have on the effectiveness of GHWs, i.e. an improved awareness of health concerns associated with smoking, is among

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<sup>62</sup> Panel Report, paras. 7.777-7.778.

<sup>63</sup> Panel Report, para. 7.825.

<sup>64</sup> Panel Report, para. 7.843.

<sup>65</sup> Panel Report, para. 7.863.

<sup>66</sup> Panel Report, para. 7.860.

those factors that are recognized as influencing the motivation to quit and cessation of the use of tobacco products."<sup>67</sup>

58. Overall, with regard to the pre-implementation evidence on the TPP measures' impact on the effectiveness of GHWs, the Panel concluded that:

[W]e find that credible evidence has been presented, emanating from recognized sources, that plain packaging of tobacco products may increase the salience of GHWs, by making them easier to see, more noticeable, and perceived as more credible and more serious. We are not persuaded that the complainants have demonstrated that these effects could not arise in Australia by reason of the large size of the GHWs applied simultaneously with the TPP measures, or that existing levels of risk awareness in Australia would render inutile any additional effort to increase such awareness and thereby affect risk beliefs. We are also not persuaded, in light of the evidence before us, that GHWs that would be more visible and noticeable, and perceived as being more credible and more serious, could not be expected to have an impact on smoking behaviours, including initiation, cessation and relapse.<sup>68</sup>

59. Finally, with respect to the TPP measures' impact on the ability of the pack to mislead consumers about the harmful effects of tobacco use, the Panel once again made three conclusions:

- First, that the Panel was not persuaded that the complainants had demonstrated that the TPP measures "by their design would not be capable of reducing the ability of tobacco packaging to mislead consumers about the harmful effects of smoking."<sup>69</sup>
- Second, the Panel concluded that, in light of the regulatory gaps in application of the Australian Consumer Law ("ACL"), it was "not persuaded that the removal of the elements of tobacco packaging that are prohibited by the TPP measures could not reduce the ability of tobacco packaging to mislead consumers to a greater extent than what was already possible under the ACL and its enforcement through the [Australian Competition and Consumer Commission]".<sup>70</sup>
- Third, the Panel concluded that there was evidence that, by reducing the pack's ability to mislead, the TPP measures would influence the behaviour of both young people (given their "pre-disposition to not paying attention to risk information"<sup>71</sup>) and current smokers (given the evidence that "smokers often use tobacco products that they perceive as being less

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<sup>67</sup> Panel Report, para. 7.862.

<sup>68</sup> Panel Report, para. 7.869.

<sup>69</sup> Panel Report, para. 7.904.

<sup>70</sup> Panel Report, para. 7.917.

<sup>71</sup> Panel Report, para. 7.923.

harmful" as an alternative to, or substitute for, cessation, "including as a result of the belief that they are easier to quit"<sup>72</sup>).

60. Accordingly, the Panel concluded with respect to the third mechanism of the TPP measures that it was "not persuaded that the complainants have demonstrated that the TPP measures, by changing the ability of tobacco packaging to mislead consumers about the harmful effects of smoking, would not have an effect on smoking cessation."<sup>73</sup> The Panel also noted, in light of the parties' lack of detailed discussion on the issue, that it did not exclude a finding that relapse behaviour would also be impacted by the TPP measures.<sup>74</sup>

61. Based on its assessment of the evidence that existed at the time Australia implemented the TPP measures, the Panel concluded its analysis relating to the design, structure and operation of the TPP measures as follows:

Overall, our review of the evidence before us in relation to the design, structure and intended operation of the TPP measures does not persuade us that, as the complainants argue, they would not be capable of contributing to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products, through the operation of the mechanisms identified in the TPP Act, in combination with other relevant tobacco control measures applied by Australia.<sup>75</sup>

## 2. The Panel's Analysis of the Post-Implementation Evidence

62. The Panel commenced its analysis of the post-implementation evidence by noting that the empirical evidence available only reflected "between a few months and a maximum of three years of application of the measure."<sup>76</sup> In relation to the weight given to this evidence, the Panel disagreed with the complainants' argument that this evidence should be the only factor in the Panel's contribution analysis. Instead, the Panel recognised the inherent limitations of the evidence before it relating to actual smoking behaviours in the early period of application of the measures.<sup>77</sup>

63. The Panel "note[d] in particular" Australia's argument that "the impact of the measures on smoking initiation can only manifest itself fully over a longer period of application, as it gradually affects future generations not exposed to any form of tobacco branding, on packaging or otherwise",<sup>78</sup> and concluded that it found these arguments persuasive:

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<sup>72</sup> Panel Report, para. 7.924.

<sup>73</sup> Panel Report, para. 7.924.

<sup>74</sup> Panel Report, para. 7.926.

<sup>75</sup> Panel Report, para. 7.929.

<sup>76</sup> Panel Report, para. 7.933.

<sup>77</sup> Panel Report, para. 7.938.

<sup>78</sup> Panel Report, para. 7.939.

[T]o the extent that the TPP measures rely on evolutions in smoking behaviours that may not be immediately perceptible or measurable, or may take time to materialize in actual behaviours, data and evidence relating to actual smoking behaviours in the early period of application of the measures may not provide a complete picture of the extent to which the measures contribute, and can be expected to contribute into the future, to their objective.<sup>79</sup>

64. Bearing these limitations in mind, the Panel proceeded to examine the post-implementation evidence available at the time of its assessment. Specifically, the Panel examined the evidence relevant to the complainants' claim that the TPP measures had not had any impact on "proximal" outcomes (Appendix A) or "distal" outcomes (Appendix B), as well as the complainants' contention that no portion of the observed declines in prevalence and consumption that followed the implementation of the TPP measures could be attributed to the effects of the measures (Appendices C and D).

65. With respect to the post-implementation evidence on "proximal outcomes", the Panel highlighted the findings of the complainants' own experts which showed that the TPP measures reduced the appeal of tobacco products and the effectiveness of GHWs.<sup>80</sup> The Panel noted that these findings "confirm, rather than discredit, the 'hypothesized direction', i.e. the hypothesis reflected in the TPP literature."<sup>81</sup> Accordingly, and on the basis of early post-implementation evidence on the operation of the three "mechanisms", as detailed in the Panel's analysis in Appendix A, the Panel concluded that:

This evidence suggests that the introduction of tobacco plain packaging, in combination with enlarged GHWs, has in fact reduced the appeal of tobacco products, as anticipated in a number of the pre-implementation studies criticized by the complainants. As discussed above, this is recognized by some of the complainants' own experts on the basis of a direct examination of data collected for the specific purpose of evaluating the effects of the TPP measures and which was provided to the complainants for use in these proceedings. Empirical evidence relating to the proximal outcomes of the TPP measures also suggests that plain packaging and enlarged GHWs have had some impact on the effectiveness of the GHWs.<sup>82</sup>

66. The Panel then considered its analysis in Appendix B of the post-implementation evidence which investigated the impact of the TPP measures on "distal outcomes", such as quitting-related cognitions, pack concealment, and quit attempts. While the Panel noted that some of the results were "limited" or "limited and mixed", it found that the available post-implementation empirical evidence on

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<sup>79</sup> Panel Report, para. 7.940.

<sup>80</sup> Panel Report, paras. 7.955-7.956.

<sup>81</sup> Panel Report, para. 7.955.

<sup>82</sup> Panel Report, para. 7.1036.

these distal outcomes suggested that the TPP measures are operating as expected in terms of positive impacts on avoidant behaviours and increased calls to Quitline.<sup>83</sup>

67. Finally, with respect to the post-implementation evidence on "smoking behaviours", i.e. prevalence and consumption, the Panel first highlighted that the complainants had not pursued their initial argument that the measures had "backfired" by increasing youth smoking prevalence and tobacco sales.<sup>84</sup>

68. With respect to prevalence, and by reference to its detailed analysis in Appendix C, the Panel noted that it had undertaken a three-step consideration of the evidence and arguments presented.

- First, the Panel considered whether the economic figures and descriptive statistical analyses showed a decrease in prevalence following the implementation of the TPP measures. The Panel concluded that they did.
- Second, the Panel considered whether the rate of prevalence had accelerated since the introduction of tobacco plain packaging in light of the pre-existing rate of decline. Again, the Panel concluded in the affirmative, finding that the downward trend in the overall smoking prevalence rate in Australia accelerated in the post-implementation period of tobacco plain packaging.
- Third, and finally, the Panel considered the parties' arguments as to whether it was possible to "isolate and quantify" the contribution of the TPP measures to the observed and accelerating declines in prevalence. The Panel found that "there is some econometric evidence suggesting that the TPP measures, together with the enlarged GHWs implemented at the same time, contributed to the reduction in overall smoking prevalence, including cigar smoking prevalence, since their entry into force."<sup>85</sup>

69. With respect to consumption, and by reference to its detailed analysis in Appendix D, the Panel noted that it had likewise undertaken a three-step consideration of the evidence and arguments presented.

- First, the Panel considered whether the economic figures and descriptive statistical analyses showed a decrease in cigarette sales and consumption following the implementation of the TPP measures. The Panel concluded that they did.
- Second, the Panel considered the parties' arguments as to whether the downward rate of cigarette sales had accelerated in the post-implementation period of the TPP measures. Again, the Panel concluded in the affirmative.

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<sup>83</sup> Panel Report, para. 7.963.

<sup>84</sup> Panel Report, paras. 7.969, 7.975.

<sup>85</sup> Panel Report, paras. 7.971-7.972.

- Third, and finally, the Panel considered the parties' arguments as to whether it was possible to "isolate and quantify" the contribution of the TPP measures to the observed and accelerating declines in consumption. The Panel found that "there is some econometric evidence suggesting that the TPP measures, in combination with the enlarged GHWs implemented at the same time, contributed to the reduction in wholesale cigarette sales, and therefore cigarette consumption, after their entry into force".<sup>86</sup>

### 3. The Panel's Overall Conclusion on the Contribution of the TPP Measures

70. Based on the totality of the pre- and post-implementation evidence, the Panel found that the complainants had not discharged their burden of demonstrating that the TPP measures were *incapable* of contributing to Australia's objective. The Panel structured its analysis by first reviewing the design, structure and operation of the TPP measures, then – in light of this structure – assessing the qualitative evidence prior to the implementation of the measures and, finally, considering the empirical evidence following the measures' implementation.

71. The Panel first concluded that, by design, the TPP measures was expected to "act in the first instance on the appeal of tobacco products, the effectiveness of GHWs, and the ability of the pack to mislead consumers about the harmfulness of tobacco products (the *mechanisms*), which in turn is intended to influence smoking *behaviour*, resulting in positive public health outcomes."<sup>87</sup> The Panel accepted that the evidence available to Australia prior to the implementation of the TPP measures supported the expected operation of the "causal chain" model.<sup>88</sup>

72. The Panel then spent over 100 pages reviewing the pre-implementation qualitative evidence, and concluded that the complainants had failed to establish:

- that the pre-implementation evidence was "fundamentally flawed";<sup>89</sup>
- that tobacco packaging is incapable of having an influence on smoking behaviours, especially in a dark market like Australia;<sup>90</sup>
- that the TPP measures are incapable of reducing the appeal of tobacco products, increasing the effectiveness of GHWs, and reducing the ability of the pack to mislead;<sup>91</sup> and

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<sup>86</sup> Panel Report, paras. 7.977, 7.979.

<sup>87</sup> Panel Report, para. 7.491.

<sup>88</sup> See Part II.C.1.

<sup>89</sup> Panel Report, para. 7.1027.

<sup>90</sup> Panel Report, para. 7.1032 (emphasis in original).

<sup>91</sup> Panel Report, paras. 7.777, 7.845, 7.904.

- that there was no correlation between these mechanisms and changes in smoking behaviour.<sup>92</sup>

73. On this basis, the Panel found that the complainants had failed to make a *prima facie* case on the basis of the design, structure, and operation of the measures, that the TPP measures were incapable of contributing to Australia's objective. The Panel noted that:

Overall, on the basis of our examination of the evidence relating to the design, structure and intended operation of the TPP measures, we are not persuaded that the complainants have demonstrated that a reduction in the appeal of tobacco products, or an improved awareness of risks through tobacco plain packaging, or the ability to mislead consumers on the harmful effects of tobacco products, through plain packaging of tobacco products as applied by Australia, would not be capable of influencing any of the relevant smoking behaviours.<sup>93</sup>

74. Not only did the Panel conclude that the complainants had failed to discharge their burden, it also concluded that:

To the contrary, in a regulatory context where tobacco packaging would otherwise be the *only* opportunity to convey a positive perception of the product through branding, as is the case in Australia, it appears to us reasonable to hypothesize some correlation between the removal of such design features and the appeal of the product, and between such reduced product appeal and consumer behaviours. It also does not appear unreasonable, in such a context, in light of the evidence before us, to anticipate that the removal of these features would also prevent them from creating a conflicting signal that would undermine other messages that seek to raise the awareness of consumers about the harmfulness of smoking that are part of Australia's tobacco control strategy, including those arising from GHWs.<sup>94</sup>

75. The Panel then noted that this evidence, which confirmed that the complainants had already *failed to demonstrate* that the design, structure and operation of the TPP measures would not contribute to their objective, should be considered "*also*" in light of available empirical evidence.<sup>95</sup>

76. The Panel analysed the post-implementation evidence in Appendices A through D and concluded that this evidence "*is consistent with a finding that the TPP measures contribute to a reduction in the use of tobacco products*".<sup>96</sup> Specifically, the

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<sup>92</sup> Panel Report, paras. 7.1032-7.1033, 7.863, 7.923-7.924.

<sup>93</sup> Panel Report, para. 7.1034.

<sup>94</sup> Panel Report, para. 7.1034 (emphasis in original).

<sup>95</sup> In doing so, the Panel specifically addressed the complainants' concerns that tobacco control policies have "intuitive appeal" and re-iterated its comprehensive approach to evaluating the evidence in the Panel record. See Panel Report, para. 7.1035.

<sup>96</sup> Panel Report, para. 7.1037.

Panel concluded that the post-implementation evidence concerning "proximal outcomes" suggests that the TPP measures are working in the "hypothesized direction", as anticipated by the pre-implementation evidence and as confirmed by the complainants' own experts,<sup>97</sup> and that the evidence on actual smoking behaviours is:

*[C]onsistent with a finding that the TPP measures contribute to a reduction in the use of tobacco products, to the extent that it suggests that, together with the enlarged GHWs introduced at the same time, plain packaging has resulted in a reduction in smoking prevalence and in consumption of tobacco products.<sup>98</sup>*

77. The Panel therefore concluded that the complainants had failed to demonstrate that the design, structure and operation of the TPP measures are incapable of contributing to Australia's objective, and that this conclusion was further supported by the findings of post-implementation empirical evidence.

### **III. CLAIMS UNDER THE TRIPS AGREEMENT AND RELATED CLAIMS UNDER THE DSU**

#### **A. Introduction to Section III**

78. 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.

79. 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 incorporates by reference Honduras's claims of error into its appeal of the Panel Report in DS441, but presents no arguments of its own concerning the Panel's interpretation and application 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.

80. Australia will demonstrate in this Part that the appellants' claims of error are unfounded. In Parts C and D, Australia will demonstrate that the Panel correctly interpreted and applied Article 16.1 and Article 20 of the TRIPS Agreement, contrary to Honduras's contentions on appeal. In Part D.3, Australia will demonstrate that the Dominican Republic is incorrect in its assertion that the Panel failed to consider the Dominican Republic's claims under Article 20 in respect of cigarette sticks, in alleged contravention of Articles 7.1 and 11 of the DSU. The claims advanced by Honduras and the Dominican Republic under Article 11 of the DSU concerning the Panel's assessment of contribution and alternatives are addressed separately in Section VII of this submission.

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<sup>97</sup> Panel Report, paras. 7.954, 7.955-7.956.

<sup>98</sup> Panel Report, para. 7.1037 (emphasis added).

81. As Australia will detail in Parts C and D below, the interpretations of Article 16.1 and Article 20 of the TRIPS Agreement that Honduras advances in its submission are based on a profound misunderstanding of those provisions. Honduras's interpretative strategy is to conflate distinct provisions of the trademark-related provisions, set out in Part II, Section 2 of the TRIPS Agreement, to contrive support for its overarching and erroneous contention that these provisions confer a "right of use" upon the owners of registered trademarks. Given this, before turning to the appellants' arguments on appeal, Australia provides a brief overview of the trademark-related provisions of the TRIPS Agreement to explain the proper role that each provision plays within the overall structure of Section 2.

## **B. Overview of Part II, Section 2 of the TRIPS Agreement**

82. Part II of the TRIPS Agreement sets out "standards concerning the availability, scope and use of intellectual property rights". Section 2 of Part II sets out the standards Members are required to maintain in respect of trademarks.

83. **Article 15.1** of the TRIPS Agreement, entitled "Protectable Subject Matter", provides that:

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

84. The first sentence of Article 15.1 defines what a trademark is, namely "[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings". This is the "protectable subject matter" of Section II, Part 2 of the TRIPS Agreement. The second sentence of Article 15.1 provides that these "signs", so defined, "shall be eligible for registration as trademarks". If a sign is not inherently distinctive, a Member "may make registrability depend on distinctiveness acquired through use".<sup>99</sup>

85. The remainder of Article 15 establishes additional rules concerning the registration of trademarks. Article 15.2 provides that Members may deny registration "on other grounds", i.e. on grounds other than failure to satisfy the requirements for registration set out in Article 15.1, provided those other grounds "do not derogate from the provisions of the Paris Convention (1967)".<sup>100</sup> Article 15.3 provides that

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<sup>99</sup> An example of a sign that is not inherently distinctive would be the use of a descriptive term for a product, such as the use of the word "sudsy" for dish soap. Since all dish soap is "sudsy", this term is not inherently distinctive in respect of dish soaps. Through regular use, however, the word "Sudsy" could become associated with a specific dish soap and, on that basis, acquire sufficient distinctiveness to become eligible for registration as a trademark.

<sup>100</sup> In this regard, Article 6quinquies B(1)-(3) of the Paris Convention provides that:

(continued)

"Members may make registrability depend on use" so long as "actual use of a trademark shall not be a condition for filing an application for registration".

86. **Article 16.1** of the TRIPS Agreement, entitled "Rights Conferred", provides in relevant part:

The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion.

87. Australia will discuss Article 16.1 in detail in Part C below. For now, the two key points to establish concerning Article 16.1 are: (1) that it serves to define the minimum *private* rights that Members are required to confer upon the owner of a registered trademark, as defined in Article 15.1; and (2) that these private rights are rights of *exclusion*, i.e. the right to *prevent* third parties from using an identical or similar sign for goods or services which are identical or similar to those in respect of which the trademark is registered, where such use would result in a likelihood of confusion. Critically, Article 16.1 does not require Members to confer upon the owner of a registered trademark a right to *use* that trademark.

88. **Article 17** of the TRIPS Agreement, entitled "Exceptions", provides that:

Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

89. By its terms, Article 17 concerns "exceptions to the rights conferred by a trademark", i.e. exceptions to the *negative rights of exclusion* defined under Article 16.1. A Member may provide "limited exceptions" to those exclusive rights "provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties".

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Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases:

1. when they are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed;
2. when they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed;
3. when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order.

90. It is evident that the "legitimate interests" of a trademark owner are not synonymous with the rights that it possesses in respect of its registered trademark. In *EC – Trademarks and Geographical Indications (Australia)*, the panel found that:

Read in context, the "legitimate interests" of the trademark owner are contrasted with the "rights conferred by a trademark", which also belong to the trademark owner. Given that Article 17 creates an exception to the rights conferred by a trademark, the "legitimate interests" of the trademark owner must be something different from full enjoyment of those legal rights.<sup>101</sup>

91. The panel in that dispute considered that the "legitimate interests" of a trademark owner can be understood by reference to "WTO Members' shared understandings of the policies and norms relevant to trademarks", which are reflected in the TRIPS Agreement itself.<sup>102</sup> The panel found in this regard that:

The function of trademarks can be understood by reference to Article 15.1 as distinguishing goods and services of undertakings in the course of trade. Every trademark owner has a legitimate interest in preserving the distinctiveness, or capacity to distinguish, of its trademark so that it can perform that function. This includes its interest in using its own trademark in connection with the relevant goods and services of its own and authorized undertakings.<sup>103</sup>

92. Importantly, however, a trademark owner's "legitimate interest" in the use of its trademark is not tantamount to a *protected right to use* that trademark. Rather, the trademark owner's legitimate interest in the use of its trademark is simply a factor that a Member must "take account of" when *creating exceptions* to the *negative rights of exclusion* defined under Article 16.1.

93. As will become apparent below, Honduras's interpretations of Articles 16 and 20 of the TRIPS Agreement attempt to convert a trademark owner's "legitimate interest" in the use of its trademark within the specific context of exceptions to the rights of exclusion under Article 16.1 into an overarching and unbounded "interest in use" that permeates all of Section II, Part 2 of the TRIPS Agreement.

94. **Article 19** of the TRIPS Agreement,<sup>104</sup> entitled "Requirement of Use", provides in relevant part:

If use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the

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<sup>101</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.662.

<sup>102</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664.

<sup>103</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664.

<sup>104</sup> Article 18 of the TRIPS Agreement, concerning the term of protection, and Article 21 of the TRIPS Agreement, concerning licensing and assignment, are not relevant to this dispute.

trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use.

95. Article 19 is relevant to this dispute primarily because it "expressly contemplates that obstacles to the use of trademarks may arise independently of the will of the trademark owner, including on the basis of government requirements".<sup>105</sup> When a government measure prevents the use of a trademark, the resulting non-use must be recognised as a "valid reason" to prevent the cancellation of that trademark.

96. **Article 20** of the TRIPS Agreement, entitled "Other Requirements", provides that:

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

97. Australia will discuss Article 20 at length in Part D below. Four key points suffice for the purposes of this overview.

98. First, Article 20 does not define any rights that accrue to a trademark owner by virtue of registration. Those rights are defined in Article 16.1. As described above, the minimum rights that a Member must confer under Article 16.1 are *negative rights of exclusion* and do not include a "right of use".

99. Second, Article 20 is not an "exceptions provision". In particular, it is not an exception to the rights Members are required to confer upon a trademark owner, a subject that is addressed by Article 17. Rather, Article 20 is a positive obligation that Members undertake to other Members not to impose special requirements that "unjustifiably" encumber the use of a trademark in the course of trade.

100. Third, and contrary to the language in Honduras's submission, Article 20 does not "prohibit" special requirements that impose encumbrances upon the use of a trademark in the course of trade. Rather, it provides only that Members may not impose such encumbrances "unjustifiably".

101. Finally, and as a consequence of the prior two points, the burden of proof under Article 20 rests with the complaining party. As the Panel correctly found, "it [is] for the complainants to make a *prima facie* case" that a measure at issue under Article 20 imposes special requirements that encumber the use of a trademark in the course of trade and "that the encumbrance is imposed 'unjustifiably'; once that has been done, the onus would shift to the respondent to prove the contrary by submitting

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<sup>105</sup> Panel Report, para. 7.2027.

sufficient arguments and evidence to this effect."<sup>106</sup> Neither Honduras nor the Dominican Republic has appealed this aspect of the Panel's interpretation.

102. **Overall**, the most salient aspects of Part II, Section 2 of the TRIPS Agreement that pertain to the matter before the Appellate Body are that: (1) the rights that Members are required to confer upon the owners of registered trademarks are private rights of exclusion; (2) any exceptions that Members provide to those private rights of exclusion must "take account of" the "legitimate interests" of the trademark owner, including its interest in using its trademark; and (3) the obligation that Members undertake in Article 20 not to impose "special requirements" that "unjustifiably encumber" the use of a trademark in the course of trade is an obligation that exists *outside* of the rights conferred by a trademark (Article 16) and exceptions to those rights (Article 17).

103. As Australia will proceed to demonstrate, Honduras's proposed interpretations of Article 16.1 and Article 20 are, at their core, an attempt to conflate these distinct provisions of Part II, Section 2 of the TRIPS Agreement under the guise of "context". The Panel correctly rejected this interpretative strategy, and the Appellate Body should do the same.

### **C. The Panel Did Not Err in Its Interpretation and Application of Article 16.1**

#### **1. Summary of the Parties' Arguments and the Panel's Findings**

104. Before the Panel, all four of the complainants argued that the TPP measures are inconsistent with Article 16.1 of the TRIPS Agreement because, the complainants alleged, the TPP measures impermissibly reduce the scope of the rights conferred under that provision. The complainants alleged that by prohibiting the use of non-word trademarks on tobacco products, the TPP measures will reduce the distinctiveness of registered non-word trademarks, and that this alleged reduction of distinctiveness would reduce the ability of the registered trademark owner to demonstrate a "likelihood of confusion".<sup>107</sup>

105. Australia argued that the complainants' claims under Article 16.1 were unfounded, because the right accorded to registered trademark owners under Article 16.1 is a *negative* right to prevent the use of certain trademarks where their use would result in a "likelihood of confusion", not a *positive* right to use a trademark.<sup>108</sup>

106. The complainants contradicted themselves before the Panel by expressly acknowledging in some of their submissions to the Panel that no "right of use" is

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<sup>106</sup> Panel Report, para. 7.2171. Honduras characterises Article 20 as a "prohibition/exception" provision, but implicitly accepts the Panel's allocation of the burden of proof.

<sup>107</sup> Panel Report, para. 7.1982.

<sup>108</sup> Panel Report, paras. 7.1954 and 7.1955.

protected under the TRIPS Agreement,<sup>109</sup> while at the same time advancing an interpretation of Article 16.1 that was entirely dependent on the existence of such a "right of use".

107. The basis of the complainants' claims under Article 16.1 was that if a trademark is not used, the "likelihood of confusion" is reduced, and so the right to prevent third parties from using similar or identical trademarks on similar or identical goods is diminished.<sup>110</sup> Australia argued that the Panel should reject the complainants' argument because Article 16.1 does not require that Members ensure that a likelihood of confusion arises so that trademark owners will be able to prevent confusion. Australia explained, in other words, that there is no "right of confusion" under Article 16.1.<sup>111</sup>

108. The Panel agreed with Australia. The Panel began its analysis by examining the ordinary meaning of Article 16.1, which provides in relevant part:

The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion.

109. In relation to the text of Article 16.1, the Panel explained that the ordinary meaning of the verb "prevent" is "to preclude, stop, or hinder", or "to stop, keep, or hinder (a person or thing) *from* doing something".<sup>112</sup> The Panel found 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>113</sup> The Panel explained 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>114</sup>

110. The Panel found support for its view that Article 16.1 does not establish a trademark owner's right to use its registered trademark in both the panel report in *EC – Trademarks and Geographical Indications (Australia)* and the Appellate Body's

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<sup>109</sup> See, e.g. Indonesia's response to Panel question No. 96; Honduras's opening statement at the first substantive meeting of the Panel, para. 21; Honduras's response to Panel question Nos. 96, 99; Dominican Republic's opening statement at the first substantive meeting of the Panel, para. 10; Dominican Republic's response to Panel question Nos. 94, 96. Cf. Cuba's response to Panel question No. 99.

<sup>110</sup> Panel Report, paras. 7.1983, 7.1986.

<sup>111</sup> Panel Report, para. 7.1984.

<sup>112</sup> Panel Report, para. 7.1973.

<sup>113</sup> Panel Report, para. 7.1974.

<sup>114</sup> Panel Report, para. 7.1974.

report in *US – Section 211 Appropriations Act*.<sup>115</sup> The Panel's analysis of the relevant findings in these prior disputes merits quoting in full:

7.1975. The panel in *EC – Trademarks and Geographical Indications (Australia)*, when interpreting the principles set out in Article 8 of the TRIPS Agreement, found that:

These principles reflect the fact that the agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts. This fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement.

7.1976. With respect to Article 16.1, in particular, the panel found that:

Article 16.1 of the TRIPS Agreement only provides for a negative right to prevent all third parties from using signs in certain circumstances.

7.1977. The Appellate Body in *US – Section 211 Appropriations Act* found, with respect to Article 16.1:

As we read it, Article 16 confers on the owner of a registered trademark an internationally agreed minimum level of "exclusive rights" that all WTO Members must guarantee in their domestic legislation. These exclusive rights protect the owner against infringement of the registered trademark by unauthorized third parties.

7.1978. In light of the ordinary meaning of the text and consistently with prior rulings, we agree with the parties that Article 16.1 does not establish a trademark owner's right to use its registered trademark. Rather, Article 16.1 only provides for a registered trademark owner's right to prevent certain activities by unauthorized third parties under the conditions set out in the first sentence of Article 16.1.<sup>116</sup>

111. In light of its view that Article 16.1 provides only negative rights to prevent third parties from using signs in particular circumstances, the Panel explained that to make out a claim under Article 16.1 the complainants would have to demonstrate that "under Australia's domestic law, the trademark owner does not have the right to prevent third-party activities that meet the conditions set out in that provision."<sup>117</sup>

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<sup>115</sup> See Panel Report, paras. 7.1975-7.1977, quoting Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246; Appellate Body Report, *US – Section 211 Appropriations Act*, para. 186.

<sup>116</sup> Panel Report, paras. 7.1974-7.1978 (internal citations omitted).

<sup>117</sup> Panel Report, para. 7.1980.

112. To this end, the Panel correctly observed that the complainants did not argue that the TPP measures affect: (1) how the criteria for trademark infringement are defined in Australia's domestic legislation; (2) how the Australian legal system assesses whether a "likelihood of confusion" exists; or (3) the procedural or evidentiary means available to right holders in infringement procedures to demonstrate that the infringement criteria are indeed fulfilled. The Panel explained that the complainants also appeared to accept that, *when* these infringement criteria are fulfilled, a trademark owner is entitled to take legal action in Australia.<sup>118</sup>

113. Rather, the complainants argued that, under the TPP measures, "the factual situation of trademark infringement set forth in the first sentence of Article 16.1 will occur less frequently and with respect to fewer signs than before, and that this constitutes a reduction of the trademark owner's right in violation of Article 16.1."<sup>119</sup>

114. The Panel therefore determined that there were two distinct parts to the complainants' argument:

- (i) the factual allegation that the TPP measures' prohibition of use of certain registered trademarks will result in a situation where these marks will lose their distinctiveness and thus reduce the occurrence of situations in which right owners can show a "likelihood of confusion" between the registered trademarks and similar or identical signs on similar products; and (ii) the assertion that this factual consequence of the TPP measures reduces or eliminates the exclusive rights that the trademark owner is to enjoy under Australia's domestic law pursuant to Article 16.1.<sup>120</sup>

115. In relation to the first aspect of the complainants' argument, the Panel explained that it was not persuaded that the TPP measures would necessarily reduce the occurrence of situations in which trademark owners can show a "likelihood of confusion".<sup>121</sup> However, the Panel determined that it would "only need to examine the causality between the TPP measures and this claimed consequence if we find that such a result would indeed lead to a violation of Article 16.1."<sup>122</sup>

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<sup>118</sup> Panel Report, para. 7.1985.

<sup>119</sup> Panel Report, para. 7.1986.

<sup>120</sup> Panel Report, para. 7.1988.

<sup>121</sup> Panel Report, para. 7.1993. The Panel explained:

[I]t is not self-evident how the operation of the TPP measures – which apply in an identical manner to all tobacco products - may affect the likelihood of confusion arising in respect of use of signs similar to the trademarks concerned for identical or similar goods (including those that are, themselves, subject to the requirements of the TPP measures), and how this would be assessed in a given instance.

Ibid. para. 7.1992.

<sup>122</sup> Panel Report, para. 7.1993.

116. In relation to the second aspect of the complainants' claims, the Panel found that 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>123</sup>

117. The Panel disagreed with the complainants' argument concerning the relevance of the panel's findings in *EC – Trademarks and Geographical Indications (Australia)* that the owner's "legitimate interest" in preserving the distinctiveness of its trademark includes an interest in using the trademark in connection with the relevant goods and services of its own or authorised undertakings.<sup>124</sup> The Panel explained:

[W]e understand the finding of the panel in *EC – Trademarks and Geographical Indications (Australia)* ... as simply confirming that the trademark owner's interest in preserving the distinctiveness of its trademark includes its interest in using its trademark in relation to the relevant goods or services, and that these interests need to be taken into account – not *protected* as a *right* – when considering whether an exception in a Member's domestic law to the exclusive *right to prevent* conferred by Article 16.1 meets the criteria for permissible exceptions as contained in Article 17.<sup>125</sup>

118. The Panel also examined the context provided by Articles 19 and 20 of the TRIPS Agreement and found further support for its view that "regulatory measures that do not affect the negative right to prevent infringing uses are not prohibited by Article 16".<sup>126</sup>

119. Articles 19 and 20 of the TRIPS Agreement make clear that "obstacles to trademark use can and do legitimately exist, and that Members retain the authority to encumber the use of trademarks under certain conditions."<sup>127</sup> The Panel explained that adopting an interpretation of Article 16 that would require Members to "safeguard a minimum opportunity to use the registered trademark" would therefore not only be without basis in the text of the provision itself, but would also "create disharmony" with those provisions of the trademark section that "clearly foresee potential regulatory prevention of use."<sup>128</sup>

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<sup>123</sup> Panel Report, para. 7.2000 (emphasis in original).

<sup>124</sup> Panel Report, para. 7.2008.

<sup>125</sup> Panel Report, para. 7.2008 (emphasis in original).

<sup>126</sup> Panel Report, para. 7.2015.

<sup>127</sup> Panel Report, para. 7.2028. The Panel explained that Article 19 "expressly contemplates that obstacles to the use of trademarks may arise independently of the will of the trademark owner, including on the basis of government requirements." The Panel further noted that Article 20 "prohibits special requirements that unjustifiably encumber use of a trademark in the course of trade, which – inversely – permits the encumbrance of use of a trademark in certain circumstances." *Ibid.* para. 7.2027.

<sup>128</sup> Panel Report, para. 7.2029.

120. The Panel therefore concluded that "Article 16.1 does not require Members to refrain from regulatory measures that may affect the ability to maintain distinctiveness of individual trademarks or to provide a 'minimum opportunity' to use a trademark to protect such distinctiveness."<sup>129</sup> Accordingly, the Panel saw no need to examine further the complainants' factual allegation that the TPP measures would reduce a trademark's distinctiveness, and lead to a situation where a "likelihood of confusion" with respect to that trademark is less likely to arise in the market.<sup>130</sup>

## 2. Honduras Errs in Its Interpretation of Article 16.1

121. In its appellant submission, Honduras claims that the Panel erred when it concluded that Article 16.1 provides only negative rights to prevent third parties from using signs in particular circumstances. Honduras argues that the Panel's "unduly narrow and formalistic" findings with respect to Article 16.1 "divorce the means of protection from the end that the means should serve (the ability to use the trademark and expand the trademark's distinctiveness, notoriety and goodwill)."<sup>131</sup> Honduras also maintains that the Panel "refus[ed] to examine the ordinary meaning of the terms in their context and in light of the function of Article 16 of the TRIPS Agreement" – a baseless contention at odds with the Panel's interpretative analysis.<sup>132</sup>

122. In its appellant submission, Honduras insists that its interpretation of Article 16.1 is not based on a "positive right to use" a trademark.<sup>133</sup> At the same time, however, 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>134</sup> In this way, Honduras's appeal of the Panel's interpretation of Article 16.1 is premised on the same fundamental defect as its original arguments before the Panel.

123. The necessary implication of Honduras's argument is that a trademark owner has a right to use a trademark, so as to maintain the distinctiveness of that trademark, and therefore maintain the owner's ability to demonstrate a "likelihood of confusion".<sup>135</sup> Honduras explains that, in its view, Article 16.1 "limit[s] the discretion

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<sup>129</sup> Panel Report, para. 7.2031.

<sup>130</sup> Panel Report, para. 7.2032.

<sup>131</sup> Honduras's appellant's submission, para. 326.

<sup>132</sup> See Honduras's appellant's submission, para. 355.

<sup>133</sup> Honduras's appellant's submission, para. 349.

<sup>134</sup> Honduras's appellant's submission, para. 429. As discussed in Part III.C.1 above, the Panel called into question the merits of the factual underpinning of Honduras's argument (i.e. that the TPP measures will weaken trademarks to the point that "almost any claim for infringement will be rejected"), but found it unnecessary to make any findings in relation to the complainants' factual allegations in light of its conclusion that the complainants' claims were without merit as a legal matter.

<sup>135</sup> Honduras explains that it is "undisputed that the more the mark is used in the course of trade, the greater its strength and thus its scope of protection. Use is the alpha and omega of the trademark." Honduras's appellant's submission, para. 359.

of Members to regulate the trademark in a manner that prevents the rights from being enjoyed by trademark owners."<sup>136</sup>

124. As the Panel properly concluded, however, there is no interpretative basis for reading a "right of use" into Article 16.1. The only right protected under Article 16.1 is a registered trademark owner's 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>137</sup> 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>138</sup>

125. Honduras argues that the Panel's failure to conclude that Article 16.1 prevents Members from adopting measures that "might negatively affect the distinctiveness of registered trademarks" is based on an "unduly narrow and formalistic reading of Article 16.1", rather than a "genuine analysis of the ordinary meaning of this provision".<sup>139</sup> Honduras claims that the Panel erroneously focused on the ordinary meaning of the term "to prevent", but neglected to focus on the ordinary meaning of the other terms in the provision, such as "owner", "registered", "trademark", "exclusive right", etc. In Honduras's view, the Panel ignored the fact that all of these latter terms are "imbued by and bound together through the concept of 'use'."<sup>140</sup>

126. To reiterate, use of a trademark by its owner is not referenced *anywhere* in Article 16.1. Honduras thus appears to suggest that a "genuine analysis of the ordinary meaning" of Article 16.1 involves ignoring the ordinary meaning of the active verb in the first sentence, and focusing instead on the idea that other terms in that provision are "imbued by" the "concept" of use. This analysis would apparently provide the basis for a conclusion that Article 16.1 actually protects the right to use a trademark. Contrary to Honduras's contention, such an approach is far outside the bounds of a proper interpretative analysis under Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention").

127. Honduras further argues that the Panel's interpretation of Article 16.1 was not "in good faith" because the Panel failed to examine the terms in Article 16.1 "in their context and in light of the function of Article 16.1".<sup>141</sup> In particular, Honduras argues that the Panel "ignores the importance of 'use' to the enforcement of trademarks and reads Article 16 without considering the context of, in particular, Articles 15, 19, and 20 which put the functional use of trademarks at the heart of the trademark rights protected by the TRIPS Agreement."<sup>142</sup>

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<sup>136</sup> Honduras's appellant's submission, para. 332.

<sup>137</sup> Panel Report, para. 7.1974.

<sup>138</sup> Panel Report, para. 7.1974.

<sup>139</sup> Honduras's appellant's submission, para. 343.

<sup>140</sup> Honduras's appellant's submission, para. 376.

<sup>141</sup> Honduras's appellant's submission, para. 355.

<sup>142</sup> Honduras's appellant's submission, para. 366.

128. Honduras appears to believe that because it *disagrees* with the Panel's analysis of the context provided by the other provisions in Part II, Section 2 of the TRIPS Agreement, it follows that the Panel failed to consider the relevance of these provisions at all, in a manner contrary to its obligation to interpret Article 16.1 "in good faith".

129. However, as discussed in Part C above, the Panel carefully considered the context of the other relevant provisions in Part II, Section 2 of the TRIPS Agreement, and determined that each of those provisions supported its conclusion that "regulatory measures that do not affect the negative right to prevent infringing uses are not prohibited by Article 16".<sup>143</sup> The Panel explained that Articles 19 and 20 of the TRIPS Agreement make clear that "obstacles to trademark use can and do legitimately exist, and that Members retain the authority to encumber the use of trademarks under certain conditions."<sup>144</sup> On this basis, the Panel found that adopting an interpretation of Article 16 that would require Members to "safeguard a minimum opportunity to use the registered trademark" would be inconsistent with those provisions that "clearly foresee potential regulatory prevention of use."<sup>145</sup>

130. Despite the fundamental logic of the Panel's contextual analysis, Honduras argues that the Panel ignored Article 20 of the TRIPS Agreement, and that the Panel failed to consider the "fact" that Article 20 "in principle protects the trademark owner from special requirements on the use of a trademark".<sup>146</sup>

131. In advancing this argument, Honduras ignores the critical term "unjustifiably" in the text of Article 20. Article 20 states that "[t]he use of a trademark in the course of trade shall not be *unjustifiably encumbered* by special requirements". In other words, and as the Panel properly found, Article 20 expressly contemplates that Members may encumber the use of a trademark by special requirements so long as the resulting encumbrance is not "unjustifiable".

132. Elsewhere in its argument, Honduras acknowledges that Article 20 does not provide "absolute" protection for trademark use,<sup>147</sup> and likewise explains that it does not consider that "every limitation of the use of a mark" would constitute a violation

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<sup>143</sup> Panel Report, para. 7.2015.

<sup>144</sup> Panel Report, para. 7.2028. The Panel explained that Article 19 "expressly contemplates that obstacles to the use of trademarks may arise independently of the will of the trademark owner, including on the basis of government requirements." The Panel further noted that Article 20 "prohibits special requirements that unjustifiably encumber use of a trademark in the course of trade, which – inversely – permits the encumbrance of use of a trademark in certain circumstances." Ibid. para. 7.2027.

<sup>145</sup> Panel Report, para. 7.2029. In relation to Article 15, the Panel explained that "the obligation in Article 15.1 to consider distinctive signs as registrable does not imply that Members have the responsibility to permit non-distinctive signs to acquire or maintain distinctiveness, or create a 'right to distinctiveness' for trademark owners." Ibid. para. 7.2009.

<sup>146</sup> Honduras's appellant's submission, para. 332.

<sup>147</sup> Honduras's appellant's submission, para. 415.

of Article 16.1.<sup>148</sup> But Honduras fails to provide any coherent framework for evaluating *which* limitations on use would, in Honduras's words, "reduce the scope of protection [in Article 16.1] below the minimum level."<sup>149</sup>

133. Honduras suggests at one point in its argument that the Panel should have superimposed the Article 20 framework directly onto Article 16.1. Honduras argues that Article 20 "imposes the exact obligation on Members that the Panel refuses to read into Article 16.1",<sup>150</sup> and thus appears to believe that the Panel should have "read into Article 16.1" a requirement that Members not "unjustifiably encumber" the use of a trademark.

134. This argument ignores the fact that encumbrances on the use of trademarks are the province of Article 20, not Article 16.1; and Article 16.1 makes no mention of the use of a trademark by its owner.<sup>151</sup> Furthermore, Honduras has no response to the Panel's view that "to read Article 16 as imposing upon Members limitations on regulations regarding trademark use could potentially render Article 20 itself, which addresses this point directly, *inutile*."<sup>152</sup>

135. In addition to its erroneous arguments concerning the Panel's analysis of the ordinary meaning and context of Article 16.1, Honduras repeatedly suggests that the Panel erred by treating "likelihood of confusion" under Article 16.1 as a "separate triggering condition".<sup>153</sup> Honduras argues that "the starting point of the right is ownership over the trademark", and that "[s]uch ownership triggers exclusive rights designed to ensure the distinctiveness of the trademark".<sup>154</sup>

136. However, the Panel's treatment of "likelihood of confusion" as a necessary condition for the exercise of a trademark owner's negative rights under Article 16.1 is based on a proper and straightforward reading of the text, which provides – explicitly – that the registered trademark owner "shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services ... *where such use would result in a likelihood of confusion*."<sup>155</sup>

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<sup>148</sup> Honduras's appellant's submission, para. 436 (emphasis added).

<sup>149</sup> Honduras's appellant's submission, para. 436. In relation to advertising bans, for example, Honduras suggests that there is "no basis to consider that such a ban would engage Article 16". *Ibid.* Honduras explains that this is because a trademark might be "less visible and lose[] part of its strength" as a result of a ban, but "such a measure leaves the distinguishing function intact". *Ibid.* This is pure assertion.

<sup>150</sup> Honduras's appellant's submission, para. 347.

<sup>151</sup> See Panel Report, para. 7.1974.

<sup>152</sup> Panel Report, para. 7.2029 (emphasis in original).

<sup>153</sup> See, e.g. Honduras's appellant's submission, paras. 327, 328, 418, 429, 432.

<sup>154</sup> Honduras's appellant's submission, para. 328.

<sup>155</sup> TRIPS Agreement, Article 16.1 (emphasis added).

137. Moreover, the Panel agreed with Honduras's *own characterisation* of the interplay between a "likelihood of confusion" and the exercise of the negative rights protected under Article 16.1.<sup>156</sup> In its submissions to the Panel, Honduras explained that under Article 16.1, "the owner's right to take action against the infringement of a trademark can only arise when the unauthorised use 'would result in a likelihood of confusion'."<sup>157</sup> Honduras itself acknowledged that "likelihood of confusion, therefore, is a *condition-precedent* for exercising the right under Article 16.1."<sup>158</sup>

138. Yet Honduras is now trying to convince the Appellate Body that the Panel erred by agreeing with Honduras with respect to this point. Australia submits that the Panel's straightforward reading of the structure of Article 16.1 is correct, and Honduras's attempt to argue that the Panel erred need not detain the Appellate Body for long.

139. Honduras argues that because of the alleged errors in the Panel's analysis, the Panel failed to appreciate that the TPP measures reduce trademarks' "scope of protection" below the "minimum guaranteed level" in Article 16.1.<sup>159</sup> For the reasons described above, Honduras's claims of error are unfounded.

140. In Australia's view, however, the key defect in Honduras's appellant submission – and what plagued all of the complainants' arguments during the panel proceedings – is that an interpretation based on an implied "right of use" or "right of distinctiveness" or "right of confusion" has *no* foundation in the text. A proper interpretative analysis under Article 31 of the Vienna Convention establishes that none of these "rights" is protected by Article 16.1, and Honduras's argument that the Panel erred by not reading any of these non-existent "rights" into the text of that provision is without merit. The Appellate Body should therefore reject Honduras's claim that the Panel erred in its interpretation of Article 16.1 of the TRIPS Agreement.

### 3. Honduras Errs in Its Contention that the Panel Misapplied Article 16.1 to the Facts of the Case

141. Honduras also argues in its appellant submission that the Panel erred in its application of Article 16.1 to the TPP measures.<sup>160</sup> Honduras maintains that its application claim is independent of its claim concerning the validity of the Panel's interpretative analysis, because Honduras argues that the Panel's decision not to address the complainants' factual allegation that the TPP measures will "reduce the distinctiveness of such trademarks" was erroneous even under the legal standard articulated by the Panel.<sup>161</sup> Honduras further alleges that the Panel's failure to address

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<sup>156</sup> See Panel Report, para. 7.1982, citing Honduras's first written submission, para. 226.

<sup>157</sup> Honduras's first written submission, para. 226.

<sup>158</sup> Honduras's first written submission, para. 226 (emphasis in original).

<sup>159</sup> Honduras's appellant's submission, para. 452.

<sup>160</sup> Honduras's appellant's submission, para. 443.

<sup>161</sup> Honduras's appellant's submission, para. 444.

the complainants' factual allegation was an exercise of false judicial economy, inconsistent with its obligation to make an objective assessment of the matter under Article 11 of the DSU.<sup>162</sup>

142. In support of its claim that the Panel needed to address the complainants' factual allegation even if it disagreed with the complainants' interpretative arguments, Honduras cites the Panel's statement that "regulatory measures that do not affect the negative right to prevent infringing uses are not prohibited by Article 16. Conversely, measures that do constrain the right to prevent provided in Article 16.1 do violate the Agreement – whether they do so incidentally or directly."<sup>163</sup> Honduras argues that, pursuant to this statement, "the question the Panel should have examined is whether it was demonstrated that the plain packaging measures constrained the right to prevent infringing uses as had been argued by Honduras."<sup>164</sup>

143. However, in their claims under Article 16.1, the complainants did not even *attempt* to argue that under Australia's domestic law, a trademark owner does not have the right to prevent third-party activities that meet the conditions set out in that provision.<sup>165</sup> In the Panel's view, this is the evidence the complainants would have needed to present in order to establish that the TPP measures "affect[ed] the negative right to prevent infringing uses".<sup>166</sup>

144. Honduras's argument concerning the Panel's application of Article 16.1 to the TPP measures is that the Panel erred by failing to examine "the extent to which the measures affected the distinctiveness and the strength of the mark".<sup>167</sup> As the Panel properly concluded, however, this factual question would *only* be relevant if a finding that the TPP measures *did* affect the distinctiveness and strength of the mark would lead the Panel to conclude that the TPP measures are inconsistent with Article 16.1. Given the Panel's view that Members are not required under Article 16.1 to "protect against reduction of distinctiveness", whether or not the TPP measures would in fact lead to a reduction of distinctiveness was *immaterial* to the Panel's analysis.

145. For the foregoing reasons, if the Appellate Body upholds the Panel's interpretative analysis, the Appellate Body should reject Honduras's argument that the Panel erred in its application of Article 16.1, as well as Honduras's argument that the Panel's decision not to address the complainants' factual allegations was inconsistent with the Panel's obligation to make an objective assessment of the matter under Article 11 of the DSU.

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<sup>162</sup> Honduras's appellant's submission, para. 460.

<sup>163</sup> Honduras's appellant's submission, para. 445, quoting Panel Report, para. 7.2015.

<sup>164</sup> Honduras's appellant's submission, para. 445.

<sup>165</sup> Panel Report, paras. 7.1980, 7.1985.

<sup>166</sup> Panel Report, paras. 7.1980, 7.2015.

<sup>167</sup> Honduras's appellant's submission, para. 452.

## **D. The Panel Did Not Err in Its Interpretation and Application of Article 20**

### **1. Summary of the Parties' Arguments and the Panel's Findings**

146. Before the Panel, all four complainants alleged that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement. To recall, Article 20 provides in relevant part that:

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.

147. The Panel divided its interpretation and application of Article 20 into three parts: (1) an examination of whether the TPP measures involve "special requirements" that "encumber" the use of a trademark<sup>168</sup>; (2) an examination of whether the special requirements imposed by the TPP measures encumber the "use of a trademark" "in the course of trade"<sup>169</sup>; and (3) an examination of whether the TPP measures "unjustifiably" encumber the use of trademarks in the course of trade, including an examination of Honduras's argument that the TPP measures are "unjustifiable" *per se* because they do not address the specific features of individual trademarks.<sup>170</sup> Australia will follow the same organisation below when summarising the parties' arguments and the Panel's findings.

#### **(a) Whether the TPP measures involve "special requirements" that "encumber" the use of a trademark**

148. Australia did not contest before the Panel that the TPP measures impose "special requirements" on the use of a trademark "insofar as they require that any word trademark used on tobacco products and their retail packaging must appear in [a] certain form".<sup>171</sup> However, Australia did contest that the elements of the TPP measures that *prohibit* the use of certain types of trademarks, such as figurative trademarks, constitute "special requirements" that "encumber" the "use" of a trademark.<sup>172</sup>

149. Australia considers that Article 20 of the TRIPS Agreement concerns encumbrances upon the use of a trademark when domestic law otherwise permits the use of that trademark. In Australia's view, this conclusion follows from the fact that nothing in the TRIPS Agreement requires Members to permit the owner of a

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<sup>168</sup> Panel Report, Section 7.3.5.3.

<sup>169</sup> Panel Report, Section 7.3.5.4.

<sup>170</sup> Panel Report, Section 7.3.5.5. The Panel's overall conclusion in respect of the complainants' claims under Article 20 is set forth in Section 7.3.5.6 of the Panel Report.

<sup>171</sup> Panel Report, para. 7.2174.

<sup>172</sup> See, e.g. Australia's first written submission, paras. 339 and 340.

registered trademark to use that trademark. The private rights that Members are required to confer upon the owners of registered trademarks are rights of *exclusion*, and these private rights do not include a right of use. As Nuno Pires de Carvalho, the former Director of the Intellectual Property and Competition Policy Division of the World Intellectual Property Organization, observes in his leading treatise on the TRIPS Agreement, Article 20 does not provide, "explicitly or implicitly, that WTO Members are obliged to recognize the right to use trademarks, even if commercialization of the good is permitted."<sup>173</sup>

150. Australia explained to the Panel that if Article 20 were interpreted to encompass measures that *prohibit* the use of trademarks for a particular purpose, this interpretation would have potentially far-reaching implications for other types of measures that prohibit the advertising of dangerous or harmful products, including other types of measures that prohibit the advertising of tobacco products.<sup>174</sup> The complainants agreed with Australia that advertising bans do not fall within the scope of Article 20. However, in Australia's view, the complainants were never able to reconcile their agreement with Australia on this point with their position that the prohibitive elements of the TPP measures *do* fall within the scope of Article 20. The complainants offered no plausible factual or interpretative basis to distinguish among these types of measures.

151. The Panel concluded that Article 20 encompasses special requirements that encumber the use of a trademark when domestic law otherwise permits its use, as well as special requirements that encumber the use of a trademark by prohibiting its use.<sup>175</sup> While noting the agreement of all parties "that a general regulatory measure, such as an advertising ban, would not be covered by the disciplines under Article 20", the Panel "did not find it necessary for the purposes of the present dispute to take a position on the extent to which any particular measures not before us ... may or may not be covered by this provision."<sup>176</sup> The Panel specifically cautioned that "nothing in our findings should be taken as suggesting that the kind of trademark use that may be affected by measures falling within the scope of Article 20 is necessarily limited to use in the form of application of a trademark on a product presented for sale."<sup>177</sup>

- (b) Whether the special requirements imposed by the TPP measures encumber the "use of a trademark" "in the course of trade"

152. In its evaluation of whether the special requirements imposed by the TPP measures encumber the "use of a trademark" "in the course of trade", the Panel began

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<sup>173</sup> Nuno Pires de Carvalho, *The TRIPS Regime of Trademarks and Designs*, Kluwer Law International (2011), para. 20.1. Other commentators on the TRIPS Agreement share this view. See Expert Report of C. Correa (10 March 2015) (AUS-16), paras. 77-80 and authorities cited therein.

<sup>174</sup> See, e.g. Australia's first written submission, para. 343.

<sup>175</sup> Panel Report, paras. 7.2236-7.2239.

<sup>176</sup> Panel Report, para. 7.2233.

<sup>177</sup> Panel Report, para. 7.2233.

by examining the parties' arguments concerning the meaning of the phrase "in the course of trade".

153. Australia argued that the "course of trade" necessarily terminates at the point of sale, because a trademarked product is no longer "in trade" once it has been sold. Thus, any encumbrance upon the use of a trademark "in the course of trade" must be evaluated by reference to the encumbrance, if any, that results from the special requirements at issue prior to the point of sale.<sup>178</sup> The complainants argued that the "course of trade" is essentially limitless and includes the use of a trademark for any commercial purpose after the product has been sold.<sup>179</sup>

154. The Panel considered "that at least some commercial activities taking place after the retail sale are covered by the phrase 'in the course of trade'".<sup>180</sup> The Panel referred, *inter alia*, to the fact that trademarks "serve an advertising function" and that this function "may continue after the completion of the sale."<sup>181</sup> The Panel saw "no reason to assume" that these post-sale commercial functions "would fall outside the scope of commercial activities covered by the phrase 'in the course of trade'".<sup>182</sup> Thus, the Panel effectively agreed with the complainants that the phrase "in the course of trade" imposes no meaningful constraint upon the scope of Article 20 and that the "course of trade" continues, at least for some purposes, for so long as a trademark is affixed to, or could have been affixed to, a product or other item that continues to exist.<sup>183</sup>

155. With regard to the relevant "use" of a trademark under Article 20, all parties appeared to agree in the proceedings before the Panel that Article 15.1 of the TRIPS Agreement defines the relevant "use" of a trademark for the purposes of Part II, Section 2 of the TRIPS Agreement, including Article 20.<sup>184</sup> To recall, Article 15.1 provides in relevant part that "[a]ny sign, or any combination of signs, *capable of distinguishing the goods or services of one undertaking from those of other undertakings*, shall be capable of constituting a trademark." On this basis, the parties appeared to agree that when Article 20 refers to the "use" of a trademark, it refers to the "use" of a trademark to "distinguish[] the goods or services of one undertaking from those of other undertakings".

156. The parties debated extensively what it *means* for a trademark to "distinguish[] the goods or services of one undertaking from those of other undertakings". In Australia's view, the definition of a trademark set out in

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<sup>178</sup> Australia's first written submission, paras. 348 and 349.

<sup>179</sup> See, e.g. Panel Report, para. 7.2260.

<sup>180</sup> Panel Report, para. 7.2263.

<sup>181</sup> Panel Report, para. 7.2263.

<sup>182</sup> Panel Report, para. 7.2263.

<sup>183</sup> Panel Report, paras. 7.2263 and 7.2264.

<sup>184</sup> See, e.g. Dominican Republic's first written submission, para. 248; Honduras's first written submission, para. 155.

Article 15.1 refers, by its terms, to the use of a trademark to identify the commercial source of the product. Closely related to this "source identification" function of a trademark is the function of indicating that products bearing the same trademark are manufactured under the control of the same commercial source and that, as a result, trademark owners might (if they so choose) use trademarks to signal to consumers that they might expect a consistency of experience with products bearing that trademark.<sup>185</sup> Australia explained that while trademarks are "used" for *other* purposes, including to advertise and promote the trademarked product by increasing its appeal, these other uses of trademarks are not encompassed by the definition of a trademark set out in Article 15.1 and are therefore not relevant "uses" of a trademark for the purposes of Article 20.<sup>186</sup>

157. The complainants, including the Dominican Republic and Honduras, steadfastly resisted the proposition that trademarks are used to advertise and promote the trademarked product. The complainants evidently recognised that *any* acknowledgement of the fact that tobacco companies use trademarked figurative elements to increase the appeal of their products to consumers and prospective consumers would be fatal to their contention that tobacco plain packaging is "unjustifiable". To avoid this, the complainants put forward various euphemisms for advertising and promotion, such as the Dominican Republic's formulation that trademarks are used to convey the "quality, characteristics, and reputation" of the trademarked product.<sup>187</sup> This was expanded upon by the Dominican Republic's expert, Professor Steenkamp, who posited that trademarks are used to convey the "intangible benefits" of a brand by creating *perceived* differences in a product, not necessarily by conveying information about *actual* differences in the product.<sup>188</sup> As Australia pointed out, Professor Steenkamp's statement that trademarks are used to convey the "intangible benefits" of the trademarked product is merely another way of saying that trademarks are used to advertise and promote the trademarked product.<sup>189</sup>

158. The Panel agreed with Australia that trademarks are used to advertise and promote the products with which they are associated, and found that tobacco companies have used branded tobacco packaging for this purpose in Australia and elsewhere.<sup>190</sup> However, in evaluating the relevant "uses" of a trademark under

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<sup>185</sup> Australia's second written submission, paras. 86-90.

<sup>186</sup> See, e.g. Australia's second written submission, paras. 91-96.

<sup>187</sup> See, e.g. Australia's second written submission, paras. 85, 97, 98 and 118.

<sup>188</sup> Expert Report of J.B. Steenkamp, "Tobacco Packaging in the Australian Context – Lessons from Marketing Principles and Empirical Data: A Rebuttal to Arguments Raised by Australia and its Experts" (11 September 2015) (DOM/HND-14), para. 93.

<sup>189</sup> See, e.g. Australia's comments on responses to Panel question No. 169, paras. 153 and 154.

<sup>190</sup> See, e.g. Panel Report, para. 7.2566 (finding that "branded packaging can act as an advertising or promotion tool in relation to tobacco products, and ... this has in fact been considered to be the case by tobacco companies operating in the Australian market"); para. 7.2567 (finding that "a key purpose of the use of branding on tobacco products, including packaging, is to generate certain positive perceptions in relation to the product in the eyes of the consumer, including ... to 'generate the optimal level of modernity, youthful image and appeal' among consumers").

Article 20, the Panel departed from the parties' common agreement that Article 15.1 indicates that such uses relate to a trademark's function in "distinguishing the goods or services of one undertaking from those of other undertakings". The Panel considered instead that what is relevant under Article 20 is "the *fact* of use" rather than any particular "function or purpose of such use".<sup>191</sup> Thus, for the Panel, all "uses" or potential "uses" of trademarks are relevant to the analysis under Article 20, including the use of trademarks to advertise and promote the trademarked product.

(c) Whether the TPP measures "unjustifiably" encumber the use of trademarks in the course of trade

159. All parties agreed that the ordinary meaning of the term "unjustifiably" can be discerned not only from definitions of the term itself, but also from the definitions of its non-adverbial form, "unjustifiable", and from their respective opposites, i.e. "justifiably" and "justifiable".

160. Australia, the Dominican Republic, and Honduras all referred to the ordinary meaning of the term "justifiable" as something that is "able to be legally or morally justified; able to be shown to be just, reasonable, or correct; defensible".<sup>192</sup> Parties also noted the connection between the terms "justifiable" and "reasonable". The ordinary meaning of the term "reasonable" is "[w]ithin the limits of reason"; "in accordance with reason; not irrational or absurd".<sup>193</sup>

161. The parties further agreed that the term "unjustifiably" requires there to be a nexus between (i) the encumbrance, if any, upon the use of a trademark in the course of trade that results from the special requirements imposed by the measure at issue; and (ii) the legitimate objective that the measure seeks to fulfil. Where the parties disagreed was in respect of the nature and degree of the required nexus.

162. In Australia's view, the ordinary meaning of the term "unjustifiably" suggests that an encumbrance upon the use of trademarks in the course of trade is "unjustifiable" if there is no rational connection between the measure and its objective, such that the encumbrance is "able to be shown to be just, reasonable, or correct" and "within the limits of reason".<sup>194</sup> Among the interpretative elements that Australia considers to support this conclusion is the fact that the drafters of Article 20 chose not to use the term "unnecessarily", a term with a well-established meaning in the GATT *acquis* and one that connotes a more stringent nexus between a measure and its objective.<sup>195</sup>

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<sup>191</sup> Panel Report, para. 7.2284.

<sup>192</sup> The Shorter Oxford English Dictionary, 6<sup>th</sup> ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1 (AUS-243), p. 1482.

<sup>193</sup> The Shorter Oxford English Dictionary, 6<sup>th</sup> ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2 (AUS-545), p. 2481.

<sup>194</sup> See, e.g. Australia's first written submission, para. 369. See also Australia's response to Panel question No. 107.

<sup>195</sup> See, e.g. Australia's first written submission, paras. 385, 393, 394 and 408.

163. Australia further considers that the context provided by Part II, Section 2 of the TRIPS Agreement supports the conclusion that the term "unjustifiably" should be given its ordinary meaning. Among other considerations, the fact that the right to use a trademark is not a right that Members are required to confer upon the owners of registered trademarks indicates that a trademark owner's ability to use a trademark is not central to the concerns of the TRIPS Agreement, which is principally concerned with defining and enforcing private rights of exclusion. Moreover, as noted above, Article 19 of the TRIPS Agreement "expressly contemplates that obstacles to the use of trademarks may arise independently of the will of the trademark owner, including on the basis of government requirements".<sup>196</sup> In Australia's view, this context supports the conclusion that the term "unjustifiably" does not require a nexus between a measure and its objective that is more stringent than the ordinary meaning of the term suggests.

164. The complainants, by contrast, sought to interpret the term "unjustifiably" as equivalent to a standard of "necessity". Australia will not summarise the complainants' interpretative arguments in support of this conclusion, as some of these arguments continue to form the basis for Honduras's appeal which Australia rebuts in Part 2 below. For present purposes, it suffices to explain that the complainants' stringent interpretation of the term "unjustifiably" was reflected in (i) their contention that Article 20 is an "exception provision" under which Australia bore the burden of proof; (ii) their contention that Article 20 requires the Member imposing an encumbrance upon the use of trademarks to choose the "least trademark-restrictive" encumbrance that is capable of making an equivalent contribution to the Member's objective; and (iii) their contention that Article 20 requires, either in some or all cases, that the Member imposing the measure formulate any "special requirements" by reference to the specific features of individual trademarks.

165. The last point is one on which Honduras and the Dominican Republic disagreed during the course of the panel proceedings. Honduras argued before the Panel that the TPP measures are "unjustifiable *per se*" because the measures do not address concerns with the specific features of individual trademarks. Honduras's position was that the term "unjustifiably" requires *in all cases* that Members formulate any special requirements that encumber the use of a trademark in the course of trade by reference to concerns with the specific features of individual trademarks.<sup>197</sup> The Dominican Republic, for its part, argued that the term "unjustifiably" requires what it called an "individualized assessment" of the specific features of particular trademarks, but conceded that no such "individualized assessment" is required if the measure at issue "does not address concerns with the specific features of the trademark".<sup>198</sup>

166. The Panel began its interpretation of the term "unjustifiably" by noting definitions of the relevant terms and concluding that:

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<sup>196</sup> Panel Report, para. 7.2027.

<sup>197</sup> Honduras's first written submission, paras. 289, 309.

<sup>198</sup> Dominican Republic's answer to Panel question No. 108, para. 133.

The term "unjustifiably" ... refers to the ability to provide a "justification" or "good reason" for the relevant action or situation that is reasonable in the sense that it provides sufficient support for that action or situation. In Article 20, the term "unjustifiably" qualifies the verb "encumbered". The above definitions therefore suggest that the term "unjustifiably", as used in Article 20, connotes a situation where the use of a trademark is encumbered by special requirements in a manner that lacks a justification or reason that is sufficient to support the resulting encumbrance.<sup>199</sup>

167. While noting that "Article 20 does not expressly identify the types of reasons that may form the basis for the 'justifiability' of an encumbrance", the Panel found "general guidance in this respect in the context provided by other provisions of the TRIPS Agreement."<sup>200</sup> The Panel noted, *inter alia*, that Article 8 of the TRIPS Agreement provides that "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health ... provided that such measures are consistent with the provisions of this Agreement." The Panel considered that Article 8.1 reflects the type of societal interests "that may provide a basis for the justification of measures under the specific terms of Article 20", and that the protection of public health is "unquestionably" among these interests.<sup>201</sup> The Panel observed that the term "unjustifiably" in Article 20 "defines, in the specific context of encumbrances in respect of the use of trademarks, the applicable standard for the permissibility of such encumbrances".<sup>202</sup>

168. The Panel then examined "the nature and extent of the relationship that must exist between, on one hand, encumbrances on the use of trademarks resulting from the special requirements at issue and, on the other, the reasons for which these special requirements were adopted".<sup>203</sup> The Panel agreed with Australia that some significance must be attached to the fact that Article 20 does not use the term "unnecessarily", and agreed that the term "unjustifiably" requires "some degree of 'rational connection' between the action to be explained ... and the reasons for its adoption".<sup>204</sup> This did not imply, in the Panel's view, "that the existence of *any* rational connection, no matter how tenuous, would always sufficiently support the imposition of [an] encumbrance ... under Article 20."<sup>205</sup> Rather, the Panel considered that the term "unjustifiably" must "take due account also of the action that is to be justified, i.e. the encumbrance on the use of a trademark in the course of trade resulting from the special requirements".<sup>206</sup> As discussed in more detail in Part (a) below, the Panel found that this element of the analysis must "take due account of the

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<sup>199</sup> Panel Report, para. 7.2395.

<sup>200</sup> Panel Report, para. 7.2397.

<sup>201</sup> Panel Report, para. 7.2406.

<sup>202</sup> Panel Report, para. 7.2405.

<sup>203</sup> Panel Report, para. 7.2412.

<sup>204</sup> Panel Report, para. 7.2422.

<sup>205</sup> Panel Report, para. 7.2422 (emphasis in original).

<sup>206</sup> Panel Report, para. 7.2423.

legitimate interest of the trademark owner in using its trademark 'in the course of trade' and how this is affected by the encumbrances to be justified."<sup>207</sup>

169. Overall, the Panel found that:

... a determination of whether the use of a trademark in the course of trade is being 'unjustifiably' encumbered by special requirements should involve a consideration of the following factors:

- a. the nature and extent of the encumbrance resulting from the special requirements, bearing in mind the legitimate interest of the trademark owner in using its trademark in the course of trade and thereby allowing the trademark to fulfil its intended function;
- b. the reasons for which the special requirements are applied, including any societal interests they are intended to safeguard; and
- c. whether these reasons provide sufficient support for the resulting encumbrance.<sup>208</sup>

170. Having interpreted the term "unjustifiably", the Panel proceeded to examine the arguments advanced by the complainants as to why the encumbrance resulting from the TPP measures is "unjustifiable". The Panel readily dismissed Honduras's argument that the TPP measures are unjustifiable "*per se*" because of the allegedly "extreme nature of the encumbrance", finding that "[w]hile a prohibition on use of a trademark involves a high degree of encumbrance ... we see no basis for assuming that a particular threshold or degree of encumbrance would be inherently 'unjustifiable'" under Article 20.<sup>209</sup>

171. The Panel also rejected Honduras's contention that an encumbrance upon the use of trademarks is "unjustifiable" if it does not concern the specific features of individual trademarks. The Panel found "no support in the text or immediate context of Article 20 for the complainants' assertion that special requirements that encumber the use of trademarks could only be 'justifiable' on the basis of an assessment of individual trademarks and their specific features."<sup>210</sup> The Panel considered instead that:

The extent to which an assessment of the unjustifiability of specific encumbrances will require an assessment on the basis of individual trademarks and their specific features will depend on the circumstances of the case. In particular, when a Member applies such requirements to a class of trademarks or to some specific types of situations rather than to the specific features of particular trademarks, an assessment of unjustifiability of such

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<sup>207</sup> Panel Report, para. 7.2428.

<sup>208</sup> Panel Report, para. 7.2430.

<sup>209</sup> Panel Report, para. 7.2441.

<sup>210</sup> Panel Report, para. 7.2496.

requirements may need to focus on their overall rationale as it relates to the reason for adopting them.<sup>211</sup>

172. The Panel noted Australia's explanation that "the TPP measures are not concerned with the specific features of particular trademarks; rather, their premise is that prescribing a standardised, plain appearance for tobacco packages and products is intended to minimise the ability of tobacco packages and products to increase the appeal of tobacco products, detract from the effectiveness of global health warnings, or mislead consumers as to the harms of tobacco use".<sup>212</sup> The Panel considered that "this approach is not, *per se*, unjustifiable."<sup>213</sup> The Panel explained that it would evaluate Australia's decision to prescribe a standardised, plain appearance for tobacco products and packages "in terms of the extent to which" these requirements are "supported by the reasons for their adoption."<sup>214</sup>

173. In the context of its application of Article 20, the Panel addressed the complainants' contention that an encumbrance upon the use of trademarks is "unjustifiable" if there are "less trademark-restrictive alternatives" that would make an equivalent contribution to the Member's legitimate objective. Australia strongly objected to this element of the complainants' interpretation of Article 20 on the grounds that a requirement of "least restrictiveness" is one of the hallmarks of an evaluation of "necessity", which, as the Panel found, is *not* the standard prescribed by Article 20. Having examined the parties' arguments, the Panel stated that:

In our view, the term "unjustifiably" in Article 20 provides a degree of latitude to a Member to choose an intervention to address a policy objective, which may have some impact on the use of trademarks in the course of trade, as long as the reasons sufficiently support any resulting encumbrance. This, however, does not mean that the availability of an alternative measure that involves a lesser or no encumbrance on the use of trademarks could not inform an assessment of whether the reasons for which the special requirements are applied sufficiently support the resulting encumbrance. We do not exclude the possibility that the availability of an alternative measure could, in the circumstances of a particular case, call into question the reasons a respondent would have given for the adoption of a measure challenged under Article 20. This might be the case in particular if a readily available alternative would lead to at least equivalent outcomes in terms of the policy objective of the challenged measure, thus calling into question whether the stated reasons sufficiently support any encumbrances on the use of trademarks resulting from the measure.<sup>215</sup>

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<sup>211</sup> Panel Report, para. 7.2505.

<sup>212</sup> Panel Report, para. 7.2507.

<sup>213</sup> Panel Report, para. 7.2507. As discussed in Part below, the Panel's finding that the TPP measures do not concern the specific features of individual trademarks means that the TPP measures fall into the category of measures that do not require an "individualized assessment" even under the Dominican Republic's interpretation of Article 20.

<sup>214</sup> Panel Report, para. 7.2507.

<sup>215</sup> Panel Report, para. 7.2598.

174. Having explained the potential relevance of an alternative measure to the "unjustifiably" analysis, the Panel did, in fact, examine the alternatives proposed by the complainants. The Panel found that none of these alternatives, alone or in combination, "would be manifestly better in contributing towards Australia's public health objectives", such that the existence of these alternatives would "call into question" the sufficiency of the reasons put forward by Australia for the adoption of the TPP measures.<sup>216</sup>

## 2. Honduras Errs in Its Interpretation of Article 20

### (a) Introduction

175. Claim I of Honduras's appeal alleges that the Panel erred in its interpretation and application of the term "unjustifiably" in Article 20 of the TRIPS Agreement. Australia addresses Honduras's claims of interpretative error in this Part, and addresses Honduras's claims of application error in Part 3 below.

176. Australia recalls that the Dominican Republic has merely "incorporated" Honduras's claims of interpretative error without advancing any arguments of its own. It is therefore only Honduras that persists with its extremist positions on the interpretation of Article 20. As Australia will proceed to demonstrate, Honduras's interpretation of Article 20 in its appellant submission remains as unfounded as it was before the Panel.

177. Before turning to Honduras's specific claims of error, Australia observes the irony that one of the *complainants* has appealed the Panel's interpretation and application of Article 20. On Australia's reading, the Panel effectively ruled in the complainants' favour on most of the key interpretative issues in dispute, including: whether Article 20 encompasses measures that prohibit the use of trademarks, in addition to measures that encumber the use of a trademark when domestic law otherwise permits its use; the meaning of the term "in the course of trade"; whether the "use" of trademarks to advertise and promote is a relevant "use" of trademarks under Article 20; and whether the term "unjustifiably" requires a consideration of less trademark-encumbering alternatives. Most significantly, the Panel interpreted and applied the term "unjustifiably" in a manner that places this term much closer to a standard of "necessity" than Australia believes is warranted under a proper interpretation.

178. In Australia's view, the Panel's interpretation of Article 20 goes too far in the direction of establishing a *de facto* "right of use", when the clear purpose of Part II, Section 2 of the TRIPS Agreement is to define the negative rights of exclusion that Members are required to confer upon the owner of a registered trademark. In addition, the Panel's understanding of the scope of Article 20 could be interpreted to capture an array of measures that, in Australia's view, Article 20 was never meant to address. In particular, by finding that Article 20 encompasses measures that prohibit the use of a trademark, that the term "in the course of trade" has no meaningful effect, and that the use of trademarks to advertise and promote a product is a relevant "use"

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<sup>216</sup> Panel Report, para 7.2601.

of trademarks, the Panel's interpretation of Article 20 suggests – contrary to the view of *all* parties – that a general advertising ban with respect to tobacco and other dangerous products could be covered by the disciplines of Article 20.<sup>217</sup> Australia does not believe the Members ever understood Article 20 to have such an expansive reach. The Panel's overly broad interpretation of the scope of this provision is all the more troubling in light of the Panel's overly stringent standard for determining whether a measure is not "unjustifiable".

179. Notwithstanding these systemic concerns, the Panel's finding that the TPP measures are *not* "unjustifiable" – even under the interpretation of Article 20 that the Panel adopted – is clearly correct, and Australia opted not to appeal the Panel's interpretation and application of Article 20 for that reason.

180. Honduras's 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>218</sup> In Honduras's view, the only encumbrances upon the use of a trademark that can ever be "justifiable" under Article 20 are encumbrances that are "directly linked to the trademark", by which it appears to mean encumbrances that are "related to the specific character and particular message" of an individual trademark.<sup>219</sup> Honduras faults the Panel for interpreting Article 20 to establish what Honduras characterises as a "general health exception". While it is not entirely clear what Honduras means by this, the overall thrust of Honduras's argument seems to be that Article 20 does not allow Members to encumber the use of trademarks for the purpose of furthering public health or other "abstract policy goals", as Honduras puts it.<sup>220</sup> In Honduras's view, any encumbrance upon the use of trademarks must, in all cases, be "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>221</sup>

181. As Australia will demonstrate in Part (b) below, Honduras's arguments in its principal appeal under Article 20 are essentially the same as arguments the Panel properly rejected, i.e. that the TPP measures are unjustifiable "*per se*" because the measures are not concerned with the specific features of individual trademarks. The Appellate Body should reject Honduras's arguments for the same reasons as the Panel.

182. The second part of Honduras's 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>222</sup> In that event, Honduras alleges that the Panel erred by not

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<sup>217</sup> Panel Report, para. 7.2233.

<sup>218</sup> Honduras appellant's submission, para. 52.

<sup>219</sup> Honduras appellant's submission, paras. 52 and 53.

<sup>220</sup> Honduras appellant's submission, para. 52.

<sup>221</sup> Honduras appellant's submission, para. 146.

<sup>222</sup> Honduras appellant's submission, para. 54.

interpreting the term "unjustifiably" to refer to "measures that are not more trademark encumbering than necessary."<sup>223</sup>

183. This second part of Honduras's 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. As Australia discusses in Part 3 below, the Panel therefore did what Honduras alleges it was required to do.

- (b) The term "unjustifiably" does not require a "trademark-specific approach" in all cases

184. Part III.2.1 of Honduras's submission alleges that "[t]he Panel errs in finding that the term 'unjustifiably' introduces a general health exception under Article 20". The concept of a "general health exception" was not discussed by the parties in the proceedings before the Panel, and there is no apparent reference to this concept in the Panel Report itself. Honduras's claim that the Panel erred in interpreting the term "unjustifiably" to "introduce a general health exception" is, in essence, a claim that the Panel erred when it rejected Honduras's argument that the TPP measures are unjustifiable "by their very nature".<sup>224</sup>

185. In Honduras's view, "public policy concerns", including public health concerns, can *never* justify a prohibition on the use of a class of trademarks (such as figurative trademarks) for a particular purpose or in a particular context (such as their use on tobacco products and packages). Honduras contends that the *only* encumbrances upon the use of a trademark in the course of trade that can ever be "justifiable" are encumbrances that are "trademark-specific and applied in a limited manner".<sup>225</sup> By "trademark-specific", Honduras evidently means that any encumbrance upon the use of a trademark must, in addition to being "limited" in its effect, address "a concern inherent in the particular trademark, such as those set out in the non-exhaustive list of concerns that justify the denial of registration and thus of protection of otherwise distinctive signs that are reflected in Article 15.2 of the TRIPS Agreement and Article 6*quinquies* B of the Paris Convention".<sup>226</sup>

186. The Dominican Republic "incorporates by reference" Honduras's arguments on appeal<sup>227</sup>, including those concerning the Panel's interpretation of the term "unjustifiably", notwithstanding that the Dominican Republic did *not* advance the same interpretation of the term "unjustifiably" in the proceedings before the Panel. As summarised in Part 1(c) above, the Dominican Republic took the position that the term "unjustifiably" requires what the Dominican Republic called an "individualized assessment" (i.e. a "trademark-specific" approach) *only* if the measure at issue is

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<sup>223</sup> Honduras appellant's submission, para. 54.

<sup>224</sup> Panel Report, para. 7.2433.

<sup>225</sup> Honduras's appellant's submission, para. 114.

<sup>226</sup> Honduras's appellant's submission, para. 146.

<sup>227</sup> Dominican Republic's appellant's submission, para. 30.

concerned with "the specific features of the trademark".<sup>228</sup> The Panel correctly found that the TPP measures are not concerned with "the specific features" of individual trademarks, but instead prescribe a standardised, plain appearance for all tobacco packages and products. Neither Honduras nor the Dominican Republic has appealed this finding. In light of the position that the Dominican Republic took before the Panel, it is unclear to Australia how the Dominican Republic can adopt Honduras's argument that a "trademark-specific" approach is required *in all cases*.

187. Structurally, Honduras's arguments follow the usual order of analysis under Articles 31 and 32 of the Vienna Convention: ordinary meaning, context, object and purpose, negotiating history. Australia will therefore rebut Honduras's arguments in that order. It should be apparent from its submission, however, that Honduras's interpretation of the term "unjustifiably" is based as much on certain recurring assertions as it is on formal methods of treaty interpretation. While Honduras's argument lacks coherence, the gist of it appears to be: (i) that Part II, Section 2 of the TRIPS Agreement confers a "right of use" upon the owners of registered trademarks; (ii) that Article 20 is a "prohibition" on special requirements that encumber this "right of use", with a "limited" exception for encumbrances that are not "unjustifiable"; and (iii) that the Panel therefore erred in interpreting Article 20 as a "general exceptions" provision similar to Article XX of the GATT 1994, as opposed to a provision that concerns "limited" exceptions to the "rights" conferred by a trademark.

188. Honduras's interpretative arguments, and the chain of "logic" they reflect, are based on a profound misunderstanding of Article 20, the TRIPS Agreement more generally, and the Panel's interpretative findings. There is no "right" to use a trademark under the TRIPS Agreement. Article 20 is not a "prohibition/exception" provision, and it does not concern "exceptions" to any "rights" conferred by a trademark. The Panel did not interpret the term "unjustifiably" as "introduc[ing] a general health exception", but merely recognised – correctly – that Article 20 does not limit the types of considerations that may justify an encumbrance upon the use of trademarks, and that public health considerations are among the types of considerations that may be relevant.

#### (1) Ordinary meaning

189. Before the Panel, there was no serious dispute about the ordinary meaning of the term "unjustifiably". All parties agreed that the ordinary meaning of the opposite term, "justifiable", is "[a]ble to be shown to be right or reasonable; defensible". The ordinary meanings of related terms, such as "reasonable", suggest notions of appropriateness to the situation. Taking into account that the term "unjustifiably" is an adverb that modifies "encumbered", the Panel considered that the ordinary meaning of the term "unjustifiably", as used in Article 20, "connotes a situation where the use of a trademark is encumbered by special requirements in a manner that lacks a justification or reason that is sufficient to support the resulting encumbrance".<sup>229</sup>

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<sup>228</sup> Dominican Republic's answer to Panel question No. 108, para. 133.

<sup>229</sup> Panel Report, para. 7.2395.

190. In its appeal, Honduras claims the Panel identified the ordinary meaning of the term "unjustifiably" and then "effectively stop[ped] engaging in any further interpretative exercise" of this term.<sup>230</sup> This is in spite of the Panel having engaged in six further pages of thorough interpretative analysis before reaching its *overall* conclusion as to the proper interpretation of the term "unjustifiably".

191. Through this mischaracterisation of the Panel's analysis, Honduras tries to create the impression that the Panel interpreted the term "unjustifiably" to mean that any "good reason" will be sufficient to support an encumbrance upon the use of trademarks. As will be clear to the Appellate Body, the Panel in fact took many interpretative considerations into account before arriving at the three-part test for determining "unjustifiably" set out in paragraph 7.2430 of the Panel Report. Moreover, this three-part test takes into account the nature and extent of the encumbrance, "bearing in mind the legitimate interest of the trademark owner in using its trademark", the reasons for which the special requirements are applied, "including any societal interests they are intended to safeguard", and "whether these reasons provide sufficient support for the resulting encumbrance".<sup>231</sup>

192. As far as Australia can discern, Honduras's only substantive argument concerning the Panel's ordinary meaning analysis is that the use of the term "unjustifiably" as an adverb to modify "encumbered" means that this term "relates to the manner in which the requirements encumber the use of the trademark" rather than the reasons for their adoption.<sup>232</sup> While it is unclear to Australia what Honduras means by this and how it supports Honduras's overall argument, the Panel properly recognised that the use of the term "unjustifiably" to modify "encumber" means that the relevant inquiry is whether the "encumbrance" resulting from the "special requirements" at issue is one that is capable of being "justified". Contrary to what Honduras suggests, the reasons for the adoption of the special requirements at issue are obviously *central* to this inquiry.

193. In short, Honduras's arguments concerning the ordinary meaning of the term "unjustifiably" provide no support for its overall contention that the only justifiable encumbrances under Article 20 are those that are "trademark-specific and applied in a limited manner".<sup>233</sup>

## (2) Context

194. Honduras divides its contextual arguments into three parts: the immediate context provided by the remainder of Article 20, the context provided by Part II, Section 2 of the TRIPS Agreement (the trademark section), and the context provided by the TRIPS Agreement as a whole.

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<sup>230</sup> Honduras's appellant's submission, para. 123.

<sup>231</sup> Panel Report, para. 7.2430.

<sup>232</sup> Honduras's appellant's submission, para. 124.

<sup>233</sup> Honduras's appellant's submission, para. 114.

195. Honduras's contextual arguments are where it begins to articulate one of its core premises: that Article 20 is a "prohibition/exception" provision. Honduras's contention that Article 20 is a "prohibition/exception" provision is closely related to another of its core premises, namely that the TRIPS Agreement confers a "right of use" upon the owners of registered trademarks. For example, earlier in its submission, Honduras argues that Article 20 "*outlaws in principle* any encumbrance on the use of a trademark" and, for that reason, "confirm[s] that 'use' of the trademark is protected and that *the rights of trademark owners extend beyond the 'negative' rights to exclude others*".<sup>234</sup>

196. Through these types of arguments, Honduras seeks to interpret the term "unjustifiably" as a term that governs "exceptions" to the "rights" conferred by a trademark and, on that basis, Honduras seeks to give the term "unjustifiably" a more stringent construction than its ordinary meaning supports. Honduras's contextual arguments are unfounded.

(a) Immediate context of Article 20

197. Honduras contends that the first sentence of Article 20 sets out a "general rule against special requirements encumbering the use of a trademark".<sup>235</sup> According to Honduras, the term "unjustifiably" "seeks to qualify" this "general prohibition" in a manner that is "parallel[]" to other provisions of the TRIPS Agreement which, it contends, require a "trademark-specific" analysis.<sup>236</sup>

198. Contrary to Honduras's contention, Article 20 is not a "prohibition/exception" provision. The Panel set out the textual arguments that weigh *against* Honduras's contention in the following passage:

We do not find any indication in the text, including its grammatical structure, for the existence of a "presumption" or "default situation" of unencumbered use, or for the existence of a "prohibition" and "exception" relationship between a principle of unencumbered use and an exception for "justifiable" encumbrances, as suggested by the complainants.

Article 20, on its face, does not prohibit as a matter of principle all measures that impose encumbrances upon the use of a trademark in the course of trade. Rather, it disallows only those special requirements that "unjustifiably encumber" the use of a trademark in the course of trade. The structure of the first sentence of Article 20 suggests that it establishes a single obligation, rather than an obligation and exception thereto: "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements".... The commitment that Members have undertaken under the

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<sup>234</sup> Honduras's appellant's submission, para. 34 (emphases added).

<sup>235</sup> Honduras's appellant's submission, para. 133.

<sup>236</sup> Honduras's appellant's submission, para. 141.

terms of Article 20 is thus to not "unjustifiably encumber[] by special requirements" the use of a trademark in the course of trade.<sup>237</sup>

199. As the Panel correctly found, Article 20 clearly sets out a single obligation to refrain from imposing special requirements that "*unjustifiably* encumber" the use of trademarks in the course of trade – *not* a "prohibition" on encumbrances that is subject to a subsequent "exception" or "qualification". Honduras's attempts to situate the term "unjustifiably" within a "rule-qualification/exception structure" are not supported by either the text or structure of Article 20.<sup>238</sup>

200. Honduras's other arguments concerning the immediate context provided by Article 20 are equally lacking. In particular, Honduras's argument regarding the use of singular nouns in Article 20 was properly rejected by the Panel on the basis that this merely reflects a commonly used drafting convention.<sup>239</sup> Honduras's other immediate contextual arguments amount to a series of non-sequiturs. For example, even if Honduras is correct in its contention that the term "special requirements" "refers only to requirements that specifically and directly concern the use of a trademark", it simply does not follow that any encumbrance resulting from "special requirements" can therefore only be "justifiable" if it is "limited" in its effects and "based on the specific nature of the trademark".<sup>240</sup> Equally fallacious is Honduras's argument that because Article 20 refers to the distinguishing function of trademarks, it somehow follows that the only "justifiable" encumbrances upon the use of a trademark are those that address "a concern inherent in the particular trademark".<sup>241</sup>

201. In reality, the immediate context provided by Article 20 is not as elaborate or convoluted as Honduras suggests. The independent clause in the first sentence of Article 20 establishes the obligation: "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements". The dependent clause in the first sentence provides a non-exhaustive list of "special requirements" – *not* a list of special requirements for which the resulting encumbrance is necessarily *unjustifiable*.<sup>242</sup> The second sentence of Article 20 does nothing more than address a particular case (namely, the case that gave rise to Article 20 in the first place). None of this context suggests the term "unjustifiably" should be given anything other than its ordinary meaning nor supports Honduras's contentions that the only "justifiable"

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<sup>237</sup> Panel Report, paras. 7.2163 and 7.2164.

<sup>238</sup> Honduras's appellant's submission, para. 141.

<sup>239</sup> Panel Report, para. 7.2494 ("We agree with Australia and a number of third parties that the use of [the term 'trademark'] in the singular is a drafting convention used in many provisions of the TRIPS Agreement, and we are therefore not persuaded that it implies, as such, that the justifiability of any special requirements must be assessed in respect of each individual trademark.").

<sup>240</sup> Honduras's appellant's submission, para. 137.

<sup>241</sup> Honduras's appellant's submission, para. 146.

<sup>242</sup> The Panel addressed and rejected Cuba's argument that the listed examples are examples of "unjustifiable encumbrances" rather than "special requirements". See Panel Report, Section 7.3.5.5.2.4. The Panel readily concluded that "the situations identified in this list are illustrations of special requirements, rather than example of encumbrances that are presumptively 'unjustifiable'". Panel Report, para. 7.2526.

encumbrances under Article 20 are those that are "trademark-specific and applied in a limited manner".<sup>243</sup>

(b) Context of Part II, Section 2

202. The context provided by Part II, Section 2 of the TRIPS Agreement was the foundation for the complainants' efforts to misinterpret Article 20 before the Panel, and remains the foundation for Honduras's arguments on appeal. Reduced to its essence, Honduras's argument is that Part II, Section 2 of the TRIPS Agreement confers a "right of use" upon the owners of registered trademarks, and that Article 20 must be interpreted as an "exception" to this "right". Honduras attempts to situate Article 20 within the context of the rights conferred by a trademark (Article 16) and exceptions to those rights (Article 17), and then improperly extrapolate from this context to conclude that the only "justifiable" encumbrances upon the use of a trademark are those that are "trademark-specific and applied in a limited manner".

203. Honduras will undoubtedly protest that its interpretation of Article 20 is not based on the existence of a "right of use". Indeed, Honduras contends that its appeal "is not about an *absolute* right to use trademarks".<sup>244</sup> However, Honduras's appeal is based on the premise that there is a "right" to use a trademark to which only certain "limited" exceptions apply.

204. The notion that the "use" of a trademark is a "protected right" under Part II of the TRIPS Agreement suffuses Honduras's submission. Honduras states, for example, that the negative rights of exclusion conferred by a trademark:

... are the means to an end – the end being the exclusive use of trademarks in commerce and the creation of a competitive marketplace. *'Use' of the mark in commerce is thus intrinsically linked to and intertwined with the rights and obligations set out in the TRIPS Agreement.*<sup>245</sup>

205. Honduras also states that Article 20 "confirm[s] that 'use' of the trademark is protected and that the rights of trademark owners *extend beyond the 'negative' rights to exclude others*".<sup>246</sup> Honduras criticises the Panel for not interpreting Article 20 by reference to the "effect the measure has *on the rights that are to be protected*, and whether that effect is 'limited'".<sup>247</sup>

206. Honduras's contention that "the rights of trademark owners extend beyond the 'negative' rights to exclude others" is refuted by the text of the TRIPS Agreement, prior jurisprudence, and the Panel's unappealed legal findings in this dispute. As discussed in Part C.1 above, the Panel found – based on the text of Article 16.1 and prior interpretations of the TRIPS Agreement in adopted panel and Appellate Body

<sup>243</sup> Honduras's appellant's submission, para. 114.

<sup>244</sup> Honduras's appellant's submission, para. 50 (emphasis added).

<sup>245</sup> Honduras's appellant's submission, para. 30 (emphasis added).

<sup>246</sup> Honduras's appellant's submission, para. 34 (emphasis added).

<sup>247</sup> Honduras's appellant's submission, para. 107 (emphasis added).

reports – that the rights that Members are required to confer upon the owner of a registered trademark under Article 16.1 do not include a right to use that trademark. Neither Honduras nor the Dominican Republic has appealed these findings – consistent with the fact that *all* parties agreed before the Panel that Article 16.1 does not establish a positive right for trademark owner's to use a registered trademark.<sup>248</sup>

207. In its appeal, Honduras nevertheless attempts to revive its claim to a "right of use" by arguing that the Panel's interpretation of Article 16.1 is inconsistent with the Panel's subsequent interpretation of Article 20. Honduras contends, for example:

The Panel finds that the rights conferred to trademark owners are merely "negative" rights to oppose unauthorised use, and that Article 16 is not engaged by a prohibition on use since it allegedly does not affect the trademark owner's right to prevent unauthorised use; but in so doing it ignores its own conclusion that "use" is protected by the TRIPS Agreement (in Article 20) and disregards the undisputed fact that the use of the mark determines the strength of the mark and thus the extent to which a trademark owner can prevent unauthorised use. It also denies the fact that the very rationale for granting the negative rights of Article 16 is to permit exclusive use.<sup>249</sup>

208. In fact, the Panel fully took into account the differences between the *rights* that Members are required to confer upon the owners of registered trademarks by virtue of Article 16.1, on the one hand, and the separate obligation that Members undertake under Article 20 not to *unjustifiably encumber* the use of a trademark, on the other.

209. Beginning with Article 16.1, the Panel found "the legal operation of the 'right to prevent' in Article 16.1 does not *per se* require the use of the registered trademark itself."<sup>250</sup> The Panel considered that "while use of the registered trademark may be the typical scenario anticipated by the TRIPS provisions, an absence of such use does not render the right to exclude provided by Article 16.1 'legally inoperative' or redundant."<sup>251</sup> The Panel clearly and correctly rejected the notion that "the very rationale for granting the negative rights of Article 16 is to permit exclusive use".

210. The Panel noted that while Article 16.1 defines the *negative* rights of exclusion that Members are required to confer upon trademark owners, subject to the possibility of exceptions under Article 17, "[o]ther provisions in Section 2 of Part II address the *use* of registered trademarks".<sup>252</sup> The Panel noted, in particular, Article 19

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<sup>248</sup> See Honduras's response to Panel question No. 99 ("Honduras is not arguing in favour of a 'right to use' trademarks"); Dominican Republic's response to Panel question No. 96, para. 58 ("the Dominican Republic ... does not contest that Article 16.1 provides a negative 'right to exclude', and its claims under Article 16.1 do not assert a positive 'right to use' a trademark.").

<sup>249</sup> Honduras's appellant's submission, para. 40.

<sup>250</sup> Panel Report, para. 7.2025.

<sup>251</sup> Panel Report, para. 7.2026.

<sup>252</sup> Panel Report, para. 7.2027 (emphasis added).

of the TRIPS Agreement, "which expressly contemplates that obstacles to the use of trademarks may arise independently of the will of the trademark owner, including on the basis of government requirements",<sup>253</sup> and Article 20, which "expressly provide[s] for conditions under which use can be encumbered".<sup>254</sup> The Panel considered that these provisions "clearly foresee potential regulatory prevention of use."<sup>255</sup> The Panel further considered that "to read Article 16 as imposing upon Members limitations on regulations regarding trademark use could potentially render Article 20 ... *inutile*."<sup>256</sup>

211. Thus, contrary to what Honduras implies, the Panel did not find that Article 20 confers a "right of use" upon the owners of registered trademarks. Rather, the Panel expressly contrasted the negative rights of exclusion that Members are required to confer under Article 16.1 with the separate obligation that Members undertake in Article 20 not to "unjustifiably encumber" the use of a trademark in the course of trade.

212. From the unfounded premise that the TRIPS Agreement confers a "right of use", Honduras seeks to enlist the context provided by Articles 15, 16, and 17 of the TRIPS Agreement to conclude that Article 20 must be interpreted to permit only "limited", "trademark-specific" "exceptions" to this "right". This erroneous attempt to conflate distinct provisions of the TRIPS Agreement is the same interpretative strategy Honduras pursued before the Panel.

213. Beginning with Article 15, Honduras argues that the *definition* of a trademark in Article 15.1, and the rules governing the *registration* of a trademark in Articles 15.2 and 15.4, suggest that "general policy objectives cannot stand in the way of registration and thus 'protection' of the trademark, *which includes use as protected under Article 20*."<sup>257</sup> That is, Honduras argues that because "trademarks are acquired, registered, maintained, invalidated and enforced on an individual basis", any encumbrance upon the use of trademarks must likewise be "justified" under Article 20 on an individual, "trademark-specific" basis.

214. The Panel readily dismissed this argument, observing that the rules governing the definition and registration of a trademark merely reflect the requirement that a trademark must be "distinctive". The Panel correctly considered that "it does not follow from this ... that special requirements under Article 20 would always need to be formulated and assessed in respect of individual trademarks".<sup>258</sup> The Panel saw "no basis for transposing the rules on the registration or invalidation of individual trademarks applicable in the situations covered under Article 6*quinquies*, to the interpretation of Article 20".<sup>259</sup> The Panel properly concluded that "[a]ny special

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<sup>253</sup> Panel Report, para. 7.2027.

<sup>254</sup> Panel Report, para. 7.2029.

<sup>255</sup> Panel Report, para. 7.2029.

<sup>256</sup> Panel Report, para. 7.2029 (emphasis in original).

<sup>257</sup> Honduras's appellant's submission, para. 152 (emphasis added).

<sup>258</sup> Panel Report, para. 7.2498.

<sup>259</sup> Panel Report, para. 7.2498.

requirements on the use of trademarks ... should be considered under the terms of Article 20", which is "silent" as to whether "special requirements" may "concern the use of individual trademarks, a class of trademarks, or use of trademarks in particular situations".<sup>260</sup>

215. Honduras then comes to the heart of its contextual argument, namely that Article 20 should be interpreted *in pari materia* with Article 17 of the TRIPS Agreement because, in Honduras's view, both of these provisions concern exceptions to the "rights" conferred by a trademark. It is from Article 17 that Honduras borrows the term "limited" – a term that does not appear in Article 20. Honduras reasons that because exceptions to the rights conferred by a trademark must be "limited" and must "take account of the legitimate interests of the owner of the trademark", it follows that any encumbrance upon the use of a trademark under Article 20 must also be "limited" and address only "trademark-specific concerns".<sup>261</sup>

216. However, contrary to what Honduras implies, the fact that Article 17 requires "exceptions" to the rights conferred by a registered trademark to be "limited" does not mean that any such exceptions must be formulated on a "*trademark-specific*" basis. The Panel expressly rejected this contention:

We note that ... the panel in *EC – Trademarks and Geographical Indications (US)* ... held that Article 17 does not require case-by-case analysis in respect of exceptions to the rights conferred under Article 16 and that the number of trademarks or trademark owners affected by an exception is not determinative in considering whether an exception is "limited" for the purposes of Article 17. This interpretation is consistent with prior interpretations of similar general exceptions clauses contained in Articles 13 and 30.

We note that, in prior rulings on Article 17, the term "limited" has not been understood to require that exceptions to the rights conferred be applied in respect of individual trademarks. The fact that the term "limited" in Article 17 does not imply that Members are necessarily required to formulate exceptions to the rights conferred in respect of individual trademarks supports the view that, similarly, Members are not necessarily required to formulate any special requirements under Article 20 in respect of individual trademarks. We further note that the term "limited" is used in Article 17 to qualify permissible exceptions to the rights conferred under Article 16, while the distinct term "unjustifiably" is used in Article 20 to qualify special requirements that may be imposed on the use of trademarks.<sup>262</sup>

217. Nor does Article 17 preclude Members from creating limited exceptions to the rights conferred by a registered trademark on the basis of broader public policy concerns, i.e. concerns that do not relate to "the specific character and particular message" of an individual trademark. This is confirmed by the fact that Article 17

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<sup>260</sup> Panel Report, para. 7.2499.

<sup>261</sup> Honduras's appellant's submission, para. 161.

<sup>262</sup> Panel Report, paras. 7.2502 and 7.2503.

expressly refers to the doctrine of fair use, which is not a rationale that concerns "the specific character and particular message" of an individual trademark.

218. Setting aside Honduras's misinterpretation of Article 17, the more fundamental problem with Honduras's contextual argument is that this provision does not have the contextual significance Honduras seeks to attribute to it. As Australia explained to the Panel, if anything, Article 17 has the *opposite* contextual significance. The fact that Article 17 does *not* apply to Article 20 confirms, first of all, that Article 20 is not an "exception" to any "rights" conferred by a registered trademark, as the Panel correctly found. In addition, the fact that Article 17 does not apply to Article 20, and that there is no similar provision that *does* apply to Article 20, further supports the conclusion that any encumbrance upon the use of trademarks need not be "limited" or necessarily "take account of the legitimate interests of the owner of the trademark", including its interest in "use".

219. In evaluating the contextual significance of Article 17 to the interpretation of Article 20, the Panel began by agreeing with the panel in *EC – Trademarks and Geographical Indications* that the "legitimate interests" of a trademark owner under Article 17 must be distinguished from "the rights conferred by a trademark" under Article 16.1. The Panel further agreed with that panel that the "legitimate interests" of a trademark owner "include[] its interest in using its own trademark in connection with the relevant goods and services of its own and authorised undertakings".<sup>263</sup> While the ability to use a trademark may be a "legitimate interest" of a trademark owner, it is *not* a "right conferred" upon trademark owners by virtue of Article 16.1.

220. Applying this context to Article 20, the Panel noted, first, that "Article 20 does not address the granting by WTO Members of 'exceptions to the rights conferred' by a trademark. Nor does it expressly refer to a concept of 'legitimate interest' of the trademark owner that should be taken into account."<sup>264</sup> The Panel *did* consider, however, that Article 17 of the TRIPS Agreement "confirms", as context, "that in assessing whether encumbrances on the use of a trademark are 'unjustifiable' within the meaning of Article 20", the treaty interpreter "must take due account of the legitimate interest of the trademark owner in using its trademark ... and how this is affected by the encumbrances to be justified".<sup>265</sup> In particular, the Panel considered that Article 17 supports the conclusion that "an assessment of the unjustifiability of encumbrances under Article 20 should involve a consideration of the nature and extent of the encumbrance on such use, including the extent to which the relevant trademarks are prevented from serving their intended function in the marketplace".<sup>266</sup>

221. While Australia considers that the Panel gave Article 17 more contextual weight than it is due, the Panel correctly found that Article 20 stands outside the

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<sup>263</sup> Panel Report, para. 7.2427 (quoting Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664).

<sup>264</sup> Panel Report, para. 7.2427.

<sup>265</sup> Panel Report, para. 7.2428.

<sup>266</sup> Panel Report, para. 7.2428.

provisions of Part II, Section 2 that define the rights conferred by a registered trademark (Article 16) and exceptions to those rights (Article 17). Honduras's arguments to the contrary misinterpret these provisions and erroneously seek to conflate Article 17 and Article 20 into what would amount to a single provision governing "exceptions" to the "rights" conferred by a trademark.

(c) Context of the TRIPS Agreement as a whole

222. Australia will not dwell on Honduras's contextual arguments based on the TRIPS Agreement as a whole, as those arguments mostly repeat the same flawed arguments that Honduras advances regarding the context provided by Part II, Section 2 of the TRIPS Agreement. Honduras's additional reference to the fact that the TRIPS Agreement does not have a "general exceptions" provision comparable to Article XX of the GATT 1994 is similarly irrelevant, given that Article 20 of the TRIPS Agreement is not an affirmative defence to a violation of any obligation contained within that agreement.

223. Honduras devotes much of this portion of its submission to a circular argument based on Article 8.1 of the TRIPS Agreement, which provides that "Members may ... adopt measures necessary to protect public health ... provided that such measures are consistent with the provisions of this Agreement". Honduras contends that this provision stands for the proposition that "any exceptions to the rules set out in the TRIPS Agreement must be found in the TRIPS Agreement itself."<sup>267</sup> As Australia has already explained, Article 20 is not an "exception" to any otherwise applicable "rules". In any event, the reference in Article 8.1 to measures "consistent with the provisions of this Agreement" merely brings the treaty interpreter back to the meaning of the term "unjustifiably". Neither Article 8.1 nor any other provision that Honduras cites in this section of its submission supports its contention that the only "justifiable" encumbrances under Article 20 are those that are "trademark-specific and applied in a limited manner".

(3) Object and purpose

224. Honduras's arguments based on the object and purpose of Part II, Section 2 of the TRIPS Agreement, and of the TRIPS Agreement as a whole, are equally hollow. Honduras seeks to elevate the "use" of intellectual property rights to a paramount concern of the TRIPS Agreement, when in fact the TRIPS Agreement is primarily concerned with defining and enforcing private rights of exclusion.

225. These primary concerns are evident from the preamble to the TRIPS Agreement. The first preambular paragraph states the agreement's purpose as, *inter alia*, seeking to "promote effective and adequate protection of intellectual property rights". The fourth preambular paragraph explicitly "recogniz[es] that intellectual property rights are private rights". Thus, the "intellectual property rights" whose "effective and adequate protection" the TRIPS Agreement seeks to "promote" are "private rights".

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<sup>267</sup> Honduras's appellant's submission, para. 171.

226. Each section in Part II of the TRIPS Agreement defines the relevant "private rights" that Members are required to confer upon the owners of a particular class of intellectual property.<sup>268</sup> In the case of trademarks, the private rights that Members are required to confer upon the owners of registered trademarks by virtue of Article 16.1 are negative rights of exclusion, as discussed at length above. Thus, the object and purpose of Part II, Section 2 of the TRIPS Agreement is the effective and adequate protection of the intellectual property rights defined in Article 16.1, which are private rights of exclusion and do not include a "right of use".

227. For this reason, Honduras is simply mistaken when it asserts that "the object and purpose of the Section on Trademarks is the orderly use of trademarks in commerce".<sup>269</sup> The object and purpose of Part II, Section 2 of the TRIPS Agreement is the effective and adequate protection of the intellectual property rights defined in Article 16.1, which are private rights of exclusion and do not include a "right of use". As the Appellate Body has previously found, the "'exclusive rights' that all WTO Members must guarantee in their domestic legislation" by virtue of Article 16.1 are rights that "protect the owner against infringement of the registered trademark by unauthorized third parties."<sup>270</sup>

228. Moreover, as the panel in *EC – Trademarks and Geographical Indications (Australia)* confirmed, the fact that the TRIPS Agreement provides for the grant of negative rather than positive rights is a "fundamental feature of intellectual property protection [that] inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives *lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement*."<sup>271</sup> The TRIPS Agreement, in other words, is not generally concerned with the use and exploitation of intellectual property rights. The specific provisions of the TRIPS Agreement must be understood in this light.

229. Honduras thus fails in its attempt to invoke the object and purpose of the TRIPS Agreement in support of its interpretation of Article 20. Nothing in the object and purpose of an agreement that is primarily concerned with the enforcement of private rights of exclusion supports Honduras's contention that the term "unjustifiably" in Article 20 permits only those encumbrances that are "trademark-specific and applied in a limited manner".

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<sup>268</sup> See TRIPS Agreement Article 9.1 (incorporating rights of exclusion for copyrighted works as set forth in Articles 1 through 21 of the Berne Convention); TRIPS Agreement Article 16.1 (defining rights of exclusion for registered trademarks); TRIPS Agreement Article 22.1 (defining rights of exclusion for geographical indications); TRIPS Agreement Article 26.1 (defining rights of exclusion for industrial designs); TRIPS Agreement Article 28.1 (defining rights of exclusion for patents); TRIPS Agreement Articles 35 and 36 (incorporating rights of exclusion for integrated circuits as set forth in Articles 2 through 7 of the Washington Treaty, and defining additional rights of exclusion for integrated circuits).

<sup>269</sup> Honduras's appellant's submission, para. 185.

<sup>270</sup> Appellate Body Report, *US – Section 211 Appropriations Act*, para. 186.

<sup>271</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246 (emphasis added).

(4) Negotiating history

230. Honduras's discussion of the negotiating history of Article 20 does not even attempt to explain why recourse to supplementary means of interpretation is warranted under Article 32 of the Vienna Convention. But, in any event, the negotiating history that Honduras recounts, which Australia takes at face value, does nothing more than suggest Article 20 was primarily intended to address the specific issue of dual-branding requirements. Notably, this is an issue that arises when domestic law *otherwise permits* the use of trademarks. Nothing in the negotiating history that Honduras recounts supports Honduras's contention that public health and other public policy considerations can never "justify" an encumbrance upon the use of trademarks that is not "limited" nor based on a "trademark-specific" concern.

(5) Conclusion to Part (b)

231. To reiterate, Honduras's 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>272</sup> In Honduras's 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*.

232. As Australia has demonstrated, Honduras's 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 in light of 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" 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's interpretative strategy, and so should the Appellate Body.

(c) Less restrictive

233. In the conditional part of its appeal of the Panel's interpretation of Article 20, 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>273</sup>

234. As Australia explained in the introduction to Part D, it is not clear to Australia how Honduras believes that the Panel should have interpreted the term "unjustifiably" differently than it did. The Panel found that an encumbrance could be found

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<sup>272</sup> Honduras appellant's submission, para. 146.

<sup>273</sup> Honduras's appellant's submission, para. 231.

"unjustifiable" under Article 20 "if a readily available alternative would lead to at least equivalent outcomes in terms of the policy objective of the challenged measure, thus calling into question whether the stated reasons sufficiently support any encumbrances on the use of trademarks resulting from the measure."<sup>274</sup> It is hard to see how the Panel's interpretation differs from what Honduras claims is required. Honduras's argument seems to be that the Panel erred by not specifying a consideration of available alternatives as a separate, formal element of its standard as opposed to an element that is inherent in what it means for something to be "unjustifiable".

235. In any event, Honduras's arguments are unfounded. The interpretative claims that Honduras sets out in Part III.2.2 of its submission are centred on the proposition that the term "unjustifiably" is equivalent to a standard of "necessity" (or even *beyond* "necessity", as Australia will discuss momentarily).

236. As noted above in Part 1, the Panel found that the context provided by other parts of the TRIPS Agreement, including provisions that use the terms "necessary" or "unnecessarily", "supports the implication of a deliberate choice of a distinct term 'unjustifiably' in Article 20."<sup>275</sup> In the light of this context, the Panel did not consider "that the term 'unjustifiably' in Article 20 ... should be assumed to be synonymous with 'unnecessarily'".<sup>276</sup>

237. The Panel's finding is correct and, if anything, did not go far enough. As Australia argued before the Panel, the concept of "necessity" was well established in the GATT *acquis* even prior to the Uruguay Round, and the drafters of the TRIPS Agreement were certainly aware of this concept when drafting Article 20. One of the hallmarks of the "necessity" standard – indeed, what sets it apart from other terms that establish a nexus – is an examination of whether the measure at issue was the least restrictive means of accomplishing a Member's objective in light of other reasonably-available alternatives that would have made an equivalent contribution to the objective. The fact that the drafters of Article 20 chose not to use the term "unnecessarily" strongly suggests they did not believe an encumbrance upon the use of trademarks must be the *least* trademark-restrictive so long as it is within the range of outcomes that are not *unjustifiable*.

238. Honduras's arguments in support of an examination of alternatives that is somehow more stringent or mandatory than what the Panel required are based on the context provided by Article 8.1 of the TRIPS Agreement. As noted previously, Article 8.1 states that "Members may ... adopt measures necessary to protect public health ... provided that such measures are consistent with the provisions of this Agreement". Based on the underlined language, Honduras argues that any encumbrance upon the use of trademarks must not only be "necessary" but must also satisfy the "additional requirement" that they "comply with the provisions of the

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<sup>274</sup> Panel Report, para. 7.2598.

<sup>275</sup> Panel Report, para. 7.2419.

<sup>276</sup> Panel Report, para. 7.2419.

TRIPS Agreement and thus respect the rules on trademark protection".<sup>277</sup> This is the same "necessity plus" or "beyond necessity" argument that Honduras (alone) advocated before the Panel.

239. Honduras misreads Article 8.1. Article 8 of the TRIPS Agreement is entitled "Principles". Article 8.1 establishes the principle that Members "may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement". Contrary to what Honduras suggests, Article 8.1 does not establish an overarching standard of "necessity" for all measures of the type described. Rather, the substantive obligation is "that such measures" be "consistent with the provisions of this Agreement". Pursuant to Article 20, special requirements that encumber the use of a trademark in the course of trade are "consistent with the provisions of this Agreement" if they are not imposed "unjustifiably".

240. The Appellate Body has previously observed, and the Panel recalled, that the covered agreements use different terms to express a "kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized".<sup>278</sup> In the case of encumbrances upon the use of a trademark in the course of trade, the required "connection or relationship" is expressed with the term "unjustifiably". As the Panel found, and as Honduras itself seems to recognise, "unjustifiably" does not have the same meaning as "unnecessarily".

241. In fact, Honduras states that "[a] difference in nuance could perhaps be that 'necessity' comes closer to the pole of indispensable and thus requires one to opt for the least restrictive alternative. The term 'unjustifiably' arguably refers to a less restrictive alternative without necessarily being the least restrictive of all alternatives."<sup>279</sup> It seems to Australia that this is more or less how the Panel interpreted the term "unjustifiably" – as a "kind or degree of connection or relationship" that is close to, but still short of, a standard of "necessity" along the "pole of indispensability". Where the Panel placed the term "unjustifiably" along the "pole of indispensability" is consistent with its conclusion that the existence of less-restrictive alternatives can be relevant to an examination of "unjustifiably" insofar as the less-restrictive alternatives "call into question" whether the reasons for the adoption of special requirements "sufficiently support" the resulting encumbrance. In other words, the existence of *less*-restrictive alternatives can be relevant to whether an encumbrance is "unjustifiable", but the term "unjustifiably" does not "require[] one to opt for the *least* restrictive alternative" in all cases. It thus seems to Australia that the Panel gave the term "unjustifiably" the very "nuance" Honduras proposes.

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<sup>277</sup> Honduras's appellant's submission, para. 236.

<sup>278</sup> Appellate Body Report, *US – Gasoline*, pp. 17 and 18, DSR 1996:1, p. 97.

<sup>279</sup> Honduras's appellant's submission, para. 247.

242. Honduras then enters into a lengthy critique of the Panel's discussion of the Doha Declaration on the TRIPS Agreement and Public Health ("Doha Declaration").<sup>280</sup> While it is unclear what relevance this has to Honduras's arguments concerning less trademark-encumbering alternatives, in any event, Honduras seems to misapprehend the purpose for which the Panel referred to the Doha Declaration – which was merely to confirm that public health considerations are "unquestionably" among the societal interests that can "justify" an encumbrance upon the use of trademarks.<sup>281</sup> It seems this is a controversial proposition only to Honduras. Whether or not the Doha Declaration constitutes a subsequent agreement, which is the focus of Honduras's argument, is ultimately beside the point. Article 8.1 of the TRIPS Agreement, by itself, makes clear that Members may adopt measures necessary for the protection of public health, provided those measures are otherwise consistent with the TRIPS Agreement. As discussed above, the relevant legal discipline in respect of special requirements upon the use of trademarks is that such requirements may not encumber the use of trademarks "unjustifiably".

243. In sum, to the extent that Honduras identifies any divergence between the Panel's interpretation of the term "unjustifiably" and the interpretation that Honduras advocates on appeal, that divergence – whatever it is – is based on Honduras's argument that the term "unjustifiably" is equivalent to a standard of "necessity", or goes "beyond" necessity. The Panel properly rejected this interpretation of the term "unjustifiably" while still finding the existence of less-restrictive alternatives is potentially relevant to evaluating whether an encumbrance upon the use of trademarks is unjustifiable.

### 3. Honduras Errs in Its Contention that the Panel Misapplied Article 20 to the Facts of the Case

244. In Part III.3 of its appeal, Honduras claims that the Panel misapplied Article 20 to the facts of the case. This part of Honduras's appeal assumes, *arguendo*, that the three-part inquiry articulated by the Panel reflects a proper interpretation of the term "unjustifiably".

245. Honduras first contends that the Panel erred "in its focus on the economic value of trademarks and in its assessment of allegedly mitigating factors".<sup>282</sup>

246. Honduras argues 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>283</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*

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<sup>280</sup> Honduras's appellant's submission, paras. 252 and 257.

<sup>281</sup> Panel Report, paras. 7.2406 and 7.2411.

<sup>282</sup> Honduras's appellant's submission, Section III.3.1.

<sup>283</sup> Honduras's appellant's submission, para. 266.

*of trade*".<sup>284</sup> In other words, the Panel's analysis focused on precisely what Honduras claims it was required to focus on.

247. Having summarised the respects in which the TPP measures either prohibit the use of trademarks or permit their use subject to special requirements that regulate their appearance<sup>285</sup>, the Panel found that "by disallowing the use of design features of trademarks, the TPP measures prevent a trademark owner from using such features *to convey any messages about the product, whether functional or intangible*, and deriving any economic value from the use of such features."<sup>286</sup> Thus, the Panel found that the TPP measures *prohibit* the use of figurative trademarks and thereby prevent these trademarks from serving *any* "distinguishing function". This is the "far-reaching" encumbrance the Panel took into account when evaluating whether the TPP measures impose an "unjustifiable" encumbrance upon the use of trademarks. The Panel *also* took into account "the trademark owner's expected potential to extract economic value" from the use of such trademarks, based on its incorporation (misguided, in Australia's view) of the concept of "legitimate interests" from Article 17. But the Panel's consideration of this economic potential was not to the exclusion of its consideration of the impact of the TPP measures upon the distinguishing functions of trademarks, as the Panel understood those functions.

248. Under the same heading, Honduras also contends that the Panel erred when it observed that the "practical implications" of the prohibitive elements of the TPP measures "are partly mitigated by the fact that the TPP measures allow tobacco manufacturers to use word trademarks, including brand and variant names, to distinguish their products from each other."<sup>287</sup> Honduras appears to misunderstand the Panel's point. The Panel did not detract from the "far-reaching" encumbrance upon the use of figurative trademarks that it had just identified. The Panel's point was that the "*practical implications* of those prohibitions" were "partly mitigated" by the fact that tobacco companies can still use word trademarks to distinguish their products from those of other undertakings. As the Panel correctly observed, the complainants did not even allege, let alone seek to prove, that consumers have been unable to distinguish tobacco products of one undertaking from those of other undertakings since the implementation of the TPP measures.<sup>288</sup> This is clearly a relevant consideration for a panel to take into account when evaluating the nature and extent of an encumbrance upon the use of trademarks.

249. Honduras then argues that "[t]he Panel's finding that the TPP measures contribute to the reduction in the use of tobacco is vitiated by several errors of law". One of these alleged "errors of law" is a cross-reference to Honduras's claims under Article 11 of the DSU in respect of the Panel's analysis of contribution, which Australia addresses in Part V below. The other two alleged errors are readily

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<sup>284</sup> Panel Report, para. 7.2563 (emphasis added).

<sup>285</sup> Panel Report, para. 7.2556.

<sup>286</sup> Panel Report, para. 7.2569 (emphasis added).

<sup>287</sup> Panel Report, para. 7.2570.

<sup>288</sup> Panel Report, para. 7.2570.

dismissed. Honduras claims that "the Panel does not engage in any weighing and balancing of the different aspects of the measures",<sup>289</sup> but that is precisely what the Panel does in Part 7.3.5.5.3.4 of the Panel Report.<sup>290</sup> Honduras's argument that the Panel failed "to take into consideration the proper degree of encumbrance" merely repeats its argument that the Panel failed to apprehend the prohibitive elements of the TPP measures, which, as shown above, is a misapprehension on Honduras's part.<sup>291</sup>

250. Honduras's next claim of application error relates to the Panel's evaluation of alternatives. Honduras's first argument under this heading presupposes that Honduras is correct *as a matter of law* that the examination of alternatives under a standard of "unjustifiability" should be identical in all respects to the examination of alternatives under a standard of "necessity".<sup>292</sup> For the reasons that Australia explained in Part 2(c) above, Honduras's equation of these two terms lacks any support. Moreover, when the Panel found that none of the proposed alternative measures "would be manifestly better in contributing towards Australia's public health objective in a comparable manner as the TPP measures operating as an integral part of Australia's comprehensive tobacco control policies and at the level desired by Australia",<sup>293</sup> the Panel was explaining why none of the proposed alternatives "call[ed] into question whether the stated reasons sufficiently support any encumbrances on the use of trademarks resulting from the measure".<sup>294</sup>

251. As for Honduras's argument that the Panel "fail[ed] to actually examine the alternative measures' contribution in light of their lesser degree of *trademark* encumbrance",<sup>295</sup> this argument once again presupposes that Honduras is correct as a matter of law that the term "unjustifiably" is equivalent to a standard of "necessity". It is not. An encumbrance upon the use of trademarks is not "unjustifiable" merely because a Member could have pursued the same objective through a measure that, in theory, has no effect upon the use of trademarks. Honduras's position reflects its erroneous belief that the TRIPS Agreement establishes a "right" to use a trademark and that the protection of this supposed "right" has a privileged status among the concerns of the covered agreements. As Australia has already demonstrated, Honduras misreads the TRIPS Agreement in arriving at this position.

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<sup>289</sup> Honduras's appellant's submission, para. 282.

<sup>290</sup> See, e.g. Panel Report, para. 7.2591 (explaining that its purpose in Part 7.3.5.5.3.4 is "to assess the public health concerns that underlie the TPP trademark requirements against their implications on the use of trademarks in the course of trade, taking into account the nature and extent of the encumbrances that we have described above"). Honduras seems to think that the Panel was required to use the phrase "weigh and balance" in this part of the Panel Report in order to make clear that it was "weighing and balancing".

<sup>291</sup> Honduras's appellant's submission, para. 283.

<sup>292</sup> Honduras's appellant's submission, para. 289.

<sup>293</sup> Panel Report, para. 7.2601.

<sup>294</sup> Panel Report, para. 7.2598.

<sup>295</sup> Honduras's appellant's submission, para. 290 (emphasis in original).

252. In any event, the Panel found that none of the complainants' proposed alternatives, either alone or in combination, would have made an equivalent contribution to Australia's legitimate objective in the absence of the TPP measures. The Panel examined in detail the one "alternative" proposed by the complainants that actually related to the use of trademarks, namely the proposed establishment of a "pre-vetting mechanism" that would evaluate "individual elements of individual trademarks."<sup>296</sup> The Panel found, correctly, that "the TPP trademark requirements are not designed to address individual trademarks and their specific features, but to contribute, as an integral part of the TPP measures, to the overall policy of standardising packaging and product appearance."<sup>297</sup> In light of this purpose, the potential to create an alternative "pre-vetting mechanism" did not "call into question whether the stated public health reasons for the special requirements on the use of trademarks sufficiently support the encumbrances resulting from the TPP trademark restrictions."<sup>298</sup>

253. Honduras's final claim of application error is that the Panel gave "undue legal weight to the FCTC Guidelines."<sup>299</sup> This argument mischaracterises both the FCTC Guidelines and the role they played in the Panel's analysis of the complainants' claims under Article 20. The FCTC Guidelines are "intended to assist the Parties in meeting their obligations and increasing the effectiveness of measures adopted".<sup>300</sup> The FCTC Guidelines for both Article 11 and Article 13 of the FCTC specifically recommend that parties adopt tobacco plain packaging.<sup>301</sup> When the Panel observed that Australia adopted the TPP measures "in line with its commitments under the FCTC", it was referring to these recommendations.<sup>302</sup> No party ever argued, and the Panel did not find, that the FCTC mandates the adoption of tobacco plain packaging, as Honduras seems to suggest.

254. Nor did the Panel find, contrary to Honduras's further suggestion, that the existence of the FCTC Guidelines could be "used to justify WTO-inconsistent plain packaging measures".<sup>303</sup> The Panel referred to the FCTC Guidelines merely to "underscore[]" "the importance of the public health reasons for which the trademark-related special requirements under the TPP measures are applied", not to find that the existence of the Guidelines could somehow overcome a finding of "WTO-inconsistency".<sup>304</sup> It is remarkable for Honduras to contend, as it does, that the existence of a specific recommendation to adopt tobacco plain packaging in

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<sup>296</sup> Panel Report, para. 7.2602.

<sup>297</sup> Panel Report, para. 7.2603.

<sup>298</sup> Panel Report, para. 7.2603.

<sup>299</sup> Honduras's appellant's submission, paras. 299 and 312.

<sup>300</sup> FCTC Article 13 (AUS-44; JE-19). See also Panel Report, para. 2.106.

<sup>301</sup> See Panel Reports, paras. 2.106-2.109.

<sup>302</sup> Panel Report, para. 7.2596.

<sup>303</sup> Honduras's appellant's submission, para. 304.

<sup>304</sup> Panel Report, para. 7.2596.

furtherance of a treaty ratified by 180 countries was "not relevant" to the Panel's evaluation of whether Australia's tobacco plain packaging measures are "unjustifiable".<sup>305</sup> The existence of this recommendation is *highly* relevant to whether tobacco plain packaging measures have been imposed "unjustifiably". If anything, the Panel did not give *enough* weight to the fact that Australia "has pursued its relevant domestic public health objective in line with the emerging multilateral public health policies in the area of tobacco control as reflected in the FCTC and the work under its auspices".<sup>306</sup> In all events, however, Honduras's argument that the Panel erred in referring to the FCTC Guidelines is groundless.

4. The Dominican Republic Errs in Its Contention that the Panel Failed to Consider Claims Concerning Cigarette Sticks

255. 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.<sup>307</sup>

256. However, 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. The Panel made findings under Article 20 in respect of the "TPP measures", defined to include the *Tobacco Plain Packaging Act 2011*, the *Tobacco Plain Packaging Regulations 2011*, and the *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011*.<sup>308</sup> Section 2.1.2.4 of the Panel Report summarises the requirements of the TPP measures as they relate to the appearance of tobacco products. In that section, the Panel details the requirements of the TPP measures pertaining to the appearance of cigarettes (Section 2.1.2.4.1) and to the appearance of cigars (Section 2.1.2.4.2). The Panel understood, and made repeated references to the fact, that the TPP measures prohibit the use of any mark on cigarette sticks (including trademarks) other than an alphanumeric code.<sup>309</sup>

257. The Panel also analysed the contribution of the TPP measures to Australia's objective taking into account that the measures prescribe requirements that affect the appearance of both tobacco products and their retail packaging. The Panel observed that:

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<sup>305</sup> Honduras's appellant's submission, para. 308.

<sup>306</sup> Panel Report, para. 7.2604.

<sup>307</sup> Australia uses the word "claims" in a general sense in the discussion that follows. As shown below, the Dominican Republic did not advance any distinct legal "claims" in its panel request concerning the aspects of the TPP measures that regulate the appearance of cigarette sticks. At most, the Dominican Republic advanced *arguments* concerning cigarette sticks in support of its *claim* that the TPP measures are inconsistent with Article 20 of the TRIPS Agreement.

<sup>308</sup> See Panel Report, para. 2.2.

<sup>309</sup> See, e.g. Panel Report, paras. 2.33 and 2.34, and Figure 8.

... the design underlying the structure of the TPP measures reflects a causal chain or 'mediational model' whereby the adoption of a uniform, standardized presentation of *tobacco products and their retail packaging* (i.e. "*plain packaging*") is intended to reduce the appeal of tobacco products to the consumer, enhance the effectiveness of GHWs and reduce the ability of the pack to mislead consumers about the harmful effects of smoking, and thereby affect smoking behaviours.<sup>310</sup>

The Panel thus recognised that the concept of "plain packaging" encompasses both the appearance of the product and the retail packaging in which it is sold.

258. The Panel's understanding of the concept of "plain packaging" is consistent with the fact that the Article 13 FCTC Guidelines specifically recognise the product itself as a medium for advertising and promoting tobacco products. The Article 13 FCTC Guidelines observe in this regard that "[t]obacco pack *or product* features are used in various ways to attract consumers, to promote products and to cultivate and promote brand identity, for example by using logos, colours, fonts, pictures, shapes and materials on or in packs *or on individual cigarettes or tobacco products*."<sup>311</sup> The Guidelines therefore recommend that "Parties should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging. Packaging, *individual cigarettes or other tobacco products* should carry no advertising or promotion, including design features that make products attractive."<sup>312</sup>

259. Consistent with the FCTC Guidelines, the Panel considered that a "relevant assumption" underlying the TPP measures "is that, where branding features are available *on tobacco products* or their retail packaging, these may act as advertising and thereby influence perceptions of tobacco products".<sup>313</sup> The Panel therefore examined "the extent to which the aspects of *tobacco products* and packaging regulated by the TPP measures can be considered to play a role in promotion and communication about tobacco products".<sup>314</sup> The Panel reviewed the relevant evidence and found that "branded packaging can act as an advertising or promotion tool in relation to tobacco products". In particular, the Panel found that "statements emanating from the tobacco industry itself" support the conclusion that "branding *on tobacco products*, including packaging, can generate certain positive perceptions in relation to the product in the eyes of the consumer."<sup>315</sup> These intermediate findings by

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<sup>310</sup> Panel Report, para. 7.519 (emphases added).

<sup>311</sup> Article 13 FCTC Guidelines (JE-21), para. 15 (emphasis added).

<sup>312</sup> Article 13 FCTC Guidelines (JE-21), para. 17 (emphasis added).

<sup>313</sup> Panel Report, para. 7.647 (emphasis added).

<sup>314</sup> Panel Report, para. 7.655 (emphasis added).

<sup>315</sup> Panel Report, para. 7.731 (emphasis added).

the Panel provided important support for the Panel's overall conclusions on contribution.<sup>316</sup>

260. The Panel again recognised the fact that the TPP measures regulate the appearance of both tobacco products and their retail packaging when it applied Article 20 to the facts of the dispute. The first paragraph of the Panel's Article 20 application section states:

As described in greater detail above, the TPP measures regulate the appearance of trademarks on tobacco retail packaging and products in various ways. In respect of retail packaging of tobacco products, the TPP measures permit the use of word marks that denote the brand, business or company name, or the name of the product variant, as long as these trademarks appear in the form prescribed by the TPP Regulations. They prohibit the use of stylized word marks, composite marks and figurative marks. *In respect of tobacco products, the TPP measures prohibit the use of all trademarks on cigarettes.* In respect of cigars, they permit the use of trademarks denoting the brand, business or company name, or the name of the product variant, as well as the country of origin, so long as these trademarks appear in the form prescribed by the TPP Regulations.<sup>317</sup>

261. The Panel also recognised the impact of the TPP measures on tobacco products when it examined specific elements of Article 20. The Panel found, for example, that "the prohibition on the use of stylized word marks, composite marks and figurative marks on tobacco retail packaging *and products*" is a set of "special requirements" within the meaning of Article 20.<sup>318</sup> The Panel further found that these special requirements "encumber" the use of trademarks "in that they restrict the manner in which the trademarks at issue may be displayed *on the relevant products and their packaging.*"<sup>319</sup> Thus, the "special requirements" and the resulting "encumbrance" upon the use of trademarks that the Panel analysed under Article 20 specifically included the prohibition on the use of trademarks on tobacco products, including cigarette sticks.

262. The Panel considered that the "encumbrance" resulting from "the TPP measures' prohibitions on the use of figurative trademarks on tobacco retail packaging

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<sup>316</sup> See, e.g. Panel Report, para. 7.777 ("In light of the above, we are not persuaded that the complainants have shown that the TPP measures would not be capable of reducing the appeal of tobacco products, and thereby contribute to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products."); Panel Report, para. 7.778 ("we find that credible evidence has been presented, emanating from recognized sources, that *plain packaging of tobacco products* may reduce their appeal, by minimizing the ability of *various branding features* to create positive associations with tobacco products that could have an influence on smoking behaviours, including smoking initiation, cessation and relapse") (emphasis added); Panel Report, para. 7.1025 ("Overall, we find 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>317</sup> Panel Report, para. 7.2240 (emphasis added).

<sup>318</sup> Panel Report, para. 7.2243 (emphasis added).

<sup>319</sup> Panel Report, para. 7.2242 (emphasis added).

and products" is "far-reaching".<sup>320</sup> The Panel recalled, however, its prior findings from its contribution analysis that "the removal of design features on retail packaging and cigarettes ... is apt to reduce the appeal of tobacco products and increase the effectiveness of GHWs."<sup>321</sup> The Panel further recalled that "[i]t is integral to this approach that the use of certain figurative features and signs ... is restricted as part of the overall standardization of retail packaging and the products themselves (cigarettes and cigars)."<sup>322</sup> The Panel's assessment of the nature and extent of the encumbrance, on the one hand, and the sufficiency of the reasons for the adoption of the special requirements, on the other, plainly encompasses the respects in which the TPP measures prohibit the use of trademarks on tobacco products, including cigarette sticks.

263. For these reasons, when the Panel concludes that "the complainants have not demonstrated that the trademark-related requirements of the TPP measures unjustifiably encumber the use of trademarks in the course of trade within the meaning of Article 20 of the TRIPS Agreement"<sup>323</sup>, this finding includes the Dominican Republic's claims under Article 20 in respect of cigarette sticks. At every relevant stage of its analysis – from its description of the measures at issue to its contribution analysis to its specific examination of the Dominican Republic's claims under Article 20 – the Panel consistently recognised that the TPP measures prohibit the use of trademarks on cigarette sticks and that the Dominican Republic had advanced a claim under Article 20 in respect of this aspect of the measures.

264. As best as Australia can discern, given that the Panel evidently *did* address the Dominican Republic's claims under Article 20 in respect of cigarette sticks, 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.

265. No such requirement to this effect exists under Article 7 and 11 of the DSU. The Appellate Body has previously observed that the "matter referred to the DSB" within the meaning of Article 7 of the DSU "consists of two elements: the specific measures at issue and the *legal basis of the complaint* (or the *claims*)."<sup>324</sup> "Together, they comprise the 'matter referred the DSB', which forms the basis for a panel's terms of reference under Article 7.1 of the DSU."<sup>325</sup> It is this "matter" that a panel must "objectively assess" under Article 11 of the DSU.

266. The *measures at issue* in DS441 are the measures listed under the first paragraph in part "A" of the Dominican Republic's panel request. In the next paragraph, the panel request explains that these measures "establish comprehensive regulation of the appearance and form of the retail packaging of tobacco products, as

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<sup>320</sup> Panel Report, para. 7.2569 (emphasis added).

<sup>321</sup> Panel Report, para. 7.2593 (emphasis added).

<sup>322</sup> Panel Report, para. 7.2593 (emphasis added).

<sup>323</sup> Panel Report, para. 7.2605.

<sup>324</sup> Appellate Body Report, *Guatemala – Cement I*, para. 72 (emphasis in original).

<sup>325</sup> Appellate Body Report, *US – Carbon Steel*, para. 125.

well as of the tobacco products themselves". The reference to the aspects of the measures that regulate the appearance of individual cigarette sticks is listed under this second paragraph as an example ("among others") of the "comprehensive regulation" described in this paragraph. The reference to cigarette sticks is an example of this "comprehensive regulation", not a distinct measure at issue.

267. Nor does the Dominican Republic's panel request advance a distinct legal *claim* under Article 20 in respect of cigarette sticks. The relevant legal claim alleges that the identified measures are inconsistent with:

Article 20 of the TRIPS Agreement, because the use of trademarks in relation to tobacco products is unjustifiably encumbered by special requirements, such as (i) use in a special form, for example, the uniform typeface, font, size, colour, and placement of the brand name, and, (ii) use in a manner detrimental to the trademark's capability to distinguish tobacco products of one undertaking from tobacco products of other undertakings ...<sup>326</sup>

268. In fact, taken literally, the Dominican Republic's legal *claim* under Article 20 relates only to "tobacco products" and does not encompass claims in respect of the retail packaging of tobacco products, which the Dominican Republic referenced only in its description of the *measures at issue*. However, Australia (and apparently the Panel) understood that the Dominican Republic's claims under Article 20 concerned the use of trademarks "in relation to tobacco products" in a more general sense, and included both the product itself and its retail packaging.

269. Furthermore, the Dominican Republic's legal claim under Article 20 makes no reference to the fact that the measures at issue *prohibit* the use of trademarks on cigarette sticks. The two examples of "special requirements" that the claim provides are examples of requirements that affect how trademarks are *used* – not how trademarks are *prohibited*. On their face, therefore, these two examples appear to relate only to the permissive elements of the TPP measures, i.e. only to the elements of the TPP measures that regulate how word marks are used on retail packaging. The Dominican Republic's "claims" concerning cigarette sticks, which it subsequently developed in its written submissions to the Panel, are more properly understood as *arguments* that the Dominican Republic advanced in support of the *claim* set forth in its panel request that the *measures at issue* unjustifiably encumber the use of trademarks through the imposition of special requirements.

270. Whether one views the Dominican Republic's assertions concerning cigarette sticks as arguments in support of its claim under Article 20, or as a subsidiary legal "claim" falling under its broader Article 20 claim, the fact is that the Panel examined this aspect of the matter referred to it. As detailed above, the Panel examined the elements of the TPP measures that prohibit the use of trademarks on cigarette sticks and made findings in respect of this aspect of the matter. The Dominican Republic's argument that the Panel was required to address this aspect of the matter under a separate subheading appears to rest entirely on the fact that the Dominican Republic's panel request identifies the cigarette requirements as one example of how the TPP

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<sup>326</sup> Request for the Establishment of a Panel by the Dominican Republic, WT/DS441/15, p. 3.

measures "establish comprehensive regulation of the appearance and form of the retail packaging of tobacco products, as well as of the tobacco products themselves".<sup>327</sup> However, it does not follow from this feature of the Dominican Republic's panel request that the Panel was required to address this aspect of the matter under a separate subheading. The Panel addressed this aspect of the matter in its Panel Report and, in so doing, discharged its obligation under Article 11 of the DSU with respect to its terms of reference under Article 7.1 of the DSU.<sup>328</sup>

### **E. Conclusion to Section III**

271. For all of the foregoing reasons, Australia requests that the Appellate Body reject all of the appellants' claims of error under Article 16.1 and Article 20 of the TRIPS Agreement, and related claims under Article 7.1 and Article 11 of the DSU.

## **IV. CLAIMS UNDER ARTICLE 2.2 OF THE TBT AGREEMENT AND ARTICLE 11 OF THE DSU: TRADE RESTRICTIVENESS**

### **A. Introduction to Section IV**

272. Before the Panel, the complainants claimed that the TPP measures were trade-restrictive under Article 2.2 of the TBT Agreement while at the same time claiming, with respect to contribution, that the TPP measures would have *no impact* on reducing the demand for, and consumption of, tobacco products in Australia. (In fact, as addressed in Section C.2, the complainants initially claimed that the TPP measures would *increase* demand and consumption). To resolve this contradiction, the complainants attempted to fundamentally redefine the legal standard of trade-restrictiveness to avoid having to concede that the TPP measures would have "a limiting effect on international trade" in tobacco products. The complainants therefore argued that the TPP measures were trade-restrictive not on the basis that they had a limiting effect on *trade* but, rather, that they had a limiting effect on certain abstract "*competitive opportunities*".

273. In particular, Honduras argued that the TPP measures severely affect the "competitive opportunities" for imported tobacco products by removing the competitive advantages that stem from product differentiation.<sup>329</sup> Honduras claimed that, by reducing brand differentiation, the TPP measures increased barriers to entry for potential market entrants and distorted conditions of competition for incumbent

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<sup>327</sup> Dominican Republic's appellant's submission, para. 1576.

<sup>328</sup> The Dominican Republic's claim of error concerning the Panel's assessment of cigarette sticks, unfounded as this claim of error is, is one of many examples of an issue that the Dominican Republic could have raised with the Panel during the interim review process, but chose not to. If the Dominican Republic believed that the Panel was required to address the Dominican Republic's arguments concerning cigarette sticks under a separate subheading, or that doing so would improve the quality of the Panel Report, the Dominican Republic could have raised this concern with the Panel during interim review. Australia discusses the role of interim review as it relates to this dispute in Part VII.C.2 below.

<sup>329</sup> Panel Report, paras. 7.1090, 7.1096 and 7.1097.

brands in Australia.<sup>330</sup> Honduras further argued that the TPP measures restricted trade by imposing compliance costs on producers.<sup>331</sup>

274. The Dominican Republic, for its part, claimed that the TPP measures eliminated "competitive opportunities" by constraining the ability of all tobacco manufacturers to compete on the basis of brands.<sup>332</sup> The Dominican Republic also argued that the TPP measures were trade-restrictive because "each and every one of the trademark requirements ... imposes conditions on the sale of tobacco products in Australia".<sup>333</sup> While the Dominican Republic did not consider it necessary to demonstrate actual trade effects, given its view that the TPP measures "are designed and structured to limit the competitive opportunities for all tobacco products",<sup>334</sup> it claimed that the TPP measures had resulted in downtrading from higher-priced to lower-priced tobacco products.<sup>335</sup>

275. Australia responded that the complainants had failed to establish that the TPP measures were trade-restrictive *within the meaning* of Article 2.2 of the TBT Agreement. In particular, Australia argued that the limitations on "competitive opportunities" alleged by the complainants, such as the ability to compete on the basis of brand differentiation, were insufficient, as matter of law, to establish the requisite "limiting effect on international trade in imported products."<sup>336</sup> Australia submitted that, in contrast to a claim that a measure modifies the conditions of competition to the detriment of imported products *relative to* domestic products, a mere change in market conditions *in the abstract* is insufficient – without more – to establish trade-restrictiveness.<sup>337</sup> Australia also argued that the complainants had failed to establish that downtrading was likely to result from the design, structure and operation of the TPP measures; and observed that the empirical evidence refuted claims that the measures had a limiting effect on trade, given that imports of tobacco products had increased in both volume and value terms since their introduction, despite consistent declines in demand for and consumption of tobacco products in Australia.<sup>338</sup>

276. The Panel began its analysis with the relevant legal standard for "trade-restrictiveness" under Article 2.2 of the TBT Agreement. Referring to the Appellate Body's interpretation of the term "restriction" in Article XI:2(a) of the GATT 1994, and to the terms "international trade" in the first sentence of Article 2.2, the Panel concluded that a technical regulation is "trade-restrictive" within the

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<sup>330</sup> Panel Report, paras. 7.1100 and 7.1101.

<sup>331</sup> Panel Report, paras. 7.1090 and 7.1097.

<sup>332</sup> Panel Report, para. 7.1105.

<sup>333</sup> Panel Report, para. 7.1104.

<sup>334</sup> Panel Report, para. 7.1106.

<sup>335</sup> Panel Report, paras. 7.1106 and 7.1107.

<sup>336</sup> Panel Report, para. 7.1130.

<sup>337</sup> Panel Report, para. 7.1053.

<sup>338</sup> Panel Report, paras. 7.1132-7.1136.

meaning of Article 2.2 when it has "a limiting effect on international trade".<sup>339</sup> The Panel found that in past disputes, where a measure had been found to accord less favourable treatment to imported products, the trade-restrictiveness of the measure had been substantiated by reference to its limiting effect on the "competitive opportunities" available to imports.<sup>340</sup> The Panel concluded that, while the existence of discrimination may be probative, it is not *required* for a determination of "trade-restrictiveness" under Article 2.2.<sup>341</sup> Instead, determining whether and to what extent a non-discriminatory technical regulation is trade-restrictive depends on the particular circumstances of a given case, and could be based on qualitative or quantitative arguments and evidence.<sup>342</sup>

277. Against this legal standard, the Panel turned to the complainants' arguments and evidence on trade-restrictiveness. While the Panel agreed with the complainants that the TPP measures limit the opportunity for tobacco manufacturers to compete on the basis of brand differentiation,<sup>343</sup> it was not persuaded that modification of the overall competitive environment for tobacco products could be assumed to have a *limiting effect on international trade*.<sup>344</sup> Rather, the Panel agreed with Australia that it needed "to be shown *how* such effects on the conditions of competition ... give rise to a limiting effect on international trade in tobacco products".<sup>345</sup>

278. In this regard, the Panel found that the complainants demonstrated that the TPP measures contributed to a reduction in the volume of imports of *premium* tobacco products both in absolute and relative terms.<sup>346</sup> However, the Panel noted that the evidence of a decline in *overall consumption* suggested that at least part of the consumption of premium tobacco products had not been substituted with the consumption of non-premium tobacco products.<sup>347</sup>

279. Referring to its earlier finding that the TPP measures can, and do in fact, contribute to Australia's objective of reducing the use of tobacco products in Australia,<sup>348</sup> the Panel reasoned that such reduction in overall consumption could be expected to lead to a reduction in the volume of imports, in circumstances where the Australian market is supplied entirely by imported tobacco products.<sup>349</sup> Accordingly, the Panel found that "the TPP measures are trade-restrictive, insofar as, by reducing

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<sup>339</sup> Panel Report, para. 7.1072.

<sup>340</sup> Panel Report, para. 7.1073.

<sup>341</sup> Panel Report, para. 7.1074.

<sup>342</sup> Panel Report, paras. 7.1075 and 7.1076.

<sup>343</sup> Panel Report, para. 7.1167.

<sup>344</sup> Panel Report, paras. 7.1166 and 7.1167.

<sup>345</sup> Panel Report, para. 7.1168 (emphasis in original).

<sup>346</sup> Panel Report, para. 7.1196.

<sup>347</sup> Panel Report, para. 7.1197.

<sup>348</sup> Panel Report, para. 7.1206.

<sup>349</sup> Panel Report, para. 7.1207.

the use of tobacco products, they reduce the volume of imported tobacco products on the Australian market and thereby have a 'limiting effect' on trade".<sup>350</sup>

280. The Panel found that the empirical evidence before it did not corroborate the complainants' allegations that the TPP measures would increase price competition and lead to a reduction in the value of imports.<sup>351</sup> To the contrary, the Panel concluded that the evidence suggested that the TPP measures "have led to an increase in the price of cigarettes which has more than offset the decrease in quantity of cigarette[s] consumed and has thereby contributed to an increase in the value of the market".<sup>352</sup> On this basis, the Panel found that "while it is plausible that the measures may also, over time, affect the overall value of tobacco imports, the evidence before us does not show this to have been the case".<sup>353</sup>

281. On appeal, Honduras claims that the Panel erred in its interpretation of the terms "trade-restrictive" in Article 2.2 of the TBT Agreement, and in its application to the facts of this dispute. In particular, Honduras claims that the Panel made two separate but related errors of law. First, Honduras alleges that the Panel erred "by rejecting a test based on ... competitive opportunities"<sup>354</sup> and "effectively requir[ing] that the modification of the conditions of competition must be discriminatory".<sup>355</sup> Second, Honduras claims that the Panel "imposed a different and higher evidentiary burden of demonstrating actual trade effects for measures that are not alleged to be discriminatory in nature".<sup>356</sup>

282. Similarly, the Dominican Republic claims that the Panel erred in its application of Article 2.2 by finding that a limitation on competitive opportunities – here, the opportunity to compete on the basis of brand differentiation – was not, in and of itself, sufficient to establish that the TPP measures were trade-restrictive.<sup>357</sup> According to the Dominican Republic, the Panel erroneously required evidence of actual trade effects,<sup>358</sup> and submitted non-discriminatory technical regulations to a "heightened" evidentiary burden.<sup>359</sup>

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<sup>350</sup> Panel Report, para. 7.1208.

<sup>351</sup> Panel Report, para. 7.1218.

<sup>352</sup> Panel Report, para. 7.1218. The Panel however did not exclude the possibility that a reduction in the value of imports may happen in the future, either as a result of the effect of the TPP measures on consumption or as a result of this effect combined with a fall in prices. See Panel Report, para. 7.1225.

<sup>353</sup> Panel Report, para. 7.1255.

<sup>354</sup> Honduras's appellant's submission, para. 484.

<sup>355</sup> Honduras's appellant's submission, para. 490.

<sup>356</sup> Honduras's appellant's submission, para. 490.

<sup>357</sup> Dominican Republic's appellant's submission, paras. 1288 and 1309.

<sup>358</sup> Dominican Republic's appellant's submission, para. 1312.

<sup>359</sup> Dominican Republic's appellant's submission, paras. 1313 and 1314.

283. The Dominican Republic further claims that the Panel erred in its application of Article 2.2 by requiring that actual trade effects be attributable "exclusively" to the TPP measures<sup>360</sup>, and by requiring consideration of possible actions by suppliers to counteract the trade-restrictive effects of the TPP measures.<sup>361</sup> Finally, the Dominican Republic claims that the Panel acted inconsistently with its duty under Article 11 of the DSU by failing to undertake an objective assessment of the complainants' evidence on downtrading.<sup>362</sup>

284. As Australia will proceed to demonstrate, none of the appellants' claims of error constitute a credible challenge to the Panel's findings. In Part B below, Australia explains why the Panel properly interpreted and applied Article 2.2 of the TBT Agreement in requiring that the complainants establish that the TPP measures have a "limiting effect on international trade". In Part C, Australia establishes that the appellants have failed to demonstrate that the Panel erroneously applied an "exclusive cause" standard under Article 2.2 of the TBT Agreement. In Part D, Australia establishes that the Panel did not improperly consider that the trade-restrictiveness of the TPP measures could be "cured" by the private actions of suppliers. Part E demonstrates that the Panel acted within the bounds of its discretion under Article 11 of the DSU in its assessment of the downtrading evidence. Part F concludes.

**B. The Panel Properly Interpreted and Applied Article 2.2 by Requiring that the Complainants Establish that the TPP Measures Have a Limiting Effect on International Trade**

285. At the core of the complainants' appeal lies a disagreement as to whether any limitation on "competitive opportunities" in the marketplace is sufficient, without more, to establish that a technical regulation is "trade-restrictive" within the meaning of Article 2.2 of the TBT Agreement. Both Honduras and the Dominican Republic acknowledge the Appellate Body's finding in *US – Tuna II (Mexico)* that the relevant legal standard for trade-restrictiveness is one of a "limiting effect on trade".<sup>363</sup> They posit, however, that in the circumstances of this dispute, the Panel's finding that the TPP measures limited the opportunity for tobacco manufacturers to compete on the basis of brand differentiation was sufficient, in and of itself, to establish that the TPP measures are trade-restrictive.

286. Both appellants take particular issue with the following passage of the Panel's reasoning:

We agree with Australia that a demonstration that the challenged measures may result in some alteration of the overall competitive environment for suppliers on the market would not, in itself, demonstrate their "trade-restrictiveness" within the meaning of Article 2.2. Rather, as described

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<sup>360</sup> Dominican Republic's appellant's submission, paras. 1317-1330.

<sup>361</sup> Dominican Republic's appellant's submission, paras. 1331-1338.

<sup>362</sup> Dominican Republic's appellant's submission, paras. 1355-1387.

<sup>363</sup> Dominican Republic's appellant's submission, paras 1280 and 1281; Honduras's appellant's submission, para. 491.

above, what we must determine is the extent to which the challenged measures have a *limiting effect* on international trade. We do not consider, therefore, that a demonstration that the TPP measures "restructured the competitive conditions of the Australian cigarette market", or that they *modify* the conditions under which all manufacturers will compete against each other on the market, would, in itself, be sufficient to demonstrate their trade-restrictiveness. In this respect, we do not understand the reference to the impact of a technical regulation on "competitive opportunities", in past panel and Appellate Body reports, to imply that *any* modification of the terms on which all products compete on the market as a result of a technical regulation would demonstrate the "trade-restrictiveness" of such technical regulation. Rather, as described above, what must be considered is the extent to which the technical regulation at issue has a *limiting effect* on *international trade*.<sup>364</sup>

287. According to Honduras, this finding is in error because the legal standard of "trade-restrictiveness" under Article 2.2 focuses on "conditions of competition of and competitive opportunities for imported products".<sup>365</sup> Honduras refers to the Appellate Body report in *US – COOL (Article 21.5 – Canada and Mexico)* and to the Panel Report in *Indonesia – Import Licensing Regime* in support of this proposition.<sup>366</sup> Honduras also posits that, similar to Articles I, II, III and XI of the GATT 1994, Article 2.2 protects "legitimate expectations" to a secure and predictable trading environment,<sup>367</sup> and that "it is very difficult" to isolate, in practice, the effects of technical regulations on international trade.<sup>368</sup>

288. The Dominican Republic, for its part, argues that the Panel "adopted an improperly narrow understanding of competitive opportunities" (and hence trade-restrictiveness) by focusing on the ability of producers to compete on the basis of prices, rather than other factors such as brand differentiation.<sup>369</sup> The Dominican Republic considers that the TBT Agreement protects competitive opportunities arising from quality and brand recognition, because the definition of a technical regulation encompasses "packaging, marking or labelling requirements".<sup>370</sup> Referring to the jurisprudence interpreting Articles III:4 and XI of the GATT 1994, the Dominican Republic posits that measures which reduce "commercial opportunities" and "create uncertainties and affect investment plans" constitute a trade restriction regardless of whether they enable imports to compete on the basis of prices.<sup>371</sup> The Dominican

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<sup>364</sup> Panel Report, para. 7.1166 (original emphasis) (footnotes omitted).

<sup>365</sup> Honduras's appellant's submission, paras. 492, 495 and 499.

<sup>366</sup> Honduras's appellant's submission, paras. 495 and 498 (quoting Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208 and Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.50).

<sup>367</sup> Honduras's appellant's submission, para. 501.

<sup>368</sup> Honduras's appellant's submission, para. 502.

<sup>369</sup> Dominican Republic's appellant's submission, paras. 1291-1296.

<sup>370</sup> Dominican Republic's appellant's submission, paras. 1300 and 1301.

<sup>371</sup> Dominican Republic's appellant's submission, para. 1304 (quoting Appellate Body Report, *Korea – Various Measures on Beef*, paras. 145 and 148; and Panel Report, *Colombia – Ports of Entry*, para. 7.240).

Republic argues that the TRIPS Agreement provides further contextual support for the view that Article 2.2 goes "far beyond concerns" related to the opportunity to compete on the basis of price.<sup>372</sup>

289. In Australia's view, there is no basis in the text of Article 2.2, properly interpreted in accordance with rules of interpretation of public international law, to conflate the "conditions of competition" standard of Articles I, II, III and XI of the GATT 1994, with the legal standard of "trade-restrictiveness" under Article 2.2 of the TBT Agreement.

290. Article 2.2 of the TBT Agreement provides, in relevant part:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.

291. By its express terms, Article 2.2 prohibits WTO Members from adopting technical regulations that constitute "*unnecessary* obstacles to international trade", understood to mean those regulations that are "more trade-restrictive than necessary" to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. In order to make a *prima facie* case under this standard, a complainant must establish that the technical regulation at issue is "trade-restrictive".

292. The ordinary meaning of the term "trade" is "buying and selling or exchange of commodities for profit, specifically between nations; commerce".<sup>373</sup> The term "restrictive" means "implying, conveying, or expressing restriction or limitation".<sup>374</sup>

293. In *US – Tuna II (Mexico)*, the Appellate Body observed that the ordinary meaning of the term restriction "refers generally to something that has a limiting effect."<sup>375</sup> The Appellate Body then found that this term, when used in conjunction with the term "trade" in Article 2.2, required a demonstration that the technical regulation at issue has a "limiting effect on trade."<sup>376</sup>

294. When viewed in the context of the first sentence of Article 2.2, a technical regulation will have a "limiting effect on trade" when it constitutes an "obstacle" ("a hindrance, an obstruction")<sup>377</sup> to *international* trade. The ordinary meaning of the

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<sup>372</sup> Dominican Republic's appellant's submission, paras. 1305-1309.

<sup>373</sup> *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2 (AUS-245), p. 3312.

<sup>374</sup> *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2 (AUS-545), p. 2553.

<sup>375</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

<sup>376</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

<sup>377</sup> *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2 (AUS-245), p. 1974.

term "international" is "existing, occurring, or carried on between nations",<sup>378</sup> thus confirming that Article 2.2 focuses on any limiting effects that technical regulations may have on international commerce in the products subject to regulation.

295. The preamble of the TBT Agreement also forms part of the context of Article 2.2 and sheds light on the object and purpose of the agreement.<sup>379</sup> The fifth recital reflects the trade-liberalisation objectives of the TBT Agreement by expressing the "desire" that technical regulations "do not create unnecessary obstacles to international trade."<sup>380</sup> These trade-liberalisation objectives are qualified by the sixth recital, which "recognizes" Members' rights to regulate trade in furtherance of legitimate policy objectives, subject to the condition that their measures are not "applied in a manner that would constitute ... a disguised restriction on international trade".<sup>381</sup> Article 2.2 of the TBT Agreement gives effect to this balance between trade-liberalisation and a Member's right to regulate by allowing trade-restrictive technical regulations, subject to the condition that they are not "more trade-restrictive than necessary to fulfil a legitimate objective".<sup>382</sup>

296. Accordingly, properly interpreted in accordance with customary rules of interpretation of public international law, the term "trade-restrictive" in Article 2.2 reflects a legal standard of a "limiting effect on international trade". This is the *only* relevant legal standard of "trade-restrictiveness", and one that has been consistently applied by the Appellate Body in all cases arising under Article 2.2 of the TBT Agreement to date.<sup>383</sup>

297. The manner in which such a limiting effect is demonstrated will depend on the circumstances of the particular case. However, whether a complainant seeks to establish the trade-restrictiveness of a technical regulation in qualitative terms – i.e. having regard to its design, structure and operation – or by providing evidence of its *actual* trade effects, a complainant cannot avoid the fundamental requirement of demonstrating that the technical regulation will result, or has resulted, in a limiting effect on international trade.

298. Honduras is therefore incorrect in arguing that the Appellate Body found in *US – COOL* that trade-restrictiveness "focuses on the competitive opportunities available to imported products."<sup>384</sup> That dispute specifically concerned the

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<sup>378</sup> *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1 (AUS-243), p. 1412.

<sup>379</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 89.

<sup>380</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 92.

<sup>381</sup> Appellate Body Report, *US – Clove Cigarettes*, paras. 94 and 95.

<sup>382</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

<sup>383</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 319. Appellate Body Report, *US – COOL*, para. 375. Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208.

<sup>384</sup> Honduras's appellant's submission, para. 491.

"competitive opportunities" of imported products *vis-à-vis like domestic products*.<sup>385</sup> It was on the basis that the measure at issue discriminated against the *group of imported products vis-à-vis like domestic products* that the Appellate Body found the measure to reduce the competitive opportunities available to imported products as a whole.<sup>386</sup> It was this skewing of the relevant market to the detriment of imported products as a whole that demonstrated that the measure had a *limiting effect on international trade*.

299. Before the Panel, the complainants sought to abstract this concept of a "limitation on competitive opportunities" from its crucial context, namely a comparison between the opportunities of imported products as a whole *vis-à-vis like domestic products*.<sup>387</sup> This is because the complainants' claims of trade-restrictiveness were not focused on restrictions on international *trade* at all. Rather, they concerned the alleged impact of the TPP measures on general market freedoms and dynamics – principally, the ability to use design features on tobacco packaging to advertise and promote tobacco products. The complainants attempted to bring such claims within the scope of Article 2.2 solely by using the *language* of "competitive opportunities" to describe these alleged market impacts. In so doing, the complainants rendered the concept meaningless for determining a *limiting effect on international trade* and, thus, for determining trade-restrictiveness within the meaning of Article 2.2.

300. The appellants rerun these same arguments now, before the Appellate Body, in referring to Articles I, II, III and XI of the GATT 1994 and positing that Article 2.2 protects "legitimate expectations" of WTO Members to predictable "competitive opportunities",<sup>388</sup> such that the relevant question is whether and to what extent technical regulations "create uncertainties and affect investment plans" and "restrict market access for imports".<sup>389</sup>

301. The "competitive opportunities" standard that the appellants continue to advocate replaces the concept of trade-restrictiveness set out in Article 2.2 with an altogether different construct – limitations on the alleged "competitive freedom" of market participants. As Honduras itself acknowledges, if "competitive freedom" were the relevant legal standard, virtually any technical regulation would be "trade-restrictive".<sup>390</sup> Indeed, it is hard to conceive of any technical regulation that would not impose, with respect to at least one market segment or one market participant, a limiting condition on "competitive freedom" that did not exist prior to its enactment.

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<sup>385</sup> See, e.g. Australia's second written submission, Part III.C.2; Australia's response to Panel question No. 117, paras. 112 and 113.

<sup>386</sup> Appellate Body Reports, *US – COOL*, para. 477.

<sup>387</sup> Australia's second written submission, paras. 370-374.

<sup>388</sup> Honduras's appellant's submission, para. 501.

<sup>389</sup> Dominican Republic's appellant's submission, para. 1304. See also Honduras's appellant's submission, para. 503.

<sup>390</sup> Honduras's appellant's submission, para. 503.

302. Moreover, 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 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>391</sup>

303. In sum, 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 *US – COOL* and *US – COOL (Article 21.5 – Canada and Mexico)*. This overly broad legal standard would read the terms "trade-restrictive" and "obstacles to international trade" out of the text of Article 2.2.

304. Accordingly, the Panel did not err in finding that any limitations on the ability to compete on the basis of brand differentiation were insufficient, without more, to establish that the TPP measures are "trade-restrictive" within the meaning of Article 2.2, particularly where such modification may in principle *increase* competition on the market.<sup>392</sup> Rather, the Panel correctly held that it was incumbent upon the complainants to demonstrate "*how* such effects on the conditions of competition on the market give rise to a limiting effect on international trade in tobacco products."<sup>393</sup>

305. In conducting that assessment, the Panel neither required that the TPP measures were discriminatory, nor applied a "heightened" evidentiary standard of actual trade effects for non-discriminatory measures, as the appellants erroneously suggest. These are the arguments to which Australia turns next.

1. The Panel Did Not Require that a Technical Regulation Be Discriminatory in Order to be "Trade-Restrictive"

306. Honduras argues that the Panel committed a legal error by requiring that the TPP measures be discriminatory in order to be trade-restrictive under Article 2.2 of the TBT Agreement. According to Honduras, the fact that the limiting effect on competitive opportunities introduced by the TPP measures applied equally to all tobacco products on the Australian market was "irrelevant" for the Panel's analysis of trade-restrictiveness under Article 2.2.<sup>394</sup> Honduras maintains that the Panel

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<sup>391</sup> See Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208 and footnote 643 thereto.

<sup>392</sup> Panel Report, para. 7.1167.

<sup>393</sup> Panel Report, para. 7.1168.

<sup>394</sup> Honduras's appellant's submission, para. 511.

erroneously conflated Articles 2.1 and 2.2 of the TBT Agreement by requiring a difference in impact on imported products relative to domestic products.<sup>395</sup>

307. Honduras has failed to establish the essential predicate of its appeal claim. It is abundantly clear from the Panel's analysis that it did *not* require that the TPP measures be discriminatory in order to conclude that they are "trade-restrictive" under Article 2.2 of the TBT Agreement.

308. At the interpretative level, the Panel expressly held that discriminatory treatment of imported products was *not* required to establish that a technical regulation is "trade-restrictive" within the meaning of Article 2.2. Referring to the Appellate Body report in *US – COOL (Article 21.5 – Canada and Mexico)*, the Panel ruled that:

This finding confirms that "non-discriminatory internal measures" may be found to be "trade-restrictive" within the meaning of Article 2.2 of the TBT Agreement. This is consistent, in our view, with the fact that Article 2.1 and 2.2 establish distinct obligations in respect of technical regulations, concerning respectively the treatment of imported products relative to each other and relative to domestic products, and trade-restrictiveness. While the existence of discrimination may contribute to the establishment of "trade-restrictiveness" within the meaning of Article 2.2, a determination of "trade-restrictiveness" is not dependent on the existence of discriminatory treatment of imported products.<sup>396</sup>

309. Thus, contrary to Honduras's suggestion, the Panel neither imposed a "discrimination requirement"<sup>397</sup> under Article 2.2, nor conflated the disciplines of Article 2.1 and 2.2 of the TBT Agreement. To the contrary, the Panel was well aware of the distinctions between these legal disciplines, and expressly found that discrimination in the sense of Article 2.1, while potentially probative, was not *required* for demonstrating that a technical regulation was "trade-restrictive" within the meaning of Article 2.2.

310. This is corroborated by the Panel's application of Article 2.2 to the qualitative and quantitative evidence before it. Had the Panel truly imposed a "discrimination requirement" under Article 2.2, it would have concluded that the absence of any discrimination between imported and domestic tobacco products under the TPP measures was dispositive of "trade-restrictiveness" under Article 2.2. Instead, the Panel proceeded to examine the three distinct bases upon which the complainants argued that the TPP measures were trade-restrictive. Contrary to Honduras's suggestion, in no instance did the Panel engage in a "comparative assessment" of the conditions of competition for imported *vis-à-vis* domestic tobacco products that

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<sup>395</sup> Honduras's appellant's submission, paras. 507 and 508.

<sup>396</sup> Panel Report, para. 7.1074 (emphasis added).

<sup>397</sup> Honduras's appellant's submission, para. 508.

would have been required to establish discriminatory treatment of imported products.<sup>398</sup>

311. In assessing Honduras's argument that the TPP measures raised the entry barriers to the Australian market, the Panel sought to determine whether Honduras had demonstrated that the TPP measures would "make it more difficult for new brands to enter the market."<sup>399</sup> The Panel was ultimately unpersuaded that the expert report produced by Honduras established that the TPP measures "have raised or will significantly raise the barriers to entry into the Australian market for tobacco products *beyond their pre-existing level.*"<sup>400</sup> On this basis, the Panel concluded that the complainants did not demonstrate that the TPP measures "would have an adverse impact *on the opportunity for imported products to gain access to and compete on the Australian market* for tobacco products, be they imported or of domestic origin."<sup>401</sup>

312. Similarly, the Panel's assessment of volume or value effects of the TPP measures did not entail any "comparative assessment" of the conditions of competition of imported *vis-à-vis* domestic tobacco products. After calling into question whether any "downtrading effects" were attributable to the TPP measures, the Panel reasoned that the "reduction in overall consumption of tobacco products arising from the TPP measures may be expected to lead to a reduction in imports, to the extent that the domestic market is supplied by imports."<sup>402</sup> On this basis, the Panel concluded that "the TPP measures are trade-restrictive, insofar as, by reducing the use of tobacco products, they reduce *the volume of imported tobacco products* on the Australian market, and thereby have a 'limiting effect' on trade."<sup>403</sup>

313. In respect of purported value effects, the Panel sought to ascertain "whether the complainants have demonstrated that [the] reduced opportunity for brand differentiation has led to an increase in price competition and a fall in prices and consequently to a decrease in the sales value of tobacco products and the total value of imports."<sup>404</sup> The Panel observed that empirical evidence suggested an increase in prices since the entry into force of the TPP measures,<sup>405</sup> but did not exclude the possibility that a reduction in the value of imported tobacco products may happen in the future, either as a result of the effect of the TPP measures on consumption only or as a result of this effect combined with a fall in prices.<sup>406</sup>

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<sup>398</sup> Honduras's appellant's submission, para. 509.

<sup>399</sup> Panel Report, para. 7.1178.

<sup>400</sup> Panel Report, para. 7.1183 (emphasis added).

<sup>401</sup> Panel Report, para. 7.1187 (emphasis added).

<sup>402</sup> Panel Report, para. 7.1207.

<sup>403</sup> Panel Report, para. 7.1208 (emphasis added).

<sup>404</sup> Panel Report, para. 7.1214.

<sup>405</sup> Panel Report, para. 7.1218.

<sup>406</sup> Panel Report, para. 7.1225.

314. Finally, the Panel sought to ascertain whether "the potential and actual [compliance] costs identified are sufficient to demonstrate that the TPP measures have a limiting effect on international trade."<sup>407</sup> The Panel ultimately concluded that "the complainants have not sufficiently identified how compliance costs associated with the TPP measures [that producers] may have had, or have, are of such nature or magnitude as to have a limiting effect on trade."<sup>408</sup> Once again, nowhere in its analysis did the Panel compare the actual or potential compliance costs imposed by the TPP measures on foreign producers with those imposed on domestic tobacco producers.

315. It is facially evident both from the Panel's interpretation of Article 2.2 and of the Panel's application of that provision to the evidence and arguments before it that the Panel in no circumstance required that the TPP measures be discriminatory in order to conclude that they are trade-restrictive within the meaning of that provision. The Panel correctly examined whether the complainants had discharged their burden of demonstrating that the TPP measures have a "limiting effect on international trade", despite the fact that such measures are neither *de jure* nor *de facto* discriminatory. Honduras's claim to the contrary merely protests the Panel's *rejection* of the complainants' attempt to *divorce* the concept of a "limitation on competitive opportunities" from its crucial discrimination context to enable the complainants to argue that the TPP measures were "trade-restrictive" without having to establish that the measures would have a limiting effect on international trade in tobacco products. This is also what underpins the appellants' "actual trade effects" claim, to which Australia now turns.

2. The Panel Did Not Impose an "Actual Trade Effects" Test in Assessing the Trade-Restrictiveness of the TPP Measures

316. Both the Dominican Republic and Honduras argue that the Panel erred in *implicitly* requiring that the trade-restrictiveness of non-discriminatory measures such as the TPP measures be established with evidence of actual trade effects. The Dominican Republic posits that the Panel's application of a heightened requirement for non-discriminatory measures is evident from its statements that evidence of a limiting effect "will in particular be required in the case of a non-discriminatory internal measure"<sup>409</sup> and that the TPP measures "modify the conditions under which all manufacturers will compete" in the market.<sup>410</sup>

317. Honduras argues further that the Panel erred in dismissing its qualitative evidence on the basis of empirical evidence demonstrating that both the volume and value of imports had increased since the introduction of the TPP measures.<sup>411</sup>

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<sup>407</sup> Panel Report, para. 7.1242.

<sup>408</sup> Panel Report, para. 7.1242.

<sup>409</sup> Dominican Republic's appellant's submission, para. 1311 (quoting Panel Report, para. 7.1168).

<sup>410</sup> Dominican Republic's appellant's submission, para. 1313 (quoting Panel Report, para. 7.1166).

<sup>411</sup> Honduras's appellant's submission, para. 518.

Similarly, Honduras states that the Panel erroneously dismissed Professor Neven's qualitative evidence that the TPP measures would reduce profit margins for producers on the basis of evidence of actual costs and average profit margins.<sup>412</sup>

318. Once again, the appellants grossly mischaracterise the Panel's analysis and findings in respect of the element of trade-restrictiveness under Article 2.2 of the TBT Agreement. The Panel very clearly held that trade-restrictiveness could be established on the basis of both qualitative and quantitative evidence, and that evidence of actual trade effects was *not* required to determine whether and to what extent a technical regulation is "trade-restrictive" within the meaning of Article 2.2.

319. In discussing the relevant legal standard, the Panel expressly acknowledged that trade-restrictiveness may be established on the basis of qualitative evidence alone:

[I]t will not always be possible to quantify a particular factor analysed under Article 2.2, or to do so with precision, because of, *inter alia*, the nature of the objective pursued and the level of protection sought, or the nature, quantity, and quality of evidence existing at the time of our analysis, or the characteristics of the technical regulation at issue as revealed by its design and structure.... Depending on the circumstances of the case, such demonstration could be based on qualitative or quantitative arguments and evidence, or both, including evidence relating to the characteristics of the challenged measure as revealed by its design and operation.<sup>413</sup>

320. Subsequently, the Panel referred to the Appellate Body's guidance in *US - COOL (Article 21.5 – Canada and Mexico)* in expressly stating that evidence of actual trade effects is not required in order to demonstrate that a non-discriminatory technical regulation has a limiting effect on international trade:

[A]ppropriate evidence of such limiting effect will in particular be required in the case of a non-discriminatory internal measure. *We do not consider, however, that this demonstration must be based on actual trade effects.* Rather, it could in principle be based on a qualitative assessment, taking into account in particular the design and operation of the measures, or on a quantitative assessment of its actual trade effects, or both.<sup>414</sup>

321. The Panel's analysis of the evidence and arguments on the Panel record corroborates that it followed the Appellate Body's guidance in *US – COOL* and *US – COOL (Article 21.5 – Canada and Mexico)* in finding that evidence of actual trade effects, while probative, was not required to establish that the TPP measures are "trade-restrictive".

322. For example, contrary to Honduras's allegation, the Panel did not discount the evidentiary weight of Professor Neven's qualitative analysis on purportedly increased

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<sup>412</sup> Honduras's appellant's submission, para. 519 (quoting Panel Report, para. 7.1181).

<sup>413</sup> Panel Report, para. 7.1076.

<sup>414</sup> Panel Report, para. 7.1168 (emphasis added).

entry barriers for want of evidence of actual trade effects. Rather, the Panel simply found that Professor Neven's qualitative analysis, when assessed on its own merits, was internally contradictory, incomplete, unsubstantiated, and therefore unpersuasive.

323. Thus, whilst the Panel agreed with Professor Neven that the TPP measures would reduce brand loyalty for incumbent suppliers ("contestability effect"), the Panel found that such effects would tend to have *positive* effects on the prospects of market entry. The Panel further found that Professor Neven had failed to examine the relative strength of the contestability effect relative to the strength of other effects.<sup>415</sup>

324. Moreover, while the Panel agreed with Professor Neven that the TPP measures would reduce the ability to create brand awareness for a new product ("communication effect"), it reasoned that Professor Neven did not examine the extent to which the ability of new entrants to communicate with potential customers had already been significantly reduced by Australia's existing advertising and promotion restrictions, including point of sale and retail display bans.<sup>416</sup>

325. The Panel further considered that Professor Neven "assume[d] that profitability will fall and that margins will get slimmer as a result of the TPP measures, because of reduced product differentiation" ("competitive effect"), but reasoned that "[t]his assumption is mostly supported by abstract economic reasoning."<sup>417</sup> The Panel then referred to empirical evidence suggesting that the profitability of certain tobacco producers had increased since the TPP measures were introduced, but considered that such evidence "[did] not mean that, in the longer run, the [TPP] measures may not lead to a fall in prices and profit margins, as suggested by Professor Neven."<sup>418</sup>

326. The Panel's ultimate conclusion about the evidentiary weight to be attributed to Professor Neven's qualitative analysis on purportedly increased entry barriers merits quoting in full:

[I]t is not clear to us that the "contestability effect" of the measures would be as weak as Professor Neven assumes in *increasing* the scope for entry, or that the communication and competitive effect of the measures would be as strong as Professor Neven assumes, in *reducing* the opportunity for entry on the market. There is therefore significant uncertainty about the strength and the relative weight of each of the three effects on entry identified in Professor Neven's report, and therefore, regarding the overall effects of the TPP measures on entry into the market on the basis of the combined operation of these three effects. This uncertainty applies both to the short and the long term. While the post-implementation evidence suggests that all three effects may have been very weak, it seems plausible that in the longer run both the contestability and the competitiveness effects may reinforce. The analysis presented in Professor Neven's report therefore does not persuade us that the

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<sup>415</sup> Panel Report, para. 7.1179.

<sup>416</sup> Panel Report, para. 7.1180.

<sup>417</sup> Panel Report, para. 7.1181.

<sup>418</sup> Panel Report, para. 7.1181.

TPP measures have raised or will significantly raise the barriers to entry into the Australian market for tobacco products beyond their pre-existing level.<sup>419</sup>

327. Thus, the Panel not only examined Professor Neven's qualitative analysis on its own terms, but also expressly admitted that empirical evidence did not establish that the contestability and competitiveness effects that Professor Neven identified would continue to be very weak "in the longer run". Honduras is simply incorrect that the Panel dismissed Professor Neven's qualitative analysis in its entirety because of a lack of evidence showing the actual effects of the TPP measures.<sup>420</sup>

328. Similarly, and contrary to Honduras's argument, the Panel did not require evidence of actual effects on the sales value of tobacco products and the total value of imports. The Panel did consider that empirical evidence on cigarette prices suggested that the TPP measures "have led to an increase in the price of cigarettes which has more than offset the decrease in the quantity of cigarette[s] consumed and has thereby contributed to an increase in the value of the market."<sup>421</sup> At the same time, however, the Panel considered that the competing qualitative evidence before it "does not allow us to exclude the possibility that the TPP measures may have reinforced price competition, which does not seem unreasonable, nor, if this hasn't happened yet, that they may reinforce it in the future. It may well be that, as argued by Professor Neven, prices will eventually start decreasing, even if the evidence presented to us does not, in our view, persuasively demonstrate, that this will be the case."<sup>422</sup> On this basis, the Panel concluded that:

In light of the above, and considering our earlier findings relating to the effect of the TPP measures on consumption, and the possibility that, to the extent that the measures would continue to contribute to their objective, these effects may increase with time, we find that while the complainants have not demonstrated that the TPP measures have reduced the value of imported tobacco products on the Australian market, it cannot be excluded that this may happen in the future, either as a result of the effect of the measures on consumption only or as a result of this effect combined with a fall in prices.<sup>423</sup>

329. Finally, the Panel sought to ascertain "whether the *potential and actual* [compliance] costs identified [by the complainants] are sufficient to demonstrate that the TPP measures have a limiting effect on international trade."<sup>424</sup> The Panel eventually concluded that such compliance costs were unsubstantiated and were not of such additional magnitude so as to have any limiting effect on trade.<sup>425</sup>

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<sup>419</sup> Panel Report, para. 7.1183 (original emphasis).

<sup>420</sup> Honduras's appellant's submission, para. 519.

<sup>421</sup> Panel Report, para. 7.1218.

<sup>422</sup> Panel Report, para. 7.1224.

<sup>423</sup> Panel Report, para. 7.1225.

<sup>424</sup> Panel Report, para. 7.1242 (original emphasis).

<sup>425</sup> Panel Report, paras. 7.1242 and 7.1244.

330. In short, the Panel's analysis unequivocally demonstrates that it neither required evidence of actual trade effects, nor applied a stricter evidentiary standard, in ascertaining whether the TPP measures are "trade-restrictive" within the meaning of Article 2.2 of the TBT Agreement. To the contrary, 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.

**C. The Panel's Alleged Requirement that Downtrading be "Exclusively" Attributable to the TPP Measures Is Inconsequential to Its Ultimate Finding Under Article 2.2 of the TBT Agreement**

331. The Dominican Republic argues that the Panel erred in requiring that the actual trade effects that it had identified – in the form of downtrading from higher to lower priced tobacco products – be "exclusively" attributable to the TPP measures. According to the Dominican Republic, having recognised that the reduction in the ratio between high- and low-end tobacco products was at least partly attributable to the TPP measures, the Panel erroneously required that this reduction be "exclusively" caused by consumer downtrading.<sup>426</sup> The Dominican Republic posits that Article 2.2 requires only that the complainant demonstrates a "genuine relationship" between the measure and its purported effects, such that it sufficed to demonstrate that the TPP measures were one cause of consumer downtrading.<sup>427</sup>

332. It is unclear to Australia that the Panel imposed a rigid "exclusive cause" standard in its analysis of trade-restrictiveness under Article 2.2 of the TBT Agreement. As the Dominican Republic acknowledges, the Panel appeared to properly understand the relevant legal standard in seeking to ascertain whether the acceleration in the decrease in the ratio of higher- to low-priced cigarette sales following the entry into force of the TPP measures "may, *in part* or in whole, be attributed to the TPP measures".<sup>428</sup>

333. However, even if the Panel did impose an "exclusive cause" standard to assess trade-restrictiveness under Article 2.2 of the TBT Agreement, any such error would be *immaterial* and therefore insufficient to overturn the Panel's finding that the TPP measures do not constitute "unnecessary obstacles to international trade" within the meaning of Article 2.2. This is because even if the Panel found evidence of downtrading attributable to the TPP measures, and found that such downtrading is "trade-restrictive" in the sense of a "limiting effect on trade", the Panel would nonetheless have found the alternatives proposed by the complainants to be more "trade-restrictive" for the same reason. As a result, the complainants would still have failed to demonstrate that the TPP measures are "more trade-restrictive than necessary" to fulfil Australia's objective.

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<sup>426</sup> Dominican Republic's appellant's submission, para.1322.

<sup>427</sup> Dominican Republic's appellant's submission, para. 1327.

<sup>428</sup> Panel Report, Appendix E, para. 47 (emphasis added).

334. In particular, with respect to the specific allegation of downtrading, the Panel found, on the basis of the econometric evidence, that "the increase in relative cigarette price *and excise tax hikes* have had a negative and *greater* impact on the ratio of higher- to low-priced cigarette wholesale sales."<sup>429</sup> Thus, to the extent that downtrading constituted stand-alone evidence of a limiting effect on international trade, the evidence on the record demonstrated that the complainants' proposed alternative of an increase in excise taxes would have a *greater* downtrading effect – and would therefore give rise to a *greater* limiting effect on international trade in tobacco products. Moreover, because the complainants offered their proposed alternatives "cumulatively" or "in combination" with one another, including some form of increased taxation, under no circumstance would their proposed alternatives be *less* trade-restrictive than the TPP measures.<sup>430</sup>

335. For this reason, even if the Panel were to have erroneously required downtrading to be "exclusively" attributable to the TPP measures, this would be inconsequential to the Panel's ultimate finding that the TPP measures are not more trade-restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement.

**D. The Panel Did Not Require Consideration of Possible Mitigating Actions by Suppliers/Producers in Examining the Trade-Restrictiveness of the TPP Measures**

336. Next, the Dominican Republic claims that the Panel erred in its application of Article 2.2 to the facts of this dispute by taking into consideration potential supply-side reactions to the trade-restrictive effects of the TPP measures.<sup>431</sup> According to the Dominican Republic, the Panel erred in considering whether the conduct of private actors mitigates the trade-restrictive effects of the TPP measures.<sup>432</sup> In support of its claim of error, the Dominican Republic refers to panel and Appellate Body jurisprudence establishing that findings of inconsistency under Article III of the GATT 1994 are not precluded where actions of private parties may avoid tax or regulatory discrimination resulting from the relevant measures.<sup>433</sup>

337. The Dominican Republic's challenge is directed at the following passage of the Panel's analysis:

In our view, however, a distinction needs to be made between demand for tobacco products and consumption (or sales) of tobacco products, where the former captures the inclination of consumers to purchase a product while the latter results from the interaction between demand and supply. We agree with

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<sup>429</sup> Panel Report, Appendix E, para. 56(c) (emphasis added).

<sup>430</sup> Panel Report, para. 7.1717.

<sup>431</sup> Dominican Republic's appellant's submission, para. 1331.

<sup>432</sup> Dominican Republic's appellant's submission, para. 1333.

<sup>433</sup> Dominican Republic's appellant's submission, paras. 1334-1336 (quoting Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 117; Panel Report, *India – Solar Cells*, para. 7.95; and Appellate Report, *US – FSC (Article 21.5 – EC)*, para. 220).

Professor Neven, the complainants' expert, that when considering the effect of branding or, for that matter, of restrictions on branding on consumption, it is important to consider both supply and demand. As he explains, this is because prohibitions of branding may not lead to a reduction of consumption because such restrictions affect not only the demand for a product but also its supply. Measures that reduce product differentiation between brands tend to force firms to compete more intensely in the market, which may lead to an increase in sales. In our view, in order to demonstrate that TPP measures are trade-restrictive, a demonstration of alleged effects of the TPP measures on demand would not be sufficient. Instead, a demonstration of alleged effects of the TPP measures on consumption would be needed.<sup>434</sup>

338. In the above passage, the Panel accepted an argument put forward by the *complainants'* expert that demand data may be ill-suited to establish the effects of the TPP measures on smoking behaviour, insofar as restrictions on product differentiation may *increase* competition and therefore sales in the marketplace. According to Professor Neven, "this supply response to regulation is not merely a voluntary decision of producers, but is a behaviour *dictated by market interactions*".<sup>435</sup>

339. Thus, contrary to what the Dominican Republic suggests, the Panel did not consider that the trade-restrictiveness of the TPP measures could somehow be "cured" or "mitigated" where suppliers adapted to the effects of the technical regulation. Rather, the Panel relied on the complainants' expert evidence of the *effects of the TPP measures on the market* to inform its assessment of the measures' trade-restrictiveness. To this end, the Panel accepted the complainants' expert's view that consumption (i.e. sales) data was a more accurate basis than demand alone for assessing the market effects of the TPP measures to determine whether the measures have a *limiting* effect on international trade.

340. In Australia's view, there is no reason why the Panel should have excluded consumption data from its analysis of the trade-restrictiveness of the TPP measures. Since the relevant inquiry under Article 2.2 of the TBT Agreement is whether the TPP measures had a "limiting effect on international trade", in conducting that assessment it was entirely proper for the Panel to ascertain the effects of the TPP measures in the marketplace, where the forces of supply and demand interact. Indeed, in the context of Article 2.1 of the TBT Agreement, the Appellate Body has expressly held that it is appropriate to review both supply and demand side evidence in determining how a technical regulation affects the conditions of competition in the marketplace.<sup>436</sup>

341. For these reasons, the Panel did not err in taking into account consumption (i.e. sales) data in determining whether the TPP measures have a limiting effect on international trade and are therefore "trade-restrictive" within the meaning of Article 2.2 of the TBT Agreement.

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<sup>434</sup> Panel Report, para. 7.1201.

<sup>435</sup> Neven Report (UKR-3), p. 20 (emphasis added).

<sup>436</sup> See, e.g. Appellate Body Report, *US – COOL*, para. 349 (where the Appellate Body examines whether recordkeeping and verification requirements imposed on upstream producers implied higher compliance costs for processors of imported livestock).

**E. The Panel Did Not Act Inconsistently with Article 11 of the DSU in Its Assessment of the Complainants' Downtrading Evidence**

342. Finally, the Dominican Republic claims that the Panel acted inconsistently with Article 11 of the DSU in its assessment of the complainants' evidence on downtrading. The Dominican Republic argues that the Panel failed to make an objective assessment of this evidence for three reasons. First, the Dominican Republic alleges that the Panel compromised its due process rights by denying the Dominican Republic an opportunity to comment on Figure E.6. Second, the Dominican Republic maintains that the Panel failed to provide a reasoned and adequate explanation for the inferences that it drew from Figure E.6. Third, the Dominican Republic posits that the Panel "made the case" for Australia when it rejected the complainants' evidence based on the Panel's own graphical analysis.<sup>437</sup>

343. In Part VII.B below, Australia provides a detailed discussion of the bounds of a panel's discretion as a trier of fact under Article 11 of the DSU. When viewed against those standards, it is evident that the Panel acted consistently with Article 11 of the DSU in its assessment of the complainants' downtrading evidence. The Panel duly took such evidence into account, and did not violate Article 11 merely by attributing to it a weight and significance that is different than that attributed to it by the complainants.<sup>438</sup>

344. First, the Dominican Republic's allegation that the graphical analysis in Figure E.6 somehow violates its due process rights ignores the fact that a panel has the authority under Article 11 of the DSU to develop its own reasoning.<sup>439</sup> The Appellate Body has explained that, in the exercise of that authority, a panel is neither required "to test its intended reasoning with the parties",<sup>440</sup> nor to "engage with the parties upon the findings and conclusions that it intends to adopt in resolving the dispute".<sup>441</sup> If the parties understand what they are required to prove, and a panel does not depart radically from the cases put forward by the parties, "a panel is not required to ventilate its intended analysis in advance of rendering its decision."<sup>442</sup>

345. Thus the Panel was *not required* under Article 11 of the DSU to give the Dominican Republic advance notice of its reasoning, or to provide the Dominican Republic with an opportunity to comment on the graphical analysis in Figure E.6, which the Dominican Republic admits was drawn from the panel record and based on the Dominican Republic's own evidence.<sup>443</sup> In any event, the Dominican Republic had the opportunity to comment or raise any concerns it may have had about Figure

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<sup>437</sup> Dominican Republic's appellant's submission, para. 1356.

<sup>438</sup> Appellate Body Report, *China – Raw Materials*, para. 341.

<sup>439</sup> Appellate Body Report, *EC – Hormones*, para. 156.

<sup>440</sup> See Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.177.

<sup>441</sup> See Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 1137.

<sup>442</sup> See Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, fn 2323.

<sup>443</sup> Dominican Republic's appellant's submission, para. 1349 and fn 1287.

E.6 during the interim review stage of proceedings under Article 15 of the DSU, but chose not to do so.

346. Second, the Dominican Republic's allegation that the Panel failed to provide a "reasoned and adequate explanation" 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. Thus, the Panel acted within the bounds of its discretion under Article 11 of the DSU in reaching the conclusion that at least part of the reduction in the ratio of high- to low-priced cigarette wholesale sales was due to an *overall* reduction in sales volumes as a result of the TPP measures.

347. Finally, the Dominican Republic accuses the Panel of "making the case" for Australia by developing Figure E.6 on the basis of statistical data presented by the complainants. As Australia elaborates in further detail in Part VII.B.3 below, the Panel retained the discretion under Article 11 of the DSU to develop its own reasoning, and is not required to restrict itself to the evidence and arguments presented by the complainants.<sup>444</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>445</sup> Moreover, the Panel is "not required to test its intended reasoning with the parties",<sup>446</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.

348. Accordingly, the appellants have failed to demonstrate that the Panel exceeded the bounds of its discretion under Article 11 of the DSU in assessing the complainants' downtrading evidence. In any event, even if the appellants had demonstrated that the Panel erred in its appreciation of Figure E.6, they have failed to explain why this error would be so *material* as to call into question the objectivity of the Panel's analysis. The appellants' mere *assertion* that these alleged errors in the Panel's appreciation of the evidence are "consequential"<sup>447</sup> does not explain why those errors rise to the required standard of materiality.

## F. Conclusion to Section IV

349. For all the foregoing reasons, the appellants have failed to demonstrate that the Panel erred in its interpretation and application of Article 2.2 of the TBT Agreement, or acted inconsistently with Article 11 of the DSU, in its assessment of the trade-restrictiveness of the TPP measures. Australia therefore respectfully requests

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<sup>444</sup> Appellate Body Report, *EC – Hormones*, para. 156.

<sup>445</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 357-358 and 406.

<sup>446</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.177.

<sup>447</sup> Dominican Republic's appellant's submission, para. 1358.

that the Appellate Body reject the appellants' claims of error with respect to the Panel's analysis of trade-restrictiveness under Article 2.2 of the TBT Agreement in their entirety.

**V. CLAIMS UNDER ARTICLE 2.2 OF THE TBT AGREEMENT:  
CONTRIBUTION**

350. Honduras claims that the Panel erred in failing to properly apply the legal standard for examining the degree of contribution of the TPP measures to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products. More specifically, Honduras argues that the Panel committed the following legal errors in its analysis of contribution:

- The Panel did not focus on the actual impact "on smoking behaviour" and "on the use of tobacco products", but gave equal or more weight to perceptions and intentions not corroborated by evidence on actual behaviour;
- The Panel did not focus on the "actual impact" of the measures on the use of tobacco products, but included baseless speculation about an uncertain future impact of the measures "over time" in light of uncorroborated statements about perceptions and intentions;
- The Panel did not make findings about the contribution of "the challenged [plain packaging measures] themselves", but rather about the challenged measures *in combination with* all other tobacco control measures adopted by Australia;
- The Panel did not examine and consider the degree of contribution by evaluating "the relevance and probative force of each piece thereof", rather it simply summarised the evidence presented and noted certain weaknesses without drawing any conclusions from these weaknesses in terms of the weight to be attached to this evidence, ultimately giving equal weight to all evidence;
- The Panel did not engage in any serious or objective assessment of the "scientific and methodological rigour" of the evidence on the degree of contribution presented in application of the SPS test it considered to be applicable, but simply included all of the evidence – or at least all of the evidence submitted by Australia – and effectively gave it all equal weight; and
- Despite its repeated statements about its intended approach to the econometric evidence, the Panel in fact conducted its own (flawed) econometric assessment of the evidence as it developed certain calculation

and estimation methods that were never discussed with the parties and that remain unexplained even in the Panel's own final report.<sup>448</sup>

351. It is now a well-established principle in the jurisprudence of the Appellate Body that "an issue will *either* be one of application of the law to the facts *or* an issue of the objective assessment of facts, and not both."<sup>449</sup> Whereas a claim of consistency or inconsistency of a given set of facts with the requirements of a treaty provision is a legal question subject to appellate review, allegations implicating a panel's appreciation of facts and evidence fall under Article 11 of the DSU.<sup>450</sup> In *EC – Seal Products*, for example, the Appellate Body noted that where claims relate to a panel's weighing and appreciation of the evidence, they are primarily *factual* in nature, and such claims are therefore properly assessed under Article 11 of the DSU as challenges to the objectivity of the panel's assessment of the facts.<sup>451</sup>

352. In Australia's view, Honduras's claims of error in respect of the Panel's analysis of the contribution element under Article 2.2 of the TBT Agreement relate to the Panel's appreciation of the evidence and arguments, and the relative weight that the Panel attributed to specific pieces of evidence. Honduras itself effectively concedes as much, given its failure to develop legal arguments in relation to any of its purported application claims, opting instead merely to cross-reference its arguments in support of its claims under Article 11 of the DSU.<sup>452</sup>

353. In these circumstances, Honduras's purported application claims in respect of the Panel's contribution analysis should be rejected for the same reasons that the Appellate Body rejected the similar allegations in *China – Rare Earths*. In that dispute, the Appellate Body found that China's claims of error in legal application in fact concerned the panel's alleged failure to provide an evidentiary basis for findings, failure to provide explanations, failure to address or "grapple with" arguments and evidence, and failure to discuss or engage with the evidence. For these reasons, the Appellate Body concluded that China's claims concerned the Panel's assessment of the facts and evidence, and therefore must be assessed under Article 11 of the DSU, rather than as purported errors in legal application.<sup>453</sup>

354. The Appellate Body recognised that a failure to make a claim under Article 11 of the DSU when challenging a factual assessment made by the Panel will have "serious consequences" for the appellant, because the claim will not fall within the scope of appellate review.<sup>454</sup> As early as *Mexico – Anti-Dumping Measures on Rice*,

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<sup>448</sup> Honduras's appellant's submission, para. 554.

<sup>449</sup> Appellate Body Report, *EC and Certain member States – Large Civil Aircraft*, para. 872 (emphasis in original).

<sup>450</sup> Appellate Body Report, *China – GOES*, para. 183.

<sup>451</sup> Appellate Body Report, *EC – Seal Products*, para. 5.243.

<sup>452</sup> Honduras's appellant's submission, para. 554, fns 304-308.

<sup>453</sup> Appellate Body Report, *China – Rare Earths*, para. 5.175.

<sup>454</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872.

the Appellate Body declined to make findings with respect to claims related to a panel's assessment of the evidence when the appellant failed to properly bring those claims under Article 11 of the DSU.<sup>455</sup> More recently, in *US – Large Civil Aircraft*, the Appellate Body declined to consider an appeal related to the panel's appreciation of the facts when this claim had not been advanced under Article 11 of the DSU.<sup>456</sup>

355. The same outcome is warranted here. The purported "legal errors" that Honduras advances regarding the Panel's *contribution analysis* under Article 2.2 of the TBT Agreement in fact relate to the Panel's *appreciation of the evidence*. Honduras's failure to bring those claims of error under Article 11 of the DSU is therefore dispositive. Accordingly, Australia respectfully requests that the Appellate Body reject Honduras's claims that the Panel erred in its application of Article 2.2 of the TBT Agreement to its contribution analysis on that basis alone. In Section VII below, Australia addresses Honduras's separate claims that the Panel acted inconsistently with Article 11 of the DSU in its assessment of the evidence on the contribution of the TPP measures to Australia's public health objective.

## **VI. CLAIMS UNDER ARTICLE 2.2 OF THE TBT AGREEMENT AND ARTICLE 11 OF THE DSU: ALTERNATIVES**

### **A. Introduction to Section VI**

356. Before the Panel, the complainants put forward four alternative measures that they asserted were reasonably available to Australia and that, in their view, would be less trade-restrictive than the TPP measures and make an equivalent contribution to Australia's objective, taking account of the risks non-fulfilment would create. These measures were: (i) an increase in the minimum legal purchase age ("MLPA") in Australia from 18 to 21 years of age; (ii) an increase in excise taxes; (iii) improved social marketing campaigns; and (iv) a "pre-vetting mechanism" to individually assess particular elements of each tobacco package and stick before they were allowed in the Australian market. The appellants' claims concern only the Panel's findings in relation to an increase in the MLPA and an increase in excise taxes.

357. In response to the complainants' assertions, Australia submitted that the measures proposed by the complainants were not in fact *alternatives* to the TPP measures, because they were *existing* elements of Australia's comprehensive tobacco control policy.<sup>457</sup> Australia also explained that, in the particular circumstances of this dispute, any alternative that would make an equivalent contribution to the TPP measures would reduce the volume of imports to the same extent, and would therefore be at least as trade-restrictive as the TPP measures.<sup>458</sup> Conversely, any alternative that was *less* trade-restrictive than the TPP measures would, by definition, make a lesser

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<sup>455</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 274.

<sup>456</sup> Appellate Body Report, *US – Large Civil Aircraft*, para. 979.

<sup>457</sup> Panel Report, paras. 7.1353 and 7.1355. The only exception was the "pre-vetting mechanism".

<sup>458</sup> Panel Report, para. 7.1360.

contribution to Australia's public health objective of reducing the use of, and exposure to, tobacco products.<sup>459</sup>

358. The Panel began its analysis by evaluating whether the four measures the complainants identified were "alternatives" to the TPP measures. Referring to the panel report in *China-Rare Earths*, the Panel found that "variations" of existing measures *could* be deemed to be alternatives for the purposes of the Panel's comparative analysis under Article 2.2, and proceeded to evaluate each of the complainants' proposed alternatives on this basis.<sup>460</sup>

359. The Panel then examined whether each of the proposed alternatives would be *less trade-restrictive* than the TPP measures, applying the same interpretative and analytical approach that it used to evaluate the trade-restrictiveness of the TPP measures. The Panel began by recalling its prior finding that a measure is trade-restrictive within the meaning of Article 2.2 of the TBT Agreement where it has a "limiting effect on international trade".<sup>461</sup> Applying this legal standard in a context where the complainants argued that each alternative could be "calibrated" to achieve a contribution equivalent to that of the TPP measures<sup>462</sup>, the Panel concluded that none of the alternative measures identified by the complainants would be *less* trade-restrictive than the TPP measures.<sup>463</sup> The Panel reasoned that, where it was undisputed that all consumption in Australia was served by imports, to the extent that each alternative would be calibrated to make an *equivalent* contribution to Australia's objective of reducing the use of, and exposure to, tobacco products as the TPP measures, each alternative would necessarily be *equally* trade-restrictive in terms of its impact on the volume of trade in tobacco products.<sup>464</sup>

360. On this basis, the Panel concluded that the complainants had failed to identify *any* alternative measures that would be *less* trade-restrictive than the TPP measures.<sup>465</sup> In each instance, the Panel recognised that this finding was sufficient to complete its analysis of the proposed alternatives, but nonetheless considered it appropriate to examine the contribution of each alternative on an *arguendo basis*.<sup>466</sup>

361. To this end, the Panel found that an increase in the MLPA would not make an equivalent contribution to Australia's public health objective because it would only impact the availability of tobacco products to individuals below 21 years of age, and would not address those aspects of demand for tobacco products that are addressed by

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<sup>459</sup> Panel Report, para. 7.1360.

<sup>460</sup> Panel Report, para. 7.1385 (quoting Panel Report, *China – Rare Earths*, para. 7.186).

<sup>461</sup> Panel Report, para. 7.1411.

<sup>462</sup> See, e.g. Panel Report paras. 7.1414, 7.1490, 7.1583, 7.1649.

<sup>463</sup> Panel Report, paras. 7.1417, 7.1496, 7.1584 and 7.1649-7.1651.

<sup>464</sup> Panel Report, paras. 7.1414, 7.1491, 7.1583 and 7.1649.

<sup>465</sup> Panel Report, paras. 7.1417, 7.1496, 7.1584 and 7.1649-7.1651

<sup>466</sup> Panel Report, paras. 7.1418, 7.1496, 7.1584 and 7.1654. The Panel also proceeded to examine whether each of the proposed alternatives was "reasonably available" to Australia.

the TPP measures.<sup>467</sup> Similarly, the Panel found that an increase in excise taxes would not make an equivalent contribution to the TPP measures, as it would leave unaddressed the effects of the TPP measures on the appearance of tobacco products, including their ability to convey images or messaging, and to act as a conditioned cue, such that their associated impact on smoking behaviours would be foregone.<sup>468</sup>

362. Having conducted this further *arguendo* analysis, the Panel concluded that the complainants had failed to identify less trade-restrictive measures that would be reasonably available to Australia and make an equivalent contribution to its objective, taking account of the risks non-fulfilment would create.<sup>469</sup>

363. On appeal, Honduras and the Dominican Republic claim that the Panel erred in its comparative analysis of alternatives under Article 2.2 of the TBT Agreement. Both appellants claim that the Panel erred by assessing the trade-restrictiveness of their proposed alternatives against an allegedly erroneous legal standard.<sup>470</sup>

364. Both appellants also claim that the Panel erred in assessing the *contribution* of the proposed alternatives by rejecting their proposed alternatives on the basis that they would not operate through the same *mechanisms* as the TPP measures.<sup>471</sup> The appellants also argue that the Panel erred by failing to compare the degree of contribution of the proposed alternatives in light of their synergies with other elements of Australia's comprehensive tobacco control policy.<sup>472</sup>

365. Honduras alone further argues that the Panel erroneously required that the alternative measures provide an "identical" contribution as a "substitute" to the TPP measures<sup>473</sup>, and that the Panel erroneously applied a more rigorous standard of "equivalence" in the context of a comprehensive suite of measures.<sup>474</sup>

366. Finally, the Dominican Republic additionally claims that the Panel acted inconsistently with Article 11 of the DSU in its assessment of the trade-restrictiveness

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<sup>467</sup> Panel Report, paras. 7.1459 and 7.1460.

<sup>468</sup> Panel Report, para. 7.1527. The Panel likewise found that improved social marketing campaigns and the pre-vetting mechanism proposed by the complainants would not make an equivalent contribution to Australia's objective of reducing the use of, and exposure to, tobacco products in Australia. See Panel Report, paras. 7.1464, 7.1531, 7.1615 and 7.1685.

<sup>469</sup> Panel Report, paras. 7.1471, 7.1545, 7.1624 and 7.1716.

<sup>470</sup> Dominican Republic's appellant's submission, para. 1420; Honduras's appellant's submission, para. 560.

<sup>471</sup> Dominican Republic's appellant's submission, para. 1492; Honduras's appellant's submission, para. 621.

<sup>472</sup> Dominican Republic's appellant's submission, para. 1525; Honduras's appellant's submission, para. 646.

<sup>473</sup> Honduras's appellant's submission, para. 635.

<sup>474</sup> Honduras's appellant's submission, para. 662.

of an increase in MLPA; and in finding that an increase in MLPA and in tobacco taxation would *not* make an equivalent contribution to Australia's objective.<sup>475</sup>

367. Australia addresses each of these claims in turn below, and demonstrates that they should be dismissed by the Appellate Body. However, Australia first explains why, in the particular circumstances of this dispute, the Appellate Body should summarily dismiss the appellants' claims without addressing their substance.

**B. The Appellate Body Should Summarily Dismiss the Appellants' Claims Regarding the Panel's Analysis of Alternative Measures**

368. This dispute presents a unique set of circumstances that render it unnecessary for the Appellate Body to address the substance of the appellants' claims regarding the Panel's comparative analysis of alternative measures under Article 2.2 of the TBT Agreement.

369. 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.

370. For the reasons Australia explained in Section IV above, the appellants' fundamentally redefined the legal standard for "trade-restrictiveness" to focus on "competitive opportunities" for imported products. This interpretation has no basis in the text of Article 2.2, as interpreted by the Appellate Body, which makes it clear that the relevant legal standard is one of "limiting effect on international trade". 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. On this basis alone, the Appellate Body should conclude that the complainants have failed to establish that the Panel erred in its analysis of alternative measures under Article 2.2 of the TBT Agreement.

371. Moreover, if the Appellate Body upholds the Panel's legal interpretation of trade-restrictiveness, there would be no need to address the second part of the appellants' claims, regarding the Panel's alleged errors in analysing the degree of *contribution* of each alternative. This is because a proposed alternative measure must be *less* trade-restrictive than the challenged measure in order to substantiate a claim that the challenged measure is "more trade-restrictive than necessary" under Article 2.2. The appellants' failure to challenge the Panel's findings that each of the proposed alternatives would be equally or more trade-restrictive than the TPP measures under the Panel's (proper) interpretation of trade-restrictiveness (rather than under the complainants' erroneous redefinition) would require the Appellate Body to dismiss the complainants' claims with respect to alternatives in their entirety, even if it faulted the Panel's *arguendo* contribution analysis.

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<sup>475</sup> Dominican Republic's appellant's submission, paras. 1421 and 1452.

372. Australia recalls that it is undisputed that the Australian market is supplied exclusively by imported tobacco products.<sup>476</sup> In these circumstances, 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.

373. For the same reasons, if the alternatives proposed by the complainants were *less* trade-restrictive than the TPP measures, by limiting international trade in tobacco products to a lesser degree, they would necessarily make a *lesser* contribution to Australia's objective of reducing the use of, and exposure to, tobacco products

374. Accordingly, if the Appellate Body upholds the Panel's interpretation of the term "trade-restrictive" under Article 2.2, this would provide a sufficient basis for the Appellate Body to dismiss the *entirety* of the complainants' appeal of the Panel's comparative analysis of alternatives under Article 2.2 of the TBT Agreement. Given that Australia has already established, in Section IV above, that the Panel did *not* err in finding that the TPP measures are "trade-restrictive" within the meaning of Article 2.2 of the TBT Agreement, Australia respectfully requests that the Appellate Body should reject – on this basis alone – the complainants' claim that the Panel erred in its comparative analysis of alternatives under Article 2.2 of the TBT Agreement.

375. For the sake of completeness, however, in the following section Australia briefly addresses the complainants' arguments that the Panel incorrectly applied Article 2.2 of the TBT Agreement when determining that increasing the MLPA and increasing excise taxes in Australia would not make an equivalent contribution to Australia's objective.

### **C. The Panel Did Not Err in Finding that the Alternatives Did Not Make an Equivalent Contribution to Australia's Objective**

376. The complainants advance four distinct arguments to challenge the Panel's finding that increasing the MLPA and excise taxes, respectively, would not make an equivalent contribution to Australia's public health objective. Australia will first address the two lines of argument advanced by both appellants, before turning to the two additional arguments advanced by Honduras alone.

#### **1. The Panel Properly Assessed the Degree of Contribution of the Alternatives to Australia's Objective of Reducing the Use of, and Exposure to, Tobacco Products**

377. First, the Dominican Republic argues that the Panel erred by rejecting the proposed alternatives on the basis that they contributed to Australia's objective of reducing smoking through *different means* than the TPP measures.<sup>477</sup> According to

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<sup>476</sup> Panel Report, para. 7.1207.

<sup>477</sup> Dominican Republic's appellant's submission, para. 1492.

the Dominican Republic, the Panel erroneously held that an alternative could not make an equivalent contribution unless it specifically addresses the design features of tobacco packaging that the TPP measures address.<sup>478</sup> For the Dominican Republic, the Panel's approach incorrectly implies that, whenever a Member adopts a trade-restrictive measure as part of a comprehensive policy, an alternative measure will not make an equivalent contribution unless it works through the same mechanism as the challenged measure.<sup>479</sup>

378. Similarly, Honduras argues that the Panel erred by assessing the extent to which increasing the MLPA and excise taxes would contribute to reducing the appeal of tobacco products. According to Honduras, the Panel thus erroneously focused on the *specific mechanisms* by which the TPP measures operate, when it should have focused instead on the extent to which each alternative contributed to the *objective* of reducing the use of, and exposure to, tobacco products in Australia.<sup>480</sup>

379. The complainants' allegations are demonstrably false. The Panel explicitly sought to ascertain the extent to which an increase in the MLPA "could contribute to Australia's *objective* of improving public health by reducing the use of, and exposure to, tobacco products"<sup>481</sup>; and the extent to which an increase in tobacco taxation "is capable of contributing to *reducing the use of tobacco products*."<sup>482</sup> In conducting this inquiry, the Panel expressly acknowledged that "a proposed alternative measure may achieve an equivalent degree of contribution in ways different from the technical regulation at issue."<sup>483</sup>

380. In respect of an increase in the MLPA, the Panel found that this purported alternative would not make an equivalent contribution to Australia's objective of reducing smoking because it would address "only the availability of tobacco products to individuals below 21 years of age", and not "initiation, cessation, or relapse in any age group over 21."<sup>484</sup> The fact that an increase in the MLPA would not affect those design features that contribute to making tobacco packaging more appealing was an additional – and *entirely appropriate* – reason for which the Panel found that this proposed alternative would not make an equivalent contribution to that of the TPP measures to reducing the use of, and exposure to, tobacco products in Australia.<sup>485</sup>

381. This is because, as the Panel properly recognised, while a proposed alternative is not required to contribute to the objective at issue in an *identical manner* to the

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<sup>478</sup> Dominican Republic's appellant's submission, paras. 1499 and 1502.

<sup>479</sup> Dominican Republic's appellant's submission, paras. 1512 and 1517.

<sup>480</sup> Honduras's appellant's submission, paras. 620-631.

<sup>481</sup> Panel Report, para. 7.1432 (emphasis added).

<sup>482</sup> Panel Report, para. 7.1511 (emphasis added).

<sup>483</sup> Panel Report, para. 7.1454 (referring to Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215).

<sup>484</sup> Panel Report, para. 7.1459.

<sup>485</sup> Panel Report, para. 7.1459.

challenged measure, this does not foreclose the possibility that an alternative that merely substitutes an *existing* element of a comprehensive strategy – in a manner that "would leave unaddressed the aspect of the problem that the challenged measure[] seek[s] to address" – may not in fact achieve an *equivalent* degree of contribution.<sup>486</sup> Rather, in these circumstances, as the Appellate Body made clear in *Brazil – Retreaded Tyres* (which Australia discusses in further detail in Part 3 below), "substituting one element of [a] comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect."<sup>487</sup>

382. To this end, in respect of an increase in excise taxes, the Panel properly understood that *substituting* the TPP measures with a variation to Australia's *existing* increases in excise taxes would reduce the synergies between the elements of Australia's comprehensive tobacco control measures and could thus potentially undermine the contribution of increased taxation to the objective of reducing the use of, and exposure to, tobacco products in Australia. The core of the Panel's rationale in this respect merits quoting in full:

[T]he TPP measures occupy a role as a contributing element in the comprehensive tobacco control regime maintained by Australia, which includes in particular a total prohibition on advertising and promotion and GHWs, as well as regular scaled increases of tobacco taxation. In this context, as discussed above, the TPP measures contribute to reinforcing, and avoid undermining, the broader prohibition on advertising and promotion for tobacco products and GHWs that Australia also maintains, neither of which is challenged in these proceedings. We also note that, as discussed above, Australia also already maintains a high level of excise and other taxes on tobacco products, as an integral component of its comprehensive tobacco control strategy. In this context, an increased tobacco excise without the simultaneous contribution by the TPP measures, described above, would impact consumer behaviour while at the same time preserving packaging features and brand appeal that could possibly frustrate or undermine the price disincentive effected by excise increases.<sup>488</sup>

383. The Panel correctly reasoned that, in the absence of the TPP measures, any contribution that increased excise taxes would make to reducing the use of, and exposure to, tobacco products 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, and to act as a conditioned smoking cue for addicted smokers. Accordingly, the Panel *correctly* held that the proposed variation to Australia's existing scaled increases in excise taxes would not contribute to Australia's objective of reducing the use of, and exposure to, tobacco products to a degree *equivalent* to that of the TPP measures.

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<sup>486</sup> Panel Report, para. 7.1731.

<sup>487</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172.

<sup>488</sup> Panel Report, para. 7.1529.

2. The Panel Did Not Err in Failing to Examine the Degree of Contribution of the Alternatives Operating Synergistically with Other Elements of Australia's Comprehensive Policy

384. Second, the Dominican Republic argues that the Panel erred in failing to examine whether the proposed alternative measures would create synergies with other existing elements of Australia's comprehensive tobacco control policy.<sup>489</sup> The Dominican Republic considers that the Appellate Body's finding in *Brazil – Retreaded Tyres* is inapplicable, because it claims that none of the complainants' proposed alternatives constituted existing elements of Australia's comprehensive tobacco control policy.<sup>490</sup> In these circumstances, the Dominican Republic asserts that the Panel should have examined the synergies between the alternative measures and other existing elements of Australia's suite of measures.<sup>491</sup> The Dominican Republic posits that an increase in the MLPA could make teenagers pay more attention to anti-tobacco campaigns and to GHWs as they become older.<sup>492</sup> The Dominican Republic maintains further that an increase in excise taxes would make measures promoting nicotine replacement therapies and aiding quitting more effective.<sup>493</sup>

385. Honduras likewise argues that the Panel erred in failing to examine the degree of contribution of an increase in the MLPA and in excise taxes in light of other tobacco control measures that Australia has in place, in particular enlarged GHWs. Honduras argues, in essence, that because any communication function of tobacco packaging would have already been addressed by the enlarged GHWs, the combined application of its proposed alternatives with enlarged GHWs would provide a degree of contribution to Australia's objective equivalent to the TPP measures.<sup>494</sup> Honduras also claims that the Panel's alleged failure to consider the combined operation of these purported alternatives and the enlarged GHWs reflects a lack of "even-handedness" by the Panel, in violation of Article 11 of the DSU.<sup>495</sup>

386. At the outset, Australia considers that it was part of the complainants' *prima facie* case under Article 2.2 to identify reasonably available, less trade-restrictive alternatives whose degree of contribution would be equivalent to the TPP measures, taking account of the risks that non-fulfilment would create. To the extent that the complainants believed that *any* of their proposed alternatives would make an equivalent contribution due to any synergistic effects they would have with other non-challenged aspects of Australia's tobacco control policy, this was *their* case to make before the Panel. It was not incumbent upon the Panel to make a *prima facie* case for

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<sup>489</sup> Dominican Republic's appellant's submission, para. 1530.

<sup>490</sup> Dominican Republic's appellant's submission, para. 1522.

<sup>491</sup> Dominican Republic's appellant's submission, para. 1523.

<sup>492</sup> Dominican Republic's appellant's submission, para. 1531.

<sup>493</sup> Dominican Republic's appellant's submission, para. 1532.

<sup>494</sup> Honduras's appellant's submission, paras. 645-657.

<sup>495</sup> Honduras's appellant's submission, paras. 1019-1025.

the complainants with respect to their proposed alternatives, as the Panel correctly observed.<sup>496</sup>

387. In any event, the Panel was correct in finding that neither an increase in MLPA nor an increase in excise taxes would have any effect on the communication function of the pack.<sup>497</sup> These two purported alternatives would therefore have *no* synergistic effects with the enlarged GHWs and, in that scenario, the remaining 25% of the pack could still be used to convey images and messaging, increasing the appeal of the pack and its ability to act as a conditioned cue for smoking.

388. In contrast, as the Panel correctly found, the TPP measures not only reduced the ability of the pack to convey positive images or messaging about tobacco products but, in doing so, also had the effect of increasing the effectiveness of the GHWs by increasing their salience, making them easier to see, more noticeable, and perceived as more credible and more serious.<sup>498</sup> The Panel considered in some detail the impact of the TPP measures in combination with GHWs compared with the impact of large GHWs *without* plain packaging. For example, the Panel cited studies on the record, which it noted were assessed to be of high quality by independent systematic reviews, which showed TPP in combination with enlarged GHWs had a statistically significant larger effect on "proximal outcomes" compared to enlarged GHWs *alone*.<sup>499</sup> The Panel also cited *the complainants' own expert*, Professor Vicusi, who in his expert report stated that "[i]t is '*almost tautological*' that the eye would be more drawn to a graphic health warning on a plain pack, which will inevitably have less to read than a branded pack".<sup>500</sup> Accordingly, the Panel's finding that neither of the proposed alternatives would operate synergistically with the enlarged GHWs was neither in error, nor reflected a lack of "even-handedness" in violation of Article 11 of the DSU.

389. Thus, even if the Panel were under an obligation to consider the "combined" effect of the alternative measures with other, non-challenged elements of Australia's comprehensive tobacco control policy, *none* of the purported alternatives would make an equivalent contribution to the TPP measures in reducing the use of, and exposure to, tobacco products in Australia.

### 3. The Panel Did Not Require an "Identical" Degree of Contribution

390. Third, Honduras claims that the Panel effectively applied a standard of "identical" contribution when it referred to the alternative measures operating as "substitutes" to the TPP measures.<sup>501</sup> Honduras posits that the Panel found an

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<sup>496</sup> Panel Report, para. 7.1718.

<sup>497</sup> Panel Report, paras. 7.1459 and 7.1527-7.1529.

<sup>498</sup> Panel Report, para. 7.869.

<sup>499</sup> Panel Report, para. 7.619.

<sup>500</sup> Panel Report, para. 7.818.

<sup>501</sup> Honduras's appellant's submission, paras. 632-635.

equivalent degree of "meaningful" contribution<sup>502</sup>, and erred in law by seeking to determine, in addition, whether the alternative measure "provides a contribution that is identical in the sense that it operates along the same causal pathway."<sup>503</sup>

391. In Australia's view, Honduras's arguments are purely academic and contradicted by the Panel's analysis. As Honduras itself acknowledges, the Panel referenced the correct legal standard of equivalence of contribution in holding that:

... a complainant need not demonstrate that its proposed alternative measure achieves a degree of contribution identical to that achieved by the technical regulation. Rather, a proposed alternative measure may achieve an equivalent degree of contribution in ways different from the technical regulation at issue, and there is a margin of appreciation in this assessment.<sup>504</sup>

392. Contrary to Honduras's allegation, the Panel never found that an increase in the MLPA to 21 years and an increase in excise taxes would make an *equivalent* level of "meaningful" contribution than the TPP measures to Australia's objective of reducing the use of, and exposure to, tobacco products. Rather, the Panel found that "an increase in the MLPA to 21 years would in principle be *apt to make a meaningful contribution* to Australia's objective of improving health by reducing the use of, and exposure to, tobacco products."<sup>505</sup> Similarly, the Panel found that "an increase in excise taxes in Australia *could, in principle, make a meaningful contribution* to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products."<sup>506</sup> In both instances, however, the Panel proceeded to examine whether these alternatives would achieve a degree of contribution to that objective that is *equivalent* to that made by the TPP measures, and ultimately concluded that they would not.<sup>507</sup>

393. Neither do the Panel references to the alternative measures as "substitutes" to the TPP measures entail a requirement of "identical" contribution, as Honduras erroneously suggests. As the Appellate Body explained in *US – COOL (Article 21.5 – Canada and Mexico)*, a comparative assessment of alternatives is a "conceptual tool" that may form part of a complainant's *prima facie* case that a technical regulation is more trade-restrictive than necessary.<sup>508</sup> This will be the case where a panel is satisfied that an alternative measure that could be applied *in lieu of* the challenged technical regulation is less trade-restrictive, reasonably available, and would make an equivalent contribution to the relevant objective, taking account of the risks non-fulfilment would create. Viewed in this light, the Panel's reference to the

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<sup>502</sup> Honduras's appellant's submission, para. 636.

<sup>503</sup> Honduras's appellant's submission, para. 637.

<sup>504</sup> Panel Report, para. 7.1369 (referring to Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.215 and 5.254).

<sup>505</sup> Panel Report, para. 7.1453 (emphasis added).

<sup>506</sup> Panel Report, para. 7.1523 (emphasis added).

<sup>507</sup> Panel Report, paras. 7.1453-7.1464 and 7.1523-7.1531.

<sup>508</sup> Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.213.

alternatives as "substitutes" to the TPP measures reveals a proper understanding of the purpose of the comparative analysis under Article 2.2, and by no means reflects a more exacting standard of "identical" contribution.

4. The Panel Did Not Impose a More Rigorous Standard of Equivalence in the Context of a Comprehensive Suite of Measures

394. Finally, Honduras claims that the Panel erred in finding that "a different and more demanding standard applies when assessing the respective equivalence of contribution of the challenged and alternative measures in the context of a 'broader policy scheme with multiple complementary elements designed to pursue in a comprehensive manner' a certain objective."<sup>509</sup>

395. Honduras posits that there is no basis in the TBT Agreement for adopting a different approach in determining that a measure is more trade-restrictive than necessary merely because it is part of a "suite of measures" or a "comprehensive policy" to address a "multifaceted problem."<sup>510</sup> Honduras adds that the facts in *Brazil – Retreaded Tyres* are different from the facts of this dispute because, it claims, the TPP measures are not a "pillar" of Australia's tobacco control strategy<sup>511</sup>; their removal would not undermine the other elements of Australia's tobacco control policy<sup>512</sup>; the proposed alternatives were apt to make a meaningful contribution<sup>513</sup> and would be effective in reducing the use of tobacco products<sup>514</sup>; and because the Panel never examined Australia's level of protection.<sup>515</sup>

396. There is no basis in the Panel's analysis to support Honduras's allegation that the Panel somehow applied a different and more exacting standard of contribution in the context of Australia's comprehensive tobacco control policy. To the contrary, notwithstanding that the proposed "alternatives" principally constituted variations to *existing* measures in Australia's comprehensive strategy and the Panel's findings that *none* of the proposed measures met the threshold requirement of being *less* trade-restrictive than the TPP measures, the Panel proceeded to properly ascertain whether *individually* each of the four alternatives proposed by the complainants would make an equivalent degree of contribution to Australia's objective of reducing the use of, and exposure to, tobacco products.

397. In the case of an increase in the MLPA to 21 years, the Panel found that this alternative would not contribute equivalently because it would have no effects on

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<sup>509</sup> Honduras's appellant's submission, para. 662 (quoting Panel Report, para. 7.1730).

<sup>510</sup> Honduras's appellant's submission, para. 667.

<sup>511</sup> Honduras's appellant's submission, para. 679.

<sup>512</sup> Honduras's appellant's submission, para. 680.

<sup>513</sup> Honduras's appellant's submission, para. 681.

<sup>514</sup> Honduras's appellant's submission, para. 683.

<sup>515</sup> Honduras's appellant's submission, para. 682.

population groups above 21 years of age, and would not address the effects of branding on the appeal of tobacco products.<sup>516</sup> In respect of increased excise taxes, the Panel found that this alternative would not contribute equivalently because the effects of brand appeal could possibly frustrate and undermine the price disincentive effected by excise tax increases.<sup>517</sup> In each instance, the Panel properly applied a standard of *equivalence of contribution* in seeking to determine whether the TPP measures are more trade-restrictive than necessary within the meaning of Article 2.2.

398. Moreover, Australia considers that the findings of the Appellate Body in *Brazil – Retreaded Tyres* are entirely apposite. To recall, in that dispute the European Union challenged Brazil's import ban on retreaded tyres, which formed part of its comprehensive policy to address risks to human life stemming from waste tyres, together with other measures such as collection and disposal schemes, and measures to encourage domestic retreading.<sup>518</sup> The Appellate Body found that both the contribution of the import ban to Brazil's public health objectives and the alternatives proposed by the European Union had to be assessed in the context of Brazil's comprehensive regulatory scheme to deal with waste tyres.<sup>519</sup>

399. Likewise, as the Panel found, the TPP measures operate in conjunction with "other wide-ranging tobacco control measures, including mandatory GHWs, restrictions on advertisement and promotion, taxation measures, restrictions on the sale and consumption of tobacco products, social marketing campaigns, and measures to address illicit tobacco trade"<sup>520</sup> as part of Australia's comprehensive strategy to address the grave risks to public health stemming from the use of, and exposure to, tobacco products. In light of the Appellate Body's prior guidance, the Panel did *not* err in seeking to determine the degree of contribution of both the TPP measures and of the proposed alternatives against the broader framework of Australia's comprehensive tobacco control policy.

400. The Panel's findings in this dispute do, however, differ markedly from one aspect of the Appellate Body's finding in *Brazil – Retreaded Tyres*. In that dispute, the panel dismissed collection and disposal schemes as *alternatives* to the import ban because those measures already figured as elements of Brazil's comprehensive policy to deal with waste tyres. The Appellate Body upheld this finding, holding that "substituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect."<sup>521</sup>

401. In contrast, the Panel in this dispute did *not* dismiss the complainants' proposed measures, such as the MLPA and excise taxes, which already feature as existing elements of Australia's comprehensive tobacco control policy, for failing to

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<sup>516</sup> Panel Report, para. 7.1459.

<sup>517</sup> Panel Report, para. 7.1529.

<sup>518</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172 and fn 297 thereto.

<sup>519</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 154 and 172.

<sup>520</sup> Panel Report, para. 7. 1729.

<sup>521</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172.

constitute *alternatives* to the TPP measures. Instead, and despite its earlier finding that none of the proposed measures would be *less* trade-restrictive than the TPP measures, the Panel proceeded to examine the degree to which these purported alternatives would contribute to reducing the use of, and exposure to, tobacco products in Australia. The Panel ultimately concluded that none of these proposed measures could make an *equivalent* contribution to the TPP measures, *inter alia*, because the effects of each of those proposed alternatives, taken individually, could be undermined by the continuing effects of branding on the appeal of tobacco products.

402. A further aspect of the Panel's analysis also refutes Honduras's claim that the Panel subjected its alternatives to a more exacting standard of equivalence in the context of a comprehensive policy. After finding that each of the alternatives identified by the complainants *individually* would not make an equivalent contribution to Australia's objective, the Panel further addressed the complainants' argument that the purported alternatives could make an equivalent contribution *cumulatively*. Despite its misgivings about the deficiencies in the *prima facie* case advanced by the complainants in this respect, the Panel found that:

... we have found above that, individually, each of the four alternatives proposed by the complainants would not make a contribution to Australia's objective that is equivalent to the contribution made by the TPP measures as part of Australia's broader regulatory framework regarding tobacco control. One basis for that conclusion is that, as detailed above, three of these alternatives would not address the effect of branding on the appeal of tobacco products, on the effectiveness of GHWs, and on the ability of retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products. This leaves one aspect of Australia's multifaceted approach to tobacco control entirely or partly unaddressed. This assessment would not, in the circumstances of this case, change even in the event that the four alternatives were combined in some way, taking into account the characteristics of the TPP measures and the regulatory context in which they operate.

In this respect, we are mindful of the Appellate Body's observation that a proposed alternative measure need not contribute to the objective to a degree that is identical to the measure at issue, and that a proposed alternative measure may achieve an equivalent degree of contribution in ways different from the technical regulation at issue. However, as discussed above, we do not understand this to imply that, where the concern being addressed is of a multifaceted nature and legitimately involves a multidimensional response, one aspect of a comprehensive strategy could be substituted for another, where they would address different aspects of the problem. In addition, a panel's "margin of appreciation" in assessing equivalence should be informed by the risks that non-fulfilment of the technical regulation's objective would create, the nature of the risks and the gravity of the consequences arising from the non-fulfilment of the technical regulation's objective, the characteristics of the technical regulation at issue as revealed through its design and structure, the nature of the objective pursued, and the nature, quantity and quality of the evidence available. In the context of these proceedings, considering the design of the TPP measures, the nature of the risks of non-fulfilment (including the gravity of the consequences), and in particular the fact that the TPP measures are designed and structured as one

of a number of elements of Australia's comprehensive tobacco control strategy (which includes taxation, social marketing, and MLPA requirements), we consider that a comparative assessment of alternative measures needs to take into account the element of tobacco control that would be left unaddressed in the absence of the TPP measures.<sup>522</sup>

403. Accordingly, the Panel's finding that increases in the MLPA and in excise taxes would not make an equivalent contribution to Australia's objective rests on a proper standard of equivalence of contribution, and the Panel did not err in finding that each alternative, applied individually or in combination with one another, would not make an equivalent contribution to reducing the use of, and exposure to, tobacco products in Australia.

**D. The Panel Did Not Act Inconsistently with Article 11 of the DSU in Its Comparative Analysis of Alternative Measures**

404. Finally, the Dominican Republic claims that the Panel acted inconsistently with Article 11 of the DSU in its comparative analysis of the proposed alternatives under Article 2.2 of the TBT Agreement. More specifically, the Dominican Republic argues that the Panel failed to provide coherent reasoning when assessing the trade-restrictiveness of an increased MLPA.<sup>523</sup> According to the Dominican Republic, the Panel assessed the *long-term effects* of an increase in the MLPA when assessing its trade-restrictiveness, but failed to take into account the same long-term effects of the proposed increase in the MLPA when assessing contribution.<sup>524</sup>

405. The Dominican Republic further claims that the Panel acted inconsistently with Article 11 of the DSU in its assessment of the degree of contribution of the proposed alternatives. The Dominican Republic argues, in particular, that the Panel "failed to provide reasoned and adequate explanations, and coherent reasoning, in finding that tobacco packaging as a means of communication would not be addressed at all in the absence of the TPP measures".<sup>525</sup> The Dominican Republic further claims that the Panel failed to "engage with the Dominican Republic's evidence and argument in assessing whether an MLPA increase would make an equivalent contribution."<sup>526</sup>

406. As Australia elaborates in Section VII below, Article 11 of the DSU requires a panel to "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." Within these parameters, "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings" and panels "are not required to accord to factual evidence of the parties the same meaning and weight as do the

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<sup>522</sup> Panel Report, paras. 7.1721 and 7.1722.

<sup>523</sup> Dominican Republic's appellant's submission, para. 1421.

<sup>524</sup> Dominican Republic's appellant's submission, paras. 1422-1426.

<sup>525</sup> Dominican Republic's appellant's submission, para. 1452.

<sup>526</sup> Dominican Republic's appellant's submission, para. 1452.

parties."<sup>527</sup> For a claim under Article 11 of the DSU to succeed, the Appellate Body must be satisfied that the panel has exceeded its authority as the trier of fact. As an initial trier of fact, a panel must provide "reasoned and adequate explanations and coherent reasoning", must base its findings on "a sufficient evidentiary basis on the record", may not apply a "double standard of proof", and must treat the evidence with "even-handedness".<sup>528</sup> The Appellate Body has further explained that not every error in the appreciation of the evidence amounts to a violation of Article 11 of the DSU. Rather, an appellant must explain *why* such evidence is so *material* to its case that the Panel's failure explicitly to address and rely upon it casts doubt on the objectivity of the panel's factual assessment.<sup>529</sup>

1. The Panel Provided Coherent Reasoning in Its Assessment of the Trade-Restrictiveness of an Increase in the MLPA

407. Against this background, Australia turns to the Dominican Republic's allegations of error under Article 11 of the DSU. The Dominican Republic has failed to demonstrate that the Panel exceeded the bounds of its discretion under Article 11 of the DSU in its assessment of the trade-restrictiveness of an increase in the MLPA.

408. The Panel's assessment of the *trade-restrictiveness* of an increase in the MLPA was neither "incoherent" nor internally contradictory with respect to its assessment of the *contribution* of that alternative. Contrary to the Dominican Republic's allegation, the Panel did *not* rely on the "future effects" of an increase in the MLPA in assessing its trade-restrictiveness. Rather, the Panel expressly agreed with Australia that "an increase in the MLPA from 18 to 21 years would eliminate the ability of tobacco companies to sell their products to people under the age of 21 years, and any competitive opportunities associated with such sales, including for imported tobacco products."<sup>530</sup> The Panel went on to conclude that an increase in the MLPA to 21 years "would restrict the volume of trade by an amount commensurate with its contribution to Australia's objective"<sup>531</sup>, and that it had "only a very limited basis upon which to assess with any degree of precision the potential impact of an increase in the MLPA to 21 years on the total value of imports".<sup>532</sup>

409. Thus, consistent with the approach it adopted when assessing the degree of contribution of an increase in the MLPA to Australia's objective, the Panel focused on the *immediate* trade-restrictive effects of an increase in MLPA, rather than on any "future" effects. The Panel's observation concerning "future trends" of the tobacco industry related *exclusively* to the relative importance to the tobacco industry of the market segment that would be immediately impacted by the proposed alternative, i.e., young adults between 18-24 years old.

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<sup>527</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1317.

<sup>528</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1317.

<sup>529</sup> Appellate Body Report, *US – COOL*, para. 300.

<sup>530</sup> Panel Report, para. 7.1413.

<sup>531</sup> Panel Report, para. 7.1414.

<sup>532</sup> Panel Report, para. 7.1416.

410. Accordingly, the Panel did not act inconsistently with Article 11 of the DSU in concluding that the complainants had failed to demonstrate that an increase in the MLPA to 21 years would not be *less* trade-restrictive than the TPP measures.<sup>533</sup>

2. The Panel Provided a Reasoned and Adequate Explanation for Finding that Tobacco Packaging as a Means of Communication Would Not Be Addressed "At All" in the Absence of the TPP Measures

411. Next, the Dominican Republic claims that the Panel acted inconsistently with Article 11 of the DSU in assessing the degree of contribution of an increase in MLPA to Australia's objective. The Dominican Republic argues that the Panel failed to provide reasoned and adequate explanations and coherent reasoning for its finding that tobacco packaging as a means of communication would not be addressed "at all" in the absence of the TPP measures.<sup>534</sup> According to the Dominican Republic, this finding is contradicted by the Panel's conclusion, on the basis of both pre- and post-implementation evidence, that enlarged GHWs and Australia's Consumer Law affect the appeal, and address misleading aspects, of tobacco packaging.<sup>535</sup>

412. The Appellate Body has emphasised that "an issue will *either* be one of application of the law to the facts *or* an issue of the objective assessment of the facts, and not both."<sup>536</sup> The Appellate Body has further held that "a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument of a claim that the Panel failed to apply correctly a provision of the covered agreements".<sup>537</sup>

413. Here, the Dominican Republic's arguments appear to merely re-cast under the guise of a claim under Article 11 of the DSU its earlier claim that the Panel erred in its application of Article 2.2 of the TBT Agreement by failing to take into account any synergistic effects of the MLPA and other non-challenged elements of Australia's comprehensive tobacco control policy. Other than alleging that the Panel failed to take into account the effects of enlarged GHWs and Australia's Consumer Law when assessing the contribution of the increase in MLPA, the Dominican Republic fails to articulate a cognisable appeal claim directed at the Panel's *appreciation of the evidence*. On this basis alone, the Appellate Body should reject the Dominican Republic's claim that the Panel acted inconsistently with Article 11 of the DSU in assessing the contribution of the MLPA to Australia's objective.

414. In any event, the inability of the increased MLPA to address tobacco packaging as a means of communication was not the only reason for the Panel's finding that this alternative would not make an equivalent contribution to Australia's

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<sup>533</sup> Panel Report, para. 7.1417.

<sup>534</sup> Dominican Republic's appellant's submission, para. 1456.

<sup>535</sup> Dominican Republic's appellant's submission, paras. 1457, 1461, 1463 and 1468.

<sup>536</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872.

<sup>537</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442.

objective. The Panel also held that an MLPA of 21 would "*only* address the availability of tobacco products to individuals below 21 years of age" and, for this reason, "[a]n increase in the MLPA would not address initiation, cessation or relapse in any age group over 21."<sup>538</sup> As such, even if the Dominican Republic were correct (and it is not) that the Panel exceeded the bounds of its discretion in finding that, in the absence of the TPP measures, "this means of communication would not be addressed at all", this would be insufficient to reverse the Panel's finding that the proposed increase in the MLPA would not make an equivalent contribution to Australia's objective.

415. Furthermore, the Panel was correct in finding that an increase in the MLPA would not "affect the design features of tobacco packaging that ... convey images and messages which are in turn capable of conveying a belief, in particular to adolescents and young adults, that initiating tobacco use can fulfil certain psychological needs and contribute to making tobacco products appealing."<sup>539</sup> 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 the increase in MLPA itself has those same effects. In contrast, the Panel found that the TPP measures do increase the effectiveness of the GHWs, thus enhancing the effects of those measures on tobacco packaging as a means of communication.

3. The Panel Properly Engaged with the Complainants' Evidence and Argument on the Degree of Contribution of the Alternatives

416. The Dominican Republic claims that the Panel acted inconsistently with Article 11 of the DSU in its assessment of the contribution of the increased MLPA and increased excise taxes. The Dominican Republic argues, in particular, that the Panel failed to engage with its evidence and argument demonstrating that: (i) in Australia's regulatory context, partially branded tobacco packaging, with large GHWs, was not appealing and did not convey positive perceptions even *before* the TPP measures were introduced; and (ii) in the absence of the TPP measures, tobacco plain packaging as a means of communication is already addressed by Australia's regulatory framework.<sup>540</sup>

417. With respect to the first argument, the Dominican Republic essentially asks the Appellate Body to *re-weigh* the evidence of various experts that the Dominican Republic considers to establish that packs were unappealing *prior* to the introduction of the TPP measures.<sup>541</sup> The Panel evidently *did* take such evidence into account<sup>542</sup>,

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<sup>538</sup> Panel Report, para. 7.1459.

<sup>539</sup> Panel Report, para. 7.1459.

<sup>540</sup> Dominican Republic's appellant's submission, para. 1472.

<sup>541</sup> Dominican Republic's appellant's submission, para. 1472 (referring to Ajzen Behavioral Theory Report, (DR/HON/IND-3), paras. 22, 174-176 and 178; Ajzen Third Report, (DOM/HND/IDN-5), Sections 3.2.2 and 3.2.3; Ajzen Response to Panel question Nos. 146, 202, and 203, (DOM/HND/IDN-6), para. 49; Steinberg Rebuttal Report, (DR/HON-10), p. 35 and 37 and Steinberg

(continued)

and did *not* act inconsistently with Article 11 of the DSU merely by attributing to those expert reports a meaning and weight different than that assigned to them by the Dominican Republic, or by failing to refer explicitly to specific pieces of evidence in reaching its findings. Moreover, as Australia explains in Section VII.E.2 below, the Dominican Republic's evidence on the purported "negative" perceptions of tobacco products in Australia is directly contradicted by the overwhelming evidence on the panel record demonstrating that tobacco packaging has been used by the industry to convey *positive* perceptions about tobacco products, including in a dark market such as Australia.

418. With respect to the second argument, the Dominican Republic itself concedes that the Panel *did* take into account the pre- and post-implementation evidence on the effects of enlarged GHWs and the ACL on the appeal of tobacco products; and on the ability of tobacco packaging to mislead consumers.<sup>543</sup> Accordingly, it is clear that the Panel did in fact "engage" with the Dominican Republic's evidence and argument that other existing elements of Australia's comprehensive tobacco control measures addressed packaging as a means of communication.

4. The Panel Provided a Reasoned and Adequate Explanation for Its Finding that the Increase in the MLPA Would Not Contribute Equivalently to Australia's Objective

419. Finally, the Dominican Republic claims that the Panel acted inconsistently with Article 11 of the DSU by providing "incoherent" reasoning in support of its finding that the increase in the MLPA would not make an equivalent contribution to Australia's objective. The Dominican Republic argues, in essence, that the Panel's approach to assessing the contribution of the TPP measures and the trade-restrictiveness of the increase in the MLPA was inconsistent with the approach it adopted to assess the contribution of the increase in the MLPA, in particular in respect of its "future effects".<sup>544</sup>

420. This is the same argument the Dominican Republic raised in respect of the Panel's finding that the MLPA was not less *trade-restrictive* than the TPP measures, but this time through the prism of the Panel's *contribution* analysis. For the same reasons explained in Part D.1 above, the Panel's approach was neither "incoherent"

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Third Report, (DOM/HND-15, paras. 26, 33 and 39) and submissions (i.e. Dominican Republic's second written submission, paras. 443-456; Dominican Republic's response to Panel question No. 134, para. 134; Dominican Republic's opening statement at the second meeting of the Panel, para. 50; Dominican Republic's comment on Australia's response to Panel question No. 170, paras. 273-274; Dominican Republic's comment on Australia's response to Panel question No. 196, paras. 585-601, 633-634, 663-665, 669; Dominican Republic's comment on Australia's response to Panel question No. 200, paras. 783, 797, 804-806; Dominican Republic's comment on Australia's response to Panel question No. 201, paras. 878-880; Dominican Republic's comment on Australia's response to Panel question No. 204, para. 898).

<sup>542</sup> Panel Report, para. 7.436.

<sup>543</sup> Dominican Republic's appellant's submission, paras. 1462-1466 (referring to Panel Report, paras. 7.803, 7.804, 7.823, 7.841, 7.860, 7.907, 7.908, 7.910, 7.917, 7.958, 7.980, 7.983).

<sup>544</sup> Dominican Republic's appellant's submission, paras. 1485 and 1487.

nor "internally contradictory". The Dominican Republic has therefore failed to establish that the Panel exceeded the bounds of its discretion under Article 11 of the DSU in assessing the contribution of the proposed increase in the MLPA to Australia's objective.

#### **E. Conclusion to Section VI**

421. For the aforementioned reasons, if the Appellate Body upholds the Panel's interpretation of "trade-restrictiveness" under Article 2.2 of the TBT Agreement, it is not necessary for the Appellate Body to address the appellants' claims regarding the Panel's comparative analysis of alternatives under that same provision.

422. In any event, for the reasons articulated above, the complainants have failed to establish that the Panel erred in examining the degree of contribution that an increase in the MLPA and increased excise taxes would make to Australia's objective of reducing the use of, and exposure to, tobacco products. The appellants have further failed to establish that the Panel acted inconsistently with Article 11 of the DSU in its comparative analysis of alternatives under Article 2.2 of the TBT Agreement.

423. Accordingly, Australia respectfully requests that the Appellate Body dismiss the complainants' claims in respect of the Panel's comparative analysis of alternatives under Article 2.2 of the TBT Agreement in their entirety.

### **VII. CLAIMS UNDER ARTICLE 11 OF THE DSU: CONTRIBUTION**

#### **A. Introduction to Section VII**

424. The appellants' claims under Article 11 of the DSU form the core of this appeal, collectively comprising nearly 450 pages of their appellants' 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. 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>545</sup>

425. In this sense, the appellants have simply resumed the litigation tactics they pursued before the Panel. During the panel proceedings, the complainants inundated Australia and the Panel with over 3,500 pages of submissions, 1,000 exhibits and more than 50 expert reports authored by some 25 separate experts, apparently with the intention of overwhelming both Australia and the Panel with the sheer volume of evidence and expert testimony. Having failed completely in that exercise before the Panel, the appellants have evidently decided to nonetheless rely on that same strategy in their appeals. Their apparent goal is to convince the Appellate Body that the magnitude of their challenges to the panel's fact-finding must mean that at least some of their claims have merit.

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<sup>545</sup> See Dominican Republic's appellant's submission, para. 33.

426. Before Australia turns to those claims, and demonstrates why *all* of them lack merit, it is useful to first recall the outcome of prior challenges to a panel's fact-finding in disputes where regulatory measures designed to protect public health, plant and animal health, the environment, and consumer protection have been challenged. As in this case, some of those challenges arose under the TBT Agreement, while others arose under the SPS Agreement and Article XX of the GATT 1994. As in this proceeding, in each case the panel was confronted with an array of competing expert reports, often presenting complex econometric modelling and statistical analyses. In all, through the course of 14 separate appellate proceedings, the Appellate Body has considered dozens of claims that a panel failed to conduct an objective assessment in considering such evidence. In *every* instance, the Appellate Body has dismissed the appellant's claims under Article 11 of the DSU.<sup>546</sup>

427. Recounting this history is useful for two purposes. First, it highlights the significant hurdle that all appellants face in advancing Article 11 claims in cases where the panel's consideration of complex expert evidence is under challenge. Second, as Australia will demonstrate, many of the Article 11 claims the appellants present here are *indistinguishable* in their nature from claims the Appellate Body has consistently rejected in prior proceedings. Against this history, and in the face of the Panel's diligent, comprehensive and competent evaluation of the expert evidence, it is clear just how untenable the appellants' Article 11 claims are – particularly in light of several further critical considerations.

428. First, a substantial number of the appellants' Article 11 claims allege that the Panel denied them due process. The allegation common to most of these claims is that they were denied any meaningful opportunity to comment on various aspects of the Panel's evaluation of the expert evidence. The implicit predicate to these claims is that the interim review process under Article 15 of the DSU is incapable of providing the parties with any opportunity to raise substantive concerns with the Panel regarding its assessment of the facts. As Australia will demonstrate, this premise is contradicted by a robust body of panel jurisprudence. In prior proceedings, WTO Members have frequently and properly used the interim review stage to raise many of the same types of substantive concerns that the appellants raise here for the first time on appeal. Moreover, panels have often addressed those concerns by incorporating substantive modifications into their final reports. The appellants apparently made a considered and conscious choice that it would improve their prospects on appeal if they did *not*

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<sup>546</sup> See Appellate Body Reports, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.192-7.227, 8.1(a); *EC – Seal Products*, paras. 5.149-5.167, 5.203, 5.243, 5.248, 5.250, 5.254-5.259, 5.281-5.288; *US – Tuna II (Mexico)*, paras. 253-281; *US – COOL*, paras. 26-29, 33, 121, 148-150, 310, 321-326; *US – Clove Cigarettes*, paras. 146-155, 208-212, 227-232, 298(a); *EC – Sardines*, paras. 292-303, 315(h); *India – Agricultural Products*, paras. 5.90-5.110, 5.177-5.185, 5.259-5.286, 6.1(a)-(b); *Australia – Apples*, paras. 263-327, 444(c); *Japan – Apples*, paras. 217-242, 243(e); *Japan – Agricultural Products II*, paras. 140-142, 143(j); *Australia – Salmon*, paras. 262-267, 279(m); *EC – Hormones*, paras. 131-149, 155-156, 253(e); *Brazil – Retreaded Tyres*, paras. 184-212, 258(a); *Dominican Republic – Cigarettes*, paras. 75-85, 128(b); *EC – Asbestos*, paras. 176-181, 192(f). The only successful Article 11 claim in these proceedings involved not a challenge to the panel's fact-finding, but its appointment of experts with manifest conflicts of interest, which the Appellate Body found violated the European Union's due process rights. See Appellate Body Report, *US – Continued Suspension*, para. 482.

utilise the opportunity provided by the interim review stage to raise their substantive concerns, and instead preserve these for appeal. However, having adopted this choice as a litigation tactic, the appellants cannot credibly suggest that the *Panel* denied them a meaningful opportunity to comment on its analysis in violation of their due process rights.

429. Similarly specious is the appellants' claim that the Panel denied them due process by not appointing an expert, and instead relying, where appropriate, on the technical staff of the WTO Secretariat, disparagingly identified in their submissions as the so-called "ghost expert". Among the many galling aspects of the appellants' appeal, this may be the most outrageous. At no point in the more than two years of panel proceedings did the appellants request the Panel to exercise its authority under Article 13 of the DSU or Article 14.2 of the TBT Agreement to appoint an expert or group of experts. They declined to do so even though they now claim the expert evidence presented by the parties "clearly went beyond the experience and expertise of the three Panellists",<sup>547</sup> a fact they claim is evident from a cursory review of the Panelists' backgrounds, which of course were known to the appellants from the outset of the case. At that time, the appellants apparently concluded that their prospects before the Panel would be improved if their experts' reports were not subject to the rigorous scrutiny of independent expert review and the Panel was left to its own resources (including those of the WTO Secretariat, as contemplated under Article 27 of the DSU) to address their claims. This too was a tactical litigation choice and, once again, exposes the lack of credibility of the appellants now claiming that the Panel denied them due process.

430. Another critical consideration ignored by the appellants when selecting Article 11 of the DSU to anchor their appeals is the allocation of the burden of proof. This is particularly apparent from the appellants' lengthy arguments that the Panel lacked "even-handedness" in its assessment of the post-implementation evidence on prevalence and consumption. At no point do the appellants acknowledge that it was the *complainants* who undertook to prove that no portion of the observed declines in prevalence and consumption could be attributed to the TPP measures. The Panel properly scrutinised the complainants' evidence for the purpose for which it was provided. The Panel did the same for Australia's rebuttal evidence. In pursuing their arguments about "even-handedness", the appellants ask the Appellate Body to review the Panel's assessment not in the context of this dispute, but in an alternate universe where Australia bore the burden of proof.

431. Finally, in choosing to submit numerous claims that the Panel's reasoning and findings are inadequately explained, the appellants dispense with even the pretence of a legitimate grievance. No party truly "not request[ing] the Appellate Body to reach any conclusions as to whether the Panel was correct" in its factual analysis would devote so much space to a panel's alleged failure to provide "reasoned and adequate" explanations.<sup>548</sup> No party could reasonably assert as much where the final report reviews the parties' arguments in meticulous detail and painstakingly documents the

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<sup>547</sup> Honduras's appellant's submission, para. 1056.

<sup>548</sup> See Dominican Republic's appellant's submission, para. 325.

bases for the Panel's findings. The appellants' claims to this effect demonstrate that their strategy for this appeal is simply to put as much as possible of the complainants' factual evidence before the Appellate Body to re-litigate the issues they lost before the Panel.

432. This Section proceeds as follows. Part B addresses the legal standard under Article 11 of the DSU. In Part C, Australia explains why the appellants have failed to assert valid due process claims. Part D discusses the relevance of the burden of proof to the Panel's assessment of the parties' factual evidence. In Parts E through G, respectively, Australia rebuts the appellants' specific claims under Article 11 of the DSU challenging the Panel's factual findings in respect of: (i) the pre-implementation qualitative evidence; (ii) the post-implementation evidence on proximal and distal outcomes (as the Panel detailed in Appendices A and B to the Panel Report); and (iii) the post-implementation evidence on prevalence and consumption (as the Panel detailed in Appendices C and D to the Panel Report). In Part H, Australia rebuts the appellants' claims under Article 11 of the DSU challenging the Panel's finding that the TPP measures are apt to contribute to Australia's legitimate objective over time. Finally, in Part I, Australia demonstrates that even if the Appellate Body were to conclude that the Panel exceeded the bounds of its discretion in relation to certain of the appellants' alleged errors, the appellants have failed to demonstrate that these errors are material to the Panel's overall conclusion on contribution. In Annex 1, Australia rebuts the appellants' claims under Article 11 of the DSU challenging the Panel's factual findings concerning cigars. In Annex 2, Australia rebuts Honduras's specific claims under Article 11 of the DSU pertaining to Professor Klick's submissions on behalf of Honduras.

## **B. Legal Standard Under Article 11 of the DSU**

### **1. Introduction**

433. In this Part, Australia sets out the legal standard applicable to claims under Article 11 of the DSU and corrects certain mischaracterisations of that standard that appear in the appellants' submissions.

434. Article 11 of the DSU provides that:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

435. To "make an objective assessment of the facts of the case", 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>549</sup> The Appellate Body has repeatedly stated that "panels enjoy a 'margin of discretion' as triers of fact",<sup>550</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>551</sup>

436. The appellants therefore cannot prevail on their Article 11 claims unless the Appellate Body is satisfied that (1) the Panel erred by "exceed[ing] the bounds of its discretion, as the trier of facts"<sup>552</sup> and (2) that the error is so material that it "undermine[s] the objectivity of the panel's assessment of the matter before it".<sup>553</sup>

## 2. The Panel's Discretion as It Pertains to Assessing the Credibility of and Weight to Be Accorded to the Evidence

437. The first and most important type of discretionary authority granted to panels relates to the weighing of evidence. The Appellate Body has repeatedly stated "that the credibility and weight of the evidence is within the panel's discretion as the trier of facts",<sup>554</sup> and that it will not "'interfere lightly' with a panel's fact-finding authority".<sup>555</sup> The fact that the Appellate Body "might have reached a different factual finding" from the one reached by the panel is not a sufficient basis to uphold a claim under Article 11 of the DSU.<sup>556</sup> In particular, panels may exercise their

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<sup>549</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>550</sup> See Appellate Body Report, *Japan – Apples*, para. 221, quoting Appellate Body Report, *EC – Asbestos*, para. 161 and citing Appellate Body Reports, *EC – Tube or Pipe Fittings*, para. 125; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *Korea – Alcoholic Beverages*, paras. 161-162; *Japan – Agricultural Products II*, paras. 141-142; *US – Wheat Gluten*, para. 151; *Australia – Salmon*, para. 266; and *Korea – Dairy*, para. 138.

<sup>551</sup> See Appellate Body Report, *Japan – Apples*, para. 222, quoting Appellate Body Report, *EC – Hormones*, para. 133 (explaining that a breach of Article 11 "impl[ies] not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel.").

<sup>552</sup> See Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.148, quoting Appellate Body Report, *US – Wheat Gluten*, para. 151. See also Appellate Body Reports, *US – Tuna II (Mexico)*, para. 254; *EC – Asbestos*, para. 162.

<sup>553</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 992, quoting Appellate Body Reports, *EC – Fasteners (China)*, para. 499 and *EC and certain member States – Large Civil Aircraft*, para. 1318 (explaining that "[i]n order for us to reverse the Panel's finding ... on the basis of Article 11 of the DSU, we would have to be satisfied that the Panel's errors, taken together or singly, undermine the objectivity of the Panel's assessment", such that "they demonstrate that the Panel's conclusion...no longer had a sufficient evidentiary and objective basis."). See also Appellate Body Reports, *China – Rare Earths*, paras. 5.178-5.179; *US – COOL*, para. 325.

<sup>554</sup> See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, fn 920, citing Appellate Body Reports, *EC – Hormones*, para. 132; *US – Wheat Gluten*, para. 151; *EC – Sardines*, para. 299; *US – Carbon Steel*, para. 142; *Japan – Apples*, para. 221.

<sup>555</sup> See, e.g. Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1317.

<sup>556</sup> See Appellate Body Report, *US – Wheat Gluten*, para. 151.

discretionary authority to assign more or less weight to certain evidence on the basis of, *inter alia*, the credibility of that evidence.<sup>557</sup> This discretionary authority extends to all types of evidence, including expert studies and statistical analyses.<sup>558</sup>

438. In weighing the evidence, a panel "is not required to accord to factual evidence of the parties the same meaning and weight as do the parties".<sup>559</sup> A panel is free to assess the facts differently than the parties<sup>560</sup> and reach factual conclusions with which they disagree.<sup>561</sup> A panel therefore does not exceed the scope of its fact-finding authority when it assesses contradictory expert evidence and determines that one expert's evidence is more persuasive or reliable.<sup>562</sup> Nor does a panel exceed its

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<sup>557</sup> See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 440. See also Appellate Body Report, *Philippines – Distilled Spirits*, paras. 236, 238 (finding that "the weight and significance to be attributed to that estimated cross-price elasticity coefficient is a matter falling within the Panel's discretion as initial trier of facts" and that "it was for the Panel to determine the credibility of the results of the study, in light of the Philippines' objections concerning the sample upon which it is based.").

<sup>558</sup> See Appellate Body Report, *Korea – Alcoholic Beverages*, para. 161 (finding that "[w]e cannot second-guess the Panel in appreciating either the evidentiary value of such studies or the consequences, if any, of alleged defects in those studies" and that "similarly, it is not for us to review the relative weight ascribed to such evidence on such matters as marketing studies"). See also *id.* at paras. 403-404 ("The fact that the Panel accorded to the studies a different meaning and weight than did the United States does not constitute a failure to make an objective assessment of the matter under Article 11 of the DSU.").

<sup>559</sup> See Appellate Body Report, *US – Clove Cigarettes*, para. 149, quoting Appellate Body Report, *Australia – Salmon*, para. 267. See also Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 400. The Appellate Body found that:

...the United States challenges the Panel's evaluation of certain studies submitted by the parties on the effects of counter-cyclical payments on plantings and production. The United States argues that the Panel downplayed and improperly interpreted the studies submitted by the United States and that it "did not even address the shortcomings of the research submitted by Brazil." In our view, the United States is asking us to review the Panel's appreciation and weighing of these studies, which is a matter that was within the Panel's authority as the trier of facts. It is evident from the Panel Report that the Panel carefully reviewed the studies submitted by both parties and reached its own conclusions as to the meaning and significance of these studies for the present dispute.

<sup>560</sup> See Appellate Body Report, *China – Rare Earths*, para. 5.199.

<sup>561</sup> See Appellate Body Report, *US – Carbon Steel (India)*, para. 4.80 ("we consider that the fact that India does not agree with a conclusion the Panel reached regarding the evidence does not mean that the Panel committed an error amounting to a violation of Article 11 of the DSU").

<sup>562</sup> See Appellate Body Report, *China – Rare Earths*, para. 5.193 ("[T]he experts disagreed on the nature of the interaction between production quotas and export quotas ... The Panel was persuaded by the position taken by Professor L. Alan Winters..."). See also Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 435. In examining the panel's treatment of the parties' economic simulations, the Appellate Body rejected the United States' claim of error:

The United States asserts that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU, because it overlooked flaws in Brazil's economic simulation model and it misrepresented and distorted the results of the simulation conducted by the United States. We disagree that the Panel "overlooked the flaws" in Brazil's economic model, considering that the Panel expressly stated that it was "mindful of the criticism by the United States that Brazil's model 'has no foundation within economic circles'" and that Brazil's model "needs to earn the confidence of this Panel". Nor do we consider that the Panel

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discretion in attributing less probative value to or rejecting certain evidence in light of concerns regarding reliability, including when the panel has previously acknowledged the relevance of that evidence.<sup>563</sup> As such, a panel does not "zero"<sup>564</sup> or "disregard"<sup>565</sup> or "ignore"<sup>566</sup> evidence merely because it ultimately determines that evidence should be weighed less heavily or rejected.<sup>567</sup>

### 3. The Panel's Discretion in Developing Reasoning Independent of the Parties, Including Whether and When to Consult Experts

439. A second important type of discretionary authority that panels exercise relates to the reasoning they adopt in addressing the parties' claims. Provided that a panel makes findings that are based on record evidence, it has the authority to develop its own legal reasoning and is not limited to the arguments advanced by the parties.<sup>568</sup>

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"misrepresented and distorted" the results of the simulations carried out by the United States. The arguments presented by the United States on appeal do not succeed in demonstrating that the Panel erred in its evaluation of the economic simulation ... the Panel's assessment of the economic simulations falls within its authority as the trier of facts and we have not been persuaded that the Panel exceeded the bounds of its authority.

Ibid (emphasis added).

<sup>563</sup> See Appellate Body Report, *China – Rare Earths*, paras. 5.197, 5.212. The Appellate Body explained why the panel's reasoning was not "incoherent":

Second, we address China's assertion that, while the Panel correctly recognized that it was essential to examine the level at which the production quota was set and the way in which the production quota and the export quota interact, the Panel then failed to do so. We note that in support of this argument China points to evidence in the Panel record that allegedly demonstrates how the quotas interact. This is the same evidence relating to pricing that was the subject of our discussion at paragraph 5.197 above, and our analysis in that paragraph applies equally here. ...The Panel expressed concerns about the reliability of the evidence submitted by China. It follows that we see no "incoherence" in the reasoning employed by the Panel in dealing with these issues and evidence.

<sup>564</sup> See Honduras's appellant's submission, paras. 728, 775, 793, 813, 885, 903, 1034; Dominican Republic's appellant's submission, paras. 874, 906.

<sup>565</sup> See Dominican Republic's appellant's submission, para. 934 (claiming that the Panel "disregarded" distal outcome variables in its summary of its findings, despite the fact that the Panel examined this evidence.).

<sup>566</sup> See, e.g. Dominican Republic's appellant's submission, para. 746 (alleging that the Panel "completely ignored" evidence offered by the Dominican Republic relating to consumer associations with tobacco products prior to the implementation of the TPP measures where the panel examined the evidence at issue and reached a different conclusion than the complainants.).

<sup>567</sup> See Appellate Body Report, *Brazil – Retreaded Tyres*, para. 202 ("A panel enjoys discretion in assessing whether a given piece of evidence is relevant for its reasoning, and is not required to discuss, in its report, each and every piece of evidence"). See also Appellate Body Report, *China – Rare Earths*, para. 5.197 ("[W]e note that the Panel did not ignore this evidence. The Panel was simply more persuaded by the evidence provided by the complainants rebutting Professor de Melo's opinion."); Appellate Body Report, *US – Clove Cigarettes*, para. 212 (finding that "the Panel did not disregard the evidence that, according to the United States, demonstrated the presence of domestically produced flavoured cigarettes other than menthol cigarettes on the US market at the time of the ban" because "the Panel reviewed that evidence but was ultimately not persuaded by it.").

<sup>568</sup> See Appellate Body Report, *EC – Hormones*, para. 156. The Appellate Body stated that:

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For example, panels may conduct additional analysis of statistical evidence in order to resolve more fully certain factual issues.<sup>569</sup> Relatedly, panels do not exceed their margin of discretion in developing reasoning that addresses only certain arguments,<sup>570</sup> or by drawing inferences from limited facts<sup>571</sup> – including drawing a more definitive conclusion on the basis of a relatively limited interim finding.<sup>572</sup>

440. In developing its reasoning, a panel is free to examine certain evidence more intensively if doing so is warranted by the facts – a panel does not "make the case" for one party where that party has put forward relevant substantiating arguments and evidence and the panel proceeds to "fully scrutinize such evidence and argumentation."<sup>573</sup>

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[N]othing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration. A panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the DSU, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute.

See also Appellate Body Report, *Argentina – Footwear (EC)*, para. 74; Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.176-7.177.

<sup>569</sup> See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 357-358 (a panel should "scrutinize" the parties' models and, as appropriate, undertake its own "evaluation and comparative analysis of the economic simulations and the particular parameters used."). See also Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 7.39-7.41. The Panel explained its additional analysis as follows:

...the Panel has analysed the revenue and cost data in two forms: (i) without cottonseed revenues and ginning costs as the US proposes and (ii) with cottonseed revenues and ginning costs as in the original dispute. The results of this analysis show that whether or not ginning costs are excluded from the calculation of the costs of production of upland cotton lint does not alter the Panel's conclusion that market revenues exceed total costs of production. To reflect this analysis in the final report, we have amended the interim report by adding new paragraphs 10.185-10.188 and by changing the text of paragraphs 10.185-10.191 of the interim report (paragraphs 10.189-10.196 of this Report).

Ibid. para. 7.41.

<sup>570</sup> See Appellate Body Report, *US – Carbon Steel (India)*, para. 4.133. The Appellate Body affirmed that:

[A] panel has the discretion to address only those arguments that it deems necessary to resolve a particular claim. Thus, the fact that a particular argument relating to a claim is not specifically addressed does not, in and of itself, lead to the conclusion that a panel has failed to conduct an objective assessment of the matter before it.

<sup>571</sup> See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 406 ("[W]e consider that, on this issue, the United States is essentially challenging the inferences drawn by the Panel from the evidence before it, and this is a matter that was within the Panel's authority as the trier of facts."). See also Appellate Body Report, *US – Wheat Gluten*, para. 155 ("although the evidence the Panel relied on is limited in nature, there are, in our view, insufficient grounds for concluding that the Panel erred, under Article 11 of the DSU"); Appellate Body Reports, *Canada – Aircraft*, para. 198; *EC – Seal Products*, para. 5.250.

<sup>572</sup> See Appellate Body Report, *US – Tuna II (Mexico)*, paras. 263-266.

<sup>573</sup> See Appellate Body Report, *EC – Fasteners (China)*, para. 566.

441. Importantly, the Appellate Body has confirmed that "a panel is not required to test its intended reasoning with the parties", so long as the panel does not "adopt[] an approach that departs so radically from the cases put forward by the parties that the parties are left guessing as to what proof they need to adduce."<sup>574</sup> Acknowledging that a panel's reasoning "may evolve over the course of the proceedings",<sup>575</sup> this standard does not require the panel to "engage with the parties upon the findings and conclusions that it intends to adopt in resolving the dispute".<sup>576</sup>

442. The discretion granted to panels to develop their reasoning also extends to deciding whether and when to seek additional information. The Appellate Body has previously explained that:

The comprehensive nature of the authority of a panel to "seek" information and technical advice from "any individual or body" it may consider appropriate, or from "any relevant source", should be underscored. This authority embraces more than merely the choice and evaluation of the *source* of the information or advice which it may seek. A panel's authority includes the authority to decide *not to seek* such information or advice at all.<sup>577</sup>

443. This finding applies specifically to the panel's decision as to whether to seek advice from experts:

Pursuant to Article 13.2 of the DSU, a panel may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter at issue. This is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision. We recall our statement in *EC Measures Concerning Meat and Meat Products (Hormones)* that Article 13 of the DSU enables a panel to seek information and technical advice as it deems appropriate in a particular case, and that the DSU leaves "to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate." Just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all.<sup>578</sup>

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<sup>574</sup> See Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.177.

<sup>575</sup> See Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 1137.

<sup>576</sup> See Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 1137 (finding that a panel does not compromise the parties' due process rights where it does not provide an "opportunity to comment on [an] alleged novel approach" that appears only in its final report where "the essence" of the panel's reasoning can be discerned from the interim report.).

<sup>577</sup> See Appellate Body Report, *US – Shrimp*, para. 104 (emphasis in original).

<sup>578</sup> See Appellate Body Report, *Argentina – Textiles and Apparel*, para. 84 (emphasis added).

#### 4. The Panel's Discretion in Framing the Explanation for Its Findings

444. A third type of discretionary authority pertains to how a panel explains its findings. The Appellate Body has acknowledged that a panel "cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly."<sup>579</sup> A panel therefore "is not required to discuss, in its report, each and every piece of evidence".<sup>580</sup> A panel may provide a relatively limited explanation or cite only select evidence and nevertheless provide an explanation that is consistent with conducting an objective assessment.<sup>581</sup> Nor does a panel err where it makes a finding that is only supported by analysis provided elsewhere in its report.<sup>582</sup> When assessing the sufficiency of the evidentiary basis for the panel's findings in light of the record evidence cited in the panel's report, the panel's findings must be "properly situate[d] ... in their context" and the structure of the panel's analysis should be taken into account, as this may reveal that the panel's previous analysis "informed the Panel's statements and conclusions...".<sup>583</sup>

#### 5. The Scope of the Panel's Obligation to Afford Due Process to the Parties

445. Panels are obligated to "ensure that the due process rights of the parties to a dispute are respected".<sup>584</sup> The steps panels must take to ensure that due process rights are upheld necessarily vary from case to case. The Appellate Body has observed that "ensuring due process requires a balancing of various interests, including systemic interests as well as those of the parties, and both general and case-specific

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<sup>579</sup> See, e.g. Appellate Body Report, *EC – Hormones*, para. 138.

<sup>580</sup> See Appellate Body Report, *Brazil – Retreaded Tyres*, para. 202. See also Appellate Body Report, *China – Rare Earths*, para. 5.221 ("[T]he fact that the Panel did not specifically refer to this evidence simply indicates that the Panel did not consider it relevant to the specific issue before it, or did not attribute to it the weight or significance that China considers it should have.").

<sup>581</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.174 ("While further analysis and explanation may have provided a more robust basis for the Panel's decision to conduct the benchmarking analysis using a range of average yields, we disagree with the European Union's claim that the Panel's analysis lacks objectivity.").

<sup>582</sup> See Appellate Body Report, *EC – Seal Products*, para. 5.284. The Appellate Body found that:

Based on the evidence and argument to which the European Union refers, the Panel had been presented with more information relating to this argument than what it referred to in footnote 799 of its Reports. We do not consider that a panel falls into error under Article 11 of the DSU for failing to cite all of the arguments and evidence supporting a particular proposition. Even if the Panel made the reference it did to identify the source of the argument, this does not mean that there were no further arguments and evidence on the Panel record that informed the Panel's statement.

Ibid.

<sup>583</sup> See Appellate Body Report, *China – Rare Earths*, para. 5.189.

<sup>584</sup> See Appellate Body Report, *US – Continued Suspension*, para. 434; Appellate Body Report, *Australia – Salmon*, para. 272.

considerations"<sup>585</sup>. As the Appellate Body has emphasised, "panels are best situated to determine how this balance should be struck in any given proceeding".<sup>586</sup>

446. To ensure due process, panels must provide the parties with an "adequate opportunity to respond to claims, arguments, or evidence presented by other parties."<sup>587</sup> A panel may fail to provide a party with "an adequate opportunity to respond" when it "makes a finding on a matter that is not before it"<sup>588</sup> or "addresses a defence that a responding party raised at such a late stage of the panel proceedings that the complaining party had no meaningful opportunity to respond to it".<sup>589</sup>

447. In evaluating a due process claim pertaining to the opportunity to comment on certain evidence, the Appellate Body may consider: "the conduct of the parties; the legal issue to which the evidence relate[s] ... and the discretion afforded under the DSU to panels in their handling of the proceedings and appreciation of the evidence."<sup>590</sup> "[T]he mere possibility that the due process rights of [a party] could have been adversely affected by the Panel's decision ... is not sufficient to establish that the due process rights of [a party] have indeed been compromised."<sup>591</sup> Where a party is aware that a particular issue may arise to which it may have cause to object yet raises no objection, and is given an adequate opportunity to defend its position in relation to the issue, the party's due process rights are not compromised by a panel's adverse decision on the issue in question.<sup>592</sup>

#### 6. The Requirement that Any Alleged Panel Errors Under Article 11 Materially Undermine the Panel's Conclusions

448. Even if the appellants could establish that the Panel exceeded the bounds of its discretion as the trier of fact, they would still need to demonstrate that the Panel's errors undermined the objectivity of the Panel's assessment.<sup>593</sup> Meeting this standard

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<sup>585</sup> See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.

<sup>586</sup> See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.

<sup>587</sup> See Appellate Body Report, *Australia – Salmon*, para. 272.

<sup>588</sup> See Appellate Body Report, *Chile – Price Band System*, para. 176.

<sup>589</sup> See Appellate Body Report, *US – Gambling*, para. 273.

<sup>590</sup> See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 155.

<sup>591</sup> See Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 197.

<sup>592</sup> See Appellate Body Report, *US – Gambling*, para. 276. See also Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50 (noting that "[w]hen a Member wishes to raise an objection in dispute settlement proceedings, it is always incumbent on that Member to do so promptly" and that a "Member that fails to raise its objections in a timely manner, notwithstanding one or more opportunities to do so, may be deemed to have waived its right to have a panel consider such objections.").

<sup>593</sup> See Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.157, quoting Appellate Body Report, *China – Rare Earths*, para. 5.178, quoting Appellate Body Report, *EC – Fasteners (China)*, para. 442 (emphasis in original) ("it is incumbent on a participant raising a claim under Article 11 on appeal to explain *why* the alleged error *meets* the standard of review under that provision").

requires establishing that the Panel's errors *materially* undermine its findings.<sup>594</sup> A material error "invalidates"<sup>595</sup> or "vitiates"<sup>596</sup> the basis for a particular finding. If, setting aside the error, a sufficient basis for the panel's finding can be identified, the error is not material.<sup>597</sup> Materiality therefore turns on whether "other elements of the Panel's analysis do support [its] conclusion."<sup>598</sup> A panel found to have ignored certain evidence, for example, would not have committed a "material" error if other evidence on the record provided a basis for its finding.<sup>599</sup> A failure to cite specific evidence in support of a finding similarly would not rise to the level of a material error where other parts of the panel's analysis are supportive of the finding.<sup>600</sup>

449. To prevail on their claims of error under Article 11, the appellants must therefore show that the Panel exceeded the bounds of its discretion *and* that the consequences for the Panel's findings are material. As will be explained in Part I, 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.

### C. Due Process

#### 1. Introduction

450. The appellants have alleged two types of due process claims. Both appellants allege that the Panel denied the appellants any opportunity to comment on certain aspects of the Panel's analysis,<sup>601</sup> including aspects that they assert were not "fully

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<sup>594</sup> See Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 722 ("To succeed in its challenge under Article 11, an appellant must show that the statement was material to the panel's legal conclusion. In this case, the United States has not demonstrated that the challenged statement was material to the Panel's conclusion as to the total amount of the subsidy provided to Boeing through the USDOD measures. This is because, as explained above, other elements of the Panel's analysis do support that conclusion"). See also Appellate Body Reports, *US – COOL*, para. 325 ("even if the Panel were to have erred in its appreciation of the Sumner Econometric Study, such an error would not have materially affected its ultimate legal conclusion under Article 2.1 of the TBT Agreement."); *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.61; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.219; *US – Tuna II (Mexico)*, para. 254; *US – Clove Cigarettes*, para. 155; *India – Agricultural Products*, para. 5.182; *EC and certain member States – Large Civil Aircraft*, para. 1318.

<sup>595</sup> See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1335.

<sup>596</sup> Appellate Body Reports, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 294; *US – COOL*, para. 323.

<sup>597</sup> See Appellate Body Report, *US – Clove Cigarettes*, paras. 153-155.

<sup>598</sup> See Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 722.

<sup>599</sup> See Appellate Body Report, *US – COOL*, paras. 322-323.

<sup>600</sup> See Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, paras. 717-719, 722.

<sup>601</sup> See, e.g. Dominican Republic's appellant's submission, para. 14 (alleging in relation to the Panel's identification and application of tests for robustness not raised by the parties that "the Panel did not at *any* point give the parties an opportunity to offer comment on the tests."); Honduras's appellant's

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explored" with the parties during the proceedings.<sup>602</sup> In presenting these claims, both appellants emphasise that the Panel's reliance on a so-called "ghost expert" further undermined their due process rights.<sup>603</sup> Honduras additionally alleges that the Panel erred under Article 11 because it was *obligated* to appoint an expert.<sup>604</sup>

451. Australia addresses both types of claims in this Part. First, Australia demonstrates that the appellants are wrong in asserting that they were denied any opportunity to comment on the Panel's analysis because they could have submitted comments at the interim review stage of the proceedings and requested a further meeting with the Panel.<sup>605</sup> Second, Australia explains that the Panel's exercise of its inherent authority not to appoint experts under Article 13 of the DSU or Article 14.2 of the TBT Agreement, and acceptance of technical assistance from the WTO Secretariat, did not deny the appellants their due process rights. The Appellate Body should therefore reject all of the appellants' due process claims.

2. The Appellants' Claims that the Panel Failed to Provide them with an Opportunity to Comment on Various Aspects of the Panel's Analysis are Unfounded

452. The Dominican Republic<sup>606</sup> and Honduras<sup>607</sup> both repeatedly assert that they were denied "any opportunity to comment" on various aspects of the Panel's analysis. There are two premises that underlie these claims, both of them erroneous.

453. The first premise of these claims is that the Panel was required to test all of its intended reasoning with the parties in order to afford due process. The Appellate

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submission, para. 15 (claiming that the Panel violated the parties' due process rights by appearing to rely on a "ghost expert" to develop and apply "robustness concerns that none of the parties raised" only to evidence submitted by the complainants "without ever having given the parties an opportunity to comment on these concerns.").

<sup>602</sup> See, e.g. Dominican Republic's appellant's submission, para. 204 (claiming in respect of Figure C.19 of the Panel Report that the Panel was required to "fully explore" the implications of Figure C.19 with the parties in order to ensure the parties' due process rights).

<sup>603</sup> See Honduras's appellant's submission, para. 15 (claiming that the Panel violated the parties' due process rights by appearing to rely on a "ghost expert" to develop and apply "robustness concerns that none of the parties raised"); Dominican Republic's appellant's submission, para. 390 (presuming that the Panel "addressed these questions in its internal deliberations, possibly with its 'ghost researchers'", and that "the parties were denied any opportunity to offer views on these important questions.").

<sup>604</sup> See Honduras's appellant's submission, para. 1069 ("the Panel was in fact under a requirement to appoint an expert in light of its obligation to conduct an objective assessment of the matter").

<sup>605</sup> Australia rebuts the allegation that the Panel was required to "fully explore" specific aspects of its analysis not previously raised by the parties during the proceedings in Part VII.G.

<sup>606</sup> See Dominican Republic's appellant's submission, paras. 42, 205, 299, 377, 977, 1147, 1356.

<sup>607</sup> See Honduras's appellant's submission, paras. 15, 896, 936, 980, 985.

Body has previously rejected this proposition.<sup>608</sup> Due process does not require that a panel "engage with the parties upon the findings and conclusions that it intends to adopt in resolving the dispute"<sup>609</sup>, 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>610</sup>

454. The second premise of these claims is the proposition that the interim review process did not offer the appellants an opportunity to comment on the aspects of the Panel's analysis that now underlie their Article 11 claims. As Australia will proceed to establish, that premise is factually incorrect. The scope of review under Article 15 of the DSU is very broad, and parties in prior cases frequently have raised concerns with a panel's interim report indistinguishable from those the appellants now raise for the first time on appeal. Because the appellants did in fact have the opportunity to address their concerns during the interim review process, their due process claims should be dismissed.

- (a) The broad scope of appropriate requests for review under Article 15 of the DSU

455. Article 15 of the DSU provides for interim review of the draft panel report by the parties prior to finalisation and circulation to the Members. Article 15.2 sets out procedures relating to review of the interim report by parties and the Panel:

Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.

456. Parties may exercise two different rights pursuant to Article 15.2. First, parties may submit written comments and requests for review of the "precise aspects" of the interim report. Second, parties may request a further meeting on any of the issues identified in the written comments. The use of the term "shall" indicates that upon receiving a request from a party, the panel is *required* to hold a further meeting. Article 15.2 concludes by advising the parties that following the comment period and any further meetings, the interim report "shall be considered the final panel report". Article 15.2 thus advises the parties that the interim review stage is their final opportunity to draw the panel's attention to precise aspects of the draft report that they believe require correction, revision, or further explanation.

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<sup>608</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.177 (a panel "is not required to test its intended reasoning with the parties.").

<sup>609</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 1137.

<sup>610</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.177.

457. The range of requests that may be submitted pursuant to Article 15.2 is broad. Requests for interim review "may legitimately include requests for "reconsideration" of specific factual or legal findings, provided that such requests are not based on the presentation of new evidence",<sup>611</sup> and do not attempt to "relitigat[e] arguments already put before a panel".<sup>612</sup> In past disputes, parties have taken advantage of the interim review stage to request that a panel:

- correct factual errors;<sup>613</sup>
- modify its analysis of the statistical evidence;<sup>614</sup>

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<sup>611</sup> See Panel Report, *US – Tuna II (Mexico)*, para. 6.3. See also Panel Report, *Japan – Alcoholic Beverages II*, para. 5.2. ("...In the view of the Panel, the purpose of the interim review stage is to consider specific and particular aspects of the interim report. Consequently, the Panel addressed the entire range of such arguments presented by the parties which it considered to be sufficiently specific and detailed.").

<sup>612</sup> See Panel Report, *US – Poultry*, para. 6.32, citing Panel Report, *Japan – DRAMS (Korea)*, para. 6.2.

<sup>613</sup> See Panel Report, *US – Steel Safeguards*, para. 9.6. In its summary of the parties' interim review comments, the panel noted that:

With respect to graphs that were generated by the Panel on the basis of USITC data and which are contained in its Reports, the Panel notes that, at the suggestion of the complainants, it has included footnote references indicating the source(s) of data used for all such graphs. It has also clarified the units for the productivity graphs that are contained in the Panel's findings on causation. The United States noted that the productivity graph following paragraph 10.367 of the Panel's Interim Reports reflected incorrect data. The Panel has re-generated this graph using the correct productivity data.

*Ibid* (emphasis added). See also Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, paras. 6.27-6.30 (explaining that "[t]he European Communities requests the Panel to correct certain factual errors in paragraph 7.540 of the Interim Report" and that "[t]he Panel accepts that the calculation of the rate paid by Boeing for water service proposed by the European Communities in its interim review comments is more accurate than the calculation made by the Panel" and that "the Panel has therefore corrected the fifth sentence of 7.540 of the Interim Report"); Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 6.225-6.231. The Panel explained:

Although the United States objects to the Panel reviewing *de novo* the evidence on which its conclusions in the Interim Report were based, in our view, it is appropriate for us to do just that in the face of a request for interim review asserting a factual error in the Interim Report. We therefore have reconsidered the evidence and arguments presented by the parties in this regard. ... Having reconsidered the evidence, we are persuaded that this conclusion was incorrect as a matter of fact.

*Ibid*.

<sup>614</sup> See Panel Report, *US – COOL*, paras. 6.108-6.109. The Panel explained:

The United States suggests modifying the Panel's analysis of the econometric studies as regards the findings of the USDA Econometric Study. In particular, the United States suggests dropping the last sentence of paragraph 7.548, which explains that potential multicollinearity calls into question the validity of certain findings of the USDA Econometric Study. Canada disagrees with the proposed changes, arguing that these would make the paragraph less accurate. ... The Panel has slightly modified, but has not deleted, the last paragraph of 7.548.

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- provide additional explanation for its reliance on certain statistical evidence;<sup>615</sup>
- provide additional explanation for its rejection of certain studies;<sup>616</sup>
- specify the sources of data underlying its statistical analysis;<sup>617</sup>

Ibid. See also Panel Report, *US – COOL*, paras. 6.84 and 6.85 (rejecting a request from the United States to modify certain data and explaining that "[r]eaching a conclusion based on partial data would involve introducing additional assumptions, and would render the data comparison less objective.").

<sup>615</sup> See Panel Report, *Chile – Alcoholic Beverages*, paras. 6.23-6.29. The Panel explained that:

With respect to paragraph 7.41, Chile disagrees with our use of the Adimark Survey as relevant evidence. We recognized its limitations based on sample size and we specifically stated that we did not wish to make too much of the survey. However, we found it both relevant and useful in that it was a study presented to the Chilean legislature and not one developed for purposes of this dispute. Chile states that we should not draw any conclusions about its value "without proper knowledge of the market". However, we specifically stated that we took note of the survey because of its consistency with other market information. ... In our view, the weight we have accorded to the Adimark survey is consistent with its limitations and its conclusions. We decline to make the changes requested by Chile.

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We must also note that we discussed at great lengths the weaknesses of the studies submitted, but found them useful supportive evidence to be considered along with other factors also discussed at length. We decline to make the change requested.

Ibid.

<sup>616</sup> See Panel Report, *US – Upland Cotton (Article 21.5 -Brazil)*, paras. 7.20-7.22. The United States requested that:

With respect to paragraph 10.95 of the interim report (paragraph 10.95 of this Report), the...Panel either (1) to add a finding that the current economic literature supports the view that counter-cyclical payments do not appear to have had more than minimal production- and trade-distorting effects, inter alia, because the conditions under which such payments might in theory have greater effects have not been established in fact by Brazil in this proceeding, or (2) to explain its basis for rejecting each of the studies cited by the United States drawing the conclusion that the production effects of counter-cyclical payments are minimal.

Ibid. para. 7.20. The Panel responded that:

...in light of the comments of the United States, the Panel has made certain changes to paragraphs 10.91 and 10.92 of the interim report (paragraphs 10.91 and 10.92 of this Report) to refer more specifically to certain studies cited by the United States.

Ibid. para. 7.22.

<sup>617</sup> See Panel Report, *EC – Aircraft*, paras. 6.38-6.40 ("The European Communities requests that the Panel cite to the source for the lower portion of the graph, below the box for EADS. ...We have made the change requested by the European Communities."). See also *EC – Aircraft*, 6.57-6.59. The Panel summarised its response to the European Communities' comments as follows:

The European Communities requests that the source of each of the figures contained in Table 1 following paragraph 7.380 of the Interim Report be identified... we have made the requested modification in order to more clearly identify the source of each of the relevant values. As a result of our review of those sources, we have also corrected three of the figures in Table 1.

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- provide additional explanation of the bases for its interim and ultimate findings;<sup>618</sup>
- delete certain factual findings;<sup>619</sup>
- specify the evidence upon which certain findings were based;<sup>620</sup>
- ensure the views of parties' experts and the findings contained in their submissions are accurately represented;<sup>621</sup>

Ibid. See also Panel Report, *EC and certain member States – Large Civil Aircraft*, 6.76-6.78, 6.88-6.90 (explaining that "[t]he European Communities ask[ed] the Panel to insert a footnote next to each figure shown in Table 7 explaining how it was calculated and citing the specific source of information relied upon" and responding that the Panel had "revised Table 7 and related footnotes with a view to providing a clearer and more precise understanding of how each figure was calculated and the information on which it was based. As a result of our review, certain figures in the table have also been revised.").

<sup>618</sup> See Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 6.85-6.87 (explaining that "[t]he United States requests that paragraph 7.476 of the Interim Report be drafted so as to express the full range of reasons supporting the Panel's decision to reject the European Communities' project-specific risk premium" and responding that the Panel "amended paragraph 7.476 (now paragraph 7.481) in order to more fully reflect the reasons underlying our rejection of the European Communities' project-specific risk premium."); see also Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, paras. 6.135-6.138, 6.151-6.153. The Panel explained that:

The European Communities requests the Panel to expand its explanation in the last sentence of paragraph 74 which explains that "the evidence suggests that the relationship between lower development costs and LCA prices is less direct than is suggested by Professor Cabral." The European Communities believes that the Panel meant to refer to "costs" more generally, rather than "development costs" specifically ("development costs" usually being used to define the specific development costs for an aircraft programme, rather than general R&D costs). More importantly, the European Communities requests that, to improve the clarity of the Report, the Panel identify more precisely how it considers the relationship to be 'less direct'...The Panel has revised paragraph 74 to clarify that in the last sentence it meant to refer to costs in a general sense as distinguished from the development costs of a specific LCA programme and to clarify more precisely why it considers that the relationship between costs and LCA prices is less direct than is suggested by Professor Cabral.

Ibid. paras. 6.151-6.153.

<sup>619</sup> See Panel Report, *US – Upland Cotton*, para. 6.20 (explaining that "[t]he United States requests that the Panel delete its factual findings" in certain paragraphs "because these findings are not necessary to resolve the matter before the Panel" and responding that in light of its function of "assist[ing] the DSB in discharging its responsibilities under the *DSU*" the Panel "declines to delete these factual findings.").

<sup>620</sup> See Panel Report, *US – Upland Cotton*, para. 6.46 ("Brazil requests that we refer to specific evidence in support of our finding in paragraph 7.1313. ... The Panel has inserted footnote 1428.").

<sup>621</sup> See Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 6.26 ("The Panel has modified the text of the ninth sentence of paragraph 7.296 of the Interim Report (now paragraph 7.297) to avoid the impression that the United States presented a specific example and that Professor Asker reviewed and ignored it."); see also Panel Report, *China – Raw Materials*, para. 6.18 (explaining that "China requests the Panel to modify and expand its reference to China's submissions" and that "the European Union requests the Panel not attribute to the European Union the content of Exhibit CHN-126, entitled 'Report of the Ad-hoc Working Group on Defining Critical Raw Materials'" and

(continued)

- explain possible inconsistencies in its reasoning;<sup>622</sup>
- address arguments raised during the proceedings but not included in the interim report;<sup>623</sup> and
- address general concerns pertaining to the manner in which the panel carried out its duties under Article 11 of the DSU.<sup>624</sup>

responding that "the Panel has [] taken note of the European Union's concern with attributing statements made in Exhibit CHN-126 to the European Union" and "has reflected China's request to expand references to its submissions."); Panel Report, *US – COOL*, paras. 6.96 and 6.97.

<sup>622</sup> See Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 7.27-7.29. The Panel explained that:

Brazil requests the Panel to amend paragraph 10.127 of the interim report (paragraph 10.127 of this Report) because, as currently formulated, the paragraph can be construed to be in contradiction with other findings made by the Panel in its interim report. ... The Panel agrees with Brazil that certain statements in paragraph 10.127 of the interim report (paragraph 10.127 of this Report) do not entirely accurately reflect the Panel's findings regarding the issue of the insulation of US cotton producers from market prices. ... [and] has amended the paragraph to better convey [the Panel's findings on] this idea.

Ibid. See also Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 6.69-6.74. The Panel explained that:

In the Interim Report, we rejected the IRR calculated by the European Communities for the A340-500/600 because, on the basis of the information contained in Exhibit EC-597 (HSBI), the repayment amounts used to determine the IRR were greater than those derived from the actual LA/MSF contract, when read in the light of the schedule of forecast deliveries. In other words, we rejected the European Communities' inclusion of [\*\*\*] it argues were called for under the French A340-500/600 LA/MSF contract. However, we accepted the IRR the European Communities calculated for the French A330-200 LA/MSF contract, even though this also appears to have been determined taking into account [\*\*\*]. In light of the arguments in the European Communities' request for interim review, we have reconsidered our findings in respect of the IRRs of these LA/MSF contracts.

Ibid. See also Panel Report, *Argentina – Poultry*, paras. 6.12-6.13. The Panel explained that:

Argentina points to an inconsistency in the Panel's review of the DCD's treatment of data submitted by Catarinense in the context of Claims 17 and 19 (paras. 7.189 and 7.190 of the Interim Report / paras 7.187 and 7.188 of the final Report). Argentina asserts that, to the extent that the Panel found that the DCD was entitled to reject Catarinense's normal value data because it had failed to comply with an accreditation obligation, the Panel should also find that the DCD was entitled to reject Catarinense's export price data for the same reason. ... We have examined carefully Argentina's comments, and agree that Catarinense's failure to comply with the relevant accreditation obligation should cause us to reject both Claims 17 and 19 regarding that exporter. We have amended our findings regarding Claim 17 accordingly (see para. 7.184 of the final Report).

Ibid. See also Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.197-5.198.

<sup>623</sup> See Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 7.39-7.41. The Panel explained that:

The Panel agrees with the United States that the interim report does not address the argument made by the United States in this proceeding that ginning costs should be excluded from the calculation of the costs of production of upland cotton lint. ... To reflect this analysis in the final report, we have amended the interim report by adding new paragraphs...

Ibid.

- (b) The appellants' failure to exercise their rights under Article 15 with respect to any of their due process claims on appeal

458. As is evident from the preceding summary, parties in prior disputes routinely use the opportunity provided by the interim review process to raise precisely the types of concerns with a panel's treatment of the evidence that the appellants cite as the basis for their due process claims. Nothing prevented the appellants from following a similar course here. As the following summary establishes, they simply *chose not to* exercise their rights under Article 15.2 of the DSU.

459. The Panel circulated its interim report on 2 May 2017. The parties had over a month to submit comments. Neither appellant sought an extension of the comment period. The Dominican Republic submitted a list of typographical, clerical, and grammatical errors, accompanied by a short letter stating that it had "carefully reviewed the Panel's findings and conclusions on the factual issues and legal claims raised in the dispute", and "would like to record its disappointment with the Panel's interim report".<sup>625</sup> This letter and list of typographical errors comprised the *entirety* of the Dominican Republic's comments on the interim report. Moreover, the Dominican Republic chose not to request a further meeting with the Panel to discuss any aspect of the interim report.

460. Honduras similarly participated in only a *limited* manner in the interim review stage. While Honduras submitted substantive comments and a list of editorial corrections,<sup>626</sup> *none* of Honduras's comments raised concerns regarding the Panel's assessment of the factual evidence or identified errors with respect to the Panel's evaluation of statistical or econometric evidence. Honduras similarly did not request a further meeting with the Panel on any issue at the interim review stage.

461. It certainly is not the case that the appellants were *unaware* of the concerns they now present to this body for the first time. For example, the Dominican Republic pointed out in its comments on the interim report that the word "The" had been omitted from the beginning of third sentence of paragraph 52, which began "Collinearity problem..."<sup>627</sup> The Dominican Republic provided no further comments in relation to this paragraph. Paragraph 52 of Appendix E details the Panel's concern with collinearity as it affected the modified trend analysis using the Aztec retail data

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<sup>624</sup> See Panel Report, *China – Rare Earths*, paras. 6.3-6.6 (noting that "[t]hroughout its comments on the Interim Reports, China alleges that the Panel has acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the matter, including of the facts of the case" and explaining that "[t]he Panel has seriously and attentively considered each one of China's allegations in this regard, as they go to the integrity of the Panel and the quality of its Reports.").

<sup>625</sup> See Comments of the Dominican Republic on the Panel's Interim Report, Cover Letter.

<sup>626</sup> See Comments of the Dominican Republic on the Panel's Interim Report (list of editorial corrections beginning at paragraph 66).

<sup>627</sup> See Comments of the Dominican Republic on the Panel's Interim Report, p. 12. In addressing this error, the Dominican Republic first identified paragraph 52, noted that the original text stated: "month. Collinearity problem also" and then suggested edited text stating "month. The collinearity problem also".

and the ARIMAX model.<sup>628</sup> The Dominican Republic now argues in its appellant submission that "the Panel developed and executed an econometric test for multicollinearity, without providing the parties with any opportunity to comment."<sup>629</sup>

462. Similarly, the Dominican Republic now points out that "[t]he Panel wrongly attributed Figure C.19 to Australia" and highlights that Australia confirmed this in its interim comments.<sup>630</sup> The Dominican Republic was therefore also aware that the Panel had incorrectly cited the source of Figure C.19 *at the interim review stage*. It therefore could have identified this and any other concerns regarding the source of Figure C.19 prior to the finalisation of the Panel Report. The Dominican Republic's claim that "the Panel did not at *any* point give the parties an opportunity to offer comment" on the Panel's evaluation of the evidence relating to Figure C.19 is therefore false.<sup>631</sup>

463. Honduras's requested changes to the Panel's descriptions of its arguments also avoided identifying any substantive concerns with the Panel's evaluation of the statistical and econometric evidence. Honduras devoted several pages to its request that the Panel amend its summary of Honduras's arguments on the contribution of the TPP measures to "(1) accurately reflect the relative weight of Honduras's arguments and the fact that by far the key argument pertains to the lack of any evidence of an effect of the plain packaging measures, and (2) to provide a correct description of Honduras's additional arguments relating to downtrading."<sup>632</sup> In the process of detailing how its arguments on smoking prevalence had been mischaracterised in the interim report and reminding the Panel of the "robust evidence" submitted by the complainants, Honduras made *no* reference to its significant concerns with the Panel's actual assessment of the effect of the TPP measures, including its application of certain robustness criteria to the parties' models.<sup>633</sup>

464. As these examples show, the appellants were fully aware *at the interim review stage* of those aspects of the Panel's treatment of the evidence that now form the basis for many of their Article 11 claims, including all of their due process related claims. The appellants could have requested the Panel to modify its characterisations of the complainants' experts' evidence, its reasoning with respect to that evidence and the conclusions it ultimately drew from that evidence. They also could have sought a

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<sup>628</sup> See Panel Report, Appendix E, para. 52.

<sup>629</sup> See Dominican Republic's appellant's submission, para. 364.

<sup>630</sup> See Dominican Republic's appellant's submission, para. 198.

<sup>631</sup> See Dominican Republic's appellant's submission, para. 14 (emphasis in original).

<sup>632</sup> See Comments of Honduras on the Panel's Interim Report, pp. 4-7.

<sup>633</sup> See Comments of Honduras on the Panel's Interim Report, pp. 4-7. The fact that the appellants' failed to take full advantage of the opportunity to ask the Panel to clarify its reasoning with respect to the post-implementation evidence is further evidenced by the Panel's responsiveness to the requests that it did receive. See, e.g. Panel Report, para. 6.42. The Panel noted:

Honduras requests the Panel to revise the text of paragraph 7.862, which it considers contains two "logical leaps" in the analysis and incorrectly reflects the views of Honduras and its experts. ... In response to these comments, the Panel has revised paragraph 7.862 to clarify its reasoning.

further meeting with the Panel to underscore the importance that they *now* attribute to these concerns in the context of seeking to substantiate appeal claims under Article 11 of the DSU. They chose to do neither of these things. In these circumstances, it is inaccurate for the appellants to assert that they had "no opportunity to comment" on the Panel's analysis. They had ample opportunity, and simply chose not to exercise it.

465. A party's tactical choice not to exercise its rights under Article 15.2 is also in clear tension with the obligation to act in "good faith" set forth in Article 3.10 of the DSU. Article 3.10 provides, in relevant part, that "...if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute". In *United States – FSC*, the Appellate Body explained that:

...[T]he principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.<sup>634</sup>

466. In prior cases the Appellate Body has made clear that the "conduct of the parties" is a relevant consideration in its evaluation of a party's due process claim, and has denied such claims where the party failed to raise its objections notwithstanding an opportunity to do so.<sup>635</sup> The same outcome is warranted here.

3. The Appellants' Claims that the Panel Erred by Not Appointing Experts and Utilising the Technical Resources of the Secretariat Are Unfounded

467. Similar considerations as those just discussed also dispense with the appellants' claims that the panel violated their due process rights by failing to appoint an expert and by relying, where appropriate, on technical support from the WTO Secretariat.

468. As explained in Part B.3 above, it is well-established that a panel's authority to appoint experts is discretionary. In *EC – Sardines*, the Appellate Body addressed the

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<sup>634</sup> See Appellate Body Report, *US – FSC*, para. 166. See also Panel Report, *EC – Asbestos*, para. 7.2, fn 3 (emphasis in original) (noting that "the fact that a party does not inform the Panel of a factual error in its findings may be contrary to the obligation in Article 3.10 ...which provides ... that 'all Members will engage in these procedures [settlement of disputes] in good faith in an effort to resolve the dispute'").

<sup>635</sup> See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 155. See also *id.* at para. 160, fn 255. The Appellate Body found that:

...we do not consider that the Panel's treatment of Exhibit PHL-289 amounted to a violation of due process. Thailand could have requested an opportunity to respond when the Philippines submitted the exhibit in question, but it did not. ...Thailand's failure to request an opportunity to respond is a consideration relevant to our overall assessment of whether, in the circumstances of this case, the Panel's conduct denied due process to Thailand.

*Ibid.*

European Communities' claim that the Panel erred under Article 11 by failing to seek information from the Codex Alimentarius Commission. The Appellate Body found that:

Article 13.2 of the DSU provides that "[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter." This provision is clearly phrased in a manner that attributes discretion to panels, and we have interpreted it in this vein. Our statements in *EC – Hormones*, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items ("Argentina – Textiles and Apparel")*, and *US – Shrimp*, all support the conclusion that, under Article 13.2 of the DSU, panels enjoy discretion as to whether or not to seek information from external sources.<sup>636</sup>

The Appellate Body elaborated that:

In *EC – Hormones*, we stated that Article 13 of the DSU "enable[s] panels to seek information and advice as they deem appropriate in a particular case". In *Argentina – Textiles and Apparel*, we stated that, pursuant to Article 13.2 of the DSU, "just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all". In *US – Shrimp*, we considered that "a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition thereof*. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case."<sup>637</sup>

469. These same considerations necessarily apply to Article 14.2 of the TBT Agreement which, like Article 13.2 of the DSU, leaves entirely to the discretion of the panel whether to seek the assistance of experts. Article 14.2 provides:

At the request of a party to a dispute, or at its own initiative, a panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts.

470. Honduras argues that in the context of this particular dispute, which involved complex scientific evidence, the Panel's discretionary authority under these provisions was somehow transformed into a mandatory obligation.<sup>638</sup> As is evident from the Appellate Body excerpts just presented, this argument is unsupported by any prior jurisprudence – which explains why Honduras was unable to cite a single case in support of its claim.<sup>639</sup> Nor is it significant that *some* prior panels, in *different*

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<sup>636</sup> See Appellate Body Report, *EC – Sardines*, para. 302.

<sup>637</sup> See Appellate Body Report, *EC – Sardines*, fn 237 (internal citations omitted) (emphasis in original).

<sup>638</sup> See Honduras's appellant's submission, paras. 16, 1057-69.

<sup>639</sup> Honduras argues that the Appellate Body's statement in *US – Continued Suspension* that "[a] panel may and should rely on the advice of experts" in reviewing a WTO Member's SPS measure, "applies, *mutatis mutandis*, to the facts and scientific evidence submitted in this dispute". See

(continued)

disputes, chose to exercise their discretionary authority to appoint experts to assist them.<sup>640</sup> That fact in no way impinged on the authority of *this* Panel to exercise its own discretion not to seek the assistance of experts.

471. Moreover, Article 14.2 of the TBT Agreement expressly provides that a panel may seek expert assistance "[a]t the request of a party to the dispute". At no time throughout the extensive panel proceedings did Honduras (or any other complainant) request the Panel to seek the existence of outside experts on the grounds, as it now claims, that "the full appreciation of the technical nuances" in the expert evidence "was not within the technical expertise of the Panel members".<sup>641</sup>

472. Given the very dim view Honduras now ascribes (unfairly) to the Panel's abilities, it is reasonable to ask what prompted it to stay silent on such an "indispensably necessary" issue throughout the entire panel process.<sup>642</sup> Honduras's appellant submission offers no insight into this question. However, having made the decision not to formally request the Panel to retain outside expert assistance, it is not credible for Honduras to now claim the Panel's failure to appoint an expert denied it due process.<sup>643</sup>

473. Honduras also claims the Panel erred by accepting technical support from a so-called "ghost expert", i.e. the WTO Secretariat, in conducting additional analysis of the complainants' statistical evidence.<sup>644</sup> While the Dominican Republic claims that its "appeal is not focused on the 'ghost' *source* of the Panel's concerns",<sup>645</sup> it implies as much by repeatedly criticising the Panel's identification of concerns with the complainants' evidence that were not previously raised by the parties.<sup>646</sup> Both appellants therefore seek to delegitimise the Panel's reasonable reliance on the Secretariat for technical assistance in an attempt to bolster their baseless Article 11 claims. The Appellate Body should treat this recasting of the Secretariat in the role of "ghost expert" for what it is – a blatant attempt by the appellants to redirect attention

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Honduras's appellant's submission, para.1067, citing Appellate Body Report, *US – Continued Suspension*, para. 592). What Honduras omits to acknowledge is that Article 11.2 of the SPS Agreement states expressly that the panel "should" seek expert advice, whereas Article 13 of the DSU and 14.2 of the TBT Agreement provide instead that the panel "may" seek such advice. Honduras also ignores the fact that like Article 14.2, Article 11.2 permits the parties to request the appointment of experts.

<sup>640</sup> See Honduras's appellant's submission, para. 1061.

<sup>641</sup> See Honduras's appellant's submission, para. 1064.

<sup>642</sup> See Honduras's appellant's submission, para. 1060.

<sup>643</sup> Similarly to its decision to wait until the appeal stage to voice concerns that could have been dealt with during interim review, Honduras's decision to wait to criticize the Panel's failure to appoint an expert when it could have requested such an appointment during the proceedings is in tension with Article 3.10 of the DSU.

<sup>644</sup> See Honduras's appellant's submission, paras. 1062-1071; see Dominican Republic's appellant's submission, para. 1353.

<sup>645</sup> See the Dominican Republic's appellant's submission, paras. 304-305.

<sup>646</sup> See Dominican Republic's appellant's submission, paras. 390-391, 395, 993, 1009, 1353 (referring to the Panel's reliance on "ghost researchers").

from their failed strategy of not requesting the Panel to appoint an outside expert in the hope of overwhelming the Panel with their voluminous econometric and statistical evidence.

474. Article 27 of the DSU sets out the responsibilities of the Secretariat. Article 27.1 provides that "[t]he Secretariat shall have the responsibility of assisting panels, ... and of providing secretarial and technical support." The Panel appropriately accepted the technical assistance provided for in Article 27 in order to accurately assess the probative value of all of the evidence submitted.

475. The importance of providing panelists with access to technical assistance is also clear from Article 8 of the DSU, which provides that panels should "be composed of well-qualified governmental and/or non-governmental individuals."<sup>647</sup> The Members explicitly decided not to require panelists to be technical experts in the specific fields at issue in the dispute over which they are presiding. In charging panelists with conducting an "objective assessment" of the facts of the case under Article 11 but not to be technical experts, and in charging the Secretariat with providing technical support, Members struck a careful balance that they believed would best serve their objectives, including the "prompt settlement" of disputes.<sup>648</sup> The argument that the Panel wrongly relied on a "ghost expert" to conduct "secret" analysis" ignores the interplay between Articles 8, 11, and 27 of the DSU.<sup>649</sup> Accepting this argument would hinder the proper functioning of panels. It would also leave future panels vulnerable to the disingenuous strategy deployed by the complainants in this dispute.

476. The Appellate Body should therefore reject the appellants' claims that the Panel erred in accepting technical assistance from the Secretariat.

#### **D. Burden of Proof**

477. Before turning to the appellants' multiple claims under Article 11 of the DSU in respect of the Panel's analysis of contribution, it is critical to first address 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. Because both the Dominican Republic and Honduras claim that the Panel acted inconsistently with Article 11 of the DSU in its analysis of contribution under Article 2.2 of the TBT Agreement, in this section Australia addresses the burden of proof under that provision.<sup>650</sup>

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<sup>647</sup> See DSU, Article 8.

<sup>648</sup> See DSU, Article 3.

<sup>649</sup> See Honduras's appellant's submission, para. 1070.

<sup>650</sup> 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.

478. The appellants' multiple Article 11 challenges against the Panel's analysis of the element of contribution under Article 2.2 of the TBT Agreement completely fail to acknowledge that it was the *complainants* that bore the burden of establishing a *prima facie* case that the TPP measures were an *unnecessary* obstacle to international trade.

479. In *US – Tuna II (Mexico)*, the Appellate Body set out its understanding of Article 2.2 as follows:

Article 2.2 does not prohibit measures that have *any* trade-restrictive effect. It refers to "unnecessary obstacles" to trade and thus *allows for some trade-restrictiveness*; more specifically, Article 2.2 stipulates that technical regulations shall not be "more trade-restrictive than necessary to fulfil a legitimate objective". Article 2.2 is thus concerned with restrictions on international trade that *exceed what is necessary* to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective.<sup>651</sup>

480. The Appellate Body clarified that the burden of demonstrating that a measure restricts trade *beyond* what is necessary to contribute to its legitimate objective is borne by the *complainant*.<sup>652</sup> Thus, as the parties bringing a claim under Article 2.2 of the TBT Agreement, it was incumbent upon the Dominican Republic and Honduras to present evidence and argument sufficient to establish a *prima facie* case that the TPP measures are "more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create".<sup>653</sup>

481. The Appellate Body has further explained that, in determining whether the complainants have discharged their *prima facie* burden, a panel must consider factors such as: "(i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the objectives."<sup>654</sup> In making their *prima facie* case under Article 2.2, a complainant may also seek to identify "a possible alternative measure that is less trade-restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available", "taking account of the risks non-fulfilment would create".<sup>655</sup>

482. It is only *after* a complainant has discharged this burden that the respondent must "rebut the complainant's *prima facie* case, by presenting evidence and arguments

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<sup>651</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 319 (emphasis added).

<sup>652</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 323.

<sup>653</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 323; Appellate Body Report, *US – COOL*, para. 379.

<sup>654</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 322.

<sup>655</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 322 and 323.

showing that the challenged measure is not more trade-restrictive than necessary to achieve the contribution it makes toward the objective pursued."<sup>656</sup>

483. In respect of the element of contribution in particular, the Appellate Body clarified in *US – COOL (Article 21.5 – Canada and Mexico)* that there is "no obligation to *quantify* the contribution of the challenged measure".<sup>657</sup> Rather, it "suffice[s] to demonstrate in qualitative terms that the measure [was] '*apt to produce a material contribution*' to its objective at some point in time", or that it is "*capable of making and does make some contribution* to its objective or that it did so to a certain extent."<sup>658</sup>

484. The Appellate Body has further clarified that the degree of contribution can be assessed on quantitative terms or on the basis of "qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence."<sup>659</sup> Whether contribution can be assessed on quantitative or qualitative terms, and the degree of precision of that assessment, depends on factors such as "the nature of the objective of the technical regulation ..., its characteristics as revealed by its design and structure, and the nature, quantity, and quality of evidence available".<sup>660</sup>

485. In the present dispute, 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>661</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>662</sup>

486. 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

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<sup>656</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 323.

<sup>657</sup> Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.209.

<sup>658</sup> Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.209 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151 and Appellate Body Report, *EC – Seal Products*, para. 5.228) (emphasis in original).

<sup>659</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

<sup>660</sup> Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.211.

<sup>661</sup> Panel Report, para. 7.485 (emphasis added).

<sup>662</sup> See, e.g. Dominican Republic's first written submission, para. 377; Dominican Republic's second written submission, para. 368; Honduras's first written submission, para. 581; Honduras's second written submission, para. 55.

*entirely* sourced from imports.<sup>663</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.

487. As discussed in Section IV, 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. In other words, the complainants *could* have argued under *their* interpretation of trade-restrictiveness that whatever degree of contribution the TPP measures make to Australia's objective is *outweighed* by whatever degree of trade-restrictiveness they identified. But that is not the case that they presented before the Panel. Rather, the complainants sought to establish that the TPP measures create an "unnecessary obstacle to international trade" under their interpretation of Article 2.2 of the TBT Agreement because the measures are *incapable* of contributing to Australia's objective.

488. The Panel undertook its assessment of the evidence 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:

Overall, our review of the evidence before us in relation to the design, structure and intended operation of the TPP measures *does not persuade us that, as the complainants argue, they would not be capable of contributing to Australia's objective* of improving public health by reducing the use of, and exposure to, tobacco products, through the operation of the mechanisms identified in the TPP Act, in combination with other relevant tobacco control measures applied by Australia.<sup>664</sup>

489. The Panel proceeded to review the post-implementation quantitative evidence aware of "the need to exercise caution in seeking to draw conclusions on the effectiveness of this type of measure[] on the basis of relatively limited information".<sup>665</sup> The Panel concluded that there was post-implementation evidence

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<sup>663</sup> Panel Report, para. 7.1207.

<sup>664</sup> Panel Report, para. 7.929 (emphasis added).

<sup>665</sup> Panel Report, para. 7.942.

that the TPP measures were having the effects "anticipated in a number of the pre-implementation studies",<sup>666</sup> and that the evidence in relation to smoking behaviours was *consistent with* the intended operation of the TPP measures.<sup>667</sup>

490. On this basis, 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. Rather, we find that the evidence before us, taken in its totality, supports the view that the TPP measures, in combination with other tobacco-control measures maintained by Australia (including enlarged GHWs introduced simultaneously with TPP), are apt to, and do in fact, contributed to Australia's objective of reducing the use of, and exposure to, tobacco products.*<sup>668</sup>

491. 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.

492. Therefore, as the Appellate Body examines the numerous claims brought by the appellants under Article 11 of the DSU to challenge the Panel's assessment of contribution, both the evidence and the Panel's assessment of that evidence must 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.

## **E. Pre-Implementation Qualitative Evidence**

### **1. Introduction**

493. The Dominican Republic presents two claims of error under Article 11 of the DSU with respect to the Panel's assessment of the pre-implementation evidence. First, the Dominican Republic claims that the Panel failed to engage with the Dominican Republic's evidence allegedly showing that *prior* to the introduction of the TPP measures "branded tobacco was not appealing and did not convey positive perceptions" in Australia.<sup>669</sup> Second, the Dominican Republic claims that the Panel's treatment of this Australia-specific evidence was "internally incoherent", given that it

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<sup>666</sup> Panel Report, para. 7.1036.

<sup>667</sup> Panel Report, para. 7.1037.

<sup>668</sup> Panel Report, para. 7.1025 (emphasis added).

<sup>669</sup> See Dominican Republic's appellant's submission, para. 700.

had elsewhere emphasised the relevance of the effects of branded tobacco in the *Australian* context.<sup>670</sup>

494. Honduras alone argues that the Panel acted inconsistently with Article 11 of the DSU by failing to provide a reasoned and adequate explanation of the probative value it attributed to the pre-implementation evidence.<sup>671</sup>

495. In addition, both the Dominican Republic and Honduras claim that the Panel acted inconsistently with Article 11 of the DSU by failing to assess whether the pre-implementation evidence was corroborated by the post-implementation evidence.<sup>672</sup>

496. In this Part, Australia addresses each of these claims under Article 11 of the DSU in turn. However, Australia first briefly summarises the Panel's findings in relation to the pre-implementation evidence, given their relevance to the appellants' claims.

## 2. Summary of the Panel's Findings

497. Before the Panel, the complainants argued that the TPP measures cannot contribute to Australia's objective through the mechanisms identified in the TPP Act, and that the post-implementation evidence shows that smoking prevalence has not in fact been reduced as a result of the TPP measures.<sup>673</sup>

498. As outlined in Section II.C.1 the Panel began its contribution analysis by examining the evidence before it relating to the design, structure, and operation of the TPP measures,<sup>674</sup> accepting that the evidence available to Australia prior to the implementation of the TPP measures supported the expected operation of the "causal chain" model and the three mechanisms as set out under the TPP Act.<sup>675</sup> The Panel then proceeded to review the pre-implementation evidence in two key phases, first addressing the complainants' broad critiques of the literature, and then assessing the evidence on each mechanism in the "causal chain".<sup>676</sup>

### (a) The Panel's analysis of the strength of the body of pre-implementation literature

499. The Panel first engaged in a comprehensive review of the literature, most of which were studies published in independent peer-reviewed journals. The Panel reviewed the complainants' extensive criticisms of the quality and methodological

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<sup>670</sup> See Dominican Republic's appellant's submission, para. 740.

<sup>671</sup> See Honduras's appellant's submission, paras. 795-805.

<sup>672</sup> See Honduras's appellant's submission, paras. 806-814; Dominican Republic's appellant's submission, paras. 747-750.

<sup>673</sup> Panel Report, para. 7.485.

<sup>674</sup> Panel Report, para. 7.487.

<sup>675</sup> See Section II.C.1.

<sup>676</sup> See Panel Report, 7.521.

rigour of these studies,<sup>677</sup> and concluded that: (i) the pre-implementation studies "originate[d] from qualified and respected sources";<sup>678</sup> (ii) the focus of the studies on "non-behavioural" or "proximal" outcomes did not constitute an "inherent flaw" in light of the "causal chain" model and the practical and ethical difficulties in directly measuring smoking behaviours through controlled experiments;<sup>679</sup> and (iii) the studies were "methodologically sound."<sup>680</sup>

500. Accordingly, the Panel found that the record contained a body of published studies predating Australia's implementation of the TPP measures that "support[ed] the hypothesis of an effect of tobacco plain packaging on the appeal of tobacco products, the effectiveness of GHWs, and the ability of packs to mislead the consumer about the harmful effects of smoking, as well as on some smoking-related behaviours."<sup>681</sup>

- (b) The Panel's findings on the evidence supporting the mechanisms of the tobacco plain packaging measures
  - (1) Tobacco plain packaging reduces the appeal of tobacco products

501. The Panel commenced its analysis of the "first mechanism" by reviewing the evidence submitted by the complainants and Australia, including extensive tobacco industry documents, and concluded that branded packaging can act as an advertising or promotional tool in relation to tobacco products.<sup>682</sup> The Panel further confirmed that "this has in fact been considered to be the case by tobacco companies operating in the Australian market even in the presence of significant restrictions on advertising in the period leading to the entry into force of the TPP measures",<sup>683</sup> explaining that in a context where no other form of promotion or advertising is permitted in relation to tobacco products, product packaging becomes the only means of brand communication available.<sup>684</sup>

502. On this basis, the Panel then examined the extent to which plain packaging of tobacco products is capable of *reducing* the appeal of those products. Following extensive review of the evidence,<sup>685</sup> the Panel concluded that there is "a body of

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<sup>677</sup> Panel Report, para. 7.520. The Panel noted that the 68 studies identified by the complainants did not cover the entire field of studies relied upon by Australia during the proceedings, and also covered studies that Australia did not expressly rely upon in support of its argument that the TPP measures contribute to their public health objective. Ibid. para. 7.540.

<sup>678</sup> Panel Report, para. 7.551.

<sup>679</sup> Panel Report, paras. 7.555, 7.557-7.560.

<sup>680</sup> Panel Report, para. 7.638.

<sup>681</sup> Panel Report, para. 7.640.

<sup>682</sup> Panel Report, paras. 7.655-7.662.

<sup>683</sup> Panel Report, para. 7.659.

<sup>684</sup> Panel Report, para. 7.659.

<sup>685</sup> Panel Report, paras. 7.667-7.683.

studies, emanating from qualified sources, supporting the proposition that plain packaging of tobacco products would reduce their appeal to the consumer."<sup>686</sup>

503. The Panel then assessed whether a reduction in the appeal of tobacco products resulting from plain packaging "may be expected to have an impact on smoking behaviours"<sup>687</sup> such as initiation, cessation and relapse.<sup>688</sup> The Panel concluded that, on the basis of the pre-implementation evidence, the complainants had not demonstrated that: (i) packaging "could not play a role in influencing the decision to smoke, and specifically on smoking initiation, in particular among adolescents and young adults, by virtue of the positive perceptions and associated product appeal created by such packaging";<sup>689</sup> and (ii) tobacco plain packaging "is not capable of influencing smoking cessation or relapse by acting on the ability of the pack to act as a conditioned cue for smoking and thus affect the ability of smokers to quit smoking, or to remain quit."<sup>690</sup>

504. Overall, therefore, the Panel concluded that it was "not persuaded that the complainants have shown that the TPP measures would not be capable of reducing the appeal of tobacco products, and thereby contribute to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products."<sup>691</sup>

(2) Tobacco plain packaging increases the effectiveness of GHWs

505. The Panel then confirmed that the evidence supporting the "second mechanism" of the causal chain supported the proposition that "in the presence of plain packaging, GHWs on tobacco products are considered easier to see, more noticeable, perceived as being more credible and more serious, attract greater visual attention, are less subject to distractions caused by other packaging elements, and are read more closely and thought about more."<sup>692</sup> Furthermore, the Panel noted that it was not persuaded by the complainants' argument that "the existence of a relatively high level of knowledge or risk awareness in Australia implies that GHWs could not be made *more* effective in achieving their objective of increasing such knowledge or risk awareness."<sup>693</sup>

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<sup>686</sup> Panel Report, para. 7.682.

<sup>687</sup> Panel Report, para. 7.699.

<sup>688</sup> Panel Report, paras. 7.701, 7.702.

<sup>689</sup> Panel Report, para. 7.747.

<sup>690</sup> Panel Report, para. 7.774. This finding was further supported by the consensus of all parties' experts that: (i) conditioning of brain chemistry is applicable in the context of addiction to tobacco products; (ii) a cue in this context is sufficient to influence a smoker's ability to quit or a recent quitter's ability to remain so; and (iii) tobacco packaging can constitute a cue for the use of tobacco products. *Ibid.* para. 7.763.

<sup>691</sup> Panel Report, para. 7.777.

<sup>692</sup> Panel Report, para. 7.825.

<sup>693</sup> Panel Report, para. 7.843.

506. The Panel then examined whether these impacts could affect smoking intentions and behaviours, and saw no basis to assume that the increased effectiveness of GHWs could not have such effects.<sup>694</sup> Specifically, the Panel concluded that: (i) it was not persuaded that the removal of branding elements, which communicate messages that appeal to adolescent reward-seeking behaviour, could not increase the effectiveness of GHWs by removing those appealing elements that may compete with, and detract from the appreciation of, the GHWs;<sup>695</sup> and (ii) it was not persuaded that the complainants had demonstrated that there could be no correlation between increases in the effectiveness of GHWs (as measured by changes in cessation knowledge, brand appeal, affective reactions, and health knowledge/risk perception) and changes in quitting intentions or smoking behaviours, including initiation and cessation.<sup>696</sup>

507. On this basis, the Panel concluded that:

... we find that credible evidence has been presented, emanating from recognized sources, that plain packaging of tobacco products may increase the salience of GHWs, by making them easier to see, more noticeable, and perceived as more credible and more serious. We are not persuaded that the complainants have demonstrated that these effects could not arise in Australia by reason of the large size of the GHWs applied simultaneously with the TPP measures, or that existing levels of risk awareness in Australia would render inutile any additional effort to increase such awareness and thereby affect risk beliefs. We are also not persuaded, in light of the evidence before us, that GHWs that would be more visible and noticeable, and perceived as being more credible and more serious, could not be expected to have an impact on smoking behaviours, including initiation, cessation and relapse.<sup>697</sup>

- (c) Tobacco plain packaging reduces the ability of the pack to mislead

508. Finally, the Panel considered whether the TPP measures could, by design, reduce the ability of tobacco packaging to mislead consumers about the harmful effects of smoking.

509. The Panel first concluded, based on the available evidence, that it was not persuaded that the complainants had demonstrated that the TPP measures were not capable of acting as intended.<sup>698</sup> The Panel then addressed the complainants' contentions that, to the extent packaging could be misleading, this was adequately addressed by the Australian Consumer Law.<sup>699</sup> Given existing regulatory gaps in the law, the Panel was not persuaded that the TPP measures could not reduce the ability

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<sup>694</sup> Panel Report, para. 7.850.

<sup>695</sup> Panel Report, para. 7.860.

<sup>696</sup> Panel Report, para. 7.863.

<sup>697</sup> Panel Report, para. 7.869.

<sup>698</sup> Panel Report, para. 7.904.

<sup>699</sup> Panel Report, para. 7.907.

of tobacco packaging to mislead consumers to a greater extent than was already possible under existing laws.<sup>700</sup>

510. Finally, the Panel considered whether the reduced ability of the pack to mislead consumers about the harmful effects of smoking could be expected to influence smoking behaviours such as initiation, cessation and relapse. The Panel concluded that, while there was less evidence presented by the parties on this issue: (i) adolescents do not pay attention to risk information, and this "pre-disposition" is likely to drive initiation behaviour where the "the perception of the long term risk is diminished;"<sup>701</sup> and (ii) it was "not persuaded that the complainants have demonstrated that the TPP measures, by changing the ability of tobacco packaging to mislead consumers about the harmful effects of smoking, would not have an effect on smoking cessation."<sup>702</sup>

(d) The Panel's overall conclusions on the pre-implementation evidence

511. After carefully analysing the pre-implementation evidence over 100 pages of its report, the Panel concluded that:

Overall, on the basis of our examination of the evidence relating to the design, structure and intended operation of the TPP measures, we are not persuaded that the complainants have demonstrated that a reduction in the appeal of tobacco products, or an improved awareness of risks through tobacco plain packaging, or the ability to mislead consumers on the harmful effects of tobacco products, through plain packaging of tobacco products as applied by Australia, would not be capable of influencing any of the relevant smoking behaviours.<sup>703</sup>

To the contrary, in a regulatory context where tobacco packaging would otherwise be the *only* opportunity to convey a positive perception of the product through branding, as is the case in Australia, it appears to us reasonable to hypothesize some correlation between the removal of such design features and the appeal of the product, and between such reduced product appeal and consumer behaviours. It also does not appear unreasonable, in such a context, in light of the evidence before us, to anticipate that the removal of these features would also prevent them from creating a conflicting signal that would undermine other messages that seek to raise the awareness of consumers about the harmfulness of smoking that are part of Australia's tobacco control strategy, including those arising from GHWs.<sup>704</sup>

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<sup>700</sup> Panel Report, para. 7.917.

<sup>701</sup> Panel Report, para. 7.923.

<sup>702</sup> Panel Report, para. 7.924. The Panel also noted, in light of the parties' lack of detailed discussion on the issue, that it did not exclude a finding that relapse behaviour would also be impacted by the TPP measures. *Ibid.* para. 7.926.

<sup>703</sup> Panel Report, para. 7.1034.

<sup>704</sup> Panel Report, para. 7.1034 (emphasis in original).

3. The Dominican Republic's Claim that the Panel Failed to Engage with Pre-Implementation Evidence of Negative Perceptions or that Its Reasoning was "Internally Incoherent" Is Unfounded

512. On appeal, the Dominican Republic claims that the Panel acted inconsistently with Article 11 of the DSU by failing to engage with evidence demonstrating that, in Australia's specific regulatory context, branded tobacco packaging was not appealing and did not convey positive perceptions *prior* to the introduction of the TPP measures.<sup>705</sup> The Dominican Republic further claims that the Panel's reasoning was "internally incoherent" because the Dominican Republic's evidence directly contradicts the Panel's finding that tobacco packaging is used in the Australian context to convey *positive* associations to the consumers.<sup>706</sup> According to the Dominican Republic, this error is "material" in light of the relevance of this evidence to the Panel's reasoning and ultimate findings,<sup>707</sup> and in light of the importance attributed to it by the parties.<sup>708</sup>

513. The Dominican Republic's appeal constitutes a thinly disguised attempt to discredit the Panel's finding that tobacco packaging has been used by the industry for decades to convey positive perceptions of tobacco products. As these findings are amply documented in the Panel Report and duly supported by record evidence, it is untenable for the Dominican Republic to argue otherwise.

514. For example, relying on extensive evidence consisting of industry statements, expert reports, and a Report by the US Surgeon General, the Panel concluded that:

The evidence above, in particular the statements emanating from the tobacco industry itself, further indicate that a key purpose of the use of branding on tobacco products, including packaging, is to generate certain positive perceptions in relation to the product in the eyes of the consumer, including, as described above, to "generate the optimal level of modernity, youthful image and appeal" among consumers. We are not persuaded that branding on tobacco packaging cannot serve this promotional function or generate certain positive perceptions in the presence of Australia's expanded GHWs, which occupy 75% of the front pack face.<sup>709</sup>

515. The Panel further referred to independent research by Cancer UK as well as numerous other expert reports on the panel record in concluding that "the evidence before us suggests that tobacco packaging may be used as an instrument of promotion. More specifically, the evidence before us also suggests that it may be

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<sup>705</sup> Dominican Republic's appellant's submission, para. 700.

<sup>706</sup> Dominican Republic's appellant's submission, para. 740.

<sup>707</sup> Dominican Republic's appellant's submission, paras. 710-728.

<sup>708</sup> Dominican Republic's appellant's submission, paras. 729-739.

<sup>709</sup> Panel Report, para. 7.660 (referring to US Surgeon General's Report 2012 (AUS-76); British American Tobacco, Packaging Brief 2001 (AUS-23); Tavassoli Report (AUS-10); Dubé Report (AUS-11); Slovic Report (AUS-12); and Tavassoli Rebuttal Report (AUS-588)).

used, and has in fact been used, to generate positive perceptions of tobacco products."<sup>710</sup>

516. The Panel's findings to this effect are based on credible evidence from recognised and reputable sources, and amply supported in the record evidence. The Panel has not exceeded the bounds of its discretion under Article 11 of the DSU simply by not attributing to the Dominican Republic's evidence the weight and significance that the Dominican Republic attributed to it, or by failing to include an express reference to a specific piece of evidence in reaching its findings.

517. In any event, Australia will proceed to demonstrate that the Dominican Republic's claims of error under Article 11 of the DSU, when examined on their own merits, also fail as a matter of law.

- (a) The Panel engaged with evidence of perceptions of tobacco packaging in Australia prior to the implementation of the TPP measures

518. According to the Dominican Republic, "nothing in the Panel's reasoning suggests that it considered the significance of the evidence concerning the perceptions conveyed by tobacco packaging to Australian adolescents and adults prior to the TPP measures."<sup>711</sup> This assertion is demonstrably false.

519. At the outset, Australia notes that the Panel did take into account evidence that is specific to the Australian market in drawing the conclusion that tobacco packaging has been used by the industry to convey *positive* perceptions about tobacco products. The Panel expressly noted that "various documents referred to or presented as evidence in these proceedings identify a number of industry documents suggesting that the tobacco industry has in fact used packaging as an instrument of communication, *including in the Australian market.*"<sup>712</sup> Such evidence included industry statements to the effect that in particular in darkening markets such as Australia "it is essential that the pack itself generates the optimum level of modernity, youthful image and appeal amongst [Adult Smokers Under 30] consumers."<sup>713</sup>

520. As the Dominican Republic itself highlighted in its appellant's submission, the Panel identified more than fifty types of positive imagery that tobacco packaging may convey based on the tobacco industry's own research.<sup>714</sup> The documents cited by the Panel identify positive imagery generated by branded tobacco packaging that are taken from Australian tobacco industry research, companies operating in Australia or their international parent companies, or relate to brands available for sale in

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<sup>710</sup> Panel Report, para. 7.663.

<sup>711</sup> See Dominican Republic's appellant's submission, para. 709.

<sup>712</sup> Panel Report, para. 7.657 (emphasis added).

<sup>713</sup> Panel Report, para. 7.657 (referring to British American Tobacco, Packaging Brief 2001 (AUS-23), and to Slovic Report (AUS-12), para. 71).

<sup>714</sup> See Dominican Republic's appellant's submission, para. 720.

Australia.<sup>715</sup> Moreover, most of the Australian tobacco industry documents post-date the introduction of general advertising bans in Australia.<sup>716</sup>

521. Thus, contrary to what the Dominican Republic suggests, the Panel considered the significance of evidence concerning perceptions conveyed by tobacco packaging to young adults in Australia prior to the introduction of the TPP measures.

522. Moreover, the Panel *expressly* acknowledged the Dominican Republic's argument that "even before the TPP measures were introduced, Australia's packaging had negative appeal"<sup>717</sup>, but was ultimately not persuaded by this line of argument. The fact that the Panel chose not to refer to specific pieces of evidence in reaching its findings regarding perceptions in Australia does not establish that the Panel exceeded the bounds of its discretion under Article 11 of the DSU, particularly in light of the abundant evidence on which the Panel relied in reaching its conclusion that tobacco packaging has been used by the industry to convey *positive* perceptions, including in dark markets such as Australia.

523. In any event, the Panel examined and weighed the key evidence that the Dominican Republic alleges was "disregarded", i.e. the study by White et al. 2015a, examining the impact of plain packaging on cigarettes with enhanced GHWs on the perceptions of adolescents in Australia based on the 2013 Australian Secondary Students Alcohol Smoking and Drug (ASSAD) survey of secondary school student use of licit and illicit substances.<sup>718</sup>

524. In relation to this study, the Panel explained that White et al. 2015a "conclude that the TPP measures have reduced the appeal of cigarette packs among adolescents."<sup>719</sup> The Panel considered this evidence to "confirm[], rather than discredit[], the ... hypothesis reflected in the TPP literature that plain packaging would reduce the appeal of tobacco products".<sup>720</sup> A panel does not "fail to engage" with evidence merely by reaching a conclusion based on that evidence with which a party disagrees.<sup>721</sup> Nor, as Australia will proceed to explain, was the Panel's reasoning "internally incoherent".

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<sup>715</sup> See Panel Report, para. 7.735.

<sup>716</sup> At no stage during the panel proceedings did the Dominican Republic question the relevance of the tobacco industry documents relied on by Australia, or express concerns about the geographic and temporal relevance of these documents.

<sup>717</sup> Panel Report, para. 7.436.

<sup>718</sup> See Panel Report, Appendix A, paras. 22, 31, 56.

<sup>719</sup> See Panel Report, Appendix A, para. 22 (emphasis added).

<sup>720</sup> See Panel Report, para. 7.954.

<sup>721</sup> See, e.g. Appellate Body Report, *US – Carbon Steel (India)*, para. 4.80.

- (b) The Panel's reasoning with respect to the evidence of negative perceptions of tobacco packaging in Australia prior to the implementation of the TPP measures is not "internally incoherent"

525. The Dominican Republic argues that the evidence of negative perceptions "directly contradicts the Panel's findings on the pre-implementation evidence that tobacco packaging necessarily conveys positive associations".<sup>722</sup> However, there is *no* internal contradiction between the Panel's finding that branded tobacco packaging can convey positive associations on the one hand, and evidence of negative perceptions of branded tobacco products amongst many Australians prior to implementation of the TPP measures on the other.

526. Put simply, positive associations can be reduced and negative perceptions can get worse, which is exactly what White et al 2015a found in the relevant study. The authors investigated the impact of standardised packaging of tobacco products on perceptions of the image of cigarette packs and brands among adolescents. The study demonstrated that tobacco plain packaging both "reduced the appeal of tobacco packs to adolescents" *and* "increased negative perceptions of packs".<sup>723</sup> In other words, the study confirmed that negative images and perceptions *could get worse*, with the authors reporting that "packs were rated less positively and more negatively in 2013 than in 2011."<sup>724</sup>

527. As the Dominican Republic highlights in its submission,<sup>725</sup> the Panel repeatedly found, based on multiple pieces of evidence, that tobacco packaging is an "instrument of promotion"<sup>726</sup> that has the power to convey positive associations.<sup>727</sup> The Panel did not caveat this finding with respect to consumers that already hold negative perceptions of branded tobacco products. If the consumer has a positive or neutral perception, branded packaging has the power to render that perception more positive; if the consumer has a negative perception, branded packaging has the power to counteract that negative perception. Thus, there is no internal contradiction between finding that in the Australian context, branded packaging is "the *only* opportunity to convey a positive perception" and evidence of negative perceptions of branded tobacco products.<sup>728</sup>

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<sup>722</sup> See Dominican Republic's appellant's submission, para. 707.

<sup>723</sup> White et al. 2015a (AUS-186), ii48. The study also confirmed that tobacco plain packs were creating uncertainty regarding whether there were differences between cigarette brands' addictive qualities and their ease of being smoked, and that there was a slight increase in the view that some cigarette brands contained more harmful substances than others.

<sup>724</sup> White et al. 2015a (AUS-186), ii42.

<sup>725</sup> See Dominican Republic's appellant's submission, paras. 716-718.

<sup>726</sup> See Panel Report, para. 7.663.

<sup>727</sup> See, e.g. Panel Report, paras. 7.778, 7.930.

<sup>728</sup> See Panel Report, para. 7.1034 (emphasis in original).

528. The Dominican Republic's argument implies that the perception of tobacco products prior the introduction of the TPP measures was as negative as Australia could reasonably hope to achieve. Honduras made a similar argument with respect to GHWs, contesting the ability of the TPP measures to *increase* risk awareness through the GHW mechanism because Australians already had a high understanding and awareness of the risks of smoking.<sup>729</sup>

529. The Panel had no difficulty in rejecting this argument and found that:

We are not persuaded, however, that the existence of a relatively high level of knowledge or risk awareness in Australia implies that GHWs could not be made *more* effective in achieving their objective of increasing such knowledge or risk awareness. It appears to us that such a view would be tenable only if assessed at the highest level of generality (namely that Australians consider smoking to be harmful and to carry risks, which the evidence before us suggests is almost universally known), and if we were to assume that the need to inform individuals about the health risks associated with tobacco use is contingent *only* on the extent of general knowledge already existing in the relevant territory. ... The complainants' argument on the inability of plain packaging to improve the effectiveness of GHWs due to current levels of risks awareness in Australia would seem to imply that the effectiveness of GHWs would not be capable of being improved in *any* meaningful way, or even that they would no longer be necessary in Australia, which we do not understand the complainants to be suggesting.<sup>730</sup>

530. The Dominican Republic is similarly asking the Appellate Body to accept that the TPP measures would be incapable of reducing the appeal of tobacco products solely because, prior to the TPP measures, some consumers already did not consider these products appealing.

531. Another flaw in the Dominican Republic's argument is that it ignores the fact that White et al 2015a found that some Australian youth rated packs positively and had positive perceptions of tobacco brands. The Dominican Republic's argument appears to assume these young people do not matter because they are a minority, but it is precisely this minority that the tobacco industry targets most because it knows that this group is most susceptible to becoming smokers. As Australia's youth smoking expert, Dr Biglan, noted: "[I]t is important to note that the young people at greatest risk to smoke are on the margins of social in-groups and are more likely to be rebellious and risk-taking."<sup>731</sup> This observation underscores the value of reducing positive perceptions and increasing negative perceptions *for all groups* and hence the significance of the White et al 2015a findings.

532. The Dominican Republic's argument is also irreconcilable with the findings of the Dominican Republic's *own expert* that the TPP measures have in fact reduced the appeal of tobacco packaging in Australia. As explained by the Panel, the

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<sup>729</sup> See Panel Report, para. 7.829.

<sup>730</sup> Panel Report, para. 7.843 (emphasis added).

<sup>731</sup> Biglan Report (AUS-13), para. 30.

complainants' experts "accept that plain packs have been, 'as intended', perceived to be less attractive, and that 'the lowered visual appeal of the pack appears to have some bearing on the respondents' evaluation of the quality, satisfaction and value of their cigarettes' compared to the previous year."<sup>732</sup>

533. The Dominican Republic has not appealed the Panel's finding, based on its own expert's analysis, that the TPP measures have reduced the appeal of the pack. Rather, the Dominican Republic's argument is that the Panel's analysis is incoherent because the Panel did not conclude that pre-existing negative perceptions of tobacco packing in Australia bar *further* reductions in appeal – even in the face of undisputed evidence that the TPP measures *have in fact reduced* the appeal of tobacco packing in Australia.

- (c) Honduras has not established that the Panel failed to provide a reasoned and adequate explanation of the probative value of the pre-implementation studies

534. Honduras claims that the Panel failed to conduct an objective assessment of the matter before it because it assigned probative value to pre-implementation evidence, despite "serious limitations" in relation to that evidence, such as its non-behavioural focus, and other methodological flaws and limitations.<sup>733</sup> Honduras maintains that the allegedly flawed studies should have been given "no probative value or weight", and 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>734</sup>

535. Honduras's claims of error are 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. As Australia explained in Part B.2, a panel does not exceed the bounds of its discretion as the trier of fact simply by assigning to specific evidence a weight and significance that is different than that attributed to it by the parties.

536. In the present dispute, the Panel carefully scrutinised the complainants' criticisms of the TPP literature and explained in detail why it did not find these criticisms to be persuasive.<sup>735</sup> The Panel explicitly rejected the complainants' criticisms based on the focus of the TPP literature;<sup>736</sup> the lack of randomised, longitudinal, counterfactual studies (which even the complainants' own experts

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<sup>732</sup> Panel Report, para. 7.954.

<sup>733</sup> Honduras's appellant's submission, para. 800.

<sup>734</sup> Honduras's appellant's submission, para. 801.

<sup>735</sup> See Panel Report, paras. 7.539-7.644.

<sup>736</sup> Panel Report, para. 7.555. See also Panel Report, para. 7.610.

acknowledged would be both impracticable and unethical);<sup>737</sup> and the alleged lack of methodological rigour.<sup>738</sup>

537. In criticising the Panel's acknowledgement of the limitations of certain studies in the process of determining the probative value of the TPP literature, Honduras is asking the Appellate Body to effectively *re-weigh* that evidence. Moreover, Honduras is asking the Appellate Body to fault the Panel under Article 11 of the DSU essentially because the Panel *fulfilled* its duty to provide a reasoned and adequate explanation for its findings.

538. Honduras further claims that the Panel's acknowledgment of the limitations of certain studies cannot be reconciled with its own standard for assessing the "robustness" of "scientific evidence".<sup>739</sup> On the contrary, the Panel properly understood that the standard of review with respect to scientific evidence does not require a panel to ascertain whether the evidence at issue is based on the "best science".<sup>740</sup> The Panel carefully considered the complainants' criticisms of the evidence and disagreed that any of these criticisms warranted the "wholesale exclusion" of any evidence from the Panel's assessment.<sup>741</sup> Instead, the Panel properly concluded that the pre-implementation evidence was credible and from reputable sources.<sup>742</sup>

- (d) The Dominican Republic's and Honduras's Claims that the Panel failed to examine the pre-implementation evidence in light of the post-implementation evidence are unfounded

539. 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>743</sup>

540. Contrary to the complainants' argument, the Panel *did* assess the pre-implementation evidence against the post-implementation evidence. Despite its reservations concerning the weight and significance to be attributed to post-implementation evidence,<sup>744</sup> the Panel expressly held that the pre-implementation

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<sup>737</sup> Panel Report, paras. 7.561, 7.562. See also Panel Report, paras. 7.557-7.560.

<sup>738</sup> Panel Report, paras. 7.638, 7.639. See also Panel Report, paras. 7.674, 7.675.

<sup>739</sup> See Honduras's appellant's submission, para. 802.

<sup>740</sup> See Appellate Body Report, *US – Continued Suspension*, paras. 602, 612.

<sup>741</sup> Panel Report, para. 7.614.

<sup>742</sup> Panel Report, paras. 7.674, 7.930.

<sup>743</sup> Dominican Republic's appellant's submission, paras. 747-779; Honduras's appellant's submission, paras. 806-814.

<sup>744</sup> Panel Report, para. 7.940.

evidence "must be considered also in light of available empirical evidence on the application of the measures."<sup>745</sup>

541. In relation to the post-implementation evidence, the Panel concluded that:

[E]vidence before us on the application of the TPP measures includes empirical evidence relating to their impact on the proximal outcomes reflecting the three mechanisms identified and anticipated in the TPP Act, since their entry into force. This evidence suggests that the introduction of tobacco plain packaging, in combination with enlarged GHWs, has in fact reduced the appeal of tobacco products, as anticipated in a number of the pre-implementation studies criticized by the complainants.<sup>746</sup>

542. The Panel further held that "[e]mpirical evidence relating to the proximal outcomes of the TPP measures also suggests that plain packaging and enlarged GHWs have had some impact on the effectiveness of the GHWs."<sup>747</sup>

543. Moreover, as Australia further explains in Part G, the Panel also concluded that evidence on actual smoking behaviours "is consistent with a finding that the TPP measures contribute to a reduction in the use of tobacco products, to the extent that it suggests that, together with the enlarged GHWs introduced at the same time, plain packaging has resulted in a reduction in smoking prevalence and in consumption of tobacco products."<sup>748</sup>

544. Accordingly, the Dominican Republic and Honduras have failed to demonstrate that the Panel acted inconsistently with Article 11 of the DSU by failing to take into account the pre-implementation evidence in light of post-implementation evidence. The Panel in fact weighed both the pre- and post-implementation evidence in reaching its overall conclusion 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>749</sup>

545. In light of the above, the Dominican Republic and Honduras have failed to establish that the Panel acted inconsistently with Article 11 of the DSU in its assessment of the pre-implementation evidence.<sup>750</sup>

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<sup>745</sup> Panel Report, para. 7.1035.

<sup>746</sup> Panel Report, para. 7.1036 (emphasis added).

<sup>747</sup> Panel Report, para. 7.1036.

<sup>748</sup> Panel Report, para. 7.1037.

<sup>749</sup> See Panel Report, para. 7.1025.

<sup>750</sup> The appellants have also failed to establish that any of the alleged errors in the Panel's appreciation of the pre-implementation evidence would rise to a level of materiality so as to call into question the objectivity of the Panel's assessment.

## **F. Post-Implementation Evidence on Proximal and Distal Outcomes (Appendices A and B)**

### **1. Introduction**

546. For the reasons described in the previous section, the appellants' Article 11 claims in relation to the Panel's findings concerning the pre-implementation evidence are unpersuasive.

547. The appellants have focused the bulk of their extensive claims under Article 11 of the DSU 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 relating to the "proximal" outcomes (Appendix A) and "distal" outcomes (Appendix B) in this section, 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 G below.

### **2. Summary of the Panel's Findings**

548. 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, namely: (i) reduction in the appeal of tobacco products; (ii) increased effectiveness of GHWs; and (iii) reduction in the ability of the pack to mislead consumers about smoking harms.

549. With respect to the impact of the TPP measures on the appeal of tobacco products, the Panel found that there is empirical evidence suggesting that the measures "have reduced the appeal of tobacco products among adult cigarette smokers, in terms of pack dislike, product dislike, perceived lower quality, satisfaction and value, lower brands' prestige, and connection and identification."<sup>751</sup> The Panel highlighted the findings of the complainants' own experts, which showed that the TPP measures had in fact reduced the appeal of tobacco products:

These conclusions suggest that Ajzen et al., having reviewed the data obtained from the NTPPTS for the Dominican Republic and Indonesia, accept that plain packs have been "as intended", perceived to be less attractive, and that "the lowered visual appeal of the pack appears to have some bearing on the respondents' evaluation of the quality, satisfaction and value of their cigarettes" compared to the previous year. We note that these experts also conclude that "these indicators of appeal of tobacco products showed statistically significant effects of the introduction of plain packaging and larger GHWs *in the hypothesized direction*". The available empirical evidence relating to the application of the TPP measures since their entry into force thus confirms, rather than discredits, the "hypothesized direction", i.e.

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<sup>751</sup> Panel Report, Appendix A, para. 29. The findings on the appeal of tobacco products among adolescents and users of non-cigarette products were consistent with these results. Ibid. paras. 31 and 32.

the hypothesis reflected in the TPP literature that plain packaging would reduce the appeal of tobacco products.<sup>752</sup>

550. Likewise, with respect to the effectiveness of GHWs, the Panel stated that the TPP measures had impacted this mechanism by "increasing the noticeability of GHWs, attention towards them, avoidance of health warnings labels, pack concealment, request for a pack with a different GHW and attribution to the motivation to quit to GHWs".<sup>753</sup> Again, the Panel highlighted the findings of the complainants' own experts, which showed that the TPP measures had statistically significantly increased the noticeability of GHWs.<sup>754</sup>

551. Finally, with respect to the ability of the TPP measures to reduce the ability of the pack to mislead consumers about the harmful effects of tobacco use, the Panel noted that – although the evidence on this mechanism was "more mixed" – it nonetheless suggested there was a statistically significant impact of the TPP measures on reducing the belief that brands differ in harmfulness.<sup>755</sup>

552. Accordingly, and on the basis of early post-implementation evidence on the operation of the three "mechanisms", the Panel concluded that:

This evidence suggests that the introduction of tobacco plain packaging, in combination with enlarged GHWs, has in fact reduced the appeal of tobacco products, as anticipated in a number of the pre-implementation studies criticized by the complainants. As discussed above, this is recognized by some of the complainants' own experts on the basis of a direct examination of data collected for the specific purpose of evaluating the effects of the TPP measures and which was provided to the complainants for use in these proceedings. Empirical evidence relating to the proximal outcomes of the TPP measures also suggests that plain packaging and enlarged GHWs have had some impact on the effectiveness of the GHWs.<sup>756</sup>

553. Given that the appellants' own experts agreed that the TPP measures, in combination with enlarged GHWs, have reduced the appeal of tobacco products and increased the noticeability of GHWs in the post-implementation period, Australia does not understand the appellants to have challenged these affirmative Panel findings in Appendix A.<sup>757</sup>

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<sup>752</sup> Panel Report, para. 7.954 (emphasis in original).

<sup>753</sup> Panel Report, Appendix A, para. 67.

<sup>754</sup> Panel Report, para. 7.955.

<sup>755</sup> Panel Report, Appendix A, para. 84 (the Panel noted that the findings of Ajzen et al. confirmed this result, though they considered the effects as being small and subject to wear out).

<sup>756</sup> Panel Report, para. 7.1036.

<sup>757</sup> Honduras does present certain limited challenges to these findings in the Annex to its appellant's submission, which Australia addresses in Annex 2. See Honduras's appellant's submission, Annex, para. 1083. As described therein, the alleged errors that Honduras identifies in relation to the Panel's appreciation of the evidence submitted by Professor Klick are facially improper claims under Article 11 of the DSU.

554. After the Panel concluded that there was statistically significant post-implementation evidence of "proximal" outcomes, as anticipated by the pre-implementation evidence, 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.).

555. Australia submitted that the relevant studies, while more suited to detecting proximal outcomes, show that the TPP measures have started to influence smoking-related behaviours.<sup>758</sup> The complainants maintained that the TPP measures have not had the expected effects on this antecedent behaviour and that, to the extent that they have, these effects are susceptible to "wear out". The Panel had earlier considered the arguments relating to "wear out" and noted:

[A]s observed by Australia, the TPP measures do not, in themselves, seek to transmit a specific message, the effect of which would "wear-out" over time, but rather seek to *limit* the ability of tobacco packaging to convey specific positive associations through branding features. We are not persuaded, therefore, that the examples cited by the complainants in this respect should be assumed to be fully transposable to the effects of plain packaging on relevant behavioural outcomes.<sup>759</sup>

556. In Appendix B, the Panel examined the studies and relevant data in light of the complainants' claim that there was no evidence to support Australia's arguments about the effects of the TPP measures on antecedent behaviour. The Panel considered that while some of the results were "limited" or "limited and mixed", the available post-implementation empirical evidence on these "distal" outcomes suggests that the TPP measures are operating as expected in terms of positive impacts on avoidant behaviours and increased calls to Quitline.<sup>760</sup>

557. The Panel noted that the survey data used in these studies may be more suited to analysing the impact of the TPP measures and enlarged GHWs on "proximal" outcomes than more "distal" outcomes. Furthermore, the Panel noted that 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>761</sup>

3. The Appellants' Claims Under Article 11 of the DSU in Relation to the Panel's Findings Concerning Evidence of "Proximal" and "Distal" Outcomes Are Unfounded

(a) Introduction

558. In relation to the Panel's findings in Appendices A and B, Honduras presents essentially the same argument that the Dominican Republic advances as its "first appeal ground" regarding the Panel's assessment of the "proximal" and "distal"

<sup>758</sup> Australia's first written submission, para. 185; Panel Report, para. 7.960.

<sup>759</sup> Panel Report, para. 7.941 (emphasis in original).

<sup>760</sup> Panel Report, para. 7.963.

<sup>761</sup> Panel Report, Appendix B, para. 118.

outcomes evidence. Broadly speaking, the appellants both argue that the Panel's findings in Appendices A and B cannot be reconciled with the Panel's finding that the contribution of the TPP measures is expected to arise through the operation of a "causal chain", because the Panel failed to properly account for its findings that the evidence for certain "proximal" and "distal" outcomes was "limited" or "limited and mixed".<sup>762</sup>

559. As Australia explains in Part (b) below, however, what the appellants are actually challenging is the Panel's discretion to assess the credibility of the evidence on the panel record, determine the weight, and make findings on the basis of that evidence. 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.

560. The Dominican Republic's "second appeal ground" with respect to the Panel's findings on "distal" outcomes in Appendix B is that the Panel's *summary* of the "distal" outcomes evidence is inconsistent with the Panel's *findings* in relation to the "distal" outcomes evidence.<sup>763</sup> As Australia demonstrates in Part (c) below, the Dominican Republic's claim is premised on a selective and erroneous reading of the Panel's analysis.

561. Finally, in Part (d), Australia demonstrates that the Dominican Republic's "third appeal ground" regarding the Panel's alleged errors in assessing the robustness of the parties' evidence on "distal" outcomes in Appendix B is likewise without merit.<sup>764</sup>

- (b) The appellants' claims that the Panel's findings on "proximal" and "distal" outcomes are "incoherent" or lack a "reasoned and adequate basis" in light of the "causal chain" posited by Australia are unfounded

- (1) Introduction

562. The Dominican Republic and Honduras contend that the Panel's analysis of the post-implementation evidence on the impact of the TPP measures on "proximal" and "distal" outcomes violates Article 11 of the DSU because it "lacks coherence with its finding that 'the contribution of the TPP measures is expected to arise from the operation of a 'causal chain'".<sup>765</sup> Specifically, the appellants argue that in its holistic

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<sup>762</sup> See, e.g. Dominican Republic's appellant's submission, paras. 893-912; Honduras's appellant's submission, paras. 746-793.

<sup>763</sup> See Dominican Republic's appellant's submission, paras. 920-935.

<sup>764</sup> See Dominican Republic's appellant's submission, paras. 936-1174.

<sup>765</sup> See, e.g. Dominican Republic's appellant's submission, paras. 893-919; Honduras's appellant's submission, paras. 755-793. The Dominican Republic argues that the Panel's analysis is in

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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>766</sup>

563. As Australia will proceed to demonstrate, the appellants' argument is unfounded, because a panel "is not required to accord to factual evidence of the parties the same meaning and weight as do the parties".<sup>767</sup> The Panel weighed the "proximal" and "distal" outcomes evidence based on its understanding of the limitations of the relevant post-implementation data, and in light of the complainants' undisputed burden of proof. There is no basis for the appellants' argument that the Panel improperly "zeroed out" the evidence that was "limited and mixed", because the Panel was acting within its discretion as the trier of fact.

(2) The Panel's framework for evaluating the post-implementation evidence

564. During the panel proceedings, the complainants took the extreme position that the pre-implementation evidence supporting the TPP measures had been "superseded" by the post-implementation empirical evidence.<sup>768</sup>

565. Australia explained that, in light of both the long-term nature of the TPP measures and the limited amount of post-implementation evidence, the complainants' radical view that the Panel should *ignore* the substantial body of pre-implementation evidence supporting the long-term efficacy of the measures was not consistent with the relevant legal and evidentiary standards for assessing contribution.<sup>769</sup>

566. Australia noted that Honduras and the Dominican Republic had filed their consultations and panel requests *before* Australia had even implemented the TPP measures – i.e. before any post-implementation evidence could even exist – but then argued that the Panel should evaluate the measures *exclusively* by reference to the post-implementation quantitative evidence that became available *during the panel proceedings*.

567. Australia explained in its submissions to the Panel that the complainants' arguments were inconsistent with the Appellate Body's prior observations that:

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violation of Article 11 because it reflects "internally incoherent" reasoning, while Honduras claims that the Panel erred by failing to provide a "reasoned and adequate explanation" for how the evidence in Appendices A and B supports either the "causal chain" or the Panel's overall conclusion on contribution. The arguments presented by the appellants in support of these claims are, however, fundamentally the same.

<sup>766</sup> See, e.g. Dominican Republic's appellant's submission, paras. 877-878, 881; Honduras's appellant's submission, paras. 773-775.

<sup>767</sup> See Appellate Body Report, *Australia – Salmon*, para. 267.

<sup>768</sup> See, e.g. Dominican Republic's first written submission, para. 553 (heading).

<sup>769</sup> See, e.g. Australia's second written submission, paras. 434-439.

- there is no requirement to *quantify* the degree of contribution of a challenged technical regulation to its objectives;<sup>770</sup>
- the effects of such public health measures "can only be evaluated with the benefit of time";<sup>771</sup>
- a panel must adopt a methodology that is suited to yielding a *correct* assessment of contribution in the *circumstances* of a given case.<sup>772</sup>

568. Against the backdrop of the Appellate Body's prior statements, Australia argued that while the post-implementation quantitative evidence was *relevant* to the Panel's inquiry, the Panel also needed to give due regard to the nature, quantity and quality of all the available evidence across a range of relevant fields including psychology, epidemiology, marketing, consumer behaviour, and economics.<sup>773</sup>

569. The Panel agreed with Australia that it had to assess the TPP measures' degree of contribution to their objective "based upon the totality of the relevant evidence" before it;<sup>774</sup> and disagreed with the complainants that the post-implementation quantitative evidence before it "superseded" the pre-implementation qualitative evidence.

570. Accordingly, it was only after the Panel completed its comprehensive review of the pre-implementation evidence, and concluded that the complainants had not met their burden of demonstrating that the TPP measures would not be capable of contributing to Australia's public health objective on the basis of the design, structure, and operation of the measures, that the Panel turned to its assessment of the post-implementation evidence.

571. In relation to the *weight* that should be given to the post-implementation evidence, the Panel recognised the inherent limitations of this evidence in the early period of application of the measures:

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<sup>770</sup> Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.209. In *EC – Seal Products*, the Appellate Body found that, where evidence of the actual operation of the measure was "limited and uneven", contribution could be demonstrated by qualitative evidence indicating that the measure is "*capable* of making and does make *some* contribution to its objective, or that it did so to a *certain extent*." Appellate Body Report, *EC – Seal Products*, para. 5.228, cited in Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.209.

<sup>771</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151. The Appellate Body expressly acknowledged that "certain complex public health ... problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures", and that it may prove difficult, in the short term, to isolate the contribution of one specific public health measure from those attributable to other measures forming part of the same comprehensive policy. *Ibid.*

<sup>772</sup> Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.210-5.211.

<sup>773</sup> See, e.g. Australia's second written submission, para. 438.

<sup>774</sup> Panel Report, para. 7.499.

We are mindful that, while our task is to assess the actual contribution of the measures to their objective in light of the available evidence before us, we must take due account of the possibility that the effects of certain measures may manifest themselves over a longer period of time and into the future. We note in this respect the observation of the Appellate Body in *US - Gasoline*, in the context of Article XX(g) of the GATT 1994, that, "in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable". Similarly, 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>775</sup>

572. The Panel noted "in particular" Australia's argument that "the impact of the measures on smoking initiation can only manifest itself fully over a longer period of application, as it gradually affects future generations not exposed to any form of tobacco branding, on packaging or otherwise",<sup>776</sup> and concluded that it found Australia's arguments persuasive:

[T]o the extent that the TPP measures rely on evolutions in smoking behaviours that may not be immediately perceptible or measurable, or may take time to materialize in actual behaviours, data and evidence relating to actual smoking behaviours in the early period of application of the measures may not provide a complete picture of the extent to which the measures contribute, and can be expected to contribute into the future, to their objective.<sup>777</sup>

573. Bearing in mind "the challenges inherent in identifying data and methodologies apt to reveal the effects of measures intended to affect population-wide behaviours in a complex setting, and the need to exercise caution in seeking to draw conclusions on the effectiveness of this type of measure on the basis of relatively limited information",<sup>778</sup> the Panel proceeded to examine the post-implementation evidence available at the time of its assessment.

574. In support of its overall conclusion 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>779</sup> the Panel noted that there was post-implementation evidence that the TPP measures were having the effects "anticipated in a number of the

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<sup>775</sup> Panel Report, para. 7.938.

<sup>776</sup> Panel Report, para. 7.939.

<sup>777</sup> Panel Report, para. 7.940.

<sup>778</sup> Panel Report, para. 7.942.

<sup>779</sup> Panel Report, para. 7.1025.

pre-implementation studies",<sup>780</sup> and that the evidence in relation to smoking behaviours was consistent with the intended operation of the TPP measures.<sup>781</sup>

- (3) The Panel acted within its discretionary authority when it attributed particular weight to various "proximal" and "distal" outcomes evidence

575. As described above, the Panel rejected the complainants' argument that its evaluation of whether the complainants had discharged their burden must be made on the basis of the post-implementation evidence alone. Instead, the Panel engaged in a thorough analysis of the pre-implementation evidence, and found that the complainants had *not* demonstrated that the TPP measures would be incapable of impacting smoking initiation, cessation, and relapse through the proposed "causal chain".

576. Therefore, in relation to the post-implementation data, the complainants bore the following burden: to demonstrate that (1) *despite* the pre-implementation evidence, and (2) *despite* the fact that the Panel recognised that 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>782</sup> the Panel must still conclude that the complainants had demonstrated that the TPP measures were *incapable* of contributing to Australia's public health objective.

577. This was an onerous burden for the complainants, and is perhaps why they initially sought to discharge it by demonstrating that the post-implementation evidence on prevalence and consumption revealed that the TPP measures had "backfired"<sup>783</sup> by *increasing* prevalence and consumption.

578. The complainants were forced to abandon this position during the panel proceedings in the face of incontrovertible evidence that rates of prevalence and consumption in Australia continued to *decline* following the implementation of the TPP measures. The complainants then shifted to arguing that the post-implementation evidence demonstrated that the TPP measures were incapable of contributing to Australia's public health objective because the measures were not having *any* of the anticipated effects on "proximal" outcomes, "distal" outcomes, or smoking behaviours.

579. This approach also failed after the complainants' own experts agreed that the TPP measures and enlarged GHWs had statistically significantly reduced the appeal of cigarettes and increased the noticeability of GHWs, as anticipated by the

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<sup>780</sup> Panel Report, para. 7.1036.

<sup>781</sup> Panel Report, para. 7.1037.

<sup>782</sup> Panel Report, para. 7.938.

<sup>783</sup> See Panel Report, para. 7.969 ("The complainants ... initially suggested that the TPP measures 'backfired' by increasing youth smoking prevalence"); Panel Report, para. 7.975 ("The complainants ... suggested initially that [the] TPP measures 'backfired' by increasing tobacco sales.").

pre-implementation evidence.<sup>784</sup> As summarised above, the Panel ultimately found that the TPP measures had a statistically significant impact on:

- increased attention to GHWs;<sup>785</sup>
- increased avoidance of health warning labels;<sup>786</sup>
- increased pack concealment;<sup>787</sup>
- increased requests for a pack with a different GHW;<sup>788</sup>
- increased attribution to the motivation to quit to GHWs;<sup>789</sup>
- increased recall of a disease on a current GHW and on believing that smoking causes blindness;<sup>790</sup>
- increased avoidant behaviours;<sup>791</sup>
- increased calls to Quitline;<sup>792</sup>
- increased avoidant behaviours with respect to cigars (through, for example, decanting cigars or concealing packs) and increased thoughts about quitting for some cigar smokers;<sup>793</sup> and
- increased associations between GHW effectiveness and quitting cognitions and behaviour among adult smokers.<sup>794</sup>

580. Despite both the pre-implementation evidence and the evidence that the TPP measures were having the anticipated impacts on the "proximal" and "distal" outcomes listed above, the Dominican Republic and Honduras claim in their appellant submissions that the Panel was nonetheless compelled to conclude that the complainants had met their burden because the evidence in relation to the impact of

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<sup>784</sup> Panel Report, para. 7.1036.

<sup>785</sup> Panel Report, Appendix A, para. 67.

<sup>786</sup> Panel Report, Appendix A, para. 67.

<sup>787</sup> Panel Report, Appendix A, para. 67.

<sup>788</sup> Panel Report, Appendix A, para. 67.

<sup>789</sup> Panel Report, Appendix A, para. 67.

<sup>790</sup> Panel Report, Appendix A, para. 68.

<sup>791</sup> Panel Report, Appendix B, para. 120(b).

<sup>792</sup> Panel Report, Appendix B, para. 120(c).

<sup>793</sup> Panel Report, Appendix B, para. 120(e).

<sup>794</sup> Panel Report, Appendix B, para. 114.

the measures on certain *other* "proximal" and "distal" outcomes was "limited" or "limited and mixed".<sup>795</sup>

581. First, contrary to the Dominican Republic's assertion, the Panel's reference to evidence in relation to particular outcomes as "limited and mixed" is not "the Panel's euphemism to describe the evidence when it does not show a TPP effect in the anticipated direction."<sup>796</sup> For example, the Panel's finding that the evidence concerning the effect of the TPP measures on quitting intentions and quitting-related cognition reactions of adult cigarette smokers was "limited and mixed" reflects the fact that there were only two studies available on this issue, and that those studies reported results that were both statistically significant and non-statistically significant.<sup>797</sup> It is self-evident why the Panel would report the outcomes as "limited" (i.e. two studies) and "mixed" (i.e. reported various findings).<sup>798</sup>

582. Second, the appellants' claim ignores that the Panel's "appreciation and weighing" of the evidence is within the Panel's authority as the trier of fact.<sup>799</sup>

583. The Panel's task was to determine whether the complainants had demonstrated that the TPP measures are incapable of contributing to Australia's public health objective through the anticipated "causal chain". The Panel explained that in light of the "causal chain", a consideration of "proximal outcomes" alone would not be sufficient to draw conclusions about the contribution of the TPP measures to Australia's public health objective.<sup>800</sup> Consistent with this understanding, the Panel proceeded to evaluate the available post-implementation evidence relating to "distal" outcomes and smoking behaviours, and based its conclusion on the totality of the relevant evidence before it.

584. As explained in detail above, however, the Panel engaged in this exercise expressly mindful that the effect of the TPP measures "may take some time to materialize fully or be perceptible in the relevant data" and was therefore aware of "the need to exercise caution in seeking to draw conclusions on the effectiveness of this type of measures on the basis of relatively limited information."<sup>801</sup>

585. Contrary to the appellants' assertions, the Panel was not compelled to weigh its post-implementation findings that the TPP measures have had a statistically significant effect in relation to certain "proximal" and "distal" outcomes against its "limited and mixed" findings. Where the evidence demonstrated that the measures were having the impact anticipated by the pre-implementation evidence, this bolstered

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<sup>795</sup> See, e.g. Dominican Republic's appellant's submission, paras. 922-924, 951-954; Honduras's appellant's submission, paras. 759-761, 775

<sup>796</sup> See Dominican Republic's appellant's submission, para. 873.

<sup>797</sup> Panel Report, Appendix B, paras. 37-39.

<sup>798</sup> See, e.g. Panel Report, para. 7.963(a).

<sup>799</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 400.

<sup>800</sup> Panel Report, para. 7.564.

<sup>801</sup> Panel Report, paras. 7.938-7.942.

the Panel's view that the complainants had not met their burden. Where the evidence in relation to the impact of the measures on certain "proximal" and "distal" outcomes was "limited and mixed", the Panel understood that evidence in light of the fact that the evidence for particular outcomes was "scarce" in the post-implementation period,<sup>802</sup> and in light of its understanding that certain outcomes might not be manifest in the post-implementation data on the record.<sup>803</sup>

586. For example, the Panel recognised that the survey datasets discussed in Appendix B cannot be used to assess the impact of the TPP measures on "non-smokers who might have taken up smoking in the absence of the TPP measures and enlarged GHWs."<sup>804</sup> Furthermore, the Panel found persuasive Australia's argument that "the impact of the measures on smoking initiation can only manifest itself fully over a longer period of application, as it gradually affects future generations not exposed to any form of tobacco branding, on packaging or otherwise."<sup>805</sup> In other words, the Panel properly recognised that just because the post-implementation evidence in relation to certain "proximal" and "distal" outcomes was "limited and mixed", this did not mean that the "causal chain" was incapable of working as intended. As noted above, the Panel found that the TPP measures have had a statistically significant effect in relation to numerous "outcomes" anticipated by the pre-implementation evidence, and that this was consistent with the TPP measures contributing to Australia's objective through the anticipated "causal chain".

587. The appellants' claims under Article 11 of the DSU in relation to the Panel's analysis of the "proximal" and "distal" outcomes evidence should therefore be rejected, because the Panel did not improperly "zero out" its findings that the evidence in relation to particular outcomes was "limited and mixed". The Panel attributed a particular *weight* to that evidence in light of its inherent limitations and the complainants' burden of proof, and in a manner well within its discretion as the trier of fact.

- (c) The Dominican Republic's argument that the Panel's summary of the distal outcomes evidence is "incoherent" is unfounded

588. The Dominican Republic's "second appeal ground" is that the Panel's summary of the impact of the TPP measures on distal outcomes "lacks coherence" with the Panel's own findings in Appendix B of its Report.<sup>806</sup> Specifically, the Dominican Republic alleges that:

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<sup>802</sup> Panel Report, Appendix B, para. 120.

<sup>803</sup> Panel Report, para. 7.938. Australia will address the Dominican Republic's Article 11 claim regarding the first proposition in Part VII.F.3(d)(2) below.

<sup>804</sup> Panel Report, Appendix B, para. 118.

<sup>805</sup> Panel Report, para. 7.939. The Dominican Republic emphasises in its appellant's submission that "reducing smoking initiation was a key objective of the TPP measures". Dominican Republic's appellant's submission, para. 734, citing Panel Report, paras. 7.490 and 7.495.

<sup>806</sup> Dominican Republic's appellant's submission, Section II.F.3.c.

- The Panel concluded that "the TPP measures and enlarged GHWs have had a statistically significant positive impact on avoidant behaviours, such as pack concealment". However, in its analysis in Appendix B, the Panel acknowledged that "the increase in concealed packs....was not sustained one year after the introduction of the TPP measures", and further acknowledged that the wear-out effect was confirmed by Ajzen et al.'s re-analysis of the data.<sup>807</sup>
- The Panel concluded that "the TPP measures and enlarged GHWs have statistically significantly increased calls to Quitline". However, in its analysis in Appendix B, the Panel had found that the increase in Quitline calls had not been sustained (i.e. there was wear-out of the effects).<sup>808</sup>
- The Panel concluded that the impact on "stopping smoking" was "mixed", when the Panel's analysis shows that the evidence was not "mixed".<sup>809</sup>

589. All three of these claims are misleading and can therefore easily be dismissed.

590. First, with respect to pack concealment, the Dominican Republic selectively cites the Panel's findings in Appendix B. The Dominican Republic bases its claims of "incoherence" on the Panel's review of a study by Zacher et al. which found, *inter alia*, that the initial effects of actively concealing packs by using phones or wallets (as opposed to, for example, concealing the packs by not displaying them at all) were not sustained long term.<sup>810</sup> However, the Dominican Republic ignores the foregoing analysis of the Panel in Appendix B, which reports findings by Zacher et al. that there was a *statistically significant effect in avoidant behaviours* such as *reducing display of tobacco packs* following the implementation of tobacco plain packaging.<sup>811</sup> The Panel notes that these findings were confirmed by the Dominican Republic's own expert.<sup>812</sup> The Panel's ultimate conclusion in its report that "[t]he TPP measures and enlarged GHWs have had a *statistically significant positive impact* on avoidant behaviours, such as pack concealment, among adult cigarette smokers"<sup>813</sup> is therefore firmly based on its analysis in Appendix B, and these uncontested findings.

591. Second, with respect to calls to the Quitline, the Panel's findings were likewise entirely consistent with its analysis in Appendix B. In Appendix B, the Panel concluded that "the empirical evidence on the impact of the TPP measures on calls to the Quitline is unambiguous" as "[b]oth Young et al. 2014 and Ajzen et al. find that

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<sup>807</sup> Dominican Republic's appellant's submission, para. 926 (emphasis omitted).

<sup>808</sup> Dominican Republic's appellant's submission, para. 928 (emphasis omitted).

<sup>809</sup> Dominican Republic's appellant's submission, para. 934.

<sup>810</sup> Panel Report, Appendix B, para. 75.

<sup>811</sup> Panel Report, Appendix B, paras. 61, 75.

<sup>812</sup> Panel Report, Appendix B, para. 75.

<sup>813</sup> Panel Report, para. 7.963(b) (emphasis added).

there was a statistically significant increase in calls to the Quitline after the introduction of the TPP measures."<sup>814</sup>

592. The Dominican Republic's argument is that the Panel ignored its own analysis in Appendix B that these effects "wore out". Once again, however, the Dominican Republic misrepresents the Panel's analysis. The Panel acknowledged that the increase in calls to Quitline "wore out",<sup>815</sup> but expressly considered and dismissed the "wear out" argument in relation to the impact of the TPP measures on *tobacco use*, stating that:

[W]e are not persuaded that a decline in the volume of Quitline calls following an increase in calls immediately after the introduction of the TPP measures would necessarily imply that the impact of the TPP measures on tobacco use would wear out, since such Quitline calls reflect effects of the TPP measures on *existing* smokers, and would not inform their effect on those would-be smokers who abstain from tobacco use as a result of the TPP measures.<sup>816</sup>

593. The Panel's finding that "the TPP measures and enlarged GHWs have statistically significantly increased calls to Quitline"<sup>817</sup> is wholly consistent with its finding that the empirical evidence on calls to Quitline is "unambiguous" and that a decline in calls does not imply that the effects of the TPP measures on tobacco use were subject to "wear out". The Dominican Republic's argument that there is a lack of correlation between these findings must therefore be rejected.

594. Finally, the Dominican Republic's claim that the Panel's findings and ultimate conclusions with respect to "stopping smoking" lack coherence can also be dismissed. Consistent with the Dominican Republic's theme, it misrepresents the Panel's consideration of this evidence in Appendix B by focusing on the "stopping smoking" behaviour out of the relevant context in which it was examined by the researchers and the Panel.

595. The behaviours of "stopping smoking" *and* "stubbing out cigarettes" were considered *together* by Durkin et al. in the same study. The Panel's consideration of this evidence in Appendix B shows that the findings on these two behavioural issues *were mixed*: while there was a positive and statistically significant impact on "stubbing out" cigarettes, there was no discernible impact on "stopping smoking".<sup>818</sup> Accordingly, and having considered and dismissed the criticisms of the findings on these two effects, the Panel states in Appendix B that the impact of the TPP measures

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<sup>814</sup> Panel Report, Appendix B, para. 103.

<sup>815</sup> Panel Report, Appendix B, paras. 91, 103.

<sup>816</sup> Panel Report, Appendix B, para. 103 (emphasis in original).

<sup>817</sup> Panel Report, para. 7.963(c).

<sup>818</sup> Panel Report, Appendix B, para. 73.

on "stopping out" and "stopping smoking" is "much more limited and mixed."<sup>819</sup> This finding in Appendix B is identical to the Panel's conclusions in its report.<sup>820</sup>

596. In sum, therefore, the Dominican Republic's arguments in relation to its "second appeal ground" are, upon review, unfounded and without merit.<sup>821</sup> The Panel's conclusions and its evidentiary analysis in Appendix B do not lack coherence, and the Dominican Republic's claims of error should be dismissed.

- (d) The Dominican Republic's claims in relation to the Panel's alleged errors in assessing the robustness of the Parties' evidence in Appendix B are likewise without merit

597. In Table 5 of its appellant submission, the Dominican Republic identifies four issues relevant to its "third appeal ground" – 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. Australia has reproduced that table here for reference, and will briefly address the first, second, and fourth issues in the sections that follow. The Dominican Republic's claim in relation to the third issue – the proximal and distal outcomes for cigars – is addressed in Annex 1.

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<sup>819</sup> Panel Report, Appendix B, para. 72.

<sup>820</sup> Panel Report, para. 7.963(b) (the TPP measures and enlarged GHWs "impact on stopping out and stopping smoking is much more limited and mixed.").

<sup>821</sup> Even if the Appellate Body were to agree with the Dominican Republic that the Panel's *summary* of certain of the "distal" outcomes evidence "overstates" the relevant findings in Appendix B, the Dominican Republic makes no attempt to support its implausible assertion that if the Appellate Body "were to conclude that the post-implementation evidence on proximal and distal evidence is sufficient to sustain the Panel's overall contribution finding", this claim of error would be *material* to the Panel's *overall* finding on contribution. See Dominican Republic's appellant's submission, para. 832 and fn 744. As Australia demonstrates in Part VII.I below, the Panel's essentially *undisputed* findings in relation to the pre- and post-implementation evidence would be more than sufficient to sustain the Panel's overall contribution finding.

**Table 5: the Dominican Republic's issues relevant for its appeal grounds**<sup>822</sup>

Outcome variables	Dataset	Australia's evidence published TPP papers	Dominican Republic's evidence re-analysis of data
1. Distal outcome: Quitline calls	Calls to Quitline dataset	Young et al. 2015	Ajzen et al
2. Distal outcomes	NTPPTS	Wakefield et al. (proximal) Durkin et al. (distal)	Ajzen et al
	ITC	Yo[u]ng et al. 2015	Ajzen et al
3. Proximal and distal outcomes for cigars	Data collected by Miller et al	Miller et al. 2015	Ajzen et al
4. Correlation between appeal and smoking behaviors	NTPPTS	Brennan et al. 2015	Ajzen et al

598. Before turning to the substance of the Dominican Republic's claims, however, Australia notes that the Dominican Republic raises due process claims under Article 11 in relation to the Panel's critiques of the re-analysis performed by Ajzen et al. concerning calls to Quitline and the correlation between appeal and smoking behaviours (i.e. the first and fourth issues in Table 5 above).<sup>823</sup>

599. In Part C above, Australia has already demonstrated that the appellants have failed to assert any valid due process claims under Article 11. The Dominican Republic argues that the Panel acted in violation of the Dominican Republic's due process rights by critiquing certain aspects of the Dominican Republic's evidence without "providing the parties an opportunity to comment".<sup>824</sup> As explained above, however, the Panel is not required to test its reasoning with the parties in advance of issuing its report. In any event, the Dominican Republic *did* have an opportunity to comment – the interim review process – but chose not to exercise that opportunity. The Dominican Republic's due process arguments regarding the Panel's assessment of the robustness of the parties' evidence are therefore baseless.

(1) Calls to Quitline

600. The Dominican Republic's claims in relation to the Panel's analysis of the evidence on post-implementation calls to Quitline are equally without foundation.

<sup>822</sup> Dominican Republic's appellant's submission, para. 945 (internal citations omitted).

<sup>823</sup> See Dominican Republic's appellant's submission, paras. 976-978, 1144-1150.

<sup>824</sup> See, e.g. Dominican Republic's appellant's submission, para. 939.

601. The evidence before the Panel concerning calls to Quitline consisted of a paper published by Young et al. 2014 on which Australia relied,<sup>825</sup> and a re-analysis of the data by Ajzen et al. on which the Dominican Republic relied.<sup>826</sup> As noted by the Panel, *both* Young et al. 2014 and Ajzen et al. found that there was a statistically significant increase in calls to Quitline after the introduction of the TPP measures.<sup>827</sup> In this respect, the Panel found that the empirical evidence on the calls to Quitline was "unambiguous".<sup>828</sup>

602. The difference between the studies, as the Panel explained, concerned only the duration of the increase in calls to Quitline – Young et al. found that the impact lasted for 43 weeks before returning to pre-implementation levels, whereas Ajzen et al. found that the impact lasted for 13 weeks before returning to pre-implementation levels.<sup>829</sup>

603. The Dominican Republic acknowledges that "[f]rom a 'big picture' perspective, this difference [in duration] is not material to an assessment of the success of the TPP measures."<sup>830</sup> Nonetheless, the Dominican Republic devotes nearly 20 pages of its appellant submission to its argument that the Panel erred in its assessment of Ajzen et al.'s analysis of the Quitline data when it noted that: (i) only two of the explanatory variables in Ajzen et al.'s autoregressive integrated moving average ("ARIMA") model specification were statistically significant; and (ii) in the pre-implementation period, most of the *predicted* Quitline calls obtained from the ARIMA model are not close to the *actual* level of Quitline calls.<sup>831</sup>

604. As Australia has explained in Part B.3 above, panels are entitled to develop independent reasoning and, in particular, panels may conduct additional analysis of statistical evidence in order to more fully resolve certain factual issues.<sup>832</sup> Furthermore, "a panel is not required to test its intended reasoning with the parties", so long as the panel does not "adopt[] an approach that departs so radically from the cases put forward by the parties that the parties are left guessing as to what proof they would have needed to adduce."<sup>833</sup> The Dominican Republic's failure to raise any objection during the interim review process belies its assertion that it considers the Panel's analysis of Ajzen et al. in paragraph 103 of Appendix B to be such a "radical" departure.<sup>834</sup>

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<sup>825</sup> Young et al. 2014 (AUS-214).

<sup>826</sup> Ajzen et al. Data Report (DOM/IDN-2).

<sup>827</sup> Panel Report, Appendix B, para. 103.

<sup>828</sup> Panel Report, Appendix B, para. 103.

<sup>829</sup> Panel Report, Appendix B, para. 103.

<sup>830</sup> Dominican Republic's appellant's submission, para. 971.

<sup>831</sup> See Panel Report, Appendix B, para. 103.

<sup>832</sup> See, e.g. Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 7.39-7.41. See also Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 357-358.

<sup>833</sup> See Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.177.

<sup>834</sup> Dominican Republic's appellant's submission, para. 1013.

605. The Dominican Republic explains that its Article 11 claim is based on the Panel's "lack of clarity" regarding the consequences of its two-sentence criticism of Ajzen et al.'s analysis.<sup>835</sup> However, it is undisputed that Ajzen et al. agreed with the Panel's ultimate finding that there was a statistically significant post-implementation increase in calls to Quitline. The Dominican Republic is quibbling with the Panel's criticisms of Ajzen et al. in the context of the Panel's observation that Ajzen et al. and Young et al. disagreed about how long the statistically significant increase in calls lasted.

606. As Australia noted at the outset of its responses to the appellants' Article 11 claims, the Dominican Republic purports to have "carefully considered whether, and in which specific instances, to challenge the lack of objectivity of the Panel's assessment".<sup>836</sup> The Dominican Republic claims that it is challenging only those alleged errors that are "consequential to the Panel's findings."<sup>837</sup>

607. In Australia's view, in light of the Panel's undisputed conclusion, the Dominican Republic's claim is trivial and does not merit further response.<sup>838</sup>

- (2) The Panel's finding that the NTPPTS and ITC datasets are "more suited to analyzing the impact ... on *proximal* outcomes, ... than more *distal* outcomes"

608. The Dominican Republic's next claim in relation to the Panel's analysis of the evidence in Appendix B is that the Panel failed to conduct an objective assessment of the parties' evidence when it found that "the survey data used in [the published TPP papers], may, as suggested by Australia, be more suited to analysing the impact of the TPP measures and enlarged GHWs on proximal outcomes, ... than more distal outcomes, such as quitting intentions and quit attempts".<sup>839</sup> In support of this finding, the Panel explained that "[q]uestions on quit intentions and quit interests were not asked to 'recent quitters'", and that "none of the survey datasets discussed above track non-smokers who might have taken up smoking in the absence of the TPP measures and enlarged GHWs."<sup>840</sup>

609. The Dominican Republic argues that the Panel's analysis is inconsistent with Article 11 of the DSU because the Panel failed to engage with the Dominican Republic's evidence, and because the Panel's reasoning is "internally incoherent".<sup>841</sup>

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<sup>835</sup> Dominican Republic's appellant's submission, para. 973.

<sup>836</sup> Dominican Republic's appellant's submission, paras. 33, 945.

<sup>837</sup> Dominican Republic's appellant's submission, para. 33.

<sup>838</sup> In any event, Australia notes that the Dominican Republic has acknowledged that its own claim is not "material". See Dominican Republic's appellant's submission, para. 971.

<sup>839</sup> Dominican Republic's appellant's submission, para. 1015, citing Panel Report, Appendix B, paras. 118 and 39.

<sup>840</sup> Panel Report, Appendix B, para. 118.

<sup>841</sup> Dominican Republic's appellant's submission, paras. 1026, 1044.

The basis for both of these arguments is essentially the same. The Dominican Republic argues that the Panel erred in relying on the proposition that "[q]uestions on quit intentions and quit interests were not asked to 'recent quitters'", because: (1) Australia did not demonstrate that the TPP measures actually caused increased quitting; (2) the Dominican Republic's experts demonstrate that the TPP measures failed to cause increased quitting; and (3) the Panel "acknowledged that the TPP measures had *no* positive impact on quitting behaviors and consumption in the first year of implementation".<sup>842</sup> In other words, the Dominican Republic argues that it should not have mattered to the Panel that the surveys did not pose questions on quit intentions and quit interests to "recent quitters", because the evidence allegedly demonstrated and the Panel allegedly found that there were no such "recent quitters" as a result of the TPP measures.

610. There is no foundation for any of these assertions. In relation to the first two propositions, Australia *did* present evidence that the TPP measures caused increased quitting and the Panel *did* acknowledge and address the Dominican Republic's contrary evidence that the TPP measures failed to increase quitting. Given that the Panel devoted an entire section of Appendix B to its analysis of that evidence,<sup>843</sup> the Dominican Republic's suggestion that it was not presented and addressed is inexplicable.

611. In relation to the third proposition, the Dominican Republic's characterisation of what the Panel *found* in relation to that evidence (i.e. the third proposition above) is entirely false. The Panel did not, at any point, "acknowledge" that the TPP measures had no positive impact on quitting behaviours and consumption in the first year of implementation. The Panel did, however, provide detailed summaries of the competing evidence submitted by the parties. In support of its argument that the Panel "acknowledged" that the TPP measures had no positive impact on quitting behaviours and consumption, the Dominican Republic references parts of the Panel's analysis where the Panel summarises the results of the Dominican Republic's experts' analyses and characterises those *summaries* as the Panel's *findings*.

612. For example, the Dominican Republic argues that the Panel *found* "that the TPP measures led to a decline in the number of smokers that quit for more than one month during the first year of implementation",<sup>844</sup> when the footnote that the Dominican Republic references for this proposition makes clear the Panel is merely *summarising* the results of Ajzen et al.'s analysis.<sup>845</sup>

613. Similarly, in relation to "consumption", the Dominican Republic cites *certain* evidence referenced by the Panel in Appendix D suggesting that there was no change in consumption in the first year of implementation of the TPP measures.<sup>846</sup> In so

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<sup>842</sup> Dominican Republic's appellant's submission, paras. 1026-1046.

<sup>843</sup> See Panel Report, Appendix B, Section 3, entitled "Evidence Relating to Quit Attempts Since the Entry into Force of the TPP Measures".

<sup>844</sup> See Dominican Republic's appellant's submission, para. 1047, fn 949.

<sup>845</sup> Panel Report, Appendix B, fn 163.

<sup>846</sup> Dominican Republic's appellant's submission, para. 1047.

doing, the Dominican Republic ignores the Panel's *actual* finding, based on the *totality* of the evidence before it, that "there is some econometric evidence suggesting that the TPP measures, in combination with the enlarged GHWs implemented at the same time, contributed to the reduction in wholesale cigarette sales, and therefore cigarette consumption, after their entry into force."<sup>847</sup>

614. The Dominican Republic's Article 11 claim is therefore baseless, because the factual predicate for its assertion that the Panel's reasoning is "internally incoherent" is a "finding" that the Panel never actually made. For this reason, the Appellate Body should dismiss the Dominican Republic's claim.<sup>848</sup>

- (e) The Panel's findings concerning the correlation between the appeal of tobacco products and smoking behaviours

615. In its final claim of error concerning the Panel's analysis of the evidence in Appendix B, the Dominican Republic argues that the Panel erred in its assessment of the post-implementation evidence on the correlation between the appeal of tobacco products and smoking-related behaviours (i.e. "distal" outcomes).<sup>849</sup>

616. In relation to the pre-implementation evidence, Australia recalls that the evidence reviewed and analysed by the United States Surgeon General, the United States National Cancer Institute, the United States Institute of Medicine and the WHO all demonstrates that tobacco product packaging is a recognised form of advertising and promotion, and one that is capable of affecting smoking-related behaviours.<sup>850</sup> In the face of this comprehensive body of evidence, the Panel rejected the complainants' arguments that branded tobacco packaging is not advertising, and that branded tobacco packaging is not capable of influencing smoking behaviours.

617. The Dominican Republic does not challenge these fundamental findings by the Panel in relation to the pre-implementation evidence. Rather, the Dominican Republic focuses on the Panel's assessment of the limited post-implementation evidence on the correlation between "proximal" and "distal" outcomes.

618. The relevant evidence before the Panel consisted of a peer-reviewed study by Brennan et al. analysing the association between "proximal" and "distal" outcomes based on the NTPTTS data in relation to the three "mechanisms", and the re-analysis

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<sup>847</sup> Panel Report, Appendix D, para. 137(c).

<sup>848</sup> Australia notes that, in any event, the alleged error is not material. As discussed above, the Panel noted in the same paragraph of Appendix B that "none of the survey datasets discussed above track non-smokers who might have taken up smoking in the absence of the TPP measures and enlarged GHWs." Panel Report, Appendix B, para. 118. In other words, the Panel found limitations in the survey datasets beyond the fact that questions on quit intentions and quit interests were not asked to "recent quitters".

<sup>849</sup> See Dominican Republic's appellant's submission, para. 1115.

<sup>850</sup> Australia's second written submission, paras. 228-230; Panel Report, paras. 7.741-7.742.

of appeal-related variables conducted by the Dominican Republic's experts, Ajzen et al., using the computer code used by Brennan et al.<sup>851</sup>

619. The Panel explained that "[a] careful review of Brennan et al. 2015 suggests that there is a positive and statistically significant association between several outcomes related to GHW effectiveness and quitting cognitions and behaviour among adult smokers."<sup>852</sup> However, Brennan et al. found "no statistically significant association between most of the appeal variable[s] and quitting-related cognitions and behaviours, while noting that further studies would be needed to explore this relationship."<sup>853</sup>

620. The Panel explained that Ajzen et al. did not replicate Brennan et al.'s analysis for the variables related to GHW effectiveness.<sup>854</sup> With respect to the appeal-related variables, the Panel found that Ajzen et al.'s results "confirm to a large extent" Brennan et al.'s findings.<sup>855</sup> Nonetheless, the Panel noted in relation to Ajzen et al.'s analysis that "only one or two explanatory variables (besides the variable of interest) are statistically significant, which could suggest that the resampled data are subject to multicollinearity."<sup>856</sup>

621. It is the Panel's latter observation that is the subject of the Dominican Republic's Article 11 claim.<sup>857</sup> Like the Dominican Republic's Article 11 claim with respect to the Panel's analysis of the evidence concerning the increase in calls to Quitline, this claim is trivial in light of the relevant context of the Panel's observation.

622. The Panel's critique of Ajzen et al.'s analysis – i.e. the observation contested by the Dominican Republic – was made in the context of its undisputed conclusion that the experts essentially agreed that the data did not show a statistically significant association between most of the appeal variables and quitting-related cognitions and behaviours. Given this context, Australia does not consider that the Dominican Republic's Article 11 claim merits additional discussion or consideration.<sup>858</sup>

623. Australia merely notes that the Dominican Republic's suggestion that the Panel's assessment of this evidence was "consequential" in light of the "causal chain"

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<sup>851</sup> Panel Report, Appendix B, paras. 113-115.

<sup>852</sup> Panel Report, Appendix B, para. 114.

<sup>853</sup> Panel Report, Appendix B, para. 116. Similarly, Brennan et al. 2015 reported no statistically significant association between the perceived harm variable and any of the quitting-related thinking and behaviour outcomes. *Ibid.* para. 114.

<sup>854</sup> Panel Report, Appendix B, para. 115.

<sup>855</sup> Panel Report, Appendix B, para. 116.

<sup>856</sup> Panel Report, Appendix B, para. 116.

<sup>857</sup> Dominican Republic's appellant's submission, para. 1130.

<sup>858</sup> In light of the undisputed conclusion by the Panel that there experts essentially agreed that the data did not show a statistically significant association between most of the appeal variables and quitting-related cognitions and behaviours, the Dominican Republic's alleged claim of error is not material to the Panel's conclusion.

framework underlying the TPP measures ignores all of the pre-implementation evidence supporting the link between reduced tobacco packaging appeal and changes in smoking behaviours. The Panel's assessment that the post-implementation evidence on the association between appeal variables and quitting-related cognitions and behaviours was "mixed and limited" was not "consequential" to its overall conclusion on contribution, because the overwhelming weight of the evidence supports the conclusion that a reduction in tobacco packaging appeal will affect initiation, cessation, and relapse.

## **G. Post-Implementation Evidence on Prevalence and Consumption (Appendices C and D)**

### **1. Introduction**

624. A significant portion of the appellants' claims under Article 11 of the DSU relate to the Panel's findings concerning the post-implementation evidence on smoking prevalence and tobacco consumption.<sup>859</sup>

625. Initially, the complainants sought to demonstrate that the TPP measures were not apt to contribute to Australia's legitimate objective on the grounds, *inter alia*, that the post-implementation evidence on prevalence and consumption revealed that the TPP measures had "backfired".<sup>860</sup> That is, the complainants took the position that the TPP measures are not apt to contribute to Australia's legitimate objective, and are *incapable* of contributing to those legitimate objective, because the measures in fact *increase* prevalence and consumption.

626. The complainants abandoned this position when the evidence established that rates of prevalence and consumption in Australia continued to *decline* following the implementation of the TPP measures. Unable to sustain their original position that the measures had "backfired", the complainants changed tactics and argued that the statistical and econometric evidence submitted by their experts proved that *no portion* of the observed declines in prevalence and consumption that followed the implementation of the TPP measures could be *attributed* to the effects of those measures.<sup>861</sup>

627. As the Panel accurately recounts, the evidence that the complainants submitted in their attempts to prove this assertion fell into two general categories. First, the complainants sought to prove that declines in prevalence and consumption had not

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<sup>859</sup> As discussed in Part VII.D above, the Dominican Republic goes so far as to claim that a reversal by the Appellate Body of the Panel's findings on post-implementation prevalence and consumption would be sufficient to reverse the Panel's overall findings on contribution. Australia demonstrates in Part VII.I below that the Dominican Republic's understanding of the role that those findings played in the Panel's analysis is in error.

<sup>860</sup> See Panel Report, para. 7.969 ("The complainants ... initially suggested that the TPP measures 'backfired' by increasing youth smoking prevalence"); Panel Report, para. 7.975 ("The complainants ... suggested initially that [the] TPP measures 'backfired' by increasing tobacco sales.").

<sup>861</sup> Panel Report, para. 7.969; Panel Report, para. 7.975.

*accelerated* since the implementation of the TPP measures in December 2012.<sup>862</sup> To this end, the complainants argued that the observed declines in prevalence and consumption following implementation of the TPP measures were merely the continuation of pre-existing trends. Second, the complainants submitted econometric models that purported to isolate and quantify the determinants of tobacco prevalence and consumption, and argued that these models proved that the TPP measures had not made a statistically significant contribution to the observed declines.<sup>863</sup>

628. Australia submitted rebuttal evidence throughout the panel proceedings that demonstrated the complainants had failed in their attempts to prove that no portion of the observed declines in prevalence and consumption could be attributed to the TPP measures. In particular, Australia demonstrated that: (i) there was, in fact, a *marked* acceleration in the declines in prevalence and consumption following the implementation of the TPP measures; (ii) the complainants' econometric models suffered from numerous flaws and limitations that rendered them *incapable* of proving that no portion of the observed declines was attributable to the TPP measures;<sup>864</sup> and (iii) once the principal flaws in the complainants' econometric models were corrected, those models were fully consistent with the intended operation of the TPP measures and the conclusion that the measures *had contributed*, together with enhanced GHWs, to the observed declines in prevalence and consumption.

629. The Panel divided its assessment of the post-implementation evidence on prevalence and consumption into two parts. The Panel first evaluated the "impact of the TPP measures on smoking prevalence"<sup>865</sup>, incorporating its more detailed assessment of that evidence in Appendix C of the Panel Report. The Panel then evaluated the "[i]mpact of the TPP measures on consumption and sales volumes of tobacco products"<sup>866</sup>, incorporating its more detailed assessment of that evidence in Appendix D of the Panel Report. All parties generally referred to these topics as, respectively, "prevalence" and "consumption".

630. In both cases, the Panel divided its assessment of the evidence relating to prevalence and consumption into three steps. In the first step, the Panel examined

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<sup>862</sup> Panel Report, para. 7.971(b); Panel Report, para. 7.977(b).

<sup>863</sup> Panel Report, para. 7.971(c); Panel Report, para. 7.977(c).

<sup>864</sup> See, e.g. Australia's second written submission, para.433 ("the quantitative post-implementation evidence corroborates the qualitative evidence establishing that the tobacco plain packaging measure is capable of contributing to reducing the use of and exposure to tobacco products in Australia, because smoking rates have declined in Australia subsequent to the adoption of the tobacco plain packaging measure, and the complainants have failed in their attempts to establish that the measure has made no contribution to this decline."); Australia's opening statement at the second substantive meeting, para. 24 ("[i]n order for the complainants to satisfy the burden of proof that they have taken on in this dispute, they must demonstrate that none of this decline in prevalence is attributable to the tobacco plain packaging measure ... Notwithstanding the enormous volume of evidence that the complainants have filed in this dispute, they have failed to make their case.").

<sup>865</sup> Panel Report, paras. 7.968-7.972.

<sup>866</sup> Panel Report, paras. 7.973-7.979.

evidence relating to whether smoking prevalence or consumption "has decreased following the implementation of the TPP measures".<sup>867</sup> In the second step, the Panel examined evidence relating to whether the reduction in smoking prevalence or consumption "has accelerated" following the implementation of the TPP measures.<sup>868</sup> In the third step, 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 smoking prevalence and consumption.<sup>869</sup>

631. The Panel found that prevalence and consumption had both declined following the implementation of the TPP measures (step 1), and that the rate of decline had accelerated in both cases following the implementation of the TPP measures (step 2). With regard to step 3, the Panel identified multiple flaws in the complainants' econometric evidence purporting to demonstrate that no portion of the observed declines could be attributed to the TPP measures, which led it to question the validity and probative value of that evidence. Based on its review of Australia's rebuttal evidence, principally the expert reports of Dr Tasneem Chipty, the Panel found that once the principal flaws in the complainants' econometric models were corrected, those models produced results consistent with the conclusion that the TPP measures had contributed to a portion of the observed declines in prevalence and consumption in the three-year period following their implementation.

632. In its "[o]verall conclusion on evidence relating to the application of the TPP measures since their entry into force",<sup>870</sup> the Panel first recalled its finding that the evidence before it was "consistent with the view that, together with the enlarged GHWs, [the TPP measures] have led in particular to a reduction in the appeal of tobacco products, as hypothesized in the TPP literature, and to a greater noticeability of GHWs."<sup>871</sup> With respect to its findings on prevalence and consumption, as detailed in Appendices C and D, the Panel found that:

The fact that pre-existing downward trends in smoking prevalence and overall sales and consumption of tobacco products have not only continued but accelerated since the implementation of the TPP measures, and that the TPP measures and enlarged GHWs had a negative and statistically significant impact on smoking prevalence and cigarette wholesale sales, is also consistent with the hypothesis that the measures have had an impact on actual smoking behaviours, notwithstanding the fact that some of the targeted behavioural outcomes could be expected to manifest themselves over a longer period of time.<sup>872</sup>

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<sup>867</sup> Panel Report, Appendix C, para. 5; Panel Report, Appendix D, para. 6.

<sup>868</sup> Panel Report, Appendix C, para. 5; Panel Report, Appendix D, para. 6.

<sup>869</sup> Panel Report, Appendix C, para. 5; Panel Report, Appendix D, para. 6.

<sup>870</sup> Panel Report, Section 7.2.5.3.6.4.

<sup>871</sup> Panel Report, para. 7.985.

<sup>872</sup> Panel Report, para. 7.986. The Panel found that the evidence summarised in Appendices C and D:

*(continued)*

633. In their appeals, neither the Dominican Republic nor Honduras contests the Panel's factual finding that prevalence and consumption declined following the implementation of the TPP measures (step 1). The Dominican Republic does contest the Panel's factual finding that the decline in smoking prevalence *accelerated* following the implementation of the TPP measures (step 2) but, as Australia will demonstrate, this claim is based on a blatant mischaracterisation of what the Panel actually found. As such, there is no credible dispute that prevalence and consumption declined following the implementation of the TPP measures, or that the rate of decline accelerated in both cases relative to the pre-existing rate of decline.

634. The Dominican Republic's and Honduras' challenges to the Panel's factual findings on prevalence and consumption relate overwhelmingly to step 3 of the Panel's analysis, in which it found that the complainants had failed to substantiate their assertion that no portion of the observed declines in prevalence and consumption could be attributed to the TPP measures.

635. Notably, the appellants' challenges to the Panel's findings in step 3 do not engage with the *fundamental* reasons the Panel found unpersuasive the complainants' econometric evidence purporting to demonstrate that the TPP measures had made no contribution to the observed declines in prevalence and consumption. At a high level, and as Australia will detail further in this section, the Panel was not persuaded by the complainants' prevalence models because these same models frequently suggested that *undisputed* determinants of prevalence – such as the price of tobacco products and increases in excise taxes – *also* had no statistically significant effect upon rates of prevalence. The Panel questioned the validity and probative value of econometric evidence that purported to establish definitively that the TPP measures had *no* impact on prevalence, when this evidence failed to identify any impact of *known* determinants of prevalence. The Panel identified similar concerns in finding the complainants' consumption models unpersuasive, 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.

636. Instead of acknowledging these fundamental problems with their evidence, the Dominican Republic and Honduras focus their allegations of error on a handful of factors the Panel identified as potential explanations for *why* the complainants' econometric models were producing these anomalous results. The Panel identified various respects in which it considered the complainants' econometric models to be misspecified<sup>873</sup>, including in ways that could explain, for example, why a model of

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Overall ... is consistent with a finding that the TPP measures contribute to a reduction in the use of tobacco products, to the extent that it suggests that, together with the enlarged GHWs introduced at the same time, plain packaging has resulted in a reduction in smoking prevalence and in consumption of tobacco products.

Panel Report, para. 7.1037.

<sup>873</sup> In broad terms, "misspecification" of an econometric model occurs when the model is set up in a way that deviates from the underlying process being examined, for example by including an

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smoking prevalence would indicate that the price of tobacco products did not have a statistically significant effect upon smoking prevalence, or why a model of consumption would indicate that the TPP raised tobacco consumption – results that do not make sense on their face. The Panel also identified various respects in which the complainants' econometric models were sensitive to alternative specifications and sample periods, suggesting that the findings of "no contribution" were driven by those particular choices rather than the underlying processes at work. The appellants' claims of error under Article 11 of the DSU focus primarily on these explanatory findings by the Panel, not the Panel's overarching determination that the complainants' models lacked coherence.

637. These claims are based on a fundamental misconception of the role of a panel under Article 11 of the DSU, especially when reviewing complex econometric evidence. Contrary to what the appellants suggest, the Panel was not required to test all of its reasoning with the parties in advance of issuing its interim report, nor engage with the parties on each and every consideration that it would take into account when evaluating the validity and probative value of their evidence. Nor was the Panel required to provide a lengthy and elaborate explanation of each such consideration, on top of the over 1,200 pages of findings and analysis that it provided, so long as the explanations that it provided were sufficient for the purpose for which they were offered.

638. Moreover, the appellants' allegations of error misapprehend the nature of the Panel's task in light of the burden of proof borne by the complainants. As discussed in Part D above, Australia did not set out – and had no burden – to prove that the TPP measures *had* contributed to the observed declines in prevalence and consumption in the three-year period following implementation. Rather, the purpose of Australia's evidence was to demonstrate that the *complainants had failed to prove* that the TPP measures made *no* contribution to those observed declines in prevalence and consumption. Australia demonstrated this, in part, by identifying certain flaws in the complainants' econometric models, and illustrating that, once corrected, the complainants' own models were consistent with the hypothesis that the TPP measures were operating as intended.

639. The Panel was not obligated under Article 11 of the DSU to ensure that Australia's rebuttal evidence – which consisted largely of adaptations of the *complainants'* evidence – was entirely free of the problems that led the Panel to question the validity and probative value of the complainants' evidence. The fact that the complainants' econometric evidence did not reliably and persuasively demonstrate that no portion of the observed declines in prevalence and consumption could be attributed to the TPP measures meant the complainants had failed to prove this element of their case.

640. The Panel *was* obligated under Article 11 of the DSU to test Australia's rebuttal evidence to ensure that this evidence supported the propositions *for which it was offered*, including Australia's repeated demonstration that correcting the principal

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irrelevant explanatory variable, by omitting a relevant explanatory variable, or by incorrectly specifying the form of the relationship between the explanatory and outcome variables.

errors in the complainants' econometric models reversed the results of those models and showed a statistically significant effect of plain packaging. The Panel did, in fact, test Australia's evidence for this purpose. The Panel noted, for example, that the revised prevalence models submitted by Dr Chipty addressed "a number of concerns that we raised while reviewing the complainants' approaches and results".<sup>874</sup> With regard to the complainants' consumption models, the Panel observed that "some concerns" that it had raised in its evaluation of the complainants' models "have been to some extent addressed by Dr Chipty" in her revisions to those models.<sup>875</sup> So modified, the Panel found that there was "some econometric evidence" on the record suggesting that the TPP measures had contributed to the observed declines in prevalence and consumption following the implementation of those measures. Together with the evidence of continued and accelerating declines in prevalence and consumption, the Panel considered that the econometric evidence on the record was "consistent with the hypothesis that the measures have had an impact on actual smoking behaviours, notwithstanding the fact that some of the targeted behavioural outcomes could be expected to manifest themselves over a longer period of time."<sup>876</sup>

641. Critically, and contrary to what the Dominican Republic and Honduras imply in their submissions, the Panel was not required to determine that Australia had established affirmatively that the TPP measures had contributed to the observed declines in prevalence and consumption. That would have amounted to an unlawful reversal of the burden of proof. Nor was the Panel required to determine that Australia's rebuttal evidence corrected *all* of the problems the Panel had identified in respect of the complainants' econometric evidence in order to: (i) conclude that this evidence did *not* prove the complainants' assertion that no portion of the observed declines in prevalence and consumption could be attributed to the TPP measures; or (ii) find that the complainants' models, as modified by Dr Chipty, provided *some* econometric evidence that was *consistent with* the conclusion that the TPP measures had contributed, at least in part, to the continued and accelerating declines in prevalence and consumption that followed the implementation of these measures.

642. As Australia will detail further in these sections, these considerations dispose of the appellants' claims that the Panel lacked "even-handedness" in its assessment of the econometric evidence in step 3 of its analyses. The Panel appropriately scrutinised evidence submitted by Australia for the *rebuttal* purpose for which it was provided, in light of the burden the *complainants* bore to prove that no portion of the observed declines in prevalence and consumption could be attributed to the TPP measures.

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<sup>874</sup> Panel Report, Appendix C, para. 120.

<sup>875</sup> Panel Report, Appendix D, para. 115.

<sup>876</sup> Panel Report, para. 7.986.

## 2. The Panel Appropriately Evaluated the Complainants' Econometric Evidence on Prevalence and Consumption in Light of Its Constantly Evolving Nature

643. Australia will rebut below the detailed allegations of error that the appellants raise in respect of the Panel's factual findings on post-implementation prevalence and consumption. Before turning to that rebuttal, however, Australia believes that it is important to recount at a higher level how the complainants' econometric evidence on prevalence and consumption changed over the course of the panel proceedings. The decisions that the Panel made about the weight to attach to the complainants' econometric evidence, and about its overall probative value, must be understood in light of the constantly changing nature of that evidence.

644. At the beginning of its evaluation of "whether the TPP measures contributed to the reduction in smoking prevalence" (Appendix C, step 3), the Panel observed that:

A particular feature of the exchange between the parties on this issue is that, on several occasions, the experts of the Dominican Republic, Honduras and Indonesia proposed in their rebuttal reports new models or methodologies, or both, that sometimes contradict some of the approaches taken in their earlier reports and invalidate the results reported in those reports. For this reason, the description of the approaches and results below is based primarily on the most recent expert reports submitted by the parties.<sup>877</sup>

645. The Panel's observation is a clear understatement. In relation to whether the TPP measures had contributed to the observed declines in prevalence and consumption, and to nearly every other aspect of the debate over prevalence and consumption, the positions taken by the complainants and their experts were in a constant state of flux over the course of the panel proceedings. Methodologies and specifications once accepted as valid were later criticised as invalid. New experts came on the scene who implicitly or explicitly disavowed the findings and methodologies of prior experts. Entire econometric models, once criticised by Australia's experts, were abandoned and replaced by different models.<sup>878</sup> The overall effect was a constantly fluctuating set of models, assumptions, and methodologies – a process that continued right up to the complainants' final submissions to the Panel.<sup>879</sup>

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<sup>877</sup> Panel Report, Appendix C, para. 60.

<sup>878</sup> See, e.g. Panel Report, Appendix C, para. 63 and fn 64 (noting that the two-stage micro-econometric analysis originally proposed by IPE was "set aside by IPE" after Australia's expert, Professor Scharfstein, demonstrated that IPE's model contained significant flaws).

<sup>879</sup> Australia notes that the complainants' experts were not only internally inconsistent (e.g. from one IPE report to the next), but also *amongst* themselves. In its review of the complainants' prevalence and consumption models, the Panel noted several instances in which the complainants' experts used conflicting methodologies without ever resolving those conflicts. See, e.g. Panel Report, Appendix D, para. 104 (observing that "[e]ven among the experts of the Dominican Republic and Honduras, different model specifications are used."); Panel Report, Appendix C, fn 121 (noting that "unlike Professor List and IPE, [Honduras's expert] Professor Klick does not address the sample reweighting corrections in the RMSS data in his analysis.").

646. Australia could provide numerous examples of how the complainants' positions "evolved"<sup>880</sup> over the course of the panel proceedings. Australia will instead focus on the two examples that the Panel itself identified in a footnote to the statement quoted above: the methodologies that the complainants' experts proposed for controlling for tax increases in their econometric models, and the methodologies that the complainants' experts proposed for calculating standard errors.<sup>881</sup>

647. These two examples involve highly technical issues. But econometrics is a technical exercise. The two examples identified by the Panel illustrate well how technical choices in the design and execution of econometric models can have a major impact on the results of those models and their reliability. The complainants' lack of consistency on these and other technical issues demonstrates how, when presented with flaws in their models, the complainants' frequent strategy was to move the goalposts rather than confront the implications of their own evidence.

(a) Example 1: Excise tax increases

648. Any econometric model that seeks to isolate and quantify the effect of a particular policy intervention (such as tobacco plain packaging) on a particular policy outcome (such as smoking prevalence or tobacco consumption) must properly take into account *other* factors that can affect that policy outcome. In the case of prevalence and consumption, all parties before the Panel agreed that excise tax increases are a factor that affects levels of prevalence and consumption. A properly specified model of prevalence or consumption must therefore account for excise tax increases.

649. As the Panel explained, there are, in principle, three types of variables that an econometrician can include in a model to control for excise tax increases.<sup>882</sup> One option is to include an indicator (or "dummy") variable to denote the presence or absence of a tax increase in a specific period. Another option is to include a variable denoting the *level* of tax in a specific period (i.e. the *rate* of tax). The third option is to include a tobacco *price* variable that *includes* the amount of tax paid. The Panel

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<sup>880</sup> See, e.g. Panel Report, Appendix C, para. 106; Panel Report, Appendix C, para. 110.

<sup>881</sup> See Panel Report, Appendix C, fn 58. The Panel noted:

For instance ... IPE initially proposed to control for excise tax increases by including (dummy) indicator variables for each excise tax increase ... but subsequently contended that a more appropriate measure to capture the excise tax increases is the weighted average price per cigarette in Australia.... Similarly, Professor List and IPE initially applied the STATA software command `ivreg2` in order to calculate standard errors that are robust to heteroscedasticity and serial correlation using the automatic bandwidth selection procedure by Newey and West 1994.... Subsequently, both Professor List and IPE applied an alternative way of calculating standard errors, that, according to them, is adjusted to reflect more accurately the original suggestion by Newey and West (1994).

Ibid. (internal citations omitted).

<sup>882</sup> See Panel Report, Appendix C, para. 106.

considered that "the three types of variables ... are in theory complementary, each with advantages and disadvantages."<sup>883</sup>

650. In its initial report on tobacco consumption, the Dominican Republic's expert, IPE, analysed wholesale cigarette sales using the IMS data and reported an *increase* in the total volume of cigarette sticks sold between 2012 (the year in which the TPP measures were implemented) and 2013. The complainants cited the IPE analysis of the IMS data as evidence that the tobacco plain packaging measures had "backfired".<sup>884</sup> IPE's initial model controlled for excise tax increases using indicator variables – the significance of which will be explained below.<sup>885</sup>

651. In her initial rebuttal report, Dr Chipty pointed out that IPE had failed to account for the uncontroverted fact that retailers "stock up" on their cigarette inventory prior to a scheduled increase in the excise tax (a practice sometimes referred to as "strategic inventory management").<sup>886</sup> Australia announced in August 2013 that it would increase the excise tax by 12.5 percent in December 2013. Not surprisingly, the IMS sales data showed a dramatic spike in wholesale sales in the two months preceding the tax hike, as retailers stocked up on inventory prior to the tax hike taking effect.<sup>887</sup>

652. Dr Chipty demonstrated that once the effect of the 2013 tax hike on inventory management was taken into account, IPE's conclusion that wholesale cigarette sales had increased following the adoption of tobacco plain packaging was reversed. Properly analysed, the IMS data showed a statistically significant decline in wholesale cigarette sales attributable to the implementation of the TPP measures. Rather than causing an *increase* in wholesale cigarette sales, as IPE had claimed, the TPP measures were associated with a statistically significant *decline* in wholesale sales of nearly six percent.<sup>888</sup>

653. In its subsequent report, IPE conceded that Dr Chipty was correct that IPE needed to account for strategic inventory management in its analysis of the IMS data. However, rather than accept Dr Chipty's conclusion that the TPP measures were associated with a statistically significant decline in wholesale cigarette sales, IPE made another fundamental change to its original model – a change that had the effect of masking the conclusions that resulted from its own model once strategic inventory management was properly taken into account.

654. In the re-specified model that IPE presented in response to Dr Chipty's rebuttal report, IPE replaced the tax indicator variables with price level variables. As

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<sup>883</sup> Panel Report, Appendix C, para. 106.

<sup>884</sup> See, e.g. Honduras's first written submission, paras. 368, 392.

<sup>885</sup> See Panel Report, Appendix C, para. 106 ("IPE was the first party to propose controlling for tobacco tax excise increases with indicator variables ...").

<sup>886</sup> See Chipty Report (AUS-17), paras. 62-63.

<sup>887</sup> See Chipty Report (AUS-17), Figure 10.

<sup>888</sup> See Chipty Report (AUS-17), para. 69.

discussed in more detail below, using price level variables instead of tax indicator variables has the potential to mask the effects of tobacco plain packaging, most importantly because tobacco plain packaging is itself a factor that can influence price. Dr Chipty demonstrated in her October 2015 report that IPE's replacement of tax indicator variables with price level variables is what allowed IPE to continue to assert that cigarette sales volumes had not declined at statistically significant levels following the introduction of tobacco plain packaging.

655. Had IPE simply modified its *original* model to account for strategic inventory management, as it conceded was necessary, it would have confirmed Dr Chipty's conclusion that the TPP measures were responsible for a statistically significant decline in sales volumes.<sup>889</sup> Instead, IPE re-specified its model in a fundamental way to avoid this conclusion. Notwithstanding the fact that IPE itself had used tax indicator variables in the original specification of its IMS consumption model, IPE subsequently joined with Professor List in asserting the superiority of price or tax level variables – but only after Dr Chipty had demonstrated that IPE's *own model* confirmed a negative and statistically significant effect of the TPP measures upon tobacco consumption.

656. The Panel appropriately took note of IPE's change of position. At the beginning of its evaluation of "whether the TPP measures contributed to the reduction in cigarette sales volumes and consumption" (Appendix D, step 3), the Panel observed, as it had in Appendix C, that "new methodologies or new model specifications or both were proposed by the experts of the Dominican Republic, Honduras and Indonesia in the course of the proceedings in response to the exchange of arguments between parties."<sup>890</sup> The Panel noted that "[i]n some cases, the new models proposed invalidate some of the previous estimations".<sup>891</sup> The Panel referenced, in this context, IPE's change of position on the most appropriate means of controlling for excise tax increases.<sup>892</sup>

657. In its more detailed assessment of IPE's econometric results based on the IMS wholesale sales data, the Panel identified a number of factors that led the Panel to "question their robustness".<sup>893</sup> Among the factors that the Panel identified was the fact that when IPE's model "includes the excise tax dummy variables, *which were initially proposed by IPE itself in its first report but later rejected as inferior control variables*, most results suggest the TPP measures *had a negative and statistically significant impact on wholesale[] cigarette sales*."<sup>894</sup>

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<sup>889</sup> See Chipty Surrebuttal Report (AUS-586), Table 10.

<sup>890</sup> Panel Report, Appendix D, para. 50.

<sup>891</sup> Panel Report, Appendix D, para. 50.

<sup>892</sup> See Panel Report, Appendix D, fn 55.

<sup>893</sup> Panel Report, Appendix D, para. 106.

<sup>894</sup> Panel Report, Appendix D, para. 106 (emphasis added).

658. It was entirely appropriate for the Panel to take into account IPE's inconsistency on an important methodological issue that literally *reversed* the results that IPE claimed to report.

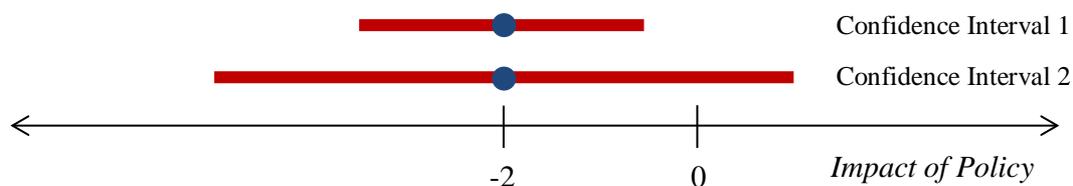
(b) Example 2: Standard errors

659. The second example cited by the Panel of how the complaints' experts "proposed in their rebuttal reports new models or methodologies, or both, that sometimes contradict some of the approaches taken in their earlier reports"<sup>895</sup> was with respect to the methodology for calculating standard errors.

660. Within an econometric model, the standard error determines the size of the confidence interval around the estimated effect of the policy under examination (such as, in this case, the effect of tobacco plain packaging on smoking prevalence or consumption). If the confidence interval includes zero, then one cannot reject the hypothesis that the policy has had no effect.<sup>896</sup> The manner in which the econometrician calculates standard errors therefore has the potential to determine whether the model supports or rejects the hypothesised effect of the policy.

661. Figure 1 below illustrates the importance of the standard error in assessing the statistical significance of a model's results. In the first case, the estimated policy effect is -2 (denoted by the blue circle) and the standard error is 0.75, leading to a 95 percent confidence interval that ranges from approximately -3.5 to -0.5 (as shown by the top red line). Because this confidence interval does not include zero, the model rejects the hypothesis that the policy has had no effect. But suppose instead that the standard error is biased upward, as shown in the second case in Figure 1. The estimated policy effect is the same (-2), but the standard error is larger (1.5) and the associated 95 percent confidence interval now ranges from approximately -5 to 1. Because this wider confidence interval includes zero, the model can no longer reject the hypothesis that the policy has had no effect.

**Figure 1: Illustration of the Role of Standard Errors and Confidence Intervals in Determining Statistical Significance**<sup>897</sup>



662. All of the parties' experts agreed that the calculation of standard errors for several of the principal models concerning prevalence and consumption needed to account for two statistical properties – heteroscedasticity and autocorrelation.<sup>898</sup> If the

<sup>895</sup> Panel Report, Appendix C, para. 60.

<sup>896</sup> See Chifty Surrebuttal Report (AUS-586), para. 13.

<sup>897</sup> See Chifty Surrebuttal Report (AUS-586), Figure 1.

<sup>898</sup> As the Panel explained, "heteroscedasticity arises when the regression error[s] variances are not constant across observations", and "autocorrelation ... arises when the disturbances are

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calculation of the standard error does not account for these statistical properties, the standard error has the potential to be biased.

663. One of the Dominican Republic's experts, IPE, first acknowledged the need to account for heteroscedasticity and autocorrelation in the calculation of standard errors. IPE claimed to have accounted for both of these statistical properties when calculating standard errors for its initial consumption and prevalence models.<sup>899</sup> However, as Dr Chipty pointed out in her subsequent reports, the computer code that IPE had used to calculate standard errors accounted only for autocorrelation and not for heteroscedasticity.<sup>900</sup> In particular, IPE had used a command in the Stata programme known as "*ivreg2*", a command that automatically accounts for autocorrelation but requires an additional command to account for heteroscedasticity – a step that IPE had neglected to take.<sup>901</sup> One of the Dominican Republic's other experts, Professor List, made the same mistake in his initial regression model. As a result, the standard errors initially reported by IPE and Professor List were significantly overstated.

664. IPE corrected its mistake in its September 2015 report, using the *ivreg2* command but this time enabling the feature that accounts for heteroscedasticity. Professor List also used the *ivreg2* command in his September 2015 report, but once again neglected to enable the feature that accounts for heteroscedasticity. It was not until Professor List's October 2015 report that he finally accounted for the problem of heteroscedasticity in his models. When he finally did so, however, he claimed to have discovered an "error" in the *ivreg2* command that affects how it accounts for *autocorrelation*, not heteroscedasticity. Professor List claimed to have discovered this "error" notwithstanding the fact that IPE and Professor List himself had used the *ivreg2* command to account for autocorrelation in their prior reports.

665. Professor List's professed identification of an "error" in *ivreg2* was a red herring to distract attention away from the fact that his *own models*, as with IPE's original model results, showed a negative and statistically significant effect of plain packaging upon prevalence and consumption once autocorrelation and heteroscedasticity were taken into account using the method they originally proposed. Professor Chipty demonstrated in her December 2015 report that all of the IPE and List models showed statistically significant declines in prevalence and consumption when standard errors were calculated using the *ivreg2* command – the same command that IPE, Professor List, Professor Chipty, and other experts in the proceedings had previously used to calculate standard errors.<sup>902</sup> Professor Chipty further demonstrated

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correlated across periods". Panel Report, Appendix C, fn 67, 68. See also Chipty Rebuttal Report (AUS-535), Appendix B, para. 3.

<sup>899</sup> See IPE Report (DOM-100), pp. 70, fn 83, 167.

<sup>900</sup> See Chipty Rebuttal Report (AUS-535), Appendix B, para. 4 ("Of particular relevance here, the IPE computer code accounted only for autocorrelation and failed to adjust for heteroscedasticity, even though IPE stated in the text of their report that they intended to do so.").

<sup>901</sup> See Chipty Second Rebuttal Report (AUS-591), fn 24.

<sup>902</sup> See Chipty Second Rebuttal Report (AUS-591), Table 2.

that Professor List's newfound concerns with *ivreg2* were misplaced, but that, in any event, using Professor List's newly-adopted methodology for calculating standard errors, and fixing other issues in his models, the estimated effects of tobacco plain packaging were still negative and the majority of those estimated effects were still statistically significant.<sup>903</sup>

666. In its October 2015 report, IPE calculated standard errors using Professor List's preferred methodology because, it explained, it had been "asked to report" its results using this methodology.<sup>904</sup> IPE acknowledged that it had previously used *ivreg2* to calculate standard errors, but stated that it had "adopt[ed] Professor List's approach for purposes of the calculations presented in this report."<sup>905</sup> Aware of the obvious inconsistency that would arise if one of the Dominican Republic's experts continued to calculate standard errors using *ivreg2* while another of its experts claimed that *ivreg2* contained an "error", IPE acceded to Professor List's abandonment of *ivreg2*.

667. The Panel first addressed the debate over methods for calculating standard errors in its examination of the parties' econometric evidence on prevalence. In its discussion of the prevalence models, the Panel observed that while "[i]nitially, Professor List and IPE chose to apply the STATA software command *ivreg2* to calculate standard errors ... [s]ubsequently, Professor List, *and later on IPE*, applied an alternative way of calculating standard errors" that Professor List claimed to be more accurate.<sup>906</sup> Based on its review of the evidence, including email exchanges that both IPE and Professor Chipty had with the developers of STATA, the Panel expressed "reservations regarding IPE and Professor List's methodologies" for calculating standard errors and therefore "question[ed] their results, based on these methodologies, that suggest that TPP measures had no statistically significant impact on smoking prevalence."<sup>907</sup>

668. The Panel made similar findings in connection with its review of the parties' econometric evidence on consumption. For example, with respect to IPE's econometric results based on the Nielsen retail sales data, the Panel "question[ed] the validity of IPE's results" among other reasons because "some of the results of the modified analysis based on the procedure to compute the standard errors applied initially, *but that were later rejected by IPE*, find a positive and statistically significant impact of the TPP measures on cigarette sales."<sup>908</sup> The Panel cited the same consideration as among the reasons why it "question[ed] the IPE's results" based on the Aztec scanner data.<sup>909</sup>

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<sup>903</sup> See Chipty Second Rebuttal Report (AUS-591), Table 3.

<sup>904</sup> IPE Second Updated Report (DOM-361), para. 1.

<sup>905</sup> IPE Second Updated Report (DOM-361), para. 4.

<sup>906</sup> Panel Report, Appendix C, para. 110 (emphasis added).

<sup>907</sup> Panel Report, Appendix C, para. 111.

<sup>908</sup> Panel Report, Appendix D, para. 107 (emphasis added).

<sup>909</sup> Panel Report, Appendix D, fn 141.

669. Once again, it was entirely appropriate for the Panel to take into account the inconsistency of the complainants' experts on an important methodological issue when evaluating the weight to attribute to the evidence they submitted. As with the issue of how to control for excise tax increases, the issue of how to calculate standard errors could lead to a different conclusion on whether the results reported by the complainants' experts were or were not consistent with a plain packaging effect. Moreover, the purported "discovery" of the "error" in *ivreg2* by Professor List was plainly an attempt to distract attention from the fact that Professor List's and IPE's original models, once corrected, showed negative and statistically significant effects of the TPP measures on prevalence and consumption.

3. The Appellants' Claims of Error Under Article 11 of the DSU  
in Respect of Specific Prevalence and Consumption Findings  
are Unfounded

670. The Dominican Republic and Honduras each make specific allegations of error under Article 11 of the DSU in respect of specific findings by the Panel concerning prevalence and consumption. However, the nature and structure of each appellant's claims are quite different.

671. The Dominican Republic organises its claims of error around specific findings of the Panel, which it divides between "the benchmark rate of decline" and the "criteria used by the Panel to assess the robustness of the parties' evidence". The Dominican Republic divides the second category into alleged "errors related to robustness criteria developed and executed by the Panel without debate with the parties" and alleged "errors related to robustness criteria debated with the parties". Within each of these groupings, the Dominican Republic identifies and discusses specific findings or observations by the Panel, mostly of a methodological nature.

672. Honduras organises its claims of error in respect of prevalence and consumption more by reference to the obligations of a panel under Article 11 of the DSU, such as a panel's obligation to provide a reasoned and adequate explanation for its findings. Along the way, Honduras makes allegations of error in respect of some of the same issues identified by the Dominican Republic in its appeal.

673. Australia will organize the rebuttal that follows around specific issues (e.g. the Panel's discussion of multicollinearity) rather than alleged violations of the Panel's obligations under Article 11 of the DSU. This structure will allow Australia to respond on a unified basis to most of the Dominican Republic's and Honduras's claims concerning prevalence and consumption. In Part 4, Australia responds to any remaining issues raised by Honduras that Australia has not already rebutted. Finally, in Part 5, Australia demonstrates that the appellants have not even *attempted* to show that the Panel's alleged failures of objective assessment in Appendices C and D, even if established in whole or in part, were *material* to the Panel's findings on prevalence and consumption.

- (a) The Dominican Republic's claims of error in respect of the "benchmark rate of decline" are unfounded and based on an obvious mischaracterisation of the Panel's actual findings

674. The Dominican Republic's headline claim of error under Article 11 of the DSU is its claim that the Panel erred in its assessment of what the Dominican Republic calls the "benchmark rate of decline" in smoking prevalence.<sup>910</sup> The term "benchmark rate of decline" is not used by the Panel. The Dominican Republic uses this term to refer to the trend in smoking prevalence that prevailed prior to the implementation of the TPP measures in December 2012.

675. The premise of the Dominican Republic's argument is that the Panel identified a "benchmark rate of decline" in the first step of its prevalence analysis, which it then disregarded in the subsequent steps of its analysis. This is plainly incorrect: the Panel did not identify a "benchmark rate of decline" in the first step of its analysis. Once this premise is taken away, the Dominican Republic's entire set of arguments concerning the "benchmark rate of decline" collapses.

676. To recall, the Panel examined three questions in its assessment of the prevalence evidence in Appendix C:<sup>911</sup>

- Has smoking prevalence *declined* following the adoption of the TPP measures?
- Has the decline in smoking prevalence *accelerated* following the adoption of the TPP measures?
- Can any decline in smoking prevalence following the adoption of the TPP measures be *attributed* to those measures, taking other tobacco control factors into account?

677. It should be apparent even from the posing of these three questions that the *pre-existing rate of decline* – the focus of the Dominican Republic's arguments – is relevant only to the second and third steps of the Panel's analysis. The first step of the Panel's analysis examined whether smoking prevalence had declined following the implementation of the TPP measures in December 2012. Answering that question did not involve or require a comparison to a "benchmark" rate of decline that prevailed *prior* to the implementation of the TPP measures. A comparison to the pre-existing rate of decline became relevant only in the second step, when the Panel examined whether the post-TPP rate of decline had accelerated *relative to* the pre-TPP rate of decline (i.e. to a "benchmark", to use the Dominican Republic's terminology). The

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<sup>910</sup> Dominican Republic's appellant's submission, Section II(D)(3)(b). In its appeal, Honduras does not directly challenge the Panel's findings concerning what the Dominican Republic calls the "benchmark rate of decline". Honduras alludes to the issue in connection with its allegation that the Panel did not "provide a reasoned and adequate explanation of rejecting all datasets other than the RMSS". See Honduras's appellant's submission, para. 929.

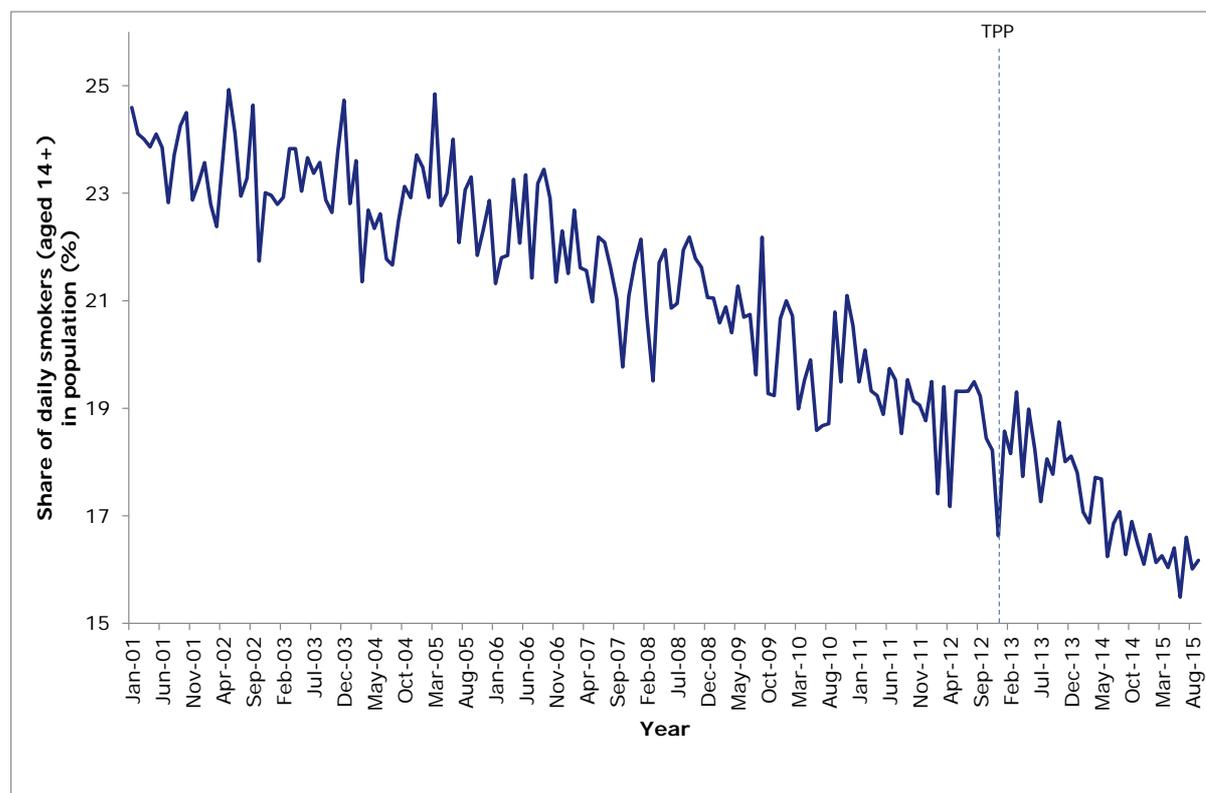
<sup>911</sup> See Panel Report, Appendix C, para. 5.

pre-existing rate of decline was also relevant to the third step of the Panel's analysis, as an analysis of attribution requires a consideration of the rate of decline that would have prevailed in the *absence* of the TPP measures. However, as explained further below, the pre-existing rate of decline in the third step differs from that in the second step because it is a *regression-adjusted* trend that controls for factors other than the TPP measures that may have influenced prevalence and consumption.

678. Contrary to the Dominican Republic's argument, the Panel did not identify a benchmark rate of decline until the second step of its analysis, when it was required to do so. For reasons that it elaborated upon in the third step of its analysis, the Panel consistently relied upon data from 2001 onward as the basis for identifying the downward trend in smoking prevalence. Critically, as Australia will show, the Panel considered and rejected the Dominican Republic's contention that the downward trend in smoking prevalence should be calculated only from July 2006 onward. In essence, the Dominican Republic's argument on appeal assumes that the Panel agreed with the Dominican Republic on this contested issue, when in fact it did not. In this way, the Dominican Republic's arguments on appeal distort the Panel's actual findings to manufacture an alleged "inconsistency" where in fact there is none.

679. The Dominican Republic's arguments begin by mischaracterising the Panel's findings in the first step of its analysis. In fact, the Panel could have taken the first step of its analysis as given – once the complainants abandoned their "backfiring" claim, there was no genuine disagreement among the parties that smoking prevalence had declined following the implementation of the TPP measures. Figure C.1, reproduced below, depicts smoking prevalence in Australia based on the Roy Morgan Single Source ("RMSS") data from January 2001, when the data series begins, to September 2015, the last month for which data were available. As Figure C.1 demonstrates, smoking prevalence unmistakably declined following the implementation of the TPP measures.

**Figure C.1: Smoking Prevalence Based on RMSS Data**



Note: The vertical dashed line indicates the introduction of TPP and enlarged GHWs. Source: RMSS data (January 2001 – September 2015).

680. The Panel observed that "the RMSS data [shown in Figure C.1] reveal a downward trend in smoking prevalence that has accelerated since July 2006. In 2001, the smoking prevalence was around 24%. In 2006, smoking prevalence was slightly lower at 23%. In 2015, the level of smoking prevalence was 18%."<sup>912</sup> As the Dominican Republic correctly notes, there appears to be a clerical error in the Panel's statement. The level of smoking prevalence was 18% in 2012, the year in which the TPP measures were implemented, and was closer to 16% at the end of the sample period in September 2015. Thus, smoking prevalence declined around two percentage points following the implementation of the TPP measures through September 2015.

681. Based on the RMSS data and other data that it reviewed in the first step of its analysis, the Panel readily concluded that "smoking prevalence in Australia continued to decrease following the introduction of the TPP measures".<sup>913</sup> As the Panel explained, however, the fact that smoking prevalence had declined following the implementation of the TPP measures did not "inform ... whether this downward trend in smoking prevalence has accelerated" following the implementation of the TPP

<sup>912</sup> Panel Report, Appendix C, para. 8.

<sup>913</sup> Panel Report, Appendix C, para. 41.

measures.<sup>914</sup> To answer that question, the Panel needed to compare the post-TPP rate of decline to the pre-TPP rate of decline – a step that it undertook in the *second* step of its analysis.

682. Based entirely on what appears to have been an ocular observation by the Panel that "the RMSS data reveal a downward trend in smoking prevalence *that has accelerated since July 2006*", the Dominican Republic contends that the Panel "found" in step 1 of its analysis that the correct "benchmark rate of decline" for all purposes that followed was one that began in July 2006. The Dominican Republic advances this contention notwithstanding the fact that (i) there was no need for the Panel to identify a "benchmark rate of decline" in step 1 of its analysis; (ii) the Panel made no reference to a "benchmark rate of decline" in step 1 of its analysis; and (iii) the Panel made clear that its findings in step 1 did not inform the question of *acceleration*, i.e. the question that actually *required* a "benchmark rate of decline".

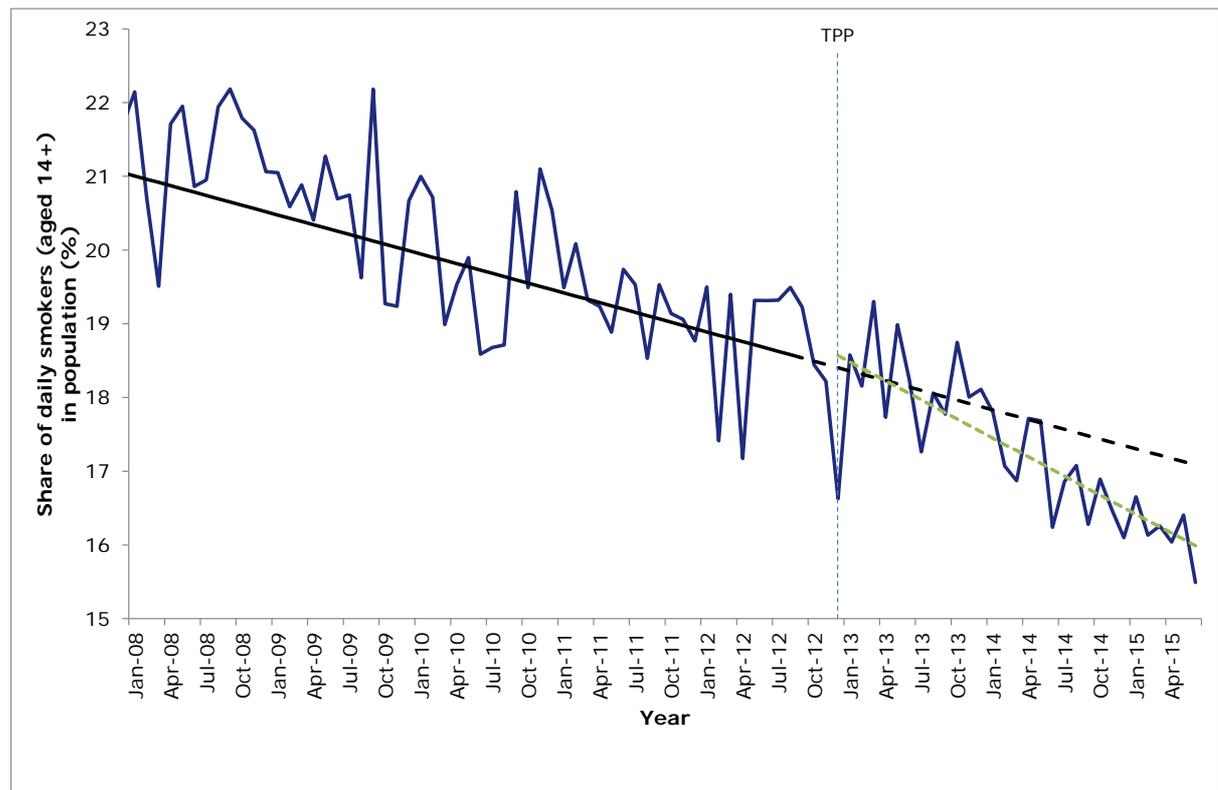
683. Having mischaracterised the Panel's findings in step 1, the Dominican Republic then modifies the Panel's figures or develops entirely new figures to depict the findings that the Dominican Republic *asserts* that the Panel made, when in fact it did not. The first of these is the Dominican Republic's Figure 11, in which it alters Figure C.1 in the Panel Report (reproduced above) by superimposing the "pre-TPP downward trend line found by the Panel in its first step". The green trend line that the Dominican Republic superimposes on Figure C.1 is, of course, not one that the Panel actually identified in step 1 of its analysis as the correct trend line. (On the contrary, as discussed below, the Panel rejected this trend line.) The Dominican Republic carries this imaginary "finding" by the Panel through the remainder of its argument, contrasting this alleged "finding" with the findings that the Panel actually made and claiming that these results are "internally incoherent".

684. The Dominican Republic then turns to mischaracterising the Panel's findings in step 2 of its analysis. Here, the Dominican Republic focuses on Figure C.19, which compares the trends in smoking prevalence before and after the implementation of the TPP measures. Figure C.19, reproduced below, clearly shows that the declining trend in smoking prevalence accelerated following the implementation of the TPP measures.

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<sup>914</sup> Panel Report, Appendix C, para. 41.

**Figure C.19: Smoking Prevalence and Pre- and Post-TPP Trends**



*Note:* The vertical dashed line indicates the introduction of TPP and enlarged GHWs. The dashed line and the dotted line denote, respectively, the pre-TPP linear trend and the post-TPP linear trend.

*Sources:* RMSS data, based on Chipty Second Rebuttal Report (AUS-591), p. 10.

685. The Dominican Republic appears to believe that Figure C.19, *including the trend line shown in that figure*, is based "only" on data from 2008 to 2015.<sup>915</sup> The Dominican Republic contends on this basis that the "benchmark rate of decline" depicted in Figure C.19 is somehow "different" than the "benchmark rate of decline" that the Panel found in steps 1 and 3.<sup>916</sup> As Australia has just shown, the Panel did not actually "find" *any* "benchmark rate of decline" in step 1 of its. As for the benchmark rate of decline that the Panel used in step 3 of its analysis, the Dominican Republic could have determined with a modest amount of calculation that the trend line shown in Figure C.19 is based on the entire RMSS data set, i.e. from January 2001 to September 2015. As Australia will show, the use of the 2001-2015 trend line in step 2 of the Panel's analysis is *entirely consistent* with the Panel's findings in step 3 of its analysis.

686. Australia agrees with the Dominican Republic that the Panel's explanation of Figure C.19 is not ideal. It is certainly confusing to depict prevalence rates from January 2008 onward while showing a trend line that is based on prevalence data from January 2001 onward. The Panel would have aided the parties' understanding of

<sup>915</sup> Dominican Republic's appellant's submission, para. 160.

<sup>916</sup> Dominican Republic's appellant's submission, para. 191.

this figure had it explained the different time periods involved. However, the origins of this figure and the trend line that it depicts are nowhere near as mysterious as the Dominican Republic implies.

687. Notwithstanding the Panel's citation to Dr Chipty's Second Rebuttal Report, Figure C.19 is ultimately derived from a figure submitted by the Dominican Republic's expert, Professor List. Figure 7 in Professor List's Second Rebuttal Report depicted what he called "macroscopic evidence" that there was no break in the trend of smoking prevalence following the implementation of the TPP measures.<sup>917</sup> Professor List's Figure 7 was based on RMSS data from January 2008 onward. In her Second Rebuttal Report, Dr Chipty modified Figure 7 by drawing one additional line to show that there was, in fact, an acceleration in the decline of prevalence following the implementation of the TPP measures.<sup>918</sup> It is Dr Chipty's modification of Professor List's Figure 7 that the Panel cites as the source for Figure C.19.

688. In the Interim Report, the figure that became Figure C.19 in the Final Report shows a continuous trend line beginning in January 2001.<sup>919</sup> The Dominican Republic itself makes note of this fact.<sup>920</sup> During the Interim Review, Australia pointed out to the Panel that Dr Chipty's figure, like Professor List's figure that it modified, began in 2008, not 2001. The Dominican Republic also makes note of this fact in its submission.<sup>921</sup> Using the underlying RMSS data, Australia was able to determine that the Panel modified the original figure (i.e. the one that appeared in the Interim Report) to show the prevalence rates beginning in January 2008 (like Professor List's Figure 7 and Dr Chipty's modification of that figure) while keeping the continuous trend line that begins in 2001. The trend line shown in Figure C.19 is therefore the same 2001-2015 trend line from the original figure, but the Panel's modification of the time frame shown on the *x* axis means that only the segment from 2008 to 2015 is shown.<sup>922</sup> Thus, in step 2 of its analysis, the Panel used a trend variable that began in 2001, not in 2006 or 2008, as the Dominican Republic implies.

689. Having either mischaracterised or misapprehended Figure C.19 in the Panel Report, the Dominican Republic engages in another of its re-imaginings of a figure shown in the Panel Report. In Figure 13 of its submission, the Dominican Republic modifies Figure C.19 by superimposing the imaginary green line representing the "benchmark rate of decline" that the Panel allegedly "found" in step 1 of its analysis.

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<sup>917</sup> See List Second Supplemental Report (DOM/IND-5), Figure 7.

<sup>918</sup> See Chipty Second Rebuttal Report (AUS-591), Figure 2.

<sup>919</sup> See Interim Panel Report, Appendix C, Figure 20 (the precursor to Figure C.19 in the Final Panel Report).

<sup>920</sup> Dominican Republic's appellant's submission, fn 122.

<sup>921</sup> Dominican Republic's appellant's submission, fn 122.

<sup>922</sup> The Dominican Republic claims despite its "best efforts", it was not able to reproduce Figure C.19. Dominican Republic's appellant's submission, para. 200. This is surprising, considering that Figure C.19 is derived from a figure originally prepared by one of its own experts. Australia was able to reproduce Figure C.19 and determine the basis for the trend line shown in that figure with little difficulty.

To repeat, the Panel made no such finding in step 1. Figure C.19 in the Panel Report accurately depicts the acceleration in the rate of decline following the implementation of the TPP measures, relative to the trend line in the RMSS data covering the entire period for which those data were available (i.e. beginning in January 2001).

690. The Dominican Republic's account of step 3 of the Panel's analysis continues in the same vein as its account of steps 1 and 2: it contrasts a "finding" that the Panel did not make in step 1 with the findings that the Panel actually made in step 3, and alleges an inconsistency between the imagined findings and the actual findings. In particular, the Dominican Republic alleges that the Panel's preference in step 3 for econometric models that used a trend variable beginning in 2001 is somehow inconsistent with the Panel's supposed "finding" in step 1 that the trend variable should begin in 2006, as the Dominican Republic had argued before the Panel.

691. The Panel explains in step 3 of its analysis *why* it believed that the trend variable should begin in 2001, not 2006. The Panel's explanation begins with its review of the available data sources and its explanation of why it considered the RMSS data to be most suited to the analysis of prevalence. The Panel explains:

While we acknowledge that no data are perfect, we agree with Australia that the RMSS data is the most suited available data submitted by the parties to analyse the impact of the TPP measures on smoking prevalence, for two main reasons. First, the RMSS data provide an actual measure of smoking prevalence (based on a population of smokers, recent quitters and non-smokers). Second, the data are available monthly for a long period of time before and after the introduction of the TPP measures. The parties disagree with respect to the selection sample period. We concur with Australia that a larger number of observations is likely to increase the precision of the estimates. In addition, we note that Professor List, in his report submitted by the Dominican Republic and Indonesia, suggests limiting the sample period to analyse smoking prevalence, but does not propose the same restriction in the analysis of cigarette consumption.<sup>923</sup>

692. In this statement, the Panel notes the contested issue ("the selection sample period", i.e. how far back in time the econometric models should go in their analysis of the RMSS data) and agrees with Australia "that a larger number of observations is likely to increase the precision of the estimates". The Panel notes "[i]n addition" Professor List's own inconsistency in his selection of sample periods. For example, in his "event study" analysis of consumption based on IMS data, Professor List used data from February 2002 to September 2015, while choosing to limit the sample period for his analyses of prevalence to the period from July 2006 onward.<sup>924</sup> The Panel expresses a clear preference for using as much data as are available, as this is "likely to increase the precision of the estimates".

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<sup>923</sup> Panel Report, Appendix C, para. 99 (emphasis added).

<sup>924</sup> See List Report (DOM/IDN-1).

693. In its analysis of IPE's and Professor Lists' econometric results, the Panel explains in further detail *why* the use of longer sample periods is "likely to increase the precision of the estimates". The Panel begins its analysis by stating:

After a careful review of the econometric reports on smoking prevalence based on the RMSS data submitted by the Dominican Republic's and Indonesia's experts, we are not persuaded that these econometric results can be taken at face value, mainly because most of their model specifications are unable to detect the impact of tobacco costliness (including excise tax increases) on smoking prevalence. Yet, all parties consider tobacco excise tax to be one of the most effective tobacco control policies. To some extent, the Dominican Republic, Honduras and Indonesia are asking the Panel to conclude that the TPP measures had no impact on smoking prevalence, because its effect is statistically not significant, but to disregard the fact that the same econometric results suggest that excise tax or price increase have also had no impact on smoking prevalence.<sup>925</sup>

694. The Panel explains in the next paragraph that "[t]he manner in which the smoking prevalence trend is modelled with respect to the sample period considered (i.e. January 2001-September 2015 or July 2006-September 2015) has an important consequence on whether the econometric analysis is able to identify the impact of other variables."<sup>926</sup> In other words, the selection of the sample period for the trend variable "has an important consequence" for the problem that the Panel identified in the preceding paragraph.

695. To this end, the Panel explains that if the trend variable is improperly specified (e.g. by choosing the wrong sample period), the trend variable ends up absorbing the effects of other variables such that those other variables no longer have explanatory power, when all parties agree that they should – a problem known as "overfitting" the data. The Panel provides the example of Professor List's two-stage micro-econometric analysis, in which the specification of the trend variable absorbed most of the explanatory power "making the price variable no longer significant in most of the specifications".<sup>927</sup> As the Panel had explained in the preceding paragraph, it was not persuaded by econometric results, such as Professor List's, which suggested that factors such as price increases "had no impact on smoking prevalence".<sup>928</sup> These types of anomalous results were more likely to occur when the trend variable was curtailed to a period representing less than the full period of available data.

696. The Panel considered it "important that the trend variable specified in the model avoid overfitting the data, to allow an identification of the impact of other variables of interest, such as individual tobacco control policies."<sup>929</sup> "Otherwise," the Panel explained, "one cannot rule out the possibility that the smoking prevalence

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<sup>925</sup> Panel Report, Appendix C, para. 103 (citations omitted).

<sup>926</sup> Panel Report, Appendix C, para. 104 (emphasis added).

<sup>927</sup> Panel Report, Appendix C, para. 104.

<sup>928</sup> Panel Report, Appendix C, para. 103.

<sup>929</sup> Panel Report, Appendix C, para. 105.

trend included in the model accounts not only for the trend itself but potentially also reflects any tobacco control policies that contributed to this trend."<sup>930</sup> It was for these reasons that the Panel "concur[red] with Australia that a larger number of observations is likely to increase the precision of the estimates" when it comes to the selection of the sample period for the trend variable. In other words, the Panel agreed with Australia that the trend variable in the RMSS data should begin in January 2001, the beginning of the available data, and not in July 2006, as the Dominican Republic and its experts had advocated.

697. The Panel's preference in step 3 of its analysis for an RMSS trend variable beginning in January 2001 is fully consistent with how it constructed the trend line in step 2 of its analysis. The Panel observed at the beginning of its step 2 analysis that the parties had "discussed extensively ... how to specify the smoking prevalence trend" and explained that it would discuss this issue "more extensively" in step 3 of its analysis, which is exactly what the Panel did.<sup>931</sup> In step 3, as shown, the Panel agreed with Australia that the RMSS trend variable should begin in January 2001, and rejected the Dominican Republic's contention that the trend variable should begin in July 2006.

698. Correcting the Dominican Republic's mischaracterisations of the Panel's findings in step 3 also dispenses with the Dominican Republic's claim that the Panel was inconsistent in its analysis between steps 1 and 3, which is once again based on the Dominican Republic's erroneous belief that the Panel "found" in step 1 that the trend variable should begin in July 2006. The Dominican Republic simply ignores the Panel's explanation in step 3 of why it rejected the Dominican Republic's argument to this effect.

699. Figure 14 in the Dominican Republic's submission is the next of its re-workings of a figure that appears in the Panel Report. This figure continues to depict the imaginary green line that purports to show "the Panel's trend line in step 1", when in fact the Panel did not identify *any* trend line in step 1. In this figure, however, the Dominican Republic adds to its diversion from the Panel's actual findings by superimposing what it characterises as the "Panel's step 3 trend line", i.e. the regression-adjusted trend line based on Dr Chipty's re-analysis of the RMSS prevalence data using January 2001 as the starting date.

700. Setting aside the more fundamental error with the Dominican Republic's Figure 14 (i.e. that the Panel "found" a trend line in step 1), it is misleading to depict a raw data trend line on the same chart as a regression-adjusted trend line and treat them as if they were comparable. A raw data trend line is nothing more than the trend of the data (here, the RMSS prevalence data). In contrast, a regression-adjusted trend line is the output of a regression analysis that seeks to *isolate* the effect of a policy intervention (here, the implementation of the TPP measures) by controlling for other variables that affect the trend (such as excise tax increases). As such, a raw data trend line has no explanatory power, while a properly specified regression-adjusted trend

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<sup>930</sup> Panel Report, Appendix C, para. 105.

<sup>931</sup> Panel Report, Appendix C, para. 53.

line does. For this reason, it is neither meaningful nor accurate to present a raw data trend line and a regression-adjusted trend line on the same chart as if they convey the same information.

701. The Dominican Republic commits the same error in its Figure 15, where it engages in its ultimate re-imagining of a Panel figure by placing all three supposed "rates of decline" on the same chart. The blue and green lines on this chart, whatever else might be said about them, are raw data trend lines. Only the red line is a regression-adjusted trend. The red line depicts the Panel's finding that the most appropriate econometric analysis of the RMSS prevalence data is one that, *inter alia*, uses all of the data available (i.e. beginning in January 2001) and that properly accounts for excise tax increases (as reflected by the level shift in 2010). This regression-adjusted trend line is well above the actual RMSS prevalence data subsequent to the implementation of the TPP measures (the black line), visually depicting the negative and statistically significant effect that the TPP measures had on smoking prevalence over this period.

702. Usefully, the Dominican Republic explains that its appeal "does not request that the Appellate Body decide which trend line is correct"<sup>932</sup> and that it "is not rearguing the case."<sup>933</sup> Nor would this be appropriate, given that the Panel considered this issue at length and found, for the reasons that it explained, that any analysis of the RMSS prevalence data should be based upon all of the data available – including the specification of a continuous trend variable beginning in January 2001. Appropriately then, the Dominican Republic is not asking the Appellate Body to revisit the Panel's factual determination.

703. As for the Dominican Republic's claims of error under Article 11 of the DSU, these claims rest upon the premise that the Panel identified a "benchmark rate of decline" in step 1 of its analysis, and then acted inconsistently with this "finding" in steps 2 and 3 of its analysis.<sup>934</sup> Since, as Australia has explained, the Panel did not identify a "benchmark rate of decline" in step 1, and it applied the same principle – that the RMSS trend line should reflect the entire period of data available – in both step 2 and step 3 of its analysis, there is no "internal incoherence" in the Panel's treatment of the appropriate trend variable in the RMSS data.

704. In sum, the Dominican Republic's claims of "internal incoherence" amount to an assertion that because the Panel observed in step 1 of its analysis that "the RMSS data [shown in Figure C.1] reveal a downward trend in smoking prevalence that has accelerated since July 2006", it follows that the Panel agreed with the Dominican Republic that any trend variable in the RMSS data should begin in July 2006. Whatever the accuracy of the Panel's observation about an "acceleration" beginning in July 2006, it simply does not follow from this observation that the Panel agreed with the Dominican Republic on the contested issue of the sample period for the RMSS data. On the contrary, as detailed above, the Panel "concur[red]" with Australia that

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<sup>932</sup> Dominican Republic's appellant's submission, para. 176.

<sup>933</sup> Dominican Republic's appellant's submission, para. 176.

<sup>934</sup> Dominican Republic's appellant's submission, paras. 185-193.

limiting the sample period to July 2006 onward would result in "overfitting" the data and was therefore an incorrect specification.

705. The Dominican Republic's *other* claims of error under Article 11 of the DSU are also readily dismissed. These claims relate to step 2 of the Panel's analysis and, in particular, Figure C.19 in the Panel Report. The Dominican Republic asserts that "[i]n step 2 of its analysis, the Panel both failed to provide reasoned and adequate explanations, and made findings that lacked a basis in the evidence contained in the panel record."<sup>935</sup> The Dominican Republic also asserts that "the Panel ... failed to respect the Dominican Republic's due process rights"<sup>936</sup> and that it "made the case for Australia".<sup>937</sup> All of these claims rest, in one way or another, on the incorrect notion that Figure C.19 was entirely new.

706. The Dominican Republic asserts that "the Panel adduced its own evidence, in the form of Figure C.19, to support its finding of an acceleration in the post-TPP rate of decline in smoking prevalence, but did not provide an explanation sufficient for the parties to replicate that evidence."<sup>938</sup> Australia has already agreed with the Dominican Republic that the Panel could have been clearer in Figure C.19, by ensuring the time period in the *x* axis corresponded to the time period of the trend line it depicted. However, as Australia has also explained: Figure C.19 has its origins in a figure submitted by Professor List, the Dominican Republic's own expert; the version of this figure that appeared in the Interim Report clearly revealed that the Panel used a continuous trend line that began in January 2001; and the RMSS data going back to 2001 are in the panel record. It took little effort for Australia to determine the basis for the trend line that appears in Figure C.19, and it is disingenuous for the Dominican Republic to claim that it could not do the same.

707. As for the Dominican Republic's assertion that "the Panel failed to afford the parties *any* opportunity to comment on the implications of [Figure C.19] for the benchmark rate of decline and, thus, for the acceleration in the rate of decline in smoking prevalence since the TPP measures", this assertion is demonstrably false.<sup>939</sup> To begin with, the Dominican Republic's assertion relates to a figure that originated *with one of its own experts*. In any event, the Dominican Republic *did* have an "opportunity to comment" on Figure C.19 during the Interim Review. As Australia explained in Part C.2(b) above, the Dominican Republic could have raised any comments, questions, or concerns that it had about Figure C.19 during the Interim Review process, but it chose not to.

708. Finally, the Dominican Republic's assertion that the Panel "made the case for Australia" through Figure C.19 is completely baseless. As the Panel explained in step 3 of its analysis, the proper sample period for the RMSS data was a heavily contested

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<sup>935</sup> Dominican Republic's appellant's submission, para. 197.

<sup>936</sup> Dominican Republic's appellant's submission, para. 202.

<sup>937</sup> Dominican Republic's appellant's submission, para. 208.

<sup>938</sup> Dominican Republic's appellant's submission, para. 200.

<sup>939</sup> Dominican Republic's appellant's submission, para. 205 (emphasis in original).

issue in the dispute. The parties' experts debated this issue at length<sup>940</sup>, and the Panel ultimately "concur[red]" with Australia's position on this issue for the reasons that the Panel explained. Resolving a contested factual issue does not amount to "making the case" for the party that advocated for the position ultimately accepted by the Panel.

709. For these reasons, the Appellate Body should reject the Dominican Republic's claim that the Panel acted inconsistently with Article 11 of the DSU in its assessment of the pre-existing trend in smoking prevalence.

(b) The appellants' claims of error under Article 11 of the DSU in respect of multicollinearity are unfounded

710. The Dominican Republic and Honduras both claim that the Panel failed to undertake an objective assessment of the matter when it applied a statistical test to evaluate whether the complainants' econometric models were affected by multicollinearity.<sup>941</sup> As the Panel explained, and as recounted further below, multicollinearity arises where two or more explanatory variables in a regression model convey the same information.<sup>942</sup>

711. The overall – and erroneous – impression that the Dominican Republic and Honduras seek to convey in their submissions is that the Panel's discussion of multicollinearity "came out of nowhere" and bore no relationship to issues that the parties had debated during the course of the panel proceedings. In fact, the Panel's discussion of multicollinearity in the Panel Report was closely related to problems with the complainants' prevalence and consumption models that Australia's expert, Dr Chipty, had consistently identified in her submissions. As Australia will demonstrate, while the Panel used a new term ("multicollinearity") that the parties had not specifically discussed during the course of the panel proceedings, the Panel used this term to describe and tie together numerous issues that had been the subject of extensive debate. Moreover, the Panel evaluated the complainants' models for multicollinearity as one possible explanation for *why* the complainants' models were producing the anomalous results that Dr Chipty had identified. The Panel's discussion of multicollinearity did not come out of nowhere.

712. Neither the Dominican Republic nor Honduras takes issue with the Panel's decision to test their experts' models for multicollinearity. The Dominican Republic specifically notes that it "does not take issue with the Panel's decision to use this robustness criterion *per se*".<sup>943</sup> In addition, neither the Dominican Republic nor Honduras alleges that the Panel's findings of multicollinearity were incorrect.

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<sup>940</sup> See, e.g. Chipty Third Rebuttal Report (AUS-605), pp. 26-30, 47-49; Chipty Surrebuttal Report (AUS-586), para. 9; IPE Third Rebuttal Report (DOM-375), Tables 2.1-4, 2.3-2; IPE Updated Report (DOM-303), 3.3; IPE Report (DOM-100), 3.2.2; List Summary Report (DOM/IDN-9), paras. 143-145.

<sup>941</sup> Dominican Republic's appellant's submission, Part II(D)(3)(c)(2); Honduras's appellant's submission, Part VIII.2.3.4.

<sup>942</sup> Panel Report, Appendix C, para. 107.

<sup>943</sup> Dominican Republic's appellant's submission, para. 364.

Instead, the appellants' claims of error under Article 11 of the DSU centre on the notion that their due process rights were denied because the Panel did not specifically raise the issue of multicollinearity with the parties during the course of the panel proceedings. This assertion ignores the fact that a panel is not "required to engage with the parties upon the findings and conclusions that it intends to adopt in resolving the dispute".<sup>944</sup>

713. Australia will first place the Panel's findings of multicollinearity within their proper context. Australia will then explain why the appellants' claims of error under Article 11 of the DSU are unfounded.

- (1) The Panel's findings of multicollinearity within the context of this dispute

714. The Panel's findings of multicollinearity relate to the regression models that the complainants' experts submitted purporting to demonstrate that the TPP measures had no statistically significant effect upon tobacco prevalence and consumption in the three-year period following the implementation of the measures.

715. Recall that a regression model estimates how an outcome variable (e.g. price or sales) changes with an explanatory variable (e.g. an indicator variable marking the introduction of a policy), holding all other explanatory variables constant. In the context of the present dispute, the parties submitted different regression models to estimate, for example, how smoking prevalence (the outcome variable) changed with the implementation of the TPP measures (denoted as an indicator variable), holding constant other variables that affect smoking prevalence. Among these other variables, the parties and their experts discussed excise taxes, tobacco prices, and the trend over time in rates of smoking prevalence.

716. The Panel explained that "[m]ulticollinearity arises when two (or more) explanatory variables convey the same information."<sup>945</sup> To the extent that two or more explanatory variables are correlated, it becomes correspondingly difficult for a regression model to analyse the *individual* effects of those variables. For example, if a regression model of smoking prevalence includes a price variable and a linear trend variable, and those two variables are highly correlated, the model will not be able to analyse the effect of *price* on smoking prevalence separately from the effect of the *linear trend* on smoking prevalence – the two explanatory variables "convey the same information" and the model is therefore said to exhibit multicollinearity.

717. The Panel further explained that "[i]n the presence of multicollinearity, the predictive power of the model remains unchanged, but the confidence interval of the coefficient estimates may increase. Moreover, the coefficient estimates may become very sensitive to minor changes in the model specification or data."<sup>946</sup> What this means in practice is that the model will tend to produce large standard errors and large

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<sup>944</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 1137.

<sup>945</sup> Panel Report, Appendix C, para. 107.

<sup>946</sup> Panel Report, Appendix C, para. 107.

confidence intervals, artificially rendering the estimated effects of the collinear variables "statistically insignificant". To return to the example above, if the price and linear trend variables in a smoking prevalence model are sufficiently collinear, the model will tend to show that either price or the linear trend, or both, do not have statistically significant effects upon prevalence, when it is evident that they should. In practice, the robustness of a regression model that exhibits multicollinearity will also tend to become sensitive to relatively minor changes in the model specification or the underlying data, such as including re-weighting corrections in the model.

718. The problems associated with multicollinearity are problems that Dr Chipty identified in the complainants' regression models *from the outset*. Dr Chipty explained that the time/trend variables in the complainants' models could themselves be measuring a policy effect, and that with highly flexible time trends it may not be possible for these models to estimate a separate policy effect of the TPP measures. Dr Chipty raised this concern multiple times, including in her first report, where she reviewed IPE's initial prevalence and consumption models. In that report, Dr Chipty observed that:

Both of IPE's prevalence and consumption analyses rely heavily on the use of time trends. In its prevalence analysis, IPE assumes that a historical time trend based on a pre Plain Packaging sample will continue into the future and looks to see if prevalence post Plain Packaging is lower than the trend-projected prevalence. In its consumption analysis, IPE fits a trend line to the full sample (including pre and post Plain Packaging) and looks to see if Plain Packaging had an effect beyond trend. ... IPE provides no economic explanation for the use of time trends in their statistical models and, as such, gives no consideration of how the inclusion of trends affects their conclusions about the impact of Plain Packaging.

IPE treats time trends in smoking prevalence and consumption as if they exist in a vacuum. Yet, they are likely the outcome – at least in part – of historical tobacco control policy, including mass education about the health effects of smoking and policies that affect cigarette prices. As a practical matter, the time trends in IPE's regression models serve as a proxy for all unmeasured variables that affect the outcome variable and have a trend component. These can include, for example, the relevant time-varying macroeconomic variables and historical tobacco control policies. Without an understanding of the economic rationale for including time trends, one cannot determine whether the estimated results and associated inference about the effects of Plain Packaging are reasonable. For example, it is unclear if changes in prevalence and consumption implied by the time trends around Plain Packaging should themselves be interpreted as effects of Plain Packaging.<sup>947</sup>

719. Dr Chipty explained in subsequent submissions that the masking effect that results from using time/trend variables stems from *overfitting* the data – a term discussed in the preceding section in relation to the "benchmark rate of decline". Overfitting the data results from, or is exacerbated by, modelling decisions such as the

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<sup>947</sup> Chipty Report (AUS-17), paras. 40-41.

use of flexible time trends<sup>948</sup> and reweighting corrections<sup>949</sup>, and can be made even worse by the use of shorter sample periods<sup>950</sup>. When time/trend variables overfit the data, the time/trend variable can absorb the effects of other variables to the point that variables that *should* have statistically significant effects no longer do. Dr Chipty summarised the complainants' overfitting problems in her third rebuttal report:

As a practical matter, the more flexible the trend line, the better it will fit the data and the more difficult it will be for other variables to have any effect beyond trend. The modelling decisions adopted by Complainants' experts have had the effect of overfitting the data. IPE's use of the shorter period of RMSS data in studying smoking prevalence has the effect of overfitting the data with the single trend line, as does their use of the longer sample in which they nonetheless estimate the Plain Packaging effect relative to trend over the shorter period. A symptom of this problem is that IPE's model is not able to measure the effect of any tobacco control policy, not just Plain Packaging. Professor Klick's use of a quadratic trend in his prevalence model suffers from the same problem. By overfitting the data, his trend line absorbs not only the effect of Plain Packaging but also the effect of price – suggesting that nothing affects tobacco consumption except the underlying trend. Professor List and IPE achieve the same effect by advocating the introduction of additional controls to account for what they describe as "reweighting" of the RMSS data. Professor List achieves the same effect in his consumption event study analysis when he fails to control for the 2010 excise tax increase. The effect of that omission is to create a steeper trend line, one that entirely reflects the tax increase, which in effect requires Plain Packaging to beat the effect of a 25 percent tax increase whose effect persists in perpetuity.<sup>951</sup>

720. Specifically with regard to IPE's prevalence model based on the RMSS data, discussed in the preceding section, Dr Chipty observed that IPE's use of a trend variable over a shorter sample period (July 2006 onward) had the effect of absorbing *all* policy effects over this period. Dr Chipty explained:

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<sup>948</sup> Quadratic and cubic trends are said to be more "flexible" than linear trends because a linear trend is constant over a fixed period of time, whereas quadratic and cubic trends allow the trend to change. Flexibility in the trend can be desirable for some purposes, but it tends to have the effect of overfitting the data. See Chipty Third Rebuttal Report (AUS-605), paras. 50-51.

<sup>949</sup> Samples are often weighted in order to ensure the sample is representative of the underlying population from which it is drawn. Re-weighting typically involves the periodic adjustment of sample weights to accord with changes in the underlying population. See Chipty Second Rebuttal Report (AUS-591), paras. 33-34. However, the re-weighting adjustments that the Dominican Republic's experts performed were different. They included several new variables to control for the supposed effects of re-weighting already done by Roy Morgan. In the simplest case, the Dominican Republic's experts included indicator variables that take on the value of one after each re-weighting event. In many other model specifications, they allowed either the trend to change at each re-weighting event or the estimated coefficient on price to change at each re-weighting event. As explained by Dr Chipty, this had the effect of introducing additional highly flexible time trends and would lead to overfitting of the data. See Chipty Third Rebuttal Report (AUS-605), para. 70(d).

<sup>950</sup> Such as restricting the RMSS prevalence data to the period from July 2006 onward, discussed in the preceding section.

<sup>951</sup> Chipty Third Rebuttal Report (AUS-605), para. 70(d).

Because tobacco control policies themselves can affect the trend in smoking prevalence, using a shorter time period risks the possibility that the estimated trend will reflect effects of tobacco control policies and absorb some or all of the policy effects, including any effects associated with Plain Packaging. Limiting the estimation sample for the analysis of smoking prevalence to the post-July 2006 data creates exactly such a situation.

That IPE's model has trouble distinguishing trend from policies is made obvious by the fact that, in this case, the linear time trend absorbs all policy effects, including the effects of excise tax increases and the effect of Plain Packaging. A closer look at IPE's estimation results shows that in the majority of their specifications, they cannot find an effect for any tobacco-control policy beyond trend in their microeconomic model of overall smoking prevalence and their aggregate time series analysis of cigar smoking prevalence, and they cannot find any effect of the 2010 excise tax increase in the aggregate time series analysis of overall smoking prevalence. Their results are an artifact of the relatively short time period they use in their analysis, and in particular their exclusion of the earlier time period during which there were no substantial national tobacco control policy interventions. The longer sample period, beginning in 2001, provides a more reasonable basis to estimate what smoking prevalence would have been after December 2012, without Plain Packaging.<sup>952</sup>

721. Similarly, Dr Chipty explained in several of her submissions that the price variables in the complainants' models (including price levels inclusive of tax) could convey some of the same information as an indicator variable for the TPP measures, because price would have increased at the same time as the introduction of the measures. For example, in her surrebuttal report, Dr Chipty explains:

IPE, Professor List, and Professor Klick control for prices at the same time as they attempt to measure the impact of Plain Packaging. As explained by Professor Katz, however, Plain Packaging generates incentives for tobacco companies to engage in further harvesting of brand-loyal customers. Consistent with this, Professor Katz finds that both the level and the rate of growth of cigarette prices increased after the introduction of Plain Packaging. Professor Klick also finds that "plain packaging... appears to have a statistically significant positive effect on price of about 5 percent." As a result, the "Plain Packaging effect" is difficult to measure with a regression model that controls for both price and an indicator variable marking the introduction of Plain Packaging. In this case, the Plain Packaging indicator captures only a partial effect of Plain Packaging, and the price variable captures the rest of its effect.<sup>953</sup>

722. The Panel's findings concerning multicollinearity in Appendices C and D of the Panel Report relate to correlations between *time/trend* variables and other variables, and to correlations between *price/tax* variables and other variables – in other words, to the same types of problems that Dr Chipty had discussed at length in

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<sup>952</sup> See Chipty Third Rebuttal Report (AUS-605), paras. 41-42.

<sup>953</sup> Chipty Surrebuttal Report (AUS-586), para. 12.

her expert submissions.<sup>954</sup> The closely related nature of the problems identified by Dr Chipty and the Panel's discussion of multicollinearity is illustrated by the Panel's findings concerning IPE's and Professor List's results on prevalence. The Panel began its discussion of these results by stating that:

After a careful review of the econometric reports on smoking prevalence based on the RMSS data submitted by the Dominican Republic's and Indonesia's experts, we are not persuaded that these econometric results can be taken at face value, *mainly because most of their model specifications are unable to detect the impact of tobacco costliness (including excise tax increases) on smoking prevalence*. Yet, all parties consider tobacco excise tax to be one of the most effective tobacco control policies. To some extent, the Dominican Republic, Honduras and Indonesia are asking the Panel to conclude that the TPP measures had no impact on smoking prevalence, because its effect is statistically not significant, *but to disregard the fact that the same econometric results suggest that excise tax or price increase have also had no impact on smoking prevalence*.<sup>955</sup>

723. The Panel then observed that:

The manner in which the smoking prevalence trend is modelled with respect to the sample period considered (i.e. January 2001-September 2015 or July 2006-September 2015) has an important consequence on whether the econometric analysis is able to identify the impact of other variables. These variables can contribute, along with demographic shifts and other factors unrelated to tobacco control policies, to creating the smoking prevalence trend. *This problem is defined as overfitting*. For instance, the issue of overfitting associated with the trend variable is so severe in the ARIMAX models reported in the IPE Reports that even the lagged dependent variable is not statistically significant, suggesting that the level of smoking prevalence does not depend on the level of smoking prevalence in the previous month, which is in complete contradiction with the fact that smoking prevalence follows a downward trend, as agreed by all parties. Similarly, the results of Professor List's two stage micro-econometric shows how the inclusion of the secular (long-term) trend *captures most of the explaining power making the price variable no longer significant in most of the specifications*, while the price variable is always statistically significant when the trend variable is not included.

*In our view, it is important that the trend variable specified in the model avoids overfitting the data, to allow an identification of the impact of other variables of interest, such as individual tobacco control policies*. Otherwise, one cannot rule out the possibility that the smoking prevalence trend included

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<sup>954</sup> See Panel Report, Appendix C, para. 107 (price and linear trend variables); Panel Report, Appendix C, para. 108 (reweighting dummies or fully flexible reweighting correction, in particular when price (or tax level) and trend variables are included); Panel Report, Appendix D, para. 106 (price variable and linear trend variable); Panel Report, Appendix D, para. 109 (instrumented price variable and linear trend variable); Panel Report, Appendix D, para. 109 (various tax, price, and trend variables in both the first and second stage); Panel Report, Appendix D, para. 110 (instrumented tax with TPP measures dummy and several time fixed effects).

<sup>955</sup> Panel Report, Appendix C, para. 103 (emphasis added).

in the model accounts not only for the trend itself but potentially also reflects any tobacco control policies that contributed to its trend. We note that while the experts of the Dominican Republic, Honduras and Indonesia discussed extensively the importance of accounting properly for the secular downward trend in smoking prevalence, *they do not address the fact that in the vast majority of their results, the price variable was not statistically significant.*<sup>956</sup>

724. The Panel's principal findings concerning IPE's and Professor List's prevalence models, as set out in these three paragraphs, identify many of the same fundamental problems that Dr Chipty identified in respect of the same models – i.e. that the explanatory variables in these models were correlated in ways that produced anomalous results, such as the result that price levels did not have a statistically significant effect upon prevalence. Among other reasons, the complainants' trend variables overfit the data to the point that other explanatory variables exhibited no statistically significant effect. The Panel was not prepared to rely on evidence that suffered from these deficiencies.

725. Having made these findings, the Panel then described its evaluation of multicollinearity in the complainants' models:

*In addition, we observe after a careful review, that there is, as shown in Figure C.20, evidence of multicollinearity between the price variable and the linear trend variable, in particular when the sample period is restricted to July 2006 to September 2015. Multicollinearity arises when two (or more) explanatory variables convey the same information. In the presence of multicollinearity, the predictive power of the model remains unchanged, but the confidence interval of the coefficient estimates may increase. Moreover, the coefficient estimates may become very sensitive to minor changes in the model specification or data. One way to mitigate multicollinearity is to increase the sample period. We note, however, that including a second linear trend specific to the July 2006-September 2015 period, as suggested by IPE, would not resolve this issue. We also note that unlike Professor Klick, IPE and Professor List does not address the fact that the TPP measures might affect the price variable. IPE and Professor List's model specifications are unable to distinguish between the impact specific to the price variable and the TPP measures. Overall, given that neither IPE nor Professor List address the issue of multicollinearity, and the potential impact of the TPP measures on prices, we call into question the econometric results based on the price variable.*<sup>957</sup>

726. It is evident from the structure of the Panel's analysis that its discussion of multicollinearity was another way of articulating the findings that the Panel had made in the preceding paragraphs. The Panel referred to multicollinearity as one possible explanation for *why* the complainants' prevalence models had produced these results – namely, because the variables specified in the complainants' models are intercorrelated and therefore convey the same information. This is simply another way of expressing Dr Chipty's concern that time/trend variables, for example, are

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<sup>956</sup> Panel Report, Appendix C, paras. 104-105 (emphasis added).

<sup>957</sup> Panel Report, Appendix C, para. 107 (emphasis added).

likely influenced by tobacco control policies such as tobacco plain packaging, and that price/tax variables can also be affected by tobacco control policies insofar as those policies have an impact upon price. The multicollinearity test that the Panel applied is a statistical test to evaluate the degree to which the correlations of the explanatory variables affect the ability of the regression model to estimate precisely the *individual* effects of each explanatory variable.

727. The Panel's decision to test for multicollinearity was reasonable in light of the results that the complainants' models were producing. Neither the Dominican Republic nor Honduras suggests otherwise in its appeal. As the Panel explained, increased confidence intervals are signs that two or more variables in the model may be collinear, as are coefficient estimates that are highly sensitive to minor changes in the model specification or data. These are exactly the types of results that the complainants' prevalence and consumption models were producing, as Dr Chipty had highlighted in her submissions. While Dr Chipty did not test the data for multicollinearity herself, the Panel's decision to test for multicollinearity was a logical and statistically valid means of confirming and explaining the oddities that the complainants' regression models were producing – oddities that were first observed by Dr Chipty in her rebuttal submissions.

- (2) The Panel's multicollinearity findings did not compromise the appellants' due process rights

728. The Dominican Republic and Honduras claim that the Panel's evaluation of multicollinearity deprived them of their due process rights under Article 11 of the DSU. These claims rest on the notion that the Panel's discussion of multicollinearity in the Panel Report "came out of nowhere" and that, as a result, the parties never had an opportunity to engage with the Panel and with each other on this issue. Neither contention can be sustained having regard to the panel record.

729. As described above, the Panel's evaluation of multicollinearity was closely related to one of the most heavily contested set of issues in the dispute, namely whether the complainants' regression models purporting to show no effect of the TPP measures on prevalence and consumption were properly specified. The Panel's decision to test the complainants' models for multicollinearity was a logical step in light of the results that the complainants' models were producing. The Panel took this step to confirm and explain, in part, why the regression models put forward by the complainants' experts showed that key explanatory variables, such as tobacco price, did not have statistically significant effects upon prevalence and consumption. The Panel's evaluation of multicollinearity therefore arose directly from the issues that the parties' experts debated at length in their submissions. It is evident from the structure of the Panel's findings that the Panel understood its discussion of multicollinearity in this light.

730. The proposition that the Panel violated the appellants' due process rights by identifying its concerns about potential multicollinearity in their experts' models misapprehends the Panel's function as the trier of fact under Article 11 of the DSU. The Appellate Body observed in *US – Upland Cotton (Article 21.5 – Brazil)* that, in

certain types of disputes, econometric models such as those at issue in this dispute can provide "an important analytical tool".<sup>958</sup> The Appellate Body explained that "[t]he relative complexity of a model and its parameters is not a reason for a panel to remain *agnostic* about them."<sup>959</sup> Rather, "[l]ike other categories of evidence", a panel must "scrutinize" econometric evidence and "reach conclusions with respect to the probative value it accords".<sup>960</sup> A panel does not exceed its discretion as the trier of fact where, as here, it scrutinises the econometric evidence before it in light of the evidence and argument submitted by the parties. As the Appellate Body's caution makes clear, a panel's function under Article 11 of the DSU goes beyond the mere passive receipt of evidence.

731. Moreover, as Australia discussed in Part C.2(b) above, to the extent that *any* due process concerns arose from the Panel's discussion of multicollinearity, those concerns were addressed when the Panel described its evaluation of multicollinearity in the Interim Report and gave the parties an opportunity to seek review of that aspect of the report, as required by Article 15.2 of the DSU.

732. In *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, the Appellate Body reviewed a claim by the European Communities that its due process rights were infringed when the panel introduced a new test in its final report to evaluate whether certain U.S. government programmes constituted specific subsidies. The European Communities claimed that the introduction of this "novel theory" in the final report "depriv[ed] the European Communities of any meaningful opportunity to comment" on the panel's approach and thereby deprived the European Communities of due process.<sup>961</sup> The Appellate Body resolved this claim by observing that:

... the predominance test appears to have emerged from repeated exchanges between the parties and the Panel over the course of the Panel proceedings. Even if the word "predominantly" was not used in the Interim Report, the essence of this test could be discerned from earlier parts of the Interim Report... We therefore do not accept the European Union's assertion that the Panel's predominance approach was unexpected because it appeared only in the Final Report. *In any event, although a panel must fully explore with the parties all pertinent issues arising in the dispute over the course of the proceedings, this does not imply that it is required to engage with the parties upon the findings and conclusions that it intends to adopt in resolving the dispute.* Indeed, it would be impossible to do so, in particular since the panel's views may evolve over the course of the proceedings.<sup>962</sup>

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<sup>958</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 357.

<sup>959</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 357 (emphasis added).

<sup>960</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 357.

<sup>961</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 1137. As with the Dominican Republic's claim in the present dispute, the European Communities did "not take issue with the Panel's use" of this test "*per se*". *Ibid.*

<sup>962</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 1137 (emphasis added).

733. As in *US – Aircraft*, the Panel's discussion of multicollinearity in the present dispute "emerged from repeated exchanges between the parties" on the subject of whether some of the variables in the complainants' regression models conveyed some or all of the same information and thereby had the potential to mask the effects of the TPP measures. Moreover, unlike in *US – Aircraft*, the Panel discussed the issue of multicollinearity in its Interim Report. The Dominican Republic and Honduras elected *not* to request review of this aspect of the report, even though parties have sought review of similar types of findings in other disputes.<sup>963</sup> The Appellate Body's reasoning in *US – Aircraft* applies *a fortiori* in the present circumstance and resolves any concerns about due process.

734. For this reason, the various questions that the Dominican Republic poses in its submission concerning the issue of multicollinearity are directed toward the wrong adjudicatory body.<sup>964</sup> These are questions that the Dominican Republic could have raised with the Panel in a request for interim review, but chose not to. It is incompatible with the respective roles of panels and the Appellate Body for a party to identify *factual* issues that it *could* have raised in interim review, but chose not to, as a basis for alleging on appeal that a panel acted inconsistently with Article 11 of the DSU.<sup>965</sup> That is exactly what the Dominican Republic and Honduras do here.

735. Even setting aside the fact that the Panel discussed its concerns about multicollinearity in the Interim Report and thereby gave the parties an opportunity to seek review of this issue, the fact remains, as the Appellate Body observed in *US – Aircraft*, that a panel is not "required to engage with the parties upon the findings and conclusions that it intends to adopt in resolving the dispute".<sup>966</sup> Thus, for example, the fact that the Panel did not ask specific *questions* to the parties concerning the issue of multicollinearity does not mean that the Panel acted inconsistently with Article 11 of the DSU, as both the Dominican Republic and Honduras imply.<sup>967</sup> As already established, "a panel is not required to test its intended reasoning with the parties."<sup>968</sup>

736. In this case, the Panel's discussion of multicollinearity did not "depart so radically" from issues that the parties *had* discussed in their submissions that the parties were "left guessing as to what proof they would have needed to adduce."<sup>969</sup> On the contrary, as Australia has demonstrated, the Panel's discussion of multicollinearity confirmed and provided context for the problems that Dr Chipty had consistently identified with the complainants' models. The complainants were

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<sup>963</sup> See, e.g. Panel Report, *US – COOL*, paras. 6.108-6.109 (requesting review of a panel finding concerning multicollinearity).

<sup>964</sup> Dominican Republic's appellant's submission, paras. 389, 396, 400.

<sup>965</sup> See Part VII.C.2(a)above.

<sup>966</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 1137.

<sup>967</sup> See Dominican Republic's appellant's submission, para. 382; Honduras's appellant's submission, para. 1075.

<sup>968</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.177.

<sup>969</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.177.

therefore well aware of the problems with their models that ultimately led the Panel to find those models unpersuasive.

(3) The appellants' claim of a lack of "even-handedness" is unfounded

737. The appellants contend that the Panel "failed to apply the multicollinearity criterion in an even-handed manner" because it "accepted the robustness of Australia's econometric evidence, without indicating whether, and if so, how it had tested for multicollinearity."<sup>970</sup> This claim misapprehends the allocation of the burden of proof in this case and its implications for how the Panel was required to evaluate the evidence before it.

738. The Appellate Body Report in *US – Upland Cotton (Article 21.5 – Brazil)*, which the Dominican Republic cites in support of its argument, is inapposite to the present situation and, in fact, helps to illustrate the importance of the burden of proof to any evaluation of whether a panel treated the parties' evidence in an even-handed fashion.

739. In *US – Upland Cotton (Article 21.5 – Brazil)*, the complaining Member, Brazil, had presented evidence based on estimates to demonstrate that certain U.S. export credit guarantee programmes constituted prohibited export subsidies under Item (j) of the Illustrative List of Export Subsidies. The responding Member, the United States, presented evidence – also based on estimates – to show that the programmes at issue operated at a profit and therefore did not constitute prohibited export subsidies under Item (j). The panel *accepted* Brazil's estimates-based evidence to find that Brazil had discharged its burden of proving that the guarantee programmes constituted prohibited export subsidies under Item (j), but *rejected* the United States' estimates-based evidence on the grounds that the U.S. evidence was based on estimates.

740. The Appellate Body found that the panel had acted inconsistently with Article 11 of the DSU by treating the same "class of quantitative evidence", i.e. data based on estimates, in a manner that was "internally incoherent".<sup>971</sup> The panel dismissed the United States' estimates-based evidence, which was "the central piece of evidence relied on by the United States", on the basis of reasoning that was internally incoherent and then "compounded the matter" by accepting evidence submitted by Brazil that "suffered from the same limitation".<sup>972</sup> The Appellate Body considered for these reasons that the panel's "treatment of the evidence submitted by the parties lacked even-handedness."<sup>973</sup>

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<sup>970</sup> Dominican Republic's appellant's submission, paras. 405, 408. See also Honduras's appellant's submission, Part VIII.2.3.4.

<sup>971</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 294.

<sup>972</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 292.

<sup>973</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 292.

741. The panel's inconsistent treatment of the evidence in *US – Upland Cotton (Article 21.5 – Brazil)* allowed Brazil to discharge its burden of proof as the complainant, while depriving the United States of the ability to rebut the case presented by Brazil by reference to the same class of evidence. In this way, the panel deprived the United States of its ability to defend itself. The same problem does not arise where, as here, the panel identifies flaws in the *complaining* Member's evidence that prevent it from discharging its burden of proof. If flaws in the complainant's evidence prevent it from discharging its burden of proof, then its claim has failed.

742. As Australia discussed in Part D above, the complainants in these disputes undertook the burden of proving that the TPP measures are not apt to contribute to Australia's legitimate objective. The complainants sought to discharge their burden, in part, by demonstrating that the TPP measures had not contributed to a reduction in prevalence and consumption in the three-year period following the implementation of the measures. The Panel found that the complainants had not, in fact, demonstrated that the TPP measures made *no* contribution to Australia's legitimate objective during that period. Among the reasons that the Panel cited was that the complainants' models purporting to show this result suffered from multicollinearity. The Panel did not need to find that Australia's expert had resolved all of the complainants' multicollinearity problems in order to reach this finding.

743. To reiterate, Australia set out to prove that the complainants had failed to prove that the TPP measures had not contributed to Australia's objective during the three-year period following implementation, and had therefore failed to prove this element of their case. Australia demonstrated this, in part, by identifying flaws in the models put forward by the complainants' experts purporting to show that the TPP measures had not had a statistically significant effect upon prevalence or consumption.

744. While the Panel refers at times to "Dr Chifty's models", it would be more accurate to say that Dr Chifty's reports identified problems with the *complainants'* models and presented *modifications* of those models to show the effect of correcting the identified problems.<sup>974</sup> Dr Chifty's consistent point was that once the identified problems in the complainants' own models were corrected, these models showed negative and statistically significant effects upon prevalence and consumption. The Panel noted that Dr Chifty's modifications resolved at least some of the problems of multicollinearity that the Panel had identified in the complainants' models.<sup>975</sup>

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<sup>974</sup> Dr Chifty did identify certain prevalence and consumption models submitted by the complainants' experts that she *preferred* over other prevalence and consumption models submitted by the complainants' experts. Dr Chifty evaluated the appropriate scientific treatment of each of the key issues – data source, sample period, estimation strategy, overfitting the data, the appropriate controls for prices and excise tax increases, and the method of calculating standard errors. The models that Dr Chifty preferred were models that, in her view, were closer to a proper specification of a prevalence or consumption model, and that were based on what Dr Chifty considered to be the most relevant or reliable source of data.

<sup>975</sup> See, e.g. Panel Report, Appendix C, para. 120 ("Dr Chifty's model specification also includes the excise tax increases dummy variables and thus avoid the problems of multicollinearity and endogeneity associated with the inclusion of the price variable (in combination with a quadratic trend variable).").

However, the Panel was not required to find that Dr Chipty's modifications of the complainants' models resolved *all* issues of multicollinearity (or all other flaws in the complainants' models) in order to find that the complainants had not satisfied their burden of proof, or to conclude that there was "some econometric evidence" on the record to suggest that the TPP measures had made a statistically significant contribution to the observed and accelerating declines in prevalence and consumption.

745. For these reasons, *US – Upland Cotton (Article 21.5 – Mexico)* lends no support to the Dominican Republic's claim that the Panel lacked "even-handedness". Unlike the situation in *Upland Cotton*, where the panel's approach deprived the United States of its ability to defend itself, the Panel in the present dispute appropriately scrutinised each parties' evidence for the purpose for which that evidence was submitted, and drew conclusions from the evidence that were well founded in each instance and not "internally incoherent".

- (4) The Dominican Republic's claim that the Panel failed to provide a reasoned and adequate explanation is unfounded

746. The Dominican Republic argues that the Panel "failed to provide 'reasoned and adequate explanations' for its multicollinearity findings" concerning the Dominican Republic's prevalence and consumption models.<sup>976</sup>

747. In its review of IPE's and Professor List's prevalence models, the Panel identifies: (1) its overarching concern with these models, as described<sup>977</sup>; (2) the importance of using the correct sample period<sup>978</sup>; (3) the importance of ensuring that the trend variable does not overfit the data<sup>979</sup>; and (4) the importance of properly controlling for tobacco excise tax increases.<sup>980</sup> The Panel then discusses two potential explanations – multicollinearity and non-stationarity (the latter discussed below) – for why IPE's and Professor List's models produced the types of anomalous results that the Panel had described, such as the suggestion that prices do not have a statistically significant effect upon prevalence. To recall, the Panel stated that:

In addition, we observe after a careful review, that there is, as shown in Figure C.20, evidence of multicollinearity between the price variable and the linear trend variable, in particular when the sample period is restricted to July 2006 to September 2015.... We also note that unlike Professor Klick, IPE and Professor List does not address the fact that the TPP measures might affect the price variable. IPE and Professor List's model specifications are unable to distinguish between the impact specific to the price variable and the TPP measures. Overall, given that neither IPE nor Professor List address the issue of multicollinearity, and the potential impact of the TPP measures on

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<sup>976</sup> Dominican Republic's appellant's submission, Part II.D.3(c)(i)(2)(iii).

<sup>977</sup> Panel Report, Appendix C, para. 103.

<sup>978</sup> Panel Report, Appendix C, para. 104.

<sup>979</sup> Panel Report, Appendix C, para. 105.

<sup>980</sup> Panel Report, Appendix C, para. 106.

prices, we call into question the econometric results based on the price variable.<sup>981</sup>

748. With regard to the consumption models submitted by the Dominican Republic's expert, IPE, the Panel noted that:

IPE's preferred specification of the modified trend analysis and the ARIMAX model includes both a price variable and a time trend variable, which happen to be highly collinear with each other. Multicollinearity appears to be even more marked when the model specification of the ARIMAX model includes five lags of the logarithm of per capita sales variables and of the price variable.<sup>982</sup>

749. The Panel also noted a potential multicollinearity issue with regard to a consumption model submitted by Honduras' expert, Professor Klick. The Panel observed that "in the first stage of the IV estimation procedure, multicollinearity appears to be high between the change in excise tax variable, the country-specific trend variable and the TPP measures dummy variable."<sup>983</sup> The Panel noted in this context that "[e]vidence of multicollinearity is confirmed by the variance inflation factors statistic."<sup>984</sup>

750. Against these explanations, the Dominican Republic now poses five specific issues regarding multicollinearity that, in its view, the Panel should have addressed as part of these explanations.<sup>985</sup> The issues identified by the Dominican Republic go far beyond what was necessary for a reasoned and adequate explanation of these statements and findings, especially taking into account the broader context in which the Panel made these statements and findings.

751. Consider, for example, the Dominican Republic's complaint that "[t]he Panel failed to explain *why it chose, and how it applied, the VIF statistic* to identify a multicollinearity problem (e.g., centered or uncentered) and how it interpreted the results (e.g., what VIF threshold did the Panel use?)."<sup>986</sup> The Dominican Republic evidently believes that on top of the Panel's 1,266 page report, including the 152 pages of evaluation of the post-implementation evidence, the Panel was required to explain not only its *concern* and the general *basis* for that concern, but also explain its views on highly technical statistical and methodological issues *relating* to that concern. This is beyond what a reasoned and adequate explanation requires.

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<sup>981</sup> Panel Report, Appendix C, para. 107. Australia notes that the Dominican Republic does not appear to contest that Figure C.20 does, in fact, provide evidence of multicollinearity.

<sup>982</sup> Panel Report, Appendix D, para. 106 (citing IPE Second Updated Report (DOM-361) and IPE Third Updated Report (DOM-375)).

<sup>983</sup> Panel Report, Appendix D, para. 109.

<sup>984</sup> Panel Report, Appendix D, fn 143.

<sup>985</sup> Dominican Republic's appellant's submission, para. 414.

<sup>986</sup> Dominican Republic's appellant's submission, para. 414(a).

752. In any event, the issues concerning multicollinearity that the Dominican Republic now identifies on appeal are the types of issues that Members routinely identify as part of the interim review process. Members frequently request panels to provide more detailed explanations of particular findings.<sup>987</sup> Had the Dominican Republic believed that the Panel's explanations of its multicollinearity findings were inadequate, and that these findings were sufficiently material to the Panel's overall conclusions to warrant concern, the Dominican Republic could have asked the Panel to provide a more detailed explanation of these findings.

(5) The Panel did not "make the case" for Australia

753. Likewise, the Appellate Body can readily dispense with the Dominican Republic's claim that the Panel "made the case" for Australia through its findings on multicollinearity.<sup>988</sup> The premise of this claim is that the Panel could not test the complainants' models for multicollinearity and refer to the problem of multicollinearity in its findings unless it had previously discussed the issue of multicollinearity with the parties. This premise is incorrect. A Panel is not "required to engage with the parties upon the findings and conclusions that it intends to adopt in resolving the dispute".<sup>989</sup> In any event, as Australia detailed in Part (1) above, the Panel's discussion of multicollinearity was closely related to, and emerged from, the problems with the complainants' models repeatedly identified by Australia's expert, Dr Chipty. The Panel did not "make the case" for Australia by confirming and providing an explanation, through the application of an additional statistical test, for several of the anomalies identified by Dr Chipty in her rebuttal evidence.

(c) The appellants' claims of error under Article 11 of the DSU in respect of non-stationarity are unfounded

754. The claims of error that the Dominican Republic and Honduras raise in relation to non-stationarity are similar to the claims that they raise in relation to multicollinearity. Without taking issue with the Panel's decision to test the complainants' models for non-stationarity, the Dominican Republic and Honduras assert that the process that the Panel followed in respect of this issue and the explanations that the Panel provided were inconsistent with the Panel's obligations under Article 11 of the DSU.<sup>990</sup> The appellants' claims are unfounded broadly for the same reasons as their claims in respect of multicollinearity.

755. Stationarity is a desirable statistical property that describes the stability of a time series. A stationary time series has the same mean, variance, and auto-correlation structure over time. In a regression model involving time series, all analysed variables must be stationary, or the residuals must be stationary. It is the stationarity of the variables that allows a regression model to evaluate the relationship

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<sup>987</sup> See, e.g. Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, paras. 6.151-6.153.

<sup>988</sup> Dominican Republic's appellant's submission, paras. 419-424.

<sup>989</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 1137.

<sup>990</sup> Dominican Republic's appellant's submission, Part II(D)(3)(c)(i)(1); Honduras's appellant's submission, para. 1046 *et seq.*

between two or more variables. If these relationships change arbitrarily over time, the regression model cannot reliably determine how one variable affects the other. Depending upon which variables are stationary or non-stationary, and whether the residuals (or error terms) are stationary, the presence of non-stationary variables in a regression model can either bias the estimated standard errors (thereby undermining the reliability of the statistical inferences that one draws from the models) or produce "spurious" regression results (i.e. indicating a statistically significant relationship between the dependent variable and an explanatory variable when in fact no such relationship exists).

756. The Panel cited the potential non-stationarity of certain variables in IPE's and Professor List's prevalence models as one among many reasons that led the Panel to "have reservations" regarding their methodologies and therefore to "question their results, based on these methodologies, that suggest that the TPP measures had no statistically significant impact on smoking prevalence."<sup>991</sup> To recall, the principal reason why the Panel was "not persuaded that these econometric results can be taken at face value" was that "most of their model specifications are unable to detect the impact of tobacco costliness (including excise tax increases) on smoking prevalence."<sup>992</sup> The non-stationarity of certain variables was one of several potential explanations identified by the Panel for *why* IPE's and Professor Lists' prevalence models produced anomalous results.

757. As detailed above, the Panel identified several reasons for questioning the validity and probative value of IPE's and Professor List's prevalence models.<sup>993</sup> The Panel then noted "in addition" two potential *explanations* – multicollinearity, as discussed in the preceding section, and non-stationarity – for why IPE's and Professor List's models produced the types of anomalous results that the Panel had described. With regard to non-stationarity, the Panel explained:

We also note that the expert reports submitted by the Dominican Republic, Honduras and Indonesia (and Australia) failed to mention that standard unit root tests suggest that the tax level and the price variables are not stationary. Yet, econometric theory recommends not estimating a model when the dependent variable (i.e. smoking prevalence) is stationary and one of the explanatory variable (i.e. tax level or price) is not stationary in order to avoid spurious and biased results.<sup>994</sup>

758. Neither the Dominican Republic nor Honduras takes issue with the Panel's references to non-stationarity as a factor that potentially contributed to some of the anomalous results that the complainants' models produced. The Dominican Republic specifically notes that it "does not take issue with the Panel's decision to use this

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<sup>991</sup> Panel Report, Appendix C, para. 111.

<sup>992</sup> Panel Report, Appendix C, para. 103.

<sup>993</sup> See Part VII.G.3(b), above.

<sup>994</sup> Panel Report, Appendix C, para. 107 (emphasis added). The Panel also identified potential non-stationarity of variables as a reason for questioning Professor List's consumption analysis based on the Aztec scanner data. See Panel Report, Appendix D, para. 44.

robustness criterion *per se*."<sup>995</sup> Nor does either appellant ask the Appellate Body to "reach any conclusions as to whether the Panel was correct in finding that the parties' respective econometric models do, or do not, entail a non-stationarity problem", as the Dominican Republic puts it.<sup>996</sup> Rather, the appellants' claims of error under Article 11 of the DSU relate to the Panel's *process* and the nature of the explanation that it provided. Australia will demonstrate that these claims of error are unfounded.

- (1) The Panel's non-stationarity findings did not compromise the appellants' due process rights

759. The appellants' claims that the Panel's references to non-stationarity deprived them of their due process rights rest on the same foundation as their due process claims in respect of the Panel's references to multicollinearity. Fundamentally, these claims rest on the misguided notion that the Panel was required to "test its reasoning" on the subject of non-stationarity with the parties before referring to non-stationarity in its interim report.

760. As with multicollinearity, the Panel's reference to non-stationarity did not "come out of nowhere", as the appellants' submissions imply. As Australia explained in Part (b)(1) above, Dr Chipty had consistently identified respects in which the complainants' econometric models produced results that did not accord with a common sense understanding of how different factors, such as tobacco price, affect rates of smoking prevalence and tobacco consumption. The Panel's reference to potential non-stationarity, along with its reference to potential multicollinearity, came *after* the Panel had identified these fundamental problems with the complainants' models and constituted one possible explanation for *why* the complainants' models were producing these results.

761. Australia recalls that "although a panel must fully explore with the parties all pertinent issues arising in the dispute over the course of the proceedings, this does not imply that it is required to engage with the parties upon the findings and conclusions that it intends to adopt in resolving the dispute."<sup>997</sup> Again, the Panel's reference to potential non-stationarity did not "depart so radically" from issues that the parties *had* discussed in their submissions that the parties were "left guessing as to what proof they would have needed to adduce."<sup>998</sup>

762. It is worth highlighting, in this context, the way in which the Panel *phrased* its concerns about non-stationarity and multicollinearity. To recall, the Panel stated:

Overall, given that neither IPE nor Professor List address the issue of multicollinearity, and the potential impact of the TPP measures on prices, we call into question the econometric results based on the price variable. We also note that the expert reports submitted by the Dominican Republic,

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<sup>995</sup> Dominican Republic's appellant's submission, para. 271.

<sup>996</sup> Dominican Republic's appellant's submission, para. 325.

<sup>997</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 1137.

<sup>998</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.177.

Honduras and Indonesia (and Australia) failed to mention that standard unit root tests suggest that the tax level and the price variables are not stationary.<sup>999</sup>

763. As the underscored language makes clear, the Panel considered that it was the complainants' experts who, at least in the first instance, should have examined their own models for potential multicollinearity and non-stationarity. The Panel's expectation was entirely reasonable, *especially* in light of the types of results that the complainants' models were producing. It bears repeating that neither the Dominican Republic nor Honduras questions the appropriateness of applying these statistical tests to their experts' models of prevalence and consumption. Given that they undertook the burden of proving that no portion of the observed declines in prevalence and consumption could be attributed to the TPP measures, the complainants' experts should have undertaken to apply these tests to their models *on their own initiative* if they wanted the Panel to find these models persuasive. The Panel's basic point in this paragraph of its analysis is that it would have expected IPE and Professor List to "address" these statistical concerns given the unexpected and counterintuitive results that many of their model specifications were producing.

764. The Panel's expectation was appropriate in its own right, but was all the more appropriate given the manner in which IPE's and Professor List's positions "evolved" over the course of the proceedings – a concern that the Panel had noted at the outset of its evaluation of step 3.<sup>1000</sup> When confronted with evident flaws in their original model specifications, IPE and Professor List changed key aspects of their original methodologies rather than examine the causes of the results that their models produced. The Panel quite reasonably expected IPE and Professor List to go back and examine *why* many of their model specifications were unable to confirm, for example, that price inclusive of tax had a negative and statistically significant effect upon smoking prevalence. Instead, IPE and Professor List found ways to move the goalposts. This was an entirely legitimate consideration for the Panel to take into account in questioning the validity and probative value of their econometric evidence.

765. In any event, the Dominican Republic and Honduras are simply wrong in their core assertion that they did not have an opportunity to engage with the Panel on the subject of non-stationarity. The Panel identified its concerns with potential non-stationarity in the interim report.<sup>1001</sup> To the extent that the Dominican Republic and Honduras had any concerns about the Panel's reference to this statistical criterion, they could have raised those concerns in connection with their requests for interim review. Instead, they raised *no* concerns about the Panel's references to non-stationarity and now challenge those factual findings on appeal as a basis for seeking to reverse the Panel's conclusions.

766. The Dominican Republic discusses at great length the report of the arbitrator in *US – COOL (Article 22.6 – US)* as if it somehow provides support for the

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<sup>999</sup> Panel Report, Appendix C, para. 107 (emphasis added).

<sup>1000</sup> See Part VII.G.1 above.

<sup>1001</sup> See Interim Report, Appendix C, para. 120.

Dominican Republic's claim that its due process rights were infringed in the present dispute.<sup>1002</sup> The Dominican Republic's argument centres on the fact that the issue of non-stationarity was one that the arbitrator discussed with the parties in *US – COOL*, whereas the Panel in the present dispute referred to non-stationarity in its report as one reason among others for questioning the validity and probative value of the complainants' evidence. For the reasons that Australia has already explained, the Panel was not required to pose questions to the parties concerning non-stationarity in order to take this factor into account in its assessment of the evidence. Moreover, the Dominican Republic's analogy to *US – COOL (Article 22.6 – US)* overlooks the fact that, for the reasons explained, the Panel in the present dispute reasonably expected *the Dominican Republic and its experts* to have addressed the issue of non-stationarity themselves in their submissions.

767. It is nevertheless worth noting that, had the Dominican Republic been sufficiently concerned about the issue of non-stationarity (or multicollinearity), it could have requested that the Panel "hold a further meeting with the parties" on this or any other issue that the Dominican Republic had identified in its request for interim review. Under Article 15.2 of the DSU, the Panel would have been obligated to hold such a meeting. While neither the Dominican Republic nor any other party could have presented new evidence at that meeting, the Dominican Republic could have raised with the Panel all of the types of questions that it now poses to the Appellate Body on a rhetorical basis.<sup>1003</sup> In addition, the Dominican Republic could have asked the Panel to modify its analysis and, potentially, its conclusions if the Dominican Republic had sufficiently persuaded the Panel that its findings in respect of non-stationarity (or multicollinearity) were inappropriate or unfounded in light of the evidence before the Panel. The Dominican Republic did not avail itself of this right.

768. What these considerations highlight, in part, is that the panel phase of a dispute settlement proceeding must eventually come to an end. More so than any other complainant, the Dominican Republic sought to turn the panel phase of this dispute into a never-ending series of competing expert submissions, in which new models replaced prior models, methodologies once endorsed were later attacked, conventions for reporting statistical significance were altered when the prior conventions no longer supported the Dominican Republic's case, and so on. Over the course of the panel proceedings, the Dominican Republic and the other complainants had more than ample opportunity to persuade the Panel of their assertion that no portion of the observed declines in prevalence and consumption could be attributed to the implementation of the TPP measures. However, the Panel was unpersuaded on the basis of the evidence before it at the time the panel proceedings came to an end in accordance with Article 12 of the DSU and the Panel's working procedures. If the Dominican Republic believed that any aspect of the Panel's findings was unsupported by the record evidence, it should have brought this concern to the Panel's attention.

769. For these reasons, the appellants' claim that the Panel infringed upon their due process rights when it referred to the potential for non-stationarity as one reason

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<sup>1002</sup> See Dominican Republic's appellant's submission, paras. 306-315.

<sup>1003</sup> See, e.g. Dominican Republic's appellant's submission, paras. 319-320; 324, 348.

among others for questioning the validity and probative value of certain econometric evidence is baseless.

- (2) The appellants' claim of a lack of even-handedness is unfounded

770. The Dominican Republic and Honduras contend that the Panel failed to evaluate the evidence in an even-handed manner because, they claim, the Panel did not apply the non-stationarity criterion to all of the rebuttal evidence submitted by Australia's expert, Dr Chifty.

771. For the reasons that Australia explained in Part (b)(3) above, the appellants' claim that the Panel lacked even-handedness misapprehends the burden of proof in this dispute, as well as the purpose for which Australia submitted Dr Chifty's rebuttal evidence. Given the rebuttal purpose for which Australia's evidence was submitted, the Panel did not need to find that Dr Chifty's rebuttal evidence corrected all deficiencies in the complainants' econometric models – including the potential non-stationarity of certain variables – in order to find that the *complainants'* evidence was insufficient to sustain their burden of proving that no portion of the observed declines in prevalence and consumption could be attributed to the TPP measures. Nor was the Panel required to find that Dr Chifty had corrected *all* deficiencies in the complainants' econometric models in order to find that the complainants' models, as revised by Dr Chifty in certain important respects, provided "some econometric evidence" to suggest that the TPP measures had made a statistically significant contribution to the observed declines in prevalence and consumption.<sup>1004</sup>

772. For these reasons, the appellants' claims that the Panel lacked even-handedness in its evaluation of the issue of non-stationarity are unfounded.

- (3) The appellants' claim that the Panel did not provide a reasoned and adequate explanation is unfounded

773. The sufficiency of a panel's explanation must be evaluated taking into account, *inter alia*, the purpose for which the panel made the finding or observation at issue, as well as the context in which it was made. As Australia described in Part (c) above, the Panel identified non-stationarity as a statistical issue that it would have expected the complainants' experts to address, especially in light of the anomalous results that

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<sup>1004</sup> In any event, the Dominican Republic's suggestion that the Panel should have tested Dr Chifty's excise tax dummies for potential non-stationarity is absurd. It is equally absurd for the Dominican Republic to claim that it tested these excise tax dummies and found them to be non-stationary. Dominican Republic's appellant's submission, para. 324(d). There is no established reason in econometrics to test *indicator* variables for non-stationarity. Australia notes that all of the econometric experts in the proceedings before the Panel used an indicator variable to estimate the effect of the TPP measures. If the Dominican Republic now believes that tax indicator variables are subject to non-stationarity, then it must also believe that the TPP indicator variable is subject to non-stationarity. If that were true, the regression models submitted by the Dominican Republic's experts would *never* have been able to prove what they claimed to prove, namely, that the TPP measures made no statistically significant contribution to the observed declines in prevalence and consumption.

many of their model specifications were producing. Neither the Dominican Republic nor Honduras challenges the relevance of this statistical criterion to the prevalence and consumption models submitted by their experts. In this context, the Panel's explanation was sufficient to identify the issue that it expected the complainants' experts to have addressed in their submissions. The Dominican Republic and Honduras do not allege that they were unable to discern the issue identified by the Panel, as confirmed by the fact that they do not challenge the relevance of the non-stationarity criterion to their models.

774. It must also be recalled, in this context, that the Panel's reference to non-stationarity came *after* the Panel had identified four principal reasons why it was unpersuaded by IPE's and Professor List's assertions that the TPP measures had no statistically significant impact on smoking prevalence. The reference to non-stationarity appears in a paragraph in which the Panel identifies certain "addition[al]" considerations.<sup>1005</sup> The Panel merely "note[s]" that the expert reports "failed to mention that standard unit root tests suggest that the tax level and the price variables are not stationary."<sup>1006</sup> For the purpose of "noting" an "additional" concern with the econometric evidence on the record – a concern that might explain, in part, the four *principal* reasons that the Panel had just identified for questioning this evidence – the Panel's explanation was sufficient to identify the basis for the Panel's finding.

775. The Dominican Republic, in particular, greatly exaggerates the significance that the Panel attached to its concern about potential non-stationarity. Australia makes this observation at this juncture not to question the *materiality* of any alleged violation of Article 11 of the DSU (a subject Australia address in Part I below), but rather to point out that the Dominican Republic overstates the extent to which the Panel was required to *explain* its concern about non-stationarity given the purpose for which the Panel noted that concern. As with its allegations of error concerning multicollinearity, the list of issues that the Dominican Republic believes that the Panel was required to address is entirely disproportionate to the purpose for which the Panel noted its concern.<sup>1007</sup>

776. Moreover, had the Dominican Republic or Honduras considered that the Panel's explanation of its concern was somehow inadequate, the Dominican Republic and Honduras could have asked the Panel to provide further explanation in connection with their requests for interim review. As Australia noted above, Members routinely request panels to provide further explanation of a specific finding if they consider the explanation provided in the interim report to be inadequate.

777. For these reasons, the Appellate Body should reject the appellants' claim that the Panel failed to provide a reasoned and adequate explanation for its concern about potential non-stationarity.

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<sup>1005</sup> Panel Report, Appendix C, para. 107.

<sup>1006</sup> Panel Report, Appendix C, para. 107.

<sup>1007</sup> See Dominican Republic's appellant's submission, para. 348.

(4) The Panel did not "make the case" for Australia

778. The Appellate Body can quickly dispense with the Dominican Republic's claim that the Panel "made the case" for Australia by noting its concern about potential non-stationarity when Australia itself had not identified this concern during the course of the panel proceedings. As Australia has already explained, the Panel's identification of this concern emerged from, and was closely related to, issues that the parties debated at length before the Panel.<sup>1008</sup> In any event, a panel does not "make the case" for a party when it evaluates the evidence on the record and identifies its own concerns in respect of this evidence. On the contrary, it is the Panel's obligation under Article 11 of the DSU to undertake its own objective assessment of the evidence. To expect otherwise misapprehends a panel's function as the finder of fact and ignores a panel's duty to scrutinise the evidence and "reach conclusions with respect to the probative value it accords".<sup>1009</sup>

(d) The Dominican Republic's claims of error under Article 11 of the DSU in respect of re-weighting are unfounded

779. The Dominican Republic alleges that the Panel acted inconsistently with Article 11 of the DSU in its evaluation of how the parties' econometric models accounted for reweighting events in the underlying data.<sup>1010</sup> The Dominican Republic alleges, in particular, that the Panel "treated the parties' evidence inconsistently" and was "internally incoherent" in its reasoning.

780. The issue of reweighting is another factual area in which the Dominican Republic's experts sought to move the goalposts during the panel proceedings in order to avoid the necessary implications of their prior submissions. IPE's and Professor List's approach to controlling for reweighting events contributed to results that the Panel considered implausible, such as the notion that the TPP measures had "backfired" and caused smoking prevalence to *increase*, or that other explanatory variables such as price did not have a statistically significant effect upon prevalence. The Dominican Republic's continued focus on the reweighting issue exemplifies its unwillingness to engage with the more fundamental reasons that the Panel identified for questioning the validity and probative value of the Dominican Republic's econometric evidence.

781. As with most of its other claims of error in respect of prevalence and consumption, the Dominican Republic's claims of error under Article 11 of the DSU are based on mischaracterisations of the Panel's findings and a misapprehension of the role that each parties' evidence played in relation to the complainants' burden of proof.

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<sup>1008</sup> See Part VII.G.3(c)(1).

<sup>1009</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 357.

<sup>1010</sup> Dominican Republic's appellant's submission, Part II(D)(3)(c)(ii)(1). Honduras refers to the reweighting issue in passing (see, e.g. Honduras's appellant's submission, para. 939), but does not raise a distinct claim of error in respect of this issue.

(1) The Panel's findings concerning re-weighting events

782. As the Dominican Republic correctly explains, survey data used in an econometric model must be representative of the population under examination. Data providers such as RMSS typically weight the survey data to ensure that the data are representative. From time to time, data providers "reweight" the survey data to account for demographic changes in the population. Depending upon how the model is specified, the econometrician may need control for these "reweighting events" to ensure that the reweighting of the underlying data does not interfere with the ability of the model to isolate and quantify the effects of the model's explanatory variables on the outcome under examination.<sup>1011</sup>

783. The issue of how to control for reweighting events arose before the Panel in connection with certain prevalence models that were based on the RMSS data. The Dominican Republic's expert, IPE, and Honduras' expert, Professor Klick, were the first economic experts to submit prevalence models based on the RMSS data. As the Panel noted, IPE "did not address the issue of reweighting [by RMSS] in its first three reports."<sup>1012</sup> Professor List, who later appeared in the proceedings on behalf of the Dominican Republic in connection with the first substantive meeting in June 2015, submitted two consecutive reports in which he also "did not consider the sample reweighting in the RMSS data to be an issue".<sup>1013</sup> Professor Klick, for his part, *never* addressed the issue of sample reweighting by RMSS.<sup>1014</sup>

784. Australia's experts, including Dr Chipty, submitted extensive criticisms of the complainants' initial prevalence models based on the RMSS data. Australia's experts identified significant flaws in these models and demonstrated that, once corrected, the complainants' own models based on the RMSS data were consistent with the conclusion that the TPP measures had made a statistically significant contribution to the observed declines in prevalence following the implementation of the measures.<sup>1015</sup>

785. In his Second Supplemental Report, Professor List identified, for the first time, a series of sample reweighting events that RMSS had undertaken during the estimation period.<sup>1016</sup> Professor List identified these reweighting events in a report submitted at the outset of the second substantive meeting in October 2015, notwithstanding the fact that IPE and Professor List had been analysing and relying

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<sup>1011</sup> As Dr. Chipty explained to the Panel, a model does not need to account for reweighting events if the model already controls for demographic changes. See Chipty Second Rebuttal Report (AUS-591), para. 37.

<sup>1012</sup> Panel Report, Appendix C, para. 108.

<sup>1013</sup> Panel Report, Appendix C, para. 108.

<sup>1014</sup> Panel Report, Appendix C, fn 121.

<sup>1015</sup> See Chipty Third Rebuttal Report (AUS-605), paras. 71-72, Table 8; Chipty Second Rebuttal Report (AUS-591), paras. 35-38, Table 4.

<sup>1016</sup> See List Second Supplemental Report (DOM/IDN-5), para. 141.

upon the RMSS data in reports dating as far back as October 2014.<sup>1017</sup> Professor List proposed to control for these reweighting events by using indicator variables denoting each event.<sup>1018</sup> IPE did not address the issue of sample reweighting until a report that it submitted in December 2015, in connection with the Dominican Republic's answers to the Panel's questions following the second substantive meeting.<sup>1019</sup> As noted above, Professor Klick never addressed the issue of sample reweighting even though he, too, had submitted evidence based on the RMSS data.

786. Australia agreed that the complainants' experts needed to control for the RMSS reweighting events, however belated their discovery of those events might be, at least insofar as their models did not otherwise control for demographic changes. The problem was with *how* Professor List and, subsequently, IPE proposed to control for the reweighting events in the affected models. By using a fully flexible reweighting approach, the modified models submitted by Professor List and IPE had the effect of overfitting the data to the point that their models could no longer find negative and statistically significant effects of *known* determinants of prevalence, such as price.<sup>1020</sup> This phenomenon was exacerbated by other modelling choices made by Professor List and IPE, such as the manner in which their models incorporated price/tax and time/trend variables (discussed in Part 2(a) above). Some of the results from these modified models went so far as to suggest that the TPP measures had "backfired" and caused an *increase* in smoking prevalence, even though this was an assertion that the complainants had disavowed by this stage in the panel proceedings.

787. The foregoing background should help to place the Panel's findings on the subject of reweighting in their proper context. It is worth quoting these findings in full, despite their length:

The parties' experts also disagree with the manner in which the population sampling correction is addressed in the RMSS data. We first note, as pointed out by Australia, that Professor List did not consider the sample reweighting in the RMSS data to be an issue in his first two reports. Similarly, IPE did not address the issue of reweighting in its first three reports. We recognize the importance of attempting to control for sample re-weighting events in the RMSS data. We note, however, that the inclusion of the three indicator variables to control for the reweighting correction in April 2009, July 2010, and April 2014, as suggested by Professor List, increases the issue of multicollinearity, in particular when the price (or tax level) and trend variables are included in the specification. This problem is accentuated when a fully flexible reweighting correction is adopted. For instance, none of the explanatory variables is statistically significant at 5% when the linear trend and price variables and the fully flexible reweighting correction are included in Professor List's model specification for smoking prevalence among minor

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<sup>1017</sup> See IPE Report (DOM-100).

<sup>1018</sup> Panel Report, Appendix C, para. 108.

<sup>1019</sup> See IPE Third Updated Report (DOM-375), para. 31.

<sup>1020</sup> See Chipty Third Rebuttal Report (AUS-605), para. 70(d).

and young adults. Similar findings apply to IPE's modified trend analysis of overall smoking prevalence, where the only significant variable is the dummy for the trend shift in July 2006. Some results of IPE's modified trend analysis even suggest that the TPP measures have led to a statistically significant increase in cigar smoking prevalence. The idea that the TPP measures "backfired" is rejected not only by Australia, but also by the Dominican Republic's and Indonesia's experts. Professor List has explicitly questioned the possibility that the TPP measures "backfired". IPE explains also that it does not interpret the statistically significant and positive impact of the TPP measures on cigar smoking prevalence as evidence that the TPP measures led to an increase in cigar smoking prevalence, but rather as strong evidence to reject the claim of the intended negative TPP measures' effect on cigar smoking prevalence. Yet, the Dominican Republic's and Indonesia's experts do not explain why such finding should be interpreted differently, without questioning the validity of the model specification that yields such result, especially when it relates to the main variable of interest of the econometric analysis. In fact, none of the Dominican Republic's and Indonesia's experts sought to explain why the TPP measures would lead to an increase in the number of smokers. Overall, and based on the above, we have doubts about the reliability of the results obtained when the price variable, time trend and sample reweighting dummies are included in the model specifications.<sup>1021</sup>

788. The Panel's findings on the subject of reweighting illustrate the complainants' overall strategy with their econometric evidence, as well as the reasons why the Panel was ultimately unpersuaded by that evidence. When faced with rebuttal evidence highlighting the flaws in their original models, the complainants' basic strategy was to identify reasons for *changing* those models, or replacing them altogether, instead of accepting the implications of their own evidence. These efforts were at best "too little, too late". While controlling for reweighting events in the RMSS data was not *inherently* problematic (unlike, for example, Professor List's "discovery" of an "error" in a widely used statistics programme), the method that Professor List and IPE adopted to control for RMSS reweighting events only exacerbated the fundamental incoherence of their econometric evidence. As the Panel's findings on reweighting make clear, the Panel was not prepared to accept the validity of models purporting to prove that no portion of the observed declines in prevalence (or consumption) could be attributed to the TPP measures, when the same models frequently produced results that were implausible on their face.

- (2) The Panel's assessment of the re-weighting issue was neither "inconsistent" nor "internally incoherent"

789. As with most of its other claims under Article 11 of the DSU relating to prevalence and consumption, the Dominican Republic's claims in respect of "reweighting" depend heavily upon the proposition that *Australia* was required to prove that a portion of the observed declines in prevalence and consumption was attributable to the TPP measures, and that the Panel understood that a part of its task

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<sup>1021</sup> Panel Report, Appendix C, para. 108 (emphasis added, footnotes omitted).

was to evaluate the evidence to determine whether Australia had proven this assertion. As Australia has demonstrated, the Dominican Republic's understanding of the burden of proof and of the task before the Panel is incorrect. The Panel's task was to evaluate whether the *complainants* had proven their assertion that no portion of the observed declines in prevalence and consumption could be attributed to the TPP measures, taking into account, *inter alia*, the rebuttal evidence submitted by Australia and its experts.

790. For this reason, the Dominican Republic is mistaken that the Panel was required to evaluate Australia's rebuttal evidence for the same concerns about reweighting that the Panel had identified in respect of the complainants' evidence. The Panel identified Professor List's and IPE's proposed methodology for controlling for RMSS reweighting events as one of several reasons for questioning the validity of their results. The Panel did not need to find that *Australia's* experts had "fixed" the reweighting problem in Professor List's and IPE's models in order to question the validity and probative value of the results that these models produced.

791. The Dominican Republic argues that Australia's expert, Dr Chipty, "accepted" Professor List's RMSS model that controlled for re-weighting events. This is entirely baseless. In its submission, the Dominican Republic reproduces Figure 3 of Dr Chipty's second rebuttal report, in which Dr Chipty herself reproduced Table 5 of Professor List's second rebuttal report.<sup>1022</sup> Dr Chipty drew a red circle around the first column in Professor List's Table 5 to highlight the fact that some of his own results – whether intermediate or final – showed a negative and statistically significant effect of the TPP measures, even accepting: (i) his newly-preferred methods for calculating standard errors (the "ivreg2" debate); and (ii) his newfound convention for reporting statistically significant results.<sup>1023</sup> In Table 1 of the same report, Dr Chipty reproduced Professor List's *own results*, but using the *normal* convention for reporting statistically significant results.<sup>1024</sup> Dr Chipty demonstrated that "all of Professor List's results, using *his* new preferred standard error calculation, show a statistically significant decline in smoking prevalence or a nearly statistically significant decline in smoking prevalence."<sup>1025</sup>

792. The Dominican Republic now claims, falsely, that Dr Chipty "relied" on Professor List's results and that the Panel "accepted" this evidence "despite the fact that the Panel rejected the robustness of the *very same model* when it was presented by Professor List."<sup>1026</sup> Dr Chipty did not "rely" on Professor List's results. Rather,

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<sup>1022</sup> Dominican Republic's appellant's submission, Figure 17.

<sup>1023</sup> This is yet another area in which Professor List had changed his position during the course of the panel proceedings. In brief, statistical results are usually reported at the 10%, 5%, and 1% significance levels, denoted, respectively, by one, two, or three stars. The Dominican Republic referred to this reporting convention as the "customary approach" early in the panel proceedings. See Dominican Republic's first written submission, fn 400. Professor List then began to report statistical significance at only the 5%, 1%, and 0.1% levels – moving the goalposts yet again.

<sup>1024</sup> Chipty Second Rebuttal Report (AUS-591), Table 1.

<sup>1025</sup> Chipty Second Rebuttal Report (AUS-591), para. 18.

<sup>1026</sup> Dominican Republic's appellant's submission, para. 449.

she pointed out that many of Professor List's *own results* showed a negative and statistically significant effect of the TPP measures, *even accepting* the numerous flaws in Professor List's model. In particular, Dr Chipty did not "rely" on the first column in Professor List's Table 5, showing the results of Professor List's when controlling for price only (the column that Dr Chipty circled in red, on which the Dominican Republic now fixates in its submission). In Table 1 of her report, Dr Chipty showed that Professor List's *own results* showed a negative and statistically significant effect of the TPP measures when reported under the normal convention, controlling for both price *and* trend.<sup>1027</sup>

793. The Dominican Republic's claim that the Panel inconsistently "accepted" the results of Professor List's analysis when "relied" upon by Dr Chipty is based on the Panel's observation that "Dr Chipty's econometric results further show[] that the negative and statistically significant effect of the TPP measures on overall smoking prevalence is robust to alternative specifications, including ... [the use of] sample reweighting dummies."<sup>1028</sup> As the Panel's footnote to this statement makes clear, the Panel is referring to tables in which Dr Chipty summarised the results of the *complainants'* experts' models, *accepting* one or more of the methodological choices that Dr Chipty considered erroneous, such as Professor List's proposed approach to controlling for RMSS reweighting events. This is commonly referred to as a "sensitivity analysis", and its purpose is to evaluate how robust the results are to different methodological and data choices. It does not imply acceptance or endorsement of the *validity* of those choices.

794. The Panel understood Dr Chipty's sensitivity analyses in exactly this way. Recall that in its evaluation of IPE's and Professor List's econometric results based on the RMSS data, the Panel had already expressed "doubts" about the "reliability of the results obtained when the price variable, time trend and sample reweighting dummies are included in the model specifications".<sup>1029</sup> The Panel's observation that certain of the model results were "robust to alternative specifications, including ... [the use of] sample reweighting dummies"<sup>1030</sup> was not an *endorsement* of using sample reweighting dummies (a methodological choice on which it had just cast doubt), but rather an observation that the econometric evidence on the record showed negative and statistically significant effects of the TPP measures *even accepting* the results of models that were based on one or more of the methodological choices advocated by the complainants' experts. This was an entirely appropriate step for the Panel to take

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<sup>1027</sup> See Chipty Second Rebuttal Report (AUS-591), Table 1. As in Professor List's Table 5, Dr. Chipty showed three different starting dates for plain packaging: October, November, and December 2015. The result for the December 2015 starting date was negative and statistically significant when controlling for both price and trend. The other two starting date assumptions were negative and very close to statistical significance.

<sup>1028</sup> Panel Report, Appendix C, para. 121.

<sup>1029</sup> Panel Report, Appendix C, para. 108 (emphasis added).

<sup>1030</sup> See Panel Report, Appendix C, para. 121.

when reviewing complex econometric evidence and in no way constituted an "acceptance" of those choices by the Panel.<sup>1031</sup>

795. These considerations dispose of the Dominican Republic's contention that the Panel "treated the parties' evidence inconsistently". The Panel evaluated the rebuttal evidence submitted by Dr Chipty for the purpose for which it was offered, i.e. as a sensitivity analysis of the complainants' own econometric results. These considerations also dispose of the Dominican Republic's claim that "the Panel's reasoning was internally incoherent". The Panel was not required to find that *Dr Chipty* had controlled for all RMSS reweighting events in order to credit her sensitivity analysis of *Professor List's* results, which controlled for only three reweighting events due to the sample period he chose.

- (e) The Dominican Republic's claims of error under Article 11 of the DSU in respect of tobacco costliness are unfounded

796. The Dominican Republic alleges that the Panel acted inconsistently with Article 11 of the DSU in respect of its treatment of "tobacco costliness". By "tobacco costliness", the Dominican Republic refers to the Panel's concern that the econometric models relied upon by the complainants to prove that no portion of the observed declines in smoking prevalence could be attributed to the TPP measures frequently indicated that tobacco prices *also* did not have a statistically significant impact upon prevalence, even though all parties agreed that price is a significant determination of prevalence. As Australia has explained, the Panel was unwilling to accept the validity and probative value of these results.

797. As with its other Article 11 claims in respect of prevalence and consumption, the essence of the Dominican Republic's claim in respect of tobacco costliness is that the Panel failed to evaluate Australia's rebuttal evidence according to the same standard.

- (1) The Panel's findings concerning tobacco costliness

798. To recall, the Panel "question[ed] the results" of Professor List's and IPE's prevalence models based on the RMSS data because, among other reasons, Professor List and IPE did "not address the fact that in the vast majority of their results, the price variable was not statistically significant."<sup>1032</sup> The Panel reasonably considered that if Professor List's and IPE's models could not reliably identify a statistically

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<sup>1031</sup> This is further demonstrated by the next sentence of this paragraph, in which the Panel states that "the impact of the TPP measures on overall smoking prevalence remains negative and statistically significant in most specifications when Professor List's procedure to compute standard errors is implemented." Panel Report, Appendix C, para. 121. Only 10 paragraphs earlier, the Panel had cast serious doubt upon Professor List's "discovery" of an "error" in the *ivreg2* command. Panel Report, Appendix C, paras. 110-111. The Panel did not suddenly reverse course and "accept" Professor List's methodology for calculating standard errors.

<sup>1032</sup> Panel Report, Appendix C, paras. 105, 111.

significant effect of *price*, these models did not provide reliable evidence that the *TPP measures* had no statistically significant effect upon prevalence. Neither the Dominican Republic nor Honduras takes issue with the logic of this criterion for evaluating the robustness of the econometric evidence.

799. The Dominican Republic does not contest the Panel's finding that the price variable in many of Professor List's and IPE's prevalence results was not statistically significant. Indeed, the Dominican Republic implicitly acknowledges the continuous effort by Professor List and IPE over the course of the panel proceedings to come up with results that showed a statistically significant effect of price upon prevalence while showing no statistically significant effect of the TPP measures.<sup>1033</sup> Without challenging the Panel's finding directly, the Dominican Republic states that:

In its findings ... the Panel did not mention the numerous Dominican Republic model specifications that *were* able to detect the impact of tobacco costliness. For example, when the Dominican Republic's experts used tax levels as a control in later reports, their models were consistently able to detect the impact of tobacco costliness. Likewise, in later reports, which accounted for reweighting events, the Dominican Republic's use of price as a control consistently detected the impact of tobacco costliness. This evidence is also rejected because other Dominican Republic models, in particular earlier models, did not consistently detect tobacco costliness.<sup>1034</sup>

800. This statement barely acknowledges that the assertion that some of Professor List's and IPE's prevalence results satisfied the Panel's tobacco costliness criterion requires acceptance of one or more methodological choices that the Panel specifically faulted. For example, the Dominican Republic's assertion requires acceptance of its position that the sample period should begin in July 2006 – a position that the Panel considered and rejected. The Dominican Republic's assertion also requires acceptance of its position that time/trend variables do not have the effect of overfitting the data – a position that the Panel also considered and rejected.

801. What the Dominican Republic seeks to present as methodological rigour on the part of its experts was, in fact, their never-ending quest to come up with econometric results that made sense, were internally coherent, *and* avoided the conclusion that the TPP measures were working as intended. When Australia's experts demonstrated that the price variable was not statistically significant in the Dominican Republic's models (among other problems), the usual response of the Dominican Republic's experts was to "refine the econometric modeling", as the Dominican Republic puts it, by changing their prior assumptions and methodologies.<sup>1035</sup> This was such an important characteristic of the complainants' econometric evidence that the Panel made reference to it on several occasions in its analysis.<sup>1036</sup> The Dominican Republic's claim that "numerous Dominican Republic

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<sup>1033</sup> Dominican Republic's appellant's submission, para. 472.

<sup>1034</sup> Dominican Republic's appellant's submission, para. 482.

<sup>1035</sup> Dominican Republic's appellant's submission, para. 472.

<sup>1036</sup> See, e.g. Panel Report, Appendix C, paras. 102, 106.

model specifications ... were able to detect the impact of tobacco costliness" assumes that the Dominican Republic had achieved its quest by the end of the panel proceedings, when in fact the Panel found that it had not.

802. The Panel did not specifically address the tobacco costliness criterion in its evaluation of the econometric evidence relating to consumption. However, as detailed in Appendix D of the Panel Report, and as discussed throughout the present submission, the Panel identified numerous respects in which it considered the complainants' consumption models to be misspecified and unreliable, including in ways that would limit the ability of these models to distinguish among different explanatory variables.<sup>1037</sup> The complainants were never able to resolve those fundamental problems with their models, let alone produce reliable results that showed a statistically significant effect of price upon tobacco consumption while showing no statistically significant effect of the TPP measures.

- (2) The Panel did not lack even-handedness in respect of the "tobacco costliness" criterion

803. In its arguments relating to the Panel's findings on prevalence and consumption, the Dominican Republic includes a number of tables that purport to summarise the Panel's alleged "inconsistencies" in its assessment of the evidence.<sup>1038</sup> Each one of these tables is erroneous and misleading for the reasons that Australia explains below in relation to that particular alleged issue. Table 2, styled as an "[o]verview table of Panel's inconsistencies in the treatment of the parties' tobacco costliness evidence", offers a case study:

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<sup>1037</sup> See, e.g. Panel Report, Appendix D, para. 106 (noting that IPE's consumption results based on the IMS data fail "to take into account the potential impact of the TPP measures on tobacco prices"); Panel Report, Appendix D, para. 108 (noting that IPE's results based on the Aztec scanner data were unreliable because "the Aztec data are characterized by a growing market coverage, which, in our view, makes it more difficult to distinguish the impact of the explanatory variables, including the TPP measures dummy variable, from the growing market coverage.").

<sup>1038</sup> Dominican Republic's appellant's submission, Tables 1, 2, and 4.

**Table 2: Overview table of Panel’s inconsistencies in the treatment of the parties’ tobacco costliness evidence [from the Dominican Republic’s appellant’s submission]**

Control for costliness	Dominican Republic’s econometric models	Australia’s econometric models
Able to detect the impact of tobacco costliness	<u>Box 1</u> : the Panel did <u>not</u> address these models	<u>Box 3</u> : Panel accepted these models
Not able to detect the impact of tobacco costliness	<u>Box 2</u> : the Panel criticized these models because they are not able to detect the impact of tobacco costliness	<u>Box 4</u> : the Panel accepted these models, even if the model detected the <u>wrong</u> impact of tobacco costliness

804. The Dominican Republic alleges "an inconsistency in the Panel's treatment of the parties' evidence" between box 1 and boxes 3/4, and between boxes 2 and 4. In both alleged instances of inconsistency, the Dominican Republic's argument that the Panel "accepted" rebuttal evidence submitted by Australia rests on a mischaracterisation of the Panel's findings in respect of that rebuttal evidence, a topic to which Australia returns below.

805. The Dominican Republic's first grievance in respect of its Table 2 is that:

the Panel rejected *all* specifications of the Dominican Republic's models, even then they were able to detect the impact of tobacco costliness. The Panel did not acknowledge the model specifications submitted by the Dominican Republic that detected the impact of tobacco costliness on smoking behavior (box 1). In particular, as noted, after the Dominican Republic's experts had been given an opportunity to adjust their models during the Panel proceedings, many of their models['] specifications were able to detect the impact of tobacco costliness (using tax levels and price) on both smoking prevalence and consumption (box 1).<sup>1039</sup>

806. As Australia discussed above, the Dominican Republic's assertion that its model results satisfied the Panel's "tobacco costliness" criterion is true only if one accepts all of the various "adjustments" that the complainants' experts made in their repeated attempts "to detect the impact of tobacco costliness ... on both smoking prevalence and consumption". The Panel did not accept all of these "adjustments". Thus, it is false for the Dominican Republic to assert that "the Panel did not address these models". The Panel did address these models and identified numerous reasons to question their validity and probative value. The Dominican Republic's claim of a

<sup>1039</sup> Dominican Republic's appellant's submission, paras. 493-495 (internal paragraph breaks omitted).

lack of "even-handedness" is therefore nothing more than a challenge to the substance of Panel's factual findings under the guise of Article 11.

807. The Dominican Republic's second grievance is that:

there is an inconsistency in the Panel's treatment of the parties' evidence in **boxes 2 and 4**. The Panel found that the Dominican Republic's models could not be "taken at face value, *mainly* because most of their model specifications are *unable to detect the impact of tobacco costliness* (including excise tax increases) on smoking prevalence" (box 2). Again, because of the results of some model specifications, particularly those filed early in the proceedings, the Panel rejected *all* specifications of the Dominican Republic's models (one-stage, two-stage, and aggregate models), including those that detected the impact of tobacco costliness.<sup>1040</sup>

808. The answer here is the same: the notion that the Dominican Republic's experts came up with models "that detected the impact of tobacco costliness" overlooks the fact that the Panel identified numerous problems with *all* of the Dominican Republic's models – not just "those filed early in the proceedings" – that led the Panel to question their validity and probative value.

809. With respect to both of its grievances, the Dominican Republic's allegation of "inconsistency" also rests on the notion that the Panel "accepted" rebuttal evidence submitted by Australia that, according to the Dominican Republic, was also "unable to detect the impact of tobacco costliness". Once again, the Dominican Republic mischaracterises the purpose for which Australia submitted this evidence, as well as the nature of the Panel's findings in respect of that evidence.

810. The Dominican Republic treats Dr Chipty's rebuttal evidence as if she set out – and was required – to fix *all* of the flaws in the complainants' econometric models. She did not, and that is certainly not what the Panel understood the purpose of her submissions to be. As discussed in Part 1 above, the Panel found that Dr Chipty's revisions to the complainants' econometric models addressed "some" or "a number" of the concerns that the Panel had identified in relation to that evidence.<sup>1041</sup> *To that extent*, the Panel considered that Dr Chipty's submissions provided "*some* econometric evidence suggesting that the TPP measures" had contributed to the observed declines in prevalence and consumption following the implementation of those measures.<sup>1042</sup> The Panel did not need to find – nor did it find<sup>1043</sup> – that Dr Chipty's revisions to the complainants' econometric models *fully* resolved the complainants' problems with tobacco costliness in order to draw these conclusions from Dr Chipty's submissions.

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<sup>1040</sup> Dominican Republic's appellant's submission, para. 496 (underscore added).

<sup>1041</sup> Panel Report, Appendix C, para. 120; Panel Report, Appendix D, para. 115.

<sup>1042</sup> Panel Report, Appendix C, para. 123(c); Panel Report, Appendix D, para. 137(c).

<sup>1043</sup> Panel Report, Appendix C, paras. 120-121; Panel Report, Appendix D, paras. 115-116.

811. In sum, Table 2 of the Dominican Republic's submission, like the other tables of its type, is erroneous and misleading in every dimension. There was no "inconsistency" in the Panel's assessment of the econometric evidence in relation to the issue of tobacco costliness. The Panel properly evaluated all of the econometric evidence on the record in relation to the burden of proof and in relation to the purposes for which the evidence was submitted.

- (3) The Dominican Republic's claim that the Panel "failed to engage" with untimely evidence submitted by the Dominican Republic is unfounded

812. In addition to its unfounded allegation of "inconsistency", the Dominican Republic contends that the Panel "failed to engage" with certain of the Dominican Republic's evidence and that the Panel's failure to do so was "so material to [the Dominican Republic's] case that the panel's failure to address it explicitly has a bearing on the objectivity of its factual assessment".

813. The Dominican Republic's claim refers to certain comments that the Dominican Republic submitted to the Panel after the period for substantive submissions had ended in accordance with the adopted timetable and working procedures. Australia will therefore provide a brief account of these circumstances, as they illuminate the complete lack of merit to the Dominican Republic's claim.

814. On 17 February 2016, after the parties had submitted comments on each other's responses to the Panel's final questions, the Dominican Republic filed a letter with the Panel claiming that Dr Chipty's third rebuttal report raised "certain questions of due process" because, it claimed, that report reflected a "change in analytical approach" from her prior submissions.<sup>1044</sup> Notwithstanding the fact that the Dominican Republic's letter was notionally styled as a *request* that the "Panel take appropriate steps, in its discretion, to ensure that the parties' due process interests are respected", the Dominican Republic submitted substantive comments on Dr Chipty's report *within that letter*.<sup>1045</sup>

815. Australia objected to the Dominican Republic's filing by letter dated 19 February 2016, expressing its "clear understanding that the comments on other parties' responses filed on 3 February 2016 constituted the final exchange of arguments and evidence in this dispute" and referring to the timetable for panel proceedings adopted over a year and a half earlier.<sup>1046</sup> Australia explained that, in its view, it would be appropriate to strike the Dominican Republic's additional comments from the record. Because the Dominican Republic's letter contained substantive comments, however,

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<sup>1044</sup> See Dominican Republic's communication to the Panel of 17 February 2016.

<sup>1045</sup> See Dominican Republic's communication to the Panel of 17 February 2016.

<sup>1046</sup> Australia's communication to the Panel of 19 February 2016.

Australia requested an opportunity to respond to these comments should the Panel accept their admissibility.<sup>1047</sup>

816. By a letter to the parties transmitted on 2 March 2016, the Panel noted that "a considerable amount of argumentation and evidence has already been exchanged concerning the robustness of the various experts' reports".<sup>1048</sup> The Panel recalled that "a panel, in pursuing prompt resolution of a dispute, needs to 'exercise control over the proceedings in order to bring an end to the back and forth exchange of competing evidence between the parties'".<sup>1049</sup> The Panel further noted, however, that the Dominican Republic had made substantive comments in its letter of 17 February 2016, thus implicating a concern for Australia's due process rights. Accordingly, the Panel accepted the Dominican Republic's untimely comments and provided Australia with an opportunity to respond to those comments.<sup>1050</sup>

817. In its comments submitted on 16 March 2016, Australia demonstrated that: (i) the issues discussed in Dr Chipty's third rebuttal report were issues that the parties had debated extensively during the course of the panel proceedings; (ii) Dr Chipty had *not* adopted a new "analytical approach" in that report; and (iii) Dr Chipty had previously responded to the exact criticism levied by the Dominican Republic in its letter of 19 February, and had explained why certain results were not "nonsensical".<sup>1051</sup>

818. The Panel summarised the events recounted above in its Report.<sup>1052</sup> Appropriately, in light of the fact that the Dominican Republic's additional comments had not raised *any* issues that the parties had not already debated extensively, the Panel did not discuss the parties' post-proceeding submissions elsewhere in its Report.

819. The Dominican Republic now seeks to use the Panel's decision not to "engage" with the "evidence" that the Dominican Republic submitted in contravention of the Panel's established working procedures and timetable as a basis for challenging the objectivity of the Panel's assessment. In effect, the Dominican Republic seeks to turn a discretionary act by the Panel – one necessitated by the Dominican Republic's own litigation tactics – into a basis for challenging the Panel's good faith.

820. In Australia's view, the Panel's decision not to refer to these events further speaks for itself: the Panel reviewed the parties' additional submissions and concluded, correctly, that these post-proceeding submissions had *not added anything* to the extensive evidence that the parties had already submitted on this topic. In these

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<sup>1047</sup> See Australia's communication to the Panel of 19 February 2016.

<sup>1048</sup> Panel's communication of 2 March 2016.

<sup>1049</sup> Panel's communication of 2 March 2016, quoting Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 155.

<sup>1050</sup> See Panel's communication of 2 March 2016.

<sup>1051</sup> In the interests of space, and to avoid playing into the Dominican Republic's litigation tactics, Australia will not provide further details in this submission concerning these three points. These details are provided in Australia's comments to the Panel of 16 March 2016.

<sup>1052</sup> See Panel Report, paras. 1.110-1.114.

circumstances, referring to the Dominican Republic's untimely "evidence" in the Panel Report would only have validated this sort of conduct in future disputes.<sup>1053</sup>

821. Among the four complainants, the Dominican Republic, in particular, approached the panel stage of this dispute as an opportunity to barrage the Panel with submissions, in the apparent belief that whichever party got the last word would – and should – "win". This is a misunderstanding of the role of panels under the DSU that has contributed to some of the challenges that the DSB is now facing. The Panel in this dispute gave the Dominican Republic *more* than ample opportunity to prove its case, and now the Dominican Republic is seeking to use the Panel's indulgence of the Dominican Republic's tactics against it. The Appellate Body should therefore forcefully reject this claim.

- (f) The Dominican Republic's claims of error under Article 11 of the DSU in respect of endogeneity are unfounded

822. The Dominican Republic alleges that the Panel violated Article 11 of the DSU by failing to undertake an objective assessment of the issue of endogeneity in its findings regarding the impact of the TPP measures on smoking prevalence (for cigarettes and cigars) and consumption (for cigarettes only).<sup>1054</sup> The issue of endogeneity arises in connection with the debate about the proper method of controlling for tobacco costliness.

- (1) The Panel's findings concerning endogeneity

823. Endogeneity typically refers to a situation where an outcome variable, like smoking prevalence or consumption, and an explanatory variable, like a measure of tobacco costliness, is jointly determined in a supply-demand system where firms change their price in response to demand and consumers change their demand in response to price. It is well recognised in the economics literature that ignoring this relationship creates a situation where the error term is correlated with the explanatory variable, creating statistical bias in the model.

824. Dr Chifty originally raised concerns about endogeneity in her assessment of the complainants' expert models that controlled for tobacco costliness with price.<sup>1055</sup> She also raised the additional concern that the TPP measures are expected to have a direct effect on prices.<sup>1056</sup> Using price as a control for tobacco costliness therefore has the potential to attribute some of the effect of the TPP measures to *price* rather

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<sup>1053</sup> It is a near certainty, in this regard, that if the Panel *had* referred to the Dominican Republic's post-proceeding "evidence" in its Report, the Dominican Republic would now be challenging those findings under Article 11 of the DSU, thereby perpetuating the consequences of its litigation tactics.

<sup>1054</sup> Dominican Republic's appellant's submission, paras. 525-526.

<sup>1055</sup> See Chifty Third Rebuttal Report (AUS-605), paras. 15-17.

<sup>1056</sup> See, e.g. Chifty Surrebuttal Report (AUS-586), para. 12; Chifty Third Rebuttal Report (AUS-605), paras. 15-17.

than correctly attributing it to the policy under examination. For these reasons, she explained that it was more reasonable to control for tobacco costliness using tax indicators or tax levels as a control for excise tax increases (which result in an increase in tobacco costliness).

825. In its evaluation of Professor List's and IPE's prevalence models, the Panel identified the uncontested importance of "specify[ing] the tobacco price control policy in the most appropriate manner."<sup>1057</sup> The Panel further observed that "the Dominican Republic's experts' view on this issue has evolved throughout the proceedings."<sup>1058</sup> As discussed in detail in Part 2(a) above, the issue of how to control for excise tax increases was an important issue on which IPE changed its position during the course of proceedings.<sup>1059</sup> Whereas IPE had originally used indicator variables to control for excise tax increases, it later adopted Professor List's position that using prices (inclusive of tax) as a control was more appropriate.

826. The Panel noted that Professor List and IPE did not "address the fact that the TPP measures might affect the price variable", i.e. that the explanatory price variable in their models could be endogenous to the dependent TPP variable.<sup>1060</sup> The Panel further noted that "IPE and Professor List's model specification are unable to distinguish between the impact specific to the price variable and the TPP measures", because of the endogeneity of the price and TPP variables.<sup>1061</sup> These were among the reasons that the Panel identified to "question their results" suggesting that "the TPP measures had no statistically significant impact on smoking prevalence."<sup>1062</sup>

827. The Panel made a similar observation concerning IPE's consumption models, noting, among other concerns, that "IPE fails to take into account the potential impact of the TPP measures on tobacco prices", i.e. the possibility that these two variables could be endogenous.<sup>1063</sup>

(2) The Panel did not lack even-handedness in its evaluation of endogeneity

828. The Dominican Republic first alleges that "the Panel treated the parties' evidence inconsistently" with respect to the issue of endogeneity.<sup>1064</sup> As it did with respect to the issue of tobacco costliness, the Dominican Republic offers a table purporting to summarise the alleged "inconsistent treatment":

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<sup>1057</sup> Panel Report, Appendix C, para. 106.

<sup>1058</sup> Panel Report, Appendix C, para. 106.

<sup>1059</sup> See Part VII.G.2(a).

<sup>1060</sup> Panel Report, Appendix C, para. 107.

<sup>1061</sup> Panel Report, Appendix C, para. 107.

<sup>1062</sup> Panel Report, Appendix C, para. 111.

<sup>1063</sup> Panel Report, Appendix D, para. 106.

<sup>1064</sup> Dominican Republic's appellant's submission, para. 546.

**Table 4: Overview table of the Panel's inconsistencies in its treatment of the parties' endogeneity evidence [from the Dominican Republic's appellant's submission]<sup>1065</sup>**

Control for costliness	Dominican Republic's econometric models	Australia's econometric models
Control for <i>tax dummies</i> or <i>tax levels</i> (which, according to the Panel, avoids endogeneity problem)	<u>Box 1</u> : Panel did not address these models	<u>Box 2</u> : Panel found that Australia avoids endogeneity problem
Control for <i>price</i> (which, according to the Panel, does not avoid endogeneity problem)	<u>Box 3</u> : Panel found that these models do <u>not</u> avoid an endogeneity problem	<u>Box 4</u> : Panel did not address these models

829. The claims reflected in this table are baseless for the same reasons as the corresponding table concerning tobacco costliness. First, with regard to the alleged "inconsistency" between box 1 and box 2, the Dominican Republic incorrectly asserts that the Panel "did not address" the Dominican Republic's models that used tax dummies or tax levels as controls.<sup>1066</sup> The Dominican Republic states that "in IPE's later models, the majority of the specifications in the prevalence models used tax dummies or tax levels, which the Panel found were '[a]ble to distinguish between the impact specific to the price variable and the TPP measures'".<sup>1067</sup> The Dominican Republic claims, in this regard, that "in IPE's later models, the majority of the specifications in the prevalence models used tax dummies or tax levels", thus satisfying the Panel's concerns about potential endogeneity.<sup>1068</sup>

830. What the Dominican Republic once again overlooks is that the Panel did address these "later" prevalence models and identified multiple reasons for questioning the validity and probative value of the results that these models produced, including: (i) their use of inappropriate sample periods; and (ii) their use of trend variables that overfit the data and thereby absorbed the effects of other explanatory variables. Oddly, the Dominican Republic tries to make a virtue out of the fact that IPE later *reverted* to its original use of tax indicator variables in its prevalence models (along with tax level variables), while neglecting to mention that, in so doing, IPE

<sup>1065</sup> See Dominican Republic's appellant's submission, Table 4.

<sup>1066</sup> Dominican Republic's appellant's submission, para. 538.

<sup>1067</sup> Dominican Republic's appellant's submission, para. 538 (quoting Panel Report, Appendix C, para. 107).

<sup>1068</sup> Dominican Republic's appellant's submission, para. 538.

made multiple *other* changes to its model specifications that the Panel expressly identified as additional reasons for questioning the results of these "later" models.

831. The Dominican Republic overlooks the same considerations with regard to its later consumption models that used tax levels instead of prices. As with its later prevalence models, the Panel identified multiple reasons *other* than potential endogeneity as reasons for questioning the validity and probative value of these models.<sup>1069</sup> For example, the Dominican Republic's later consumption models that avoided the problem of endogeneity imposed the assumption that the effect of each tax increase was proportional to the size of the increase – a position that the Panel considered and rejected.<sup>1070</sup> The Dominican Republic therefore has no basis for its claim that the Panel "did not address" these models.

832. As for the alleged "inconsistency between the Panel's treatment of the parties' evidence in boxes 3 and 4"<sup>1071</sup>, the Dominican Republic's argument again relies on the notion that the Panel was required to make a "similar finding" on endogeneity with respect to certain rebuttal evidence submitted by Dr Chipty.<sup>1072</sup> This argument merely repeats the error that underlies *all* of its characterisations of Australia's rebuttal evidence.

833. The Dominican Republic claims that "the Dominican Republic (Professor List) and Australia (Dr Chipty) each submitted a *two-stage prevalence model (cigarettes)* that controlled for the impact of tobacco costliness using solely price (and not tax dummies or tax levels)."<sup>1073</sup> The Dominican Republic then claims that "while the Panel rejected Professor List's approach, it considered Dr Chipty's model to be sufficiently robust to rely on it as a basis for its smoking prevalence findings."<sup>1074</sup> This is a blatant mischaracterisation of the facts. Dr Chipty never endorsed the use of price as a control for tobacco costliness. In fact, she consistently identified problems with the use of price as a control for tobacco costliness.<sup>1075</sup> What the Dominican Republic identifies as "Dr Chipty's model" is a single row in a table where Dr Chipty conducted a sensitivity analysis of various model results using updated data, including the results from the "List Two-Stage Microeconomic Analysis of Overall Smoking Prevalence".<sup>1076</sup> Dr Chipty included this model in her sensitivity analysis to be

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<sup>1069</sup> Panel Report, Appendix D, para. 106.

<sup>1070</sup> Panel Report, Appendix D, para. 106.

<sup>1071</sup> Dominican Republic's appellant's submission, para. 552.

<sup>1072</sup> Dominican Republic's appellant's submission, para. 552.

<sup>1073</sup> Dominican Republic's appellant's submission, para. 553.

<sup>1074</sup> Dominican Republic's appellant's submission, para. 553.

<sup>1075</sup> See, e.g. Chipty Third Rebuttal Report (AUS-605), para. 70(e) ("It is better to control for the factors that affect price, rather than price directly, because the former accounts for both demand and supply side responses to tobacco control policies.").

<sup>1076</sup> See Dominican Republic's appellant's submission, fn 476, citing Chipty Second Rebuttal Report (AUS-591), Table 5, Row [B].

comprehensive – *not* to endorse a model that she had consistently identified as unreliable.<sup>1077</sup>

834. All of the Dominican Republic's (and Honduras's) flawed allegations of a lack of "even-handedness" rely on this consistent mischaracterisation of the purpose for which Australia submitted different pieces of rebuttal evidence, as well as the factual findings that the Panel drew from that evidence.

- (3) The Panel provided a reasoned and adequate explanation for its findings

835. The Dominican Republic's allegation that the Panel failed to provide a reasoned and adequate explanation for its finding that Professor List and IPE failed to address "the potential impact of the TPP measures on prices" is also based on this same flawed premise. The Dominican Republic states that IPE "presented specifications using tax dummies and tax levels (instead of price) as a control for the impact of tobacco costliness, and in each of those specifications, still found no effect of the TPP measures on smoking behavior."<sup>1078</sup> The Dominican Republic argues that the Panel did not provide a reasoned and adequate explanation for why these later specifications did not resolve its concerns about endogeneity. As Australia explained above, the Panel did address these later specifications and identified other reasons for questioning the validity and probative value of their results. The Dominican Republic's suggestion that its experts resolved the problem of endogeneity in their models assumes that its experts resolved *other* problems with these specifications, when the Panel found that they had not.

- (g) The Dominican Republic's claims of error under Article 11 of the DSU in respect of proportionality are unfounded

836. The Dominican Republic alleges, in respect of the cigarette consumption models only, that the Panel did not make an objective assessment of the "proportionality assumption".<sup>1079</sup> Specifically, the Dominican Republic claims that the Panel failed to provide "reasoned and adequate explanations" for its findings concerning the proportionality assumption.<sup>1080</sup>

837. The issue of proportionality relates to the use of *tax levels* (i.e. variables indicating the *rate* of tax over time) as a method of controlling for tobacco costliness in a regression model. The use of tax levels as a control assumes that the *size* of a given tax increase is proportional, in each case, to its *effect* on the dependent variable

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<sup>1077</sup> See, e.g. Chipty Third Rebuttal Report (AUS-605), para. 70(c)(ii) ("The one-stage before-after approach is also preferable to Professor List's trend-projection analysis of consumption *and his two stage microeconomic analysis of smoking prevalence* because the one-stage approach produces reliable standard errors that can be used for statistical inference.") (emphasis added).

<sup>1078</sup> Dominican Republic's appellant's submission, para. 556.

<sup>1079</sup> Dominican Republic's appellant's submission, paras. 560-563.

<sup>1080</sup> Dominican Republic's appellant's submission, para. 572.

under consideration (consumption, in this instance). The Dominican Republic does not dispute that the use of tax levels as a control for tobacco costliness requires "proportionality" in this sense.<sup>1081</sup>

838. With respect to results of IPE's consumption models based on the IMS/EOS data, the Panel "question[ed] their robustness" on the grounds, *inter alia*, that IPE "ignores the fact that the proportionality assumption underlying the use of the tax level ... is rejected."<sup>1082</sup> Dr Chifty had identified this issue with IPE's consumption model in her third rebuttal submission.<sup>1083</sup>

839. The Dominican Republic argues that the Panel did not provide a reasoned and adequate explanation for questioning the validity of IPE's consumption models on this basis.

840. The Dominican Republic argues, first, that it was unreasonable for the Panel to take the requirement of proportionality into account when evaluating IPE's consumption models, because Dr Chifty referred to this issue for the first time in her final expert submission.<sup>1084</sup> Again, the Dominican Republic's argument misapprehends the purpose for which each side submitted expert evidence within the overall framework of the burden of proof, as well as the role of the Panel in evaluating that evidence. The Dominican Republic appears to believe that the Panel was not entitled to test the evidence submitted by the Dominican Republic's experts unless *Australia's* experts had previously and specifically identified the *exact problem* that the Dominican Republic's evidence contained. Yet it is uncontested that IPE's models incorporating tax level variables *required* proportionality to be valid. Thus, the Dominican Republic implies that its experts were allowed to lack an understanding of their own model's assumptions, or intentionally fail to test the assumptions underlying their models, unless and until *Australia's* experts pointed out the problem. The Dominican Republic implies, moreover, that the Panel had *no choice* but to accept the validity of these models unless and until Australia submitted rebuttal evidence highlighting the problem. These are fundamentally untenable propositions, in light of the Panel's duty to scrutinise the evidence and "reach conclusions with respect to the probative value it accords".<sup>1085</sup>

841. The Dominican Republic's second argument under this heading is merely a reversion back to the arguments that it made when it submitted comments on

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<sup>1081</sup> Dominican Republic's appellant's submission, para. 561 ("The use of tax levels as a control for tobacco costliness implicitly assumes that the proportionality assumption holds. Therefore, if there is no proportionality between the size of a tax increase and its effect, the use of tax levels is inappropriate as a control for tobacco costliness.").

<sup>1082</sup> Panel Report, Appendix D, para. 106.

<sup>1083</sup> See Chifty Third Rebuttal Report (AUS-605), paras. 22-26.

<sup>1084</sup> Dominican Republic's appellant's submission, para. 575.

<sup>1085</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 357. Although it scarcely seems necessary to add, Australia points out that Dr. Chifty discussed the issue of proportionality in her final submission because it was necessitated by IPE's use of tax level variables *in its immediately preceding submission*.

Dr Chipty's third rebuttal report after the period for substantive submissions had ended in accordance with the timetable and working procedures adopted by the Panel.<sup>1086</sup> Australia has previously addressed this issue in Part (e)(3) above.

4. Honduras's Other Claims of Error Under Article 11 of the DSU  
in Respect of Prevalence and Consumption Are Unfounded

842. As noted at the outset of this Part, Honduras alleges a number of Article 11 claims concerning prevalence and consumption that do not fit within the issue-led structure that Australia followed above. Australia will now rebut these other claims of error by Honduras, either demonstrating that Australia has previously addressed the point or explaining why Honduras' claim is baseless.

- (a) Honduras's claim that the Panel's intermediate findings in respect of prevalence and consumption do not support its overall conclusion on contribution is unfounded

843. Honduras alleges that the Panel's findings concerning prevalence and consumption set out in Appendices C and D do not support the Panel's overall conclusion that the complainants had failed to demonstrate that the TPP measures are not apt to contribute to their objective.<sup>1087</sup> This claim is based on a mischaracterization of the Panel's actual findings and conclusions.

844. To recall, the Panel's "[o]verall conclusion on the degree of contribution of the TPP measures to Australia's objective" was 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>1088</sup> The Panel found, "rather", that the evidence on the record, taken "in its totality", supported "the view that the TPP measures, in combination with other tobacco-control measures maintained by Australia (including the enlarged GHWs introduced simultaneously with TPP), are apt to, and do in fact, contribute to Australia's objective of reducing the use of, and exposure to, tobacco products."<sup>1089</sup>

845. To further explain these conclusions, the Panel began by summarising its prior findings and conclusions based on the design, structure, and operation of the TPP measures.<sup>1090</sup> The Panel then summarised its prior findings and conclusions based on the "available empirical evidence on the application of the measures."<sup>1091</sup> In that latter connection, the Panel first recalled the evidence suggesting that "the introduction of tobacco plain packaging, in combination with enlarged GHWs, has in fact reduced the

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<sup>1086</sup> Dominican Republic's appellant's submission, para. 576.

<sup>1087</sup> Honduras's appellant's submission, Part VIII.2.1.1.1.

<sup>1088</sup> Panel Report, para. 7.1025.

<sup>1089</sup> Panel Report, para. 7.1025.

<sup>1090</sup> Panel Report, paras. 7.1026-7.1034.

<sup>1091</sup> Panel Report, para. 7.1035.

appeal of tobacco products, as anticipated in a number of the pre-implementation studies criticised by the complainants."<sup>1092</sup> The Panel then summarised its findings in respect of the post-implementation evidence on prevalence and consumption:

Finally, we also considered the evidence before us on actual smoking behaviours in Australia since the entry into force of the measures, as reflected in data relating to the evolution of smoking prevalence and consumption. As discussed, the extent to which the data available at the time of our assessment can inform an overall assessment of the actual and expected contribution of the measures to their objective is disputed. The data before us in these proceedings relates to a period of up to three years following the entry into force of the TPP measures. Overall, we find that this evidence is consistent with a finding that the TPP measures contribute to a reduction in the use of tobacco products, to the extent that it suggests that, together with the enlarged GHWs introduced at the same time, plain packaging has resulted in a reduction in smoking prevalence and in consumption of tobacco products.<sup>1093</sup>

846. Honduras's contention appears to be that the Panel's findings in Appendices C and D do not support the Panel findings quoted above, and that the quoted findings, in turn, do not support the Panel's *overall* conclusion that the complainants had failed to demonstrate that the TPP measures are not apt to contribute to Australia's legitimate objective, including the Panel's finding that the evidence before it, taken "in its totality", supported 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>1094</sup>

847. Honduras misreads the Panel Report. To begin with, Honduras entirely overlooks the Panel's findings in Appendices C and D that prevalence and consumption declined following the implementation of the TPP measures (step 1), and that the rate of decline accelerated in both instances relative to pre-implementation trends (step 2). Those findings, by themselves, support the Panel's findings in the main body of the Report, including its conclusion that the TPP measures "are apt to, and do in fact, contribute to" Australia's legitimate objective.

848. Implicit in Honduras's argument is that the Panel was required to find that the TPP measures are incapable of contributing to Australia's objective if a statistically significant "plain packaging effect" could not be isolated and quantified using econometric methods within the first three years following implementation. Australia never accepted this proposition and, more importantly, neither did the Panel. Yet even accepting Honduras's mistaken belief that the only relevant evidence concerning prevalence and consumption was the econometric evidence (step 3), the Panel's findings in Appendices C and D are consistent with, and support, the Panel's broader findings. In particular, the Panel's findings in Appendices C and D that

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<sup>1092</sup> Panel Report, para. 7.1036.

<sup>1093</sup> Panel Report, para. 7.1037.

<sup>1094</sup> Honduras's appellant's submission, paras. 738-744.

"there is some econometric evidence suggesting that the TPP measures, together with the enlarged GHWs implemented at the same time, contributed to" the declines in prevalence and consumption "observed after their entry into force"<sup>1095</sup>

support its finding that the econometric evidence on the record was

"consistent with a finding that the TPP measures contribute to a reduction in the use of tobacco products, to the extent that it suggests that, together with the enlarged GHWs introduced at the same time, plain packaging has resulted in a reduction in smoking prevalence and in consumption of tobacco products."<sup>1096</sup>

and in turn with its finding 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>1097</sup>

849. In reaching its overall conclusions, the weight that the Panel gave to the post-implementation evidence on prevalence and consumption, including the econometric evidence in step 3, was expressly informed by the fact that the available data encompassed only three years following implementation, and that "the extent to which the data available at the time of our assessment can inform an overall assessment of the actual and expected contribution of the measures to their objective is disputed."<sup>1098</sup> The Panel's findings that the complainants' econometric models, as modified by Dr Chipty and in light of other concerns identified by the Panel, provided "some econometric evidence" in support of the Panel's overall conclusions was therefore fully reasoned and supported.

- (b) The Panel provided a reasoned and adequate explanation of how the facts found support its intermediate findings on prevalence and consumption

850. Honduras alleges that the Panel's "intermediate findings" at the conclusion of each of Appendices C and D are not "adequately grounded in the facts on the record, not based on an even-handed assessment of the evidence and not supported by a reasoned explanation."<sup>1099</sup>

851. The arguments set out in this section of Honduras's submission relate to many of the issue-specific topics that Australia addressed in Part 3 above. Australia considers that its prior discussions of those issues also serve to rebut the arguments that Honduras makes under this heading.

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<sup>1095</sup> Panel Report, Appendix C, para. 123(c).

<sup>1096</sup> Panel Report, para. 7.1037.

<sup>1097</sup> Panel Report, para. 7.1043.

<sup>1098</sup> Panel Report, para. 7.1044.

<sup>1099</sup> Honduras's appellant's submission, para. 873.

852. Australia notes that the predominant theme of Honduras's arguments in support of this claim is that the Panel was required to evaluate the rebuttal evidence submitted by Australia's expert, Dr Chipty, to determine whether *Dr Chipty* had resolved all of the reasons that the Panel had identified for questioning the validity and probative value of the *complainants'* econometric evidence.<sup>1100</sup> Australia has already explained why these arguments misapprehend the burden of proof in this dispute, misapprehend the purpose for which Australia submitted its rebuttal evidence, and misapprehend the conclusions that the Panel drew from that evidence. Australia will not repeat those explanations here.

853. Honduras's arguments in this section of its submission also: ask the Appellate Body to reweigh the evidence;<sup>1101</sup> mischaracterise the Panel's actual findings;<sup>1102</sup> allude to its unfounded claim that the Panel erred by relying upon econometric support from the Secretariat;<sup>1103</sup> rehearse its later claim that the Panel "zeroed out" evidence when the Panel in fact examined that evidence and found it unpersuasive;<sup>1104</sup> and claim that Honduras did not have "any meaningful opportunity to comment" on the Panel's findings when in fact it did.<sup>1105</sup> Each one of these arguments is unfounded for the reasons that Australia has already explained. Taken together, these arguments demonstrate an attempt to re-litigate the Panel's factual findings before the Appellate Body.

- (c) Honduras is incorrect that the Panel "disregarded completely" the complainants' evidence concerning prevalence and consumption

854. Honduras alleges that "[t]he Panel fails to provide a reasoned and adequate explanation of why the complainants' evidence on the lack of impact of the TPP

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<sup>1100</sup> See, e.g. Honduras's appellant's submission, paras. 878, 884, 898-902.

<sup>1101</sup> See, e.g. Honduras's appellant's submission, para. 890 ("These are the two reasons for selecting this dataset and rejecting all others. *Neither of these is convincing.*") (emphasis added).

<sup>1102</sup> See, e.g. Honduras's appellant's submission, para. 880 (alleging that the Panel found the RMSS data to be the most probative and reliable "without even examining the conflicting evidence that is based on all of the other datasets before the Panel", when in fact the Panel provided a detailed explanation for its RMSS finding but nevertheless examined other models that were *not* based on the RMSS data) (see, e.g. Panel Report, Appendix C, para. 113 (Professor Klick's results based only on smoking incidence data); Panel Report, Appendix C, para. 114 (Professor Klick's results based on commissioned Roy Morgan Research Survey data); Panel Report, Appendix C, para. 115 (Professor Klick's results based on NSWPHS data); Panel Report, Appendix C, para. 116 (Professor Klick's results based on CITTS data)).

<sup>1103</sup> See, e.g. Honduras's appellant's submission, para. 883 ("Thus, it is unclear how was the Panel made aware of this considering that none of the three panellists are econometric experts.").

<sup>1104</sup> See, e.g. Honduras's appellant's submission, para. 885 ("The Panel failed to provide a reasoned and adequate explanation of why all other datasets and expert report based on those other datasets can be zeroed despite its proclaimed 'totality of facts' approach").

<sup>1105</sup> See, e.g. Honduras's appellant's submission, para. 896 (alleging that Honduras did not have an opportunity to comment upon or ask questions concerning Figure D.14 in the Panel Report, when the identical figure appeared in the Interim Report (Figure 35) and Honduras said nothing about it in its request for interim review).

measures on prevalence and consumption was so flawed that it could be disregarded completely".<sup>1106</sup>

855. In so doing, Honduras confuses the difference between a panel *disregarding* evidence, on the one hand, and a panel *not being persuaded* by certain evidence and therefore deciding to *reject* or *accord less weight* to that evidence, on the other. A panel does not "zero", "ignore", or "disregard" evidence merely because the panel is unpersuaded by that evidence or attaches less weight to it than the party submitting the evidence would have liked.<sup>1107</sup> Nor does a panel "zero", "ignore", or "disregard" evidence merely because the panel does not refer to "each and every piece of evidence" in its report or respond to each and every assertion and counter-assertion made by the parties.<sup>1108</sup> These two settled principles resolve the vast majority of Honduras's specific allegations in the 27 pages of its submission that it devotes to this claim.<sup>1109</sup>

856. Along the way, Honduras seeks to re-litigate contested factual issues;<sup>1110</sup> questions the Panel's competence in a manner that is entirely inappropriate and unfounded;<sup>1111</sup> challenges the Panel's right to undertake additional analyses of complex statistical and econometric evidence;<sup>1112</sup> advances its unfounded claim that the Panel erred by relying upon econometric support from the Secretariat;<sup>1113</sup> reiterates its erroneous claim that it had no opportunity to comment on issues raised in

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<sup>1106</sup> Honduras's appellant's submission, Section VIII.2.1.6.

<sup>1107</sup> See, e.g. Appellate Body Report, *China – Rare Earths*, para. 5.197 ("[W]e note that the Panel did not ignore this evidence. The Panel was simply more persuaded by the evidence provided by the complainants rebutting Professor de Melo's opinion."); Appellate Body Report, *US – Clove Cigarettes*, para. 212 (finding that "the Panel did not disregard the evidence that, according to the United States, demonstrated the presence of domestically produced flavoured cigarettes other than menthol cigarettes on the US market at the time of the ban" because "the Panel reviewed that evidence but was ultimately not persuaded by it.").

<sup>1108</sup> See, e.g. Appellate Body Report, *Brazil – Retreaded Tyres*, para. 202 ("A panel enjoys discretion in assessing whether a given piece of evidence is relevant for its reasoning, and is not required to discuss, in its report, each and every piece of evidence".).

<sup>1109</sup> See, e.g. Honduras's appellant's submission, paras. 912-930 (taking issue with the weight that the Panel decided to accord to analyses based on different datasets); paras. 931-946 (taking issue with the weight that the Panel decided to accord to different expert submissions and the manner in which it resolved highly contested methodological issues); paras. 947-951 (taking issue with the Panel's concern that Professor Klick's quadratic trend overfits the data); paras. 953-965 (taking issue with the Panel's findings concerning Professor Klick's "unique" difference-in-difference approach); paras. 966-981 (returning to the weight that the Panel decided to accord to analyses based on different datasets); paras. 982-991 (taking issue with the weight accorded to Professor Klick's consumption analyses).

<sup>1110</sup> See, e.g. Honduras's appellant's submission, para. 985 ("None of these concerns are actually valid and can easily be rebutted").

<sup>1111</sup> See, e.g. Honduras's appellant's submission, para. 990 (accusing the Panel of a "complete lack of understanding of statistics and econometric analysis.").

<sup>1112</sup> See, e.g. Honduras's appellant's submission, para. 936.

<sup>1113</sup> See, e.g. Honduras's appellant's submission, para 938.

the Panel Report,<sup>1114</sup> and refers to evidence not on the record in flagrant violation of Article 17.6 of the DSU.<sup>1115</sup>

857. Accordingly, the Appellate Body should reject these claims.

- (d) Honduras's claim that the Panel "disregards, misrepresents, and distorts evidence presented by Honduras" is unfounded and is nothing more than an attempt to re-litigate the Panel's findings

858. Section VIII.2.2 of Honduras's submission alleges that "[t]he Panel disregards, misrepresents, and distorts evidence presented by Honduras that was material for a proper and objective assessment of the matter in dispute."

859. This section of Honduras's submission appears to comprise merely a list of grievances drafted by an expert who is disappointed that a panel found his or her evidence unpersuasive. This is an entirely inappropriate use of appellate review under Article 17.6 of the DSU. Australia does not believe that these arguments merit a response in the main body of its submission.<sup>1116</sup>

- (e) Honduras's claim that the Panel was "biased in its approach to statistical significance" is unfounded

860. Honduras's last Article 11 claim relating specifically to the Panel's prevalence and consumption findings, not already rebutted elsewhere in this submission, is its claim that the Panel was "biased in its approach to statistical significance".<sup>1117</sup>

861. Honduras's claim takes issue with the Panel's decision to question the validity and probative value of the complainants' econometric results on the grounds that some of those results suggested that the TPP measures had resulted in a statistically significant *increase* in prevalence or consumption (i.e. that the TPP measures had "backfired"). Honduras argues that this aspect of the Panel's rationale reflects a "fundamental error related to the concept of statistical significance".<sup>1118</sup>

862. Honduras's statement that "[t]he Panel consistently is giving the benefit of the doubt to Australia even when there is no or a limited statistical significance in favour

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<sup>1114</sup> See, e.g. Honduras's appellant's submission, para. 980 (claiming that the Panel "deprive[d] the parties of an opportunity to review the report in order to assess whether the Panel's approach was objective and scientifically sound."); para. 985 (claiming that the Panel "fail[ed] to give an opportunity to the parties to comment or review the assertions").

<sup>1115</sup> See, e.g. Honduras's appellant's submission, para. 993. See Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 222.

<sup>1116</sup> Australia briefly addresses these grievances in Annex 2 to this submission.

<sup>1117</sup> Honduras's appellant's submission, Section VIII.2.3.3.

<sup>1118</sup> Honduras's appellant's submission, para. 1028.

of Australia's hypotheses"<sup>1119</sup> misapprehends, once again, the burden that each side in this dispute faced.

863. It was the complainants, not Australia, that undertook the task of proving that the TPP measures made *no* statistically significant contribution to the declines in prevalence and consumption observed following the implementation of the measures. Australia did not seek, require, or obtain "the benefit of the doubt" in rebutting the complainants' assertion. Rather, Australia submitted expert evidence to demonstrate that the complainants' econometric models contained flaws that rendered these models incapable of proving that no portion of the observed declines in prevalence and consumption could be attributed to the TPP measures. These flaws resulted, *inter alia*, in results suggesting that the TPP measures had "backfired", when all parties agreed that this had not happened. It was therefore entirely appropriate for the Panel to take these anomalous results into account when evaluating the validity and probative value of the evidence that the complainants had submitted to prove their assertion.

5. The Appellants Have Failed to Demonstrate the Materiality of the Panel's Alleged Failures of Objectivity in Respect of Prevalence and Consumption

864. In order to substantiate a claim that a panel failed to make an objective assessment of the matter as required by Article 11 of the DSU, an appellant must demonstrate not only that the panel exceeded the bounds of its discretion as trier of fact under Article 11 of the DSU, but also that this inconsistency, so established, was *material* to the Panel's findings and conclusions.<sup>1120</sup>

865. Australia will address in Part I below the appellants' contention that the Panel's alleged failures of objectivity in respect of its assessment of the post-implementation evidence are so material as to undermine the Panel's *overall* conclusion on contribution, even if those alleged failures of objectivity are credited in full. As Australia will demonstrate, the appellants' contention misconstrues the basis for the Panel's overall conclusion that the appellants had failed to demonstrate that the TPP measures are not apt to contribute to Australia's legitimate objective.

866. What is remarkable about the appellants' submissions is that they do not even *attempt* to demonstrate that the Panel's alleged failures of objectivity in respect of its assessment of the prevalence and consumption evidence are so material as to undermine the Panel's successive intermediate findings and conclusions. The appellants evidently believe that it is sufficient to allege a series of errors by the Panel in its assessment of the consumption and prevalence evidence, and then leave it up to the Appellate Body to figure out whether any *single* error, or any *combination* of errors, was so material as to undermine the Panel's intermediate findings. This is not

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<sup>1119</sup> Honduras's appellant's submission, para. 1035.

<sup>1120</sup> See, e.g. Appellate Body Reports, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.147; *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 992, *EC and certain member States – Large Civil Aircraft*, para. 1318; *China – Rare Earths*, paras. 5.178-5.179; *US – COOL*, para. 325.

a sufficient basis for an appellant to discharge its heavy burden of proving that a panel failed to examine the matter objectively.

867. In this context, it is important to recall the Panel's approach in Appendices C and D, the structure of its findings in those appendices, and how those findings relate, in turn, to the Panel's findings in the main body of the Panel Report.

868. As explained previously, the Panel examined three issues relating to prevalence and consumption: (1) whether consumption and prevalence had *declined* following the implementation of the TPP measures; (2) whether the rate of decline had *accelerated* following the implementation of the TPP measures; and (3) whether any portion of the observed declines in prevalence or consumption could be *attributed* to the TPP measures.

869. The Panel's findings in Appendices C and D represented, in turn, one element of its "[o]verall conclusion on evidence relating to the application of the TPP measures since their entry into force".<sup>1121</sup> Specifically, in paragraph 7.986, the Panel found that:

The fact that pre-existing downward trends in smoking prevalence and overall sales and consumption of tobacco products have not only continued but accelerated since the implementation of the TPP measures, and that the TPP measures and enlarged GHWs had a negative and statistically significant impact on smoking prevalence and cigarette wholesale sales, is also consistent with the hypothesis that the measures have had an impact on actual smoking behaviours, notwithstanding the fact that some of the targeted behavioural outcomes could be expected to manifest themselves over a longer period of time.<sup>1122</sup>

870. In its "[o]verall conclusion on the degree of contribution of the TPP measures to Australia's objective", the Panel explained that:

Finally, we also considered the evidence before us on actual smoking behaviours in Australia since the entry into force of the measures, as reflected in data relating to the evolution of smoking prevalence and consumption. As discussed, the extent to which the data available at the time of our assessment can inform an overall assessment of the actual and expected contribution of the measures to their objective is disputed. The data before us in these proceedings relates to a period of up to three years following the entry into force of the TPP measures. Overall, we find that this evidence is consistent with a finding that the TPP measures contribute to a reduction in the use of tobacco products, to the extent that it suggests that, together with the enlarged GHWs introduced at the same time, plain packaging has resulted in a reduction in smoking prevalence and in consumption of tobacco products.<sup>1123</sup>

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<sup>1121</sup> Panel Report, 7.2.5.3.6.4.

<sup>1122</sup> Panel Report, para. 7.986.

<sup>1123</sup> Panel Report, para. 7.1037.

871. Neither the Dominican Republic nor Honduras attempts to explain how its various claims under Article 11 of the DSU concerning the Panel's evaluation of prevalence and consumption, even if accepted, would represent a *material* lack of objectivity within the structure of these findings. The appellants' failure to undertake this task is all the more striking in light of the length and complexity of the Panel's findings.

872. Consider, for example, the Panel's discussion of multicollinearity, an issue raised by both the Dominican Republic and Honduras. As Australia has explained, the Panel referred to multicollinearity as one possible explanation for the anomalous results that the complainants' econometric models were producing. In respect of Professor List's and IPE's prevalence models, for example, the Panel discussed potential multicollinearity after identifying four *other* concerns with those models. Thus, even accepting *arguendo* the appellants' contention that the Panel erred in its decision to evaluate potential multicollinearity in this instance, any examination of the *materiality* of this error would require consideration of whether the Panel's assessment of multicollinearity was material, *inter alia*, to:

- its finding that Professor List's and IPE's prevalence models were unreliable;
- its finding that Professor List's and IPE's prevalence models, as modified by Dr Chipty, provided "some econometric evidence suggesting that the TPP measures, together with the enlarged GHWs implemented at the same time, contributed to the reduction in overall smoking prevalence"; and
- its finding in the main body of the Panel Report that all three steps of both its prevalence and consumption analysis (i.e decline, acceleration, and attribution), taken together, were "consistent with the hypothesis that the measures have had an impact on actual smoking behaviours, notwithstanding the fact that some of the targeted behavioural outcomes could be expected to manifest themselves over a longer period of time".<sup>1124</sup>

873. Whether with regard to multicollinearity or any other issue, neither appellant seeks to demonstrate that *any* of the Panel's alleged failures of objectivity concerning prevalence and consumption, whether considered individually or in combination, were *material* to the Panel's successive intermediate findings. Honduras simply asserts that "[w]hen all these errors are put together it becomes clear that these errors were material and pervasive."<sup>1125</sup> In its "conclusion and request for relief", the

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<sup>1124</sup> And likewise with the Panel's finding that the "data relating to the evolution of smoking prevalence and consumption" are "consistent with a finding that the TPP measures contribute to a reduction in the use of tobacco products, to the extent that it suggests that, together with the enlarged GHWs introduced at the same time, plain packaging has resulted in a reduction in smoking prevalence and in consumption of tobacco products." Panel Report, para. 7.1037.

<sup>1125</sup> Honduras's appellant's submission, para. 711. Even here, Honduras appears to refer to the Panel's *overall* finding that the complainants' had failed to demonstrate that the TPP measures are not apt to contribute to Australia's legitimate objectives.

Dominican Republic skips directly to requesting the Appellate Body to *reverse* certain of the Panel's intermediate findings regarding prevalence and consumption without ever establishing that the Panel's alleged failures of objectivity were material to those findings.<sup>1126</sup>

874. The appellants' approach to challenging the Panel's factual findings on prevalence and consumption amounts to alleging a series of errors and asking the Appellate Body to accept on the basis of assertion that these alleged errors were material to the findings and conclusions that the appellants seek to have overturned. This is not a sufficient basis for the appellants to discharge their burden of proving a lack of objective assessment under Article 11 of the DSU. As the Appellate Body has repeatedly explained, an allegation that a panel failed to undertake an objective assessment of the matter is a serious allegation.<sup>1127</sup> In this case, the appellants decided to challenge a large number of the Panel's intermediate findings and observations concerning the post-implementation evidence on prevalence and consumption. The appellants thereby undertook the burden of proving that the alleged errors of objective assessment, whether established in whole or in part, were *material* to the findings on prevalence and consumption that the appellants request the Appellate Body to overturn. The appellants have not even *attempted* to discharge, let alone actually discharged, this burden.

#### H. Aptitude to Contribute "Over Time"

875. Finally, the appellants have brought multiple claims challenging the Panel's statement that the TPP measures:

... may be expected to have an impact in particular on future generations of young people whose exposure to tobacco advertising or promotion in Australia will have been generally limited, and that effects on smoking cessation for existing smokers will also take some time to produce their full effects.<sup>1128</sup>

876. The Dominican Republic claims that, in finding that the TPP measures would have effects in the future, the Panel erred in its application of the proper evidentiary standard in Article 2.2 of the TBT Agreement, by failing to: (i) articulate the hypotheses that provided the theoretical pathway to future effects; and (ii) test those hypotheses with supporting evidence.<sup>1129</sup>

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<sup>1126</sup> Dominican Republic's appellant's submission, para. 583-586. The Dominican Republic's various assertions that the Panel's alleged failures of objectivity were "consequential" or "serious and consequential", or assertions to similar effect, do not even remotely satisfy its burden of establishing the materiality of any one of these alleged failures, or any combination thereof. See, e.g. Dominican Republic's appellant's submission, paras. 33, 37, 43, 295, 381, 447, 487, 545, 573.

<sup>1127</sup> See Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.28. See also Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 6.200; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.191; *India – Agricultural Products*, para. 5.179; *China – Rare Earths*, para. 5.227.

<sup>1128</sup> Panel Report, para. 7.1044.

<sup>1129</sup> Dominican Republic's appellant's submission, para. 1221.

877. Both the Dominican Republic and Honduras additionally claim that the Panel acted inconsistently with Article 11 of the DSU in making this finding, by failing to provide a reasoned and adequate explanation.<sup>1130</sup> The Dominican Republic claims that the Panel further violated Article 11 by failing to engage with the complainants' evidence on initiation and cessation.<sup>1131</sup>

878. Neither appellant disputes that the Panel was correct in seeking to determine whether the TPP measures are apt to contribute to Australia's public health objective in the future; nor that this determination may be based on "quantitative projections in the future, or on qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence."<sup>1132</sup>

879. The Dominican Republic's claim that the Panel misapplied the relevant evidentiary standard cannot be sustained in view of the Panel's findings. For the reasons Australia explained in Part E, the Panel properly found that the pre-implementation qualitative evidence constituted reputable science that demonstrated the anticipated impact of the TPP measures on proximal outcomes, including: reducing the appeal of tobacco products; increasing the effectiveness of GHWs; and reducing the ability of packaging to mislead consumers about the harmful effects of smoking. Moreover, as Australia explained in Parts F to G above, the Panel sought to corroborate this qualitative evidence with post-implementation empirical evidence and, having done so, properly concluded that the TPP measures have led to a reduction in the appeal of tobacco products and to greater noticeability of the GHWs; and that the prevalence and consumption evidence was consistent with the hypothesis that the TPP measures have had an impact on actual smoking behaviours in Australia.<sup>1133</sup>

880. Given that the Panel's finding that the TPP measures are apt to make a future contribution to reducing smoking in Australia was *clearly* based on "qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence", the Dominican Republic's claim is baseless.<sup>1134</sup>

881. The findings of the Panel quoted above similarly refute the appellants' Article 11 claims that the Panel failed to provide a *reasoned and adequate explanation* for determining that the TPP measures would have effects in the long term.

882. The Dominican Republic's additional Article 11 claim is, in essence, directed at the Panel's *appreciation* of the complainants' pre-implementation evidence that purportedly demonstrated that adolescents had negative perceptions of the pack *prior* to implementation of the TPP measures; and of the empirical post-implementation evidence on "proximal" and "distal" outcomes. For the reasons Australia explained in

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<sup>1130</sup> Dominican Republic's appellant's submission, para. 1224; Honduras's appellant's submission, para. 842.

<sup>1131</sup> Dominican Republic's appellant's submission, para. 1224.

<sup>1132</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

<sup>1133</sup> See Panel Report, paras. 7.985-7.986.

<sup>1134</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

Parts E and F above, the Panel acted properly within the bounds of its discretion under Article 11 of the DSU in its assessment of that evidence.

883. Accordingly, the appellants have also failed to demonstrate that the Panel acted inconsistently with Article 11 of the DSU in reasoning that the TPP measures could be expected to contribute to Australia's objective in the future.<sup>1135</sup>

## I. Materiality of Alleged Errors

### 1. Introduction

884. Australia has demonstrated in Parts C through H above 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>1136</sup> A "material" error is one that "invalidates"<sup>1137</sup> or "vitiates"<sup>1138</sup> the basis for a particular finding. "Materiality" therefore turns on whether "other elements of the Panel's analysis" support its conclusion.<sup>1139</sup>

885. Given the extraordinarily detailed nature of the appellants' Article 11 claims, the appellants' cursory treatment of materiality stands out. Honduras and the Dominican Republic repeatedly *assert* that the alleged errors they have identified "individually and collectively" merit the reversal of both the Panel's intermediate findings and its overall contribution finding.<sup>1140</sup> However, the appellants fail to *substantiate* these assertions.

886. Australia has already demonstrated in Parts E and F above that the appellants' materiality arguments in relation to the Panel's assessment of the pre-implementation evidence and the post-implementation evidence on "proximal" and "distal" outcomes are baseless, and will not revisit those arguments here.

887. 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

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<sup>1135</sup> Panel Report, para. 7.1044.

<sup>1136</sup> See, e.g. Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 722.

<sup>1137</sup> See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1335.

<sup>1138</sup> Appellate Body Reports, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 294; *US – COOL*, para. 323.

<sup>1139</sup> See Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 722.

<sup>1140</sup> See, e.g. Honduras's appellant's submission, paras. 697, 1072, 1079; Dominican Republic's appellant's submission, paras. 824-825, 1176-1177.

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>1141</sup>

888. Australia has already demonstrated in detail in Part G above that the appellants' claims of error in relation to the Panel's assessment of the post-implementation evidence in Appendices C and D are without merit. Furthermore, Australia has explained in Part G.5 that the appellants have not even *attempted* 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*.<sup>1142</sup> Accordingly, there is no legal foundation for the Dominican Republic's consequential claim regarding the Panel's *overall* contribution finding. This disposes of the Dominican Republic's argument in its entirety.

889. 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.

890. In this respect, as Australia will demonstrate in Part 2 below, the Dominican Republic's argument that the disputed Panel findings on the impact of the TPP measures on smoking behaviors 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.<sup>1143</sup>

891. Moreover, as Australia will demonstrate in Part 3 below, the Panel's overall conclusion 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" would still stand on the basis of the body of pre- and post-implementation evidence that is essentially *uncontested* on appeal.

## 2. The Dominican Republic's Claim that the Panel's Alleged Errors Are "Material" to the Panel's Overall Contribution Finding Is Unfounded

892. The Dominican Republic's argument that the disputed Panel findings in Appendices C and D are *material* to the Panel's overall contribution finding fundamentally misunderstands the Panel's analysis.

893. In making this argument, the Dominican Republic misconstrues the relevance of the Panel's acknowledgment that the objective of the TPP measures is to influence actual smoking behaviours, and its observation that the post-implementation evidence concerning the impact of the TPP measures should be an "integral part" of its

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<sup>1141</sup> See, e.g. Dominican Republic's appellant's submission, para. 626.

<sup>1142</sup> See Part VII.G.5.

<sup>1143</sup> See, e.g. Dominican Republic's appellant's submission, para. 600.

assessment. *Neither* proposition supports the Dominican Republic's argument that the disputed Panel findings in relation to the post-implementation evidence on prevalence and consumption were "necessary" for, or "indispensable" to, its overall conclusion.<sup>1144</sup>

894. It is undisputed that the objective of the TPP measures is to improve public health by influencing smoking behaviours, such as initiation, cessation, and relapse. Any evaluation of whether the TPP measures are capable of contributing to Australia's objective must therefore evaluate whether the TPP measures are capable of affecting those smoking behaviours.

895. There was therefore no dispute between the parties that the post-implementation quantitative evidence on smoking behaviours was *relevant* to the Panel's contribution assessment.<sup>1145</sup> This is why the Panel did not reach an overall conclusion on contribution until after its assessment of the post-implementation evidence, and why the Panel explained that the post-implementation evidence concerning the impact of the TPP measures on smoking behaviours should be an "integral part" of its analysis.

896. In the very next line of its report, however, the Panel explained that "[t]he exact *weight* to be accorded to this [post-implementation quantitative] evidence will ... depend on its nature, quality, and probative value in respect of the question before us."<sup>1146</sup> It is the Panel's assessment of *this* issue – the weight that should be accorded to the post-implementation evidence – that is relevant to evaluating the Dominican Republic's assertion that the Panel considered the disputed post-implementation evidence on smoking behaviour to be *necessary* or *indispensable* to its overall conclusion.

897. Critically, as Australia described in Part G above, the Panel expressly disagreed with the complainants that the post-implementation evidence on smoking behaviours "superseded" the pre-implementation evidence supporting the TPP measures. The Panel instead found that it had to assess the TPP measures' degree of contribution to Australia's objective "based upon the *totality* of the relevant evidence" before it.<sup>1147</sup>

898. The Panel began its analysis with a comprehensive review of the pre-implementation evidence. Based on the pre-implementation evidence, the Panel concluded that the complainants had failed to demonstrate that the TPP measures were incapable of contributing to Australia's public health objective based on their design, structure, and operation.<sup>1148</sup>

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<sup>1144</sup> See, e.g. Dominican Republic's appellant's submission, para. 600.

<sup>1145</sup> See, e.g. Panel Report, para. 7.934.

<sup>1146</sup> Panel Report, para. 7.497 (emphasis added).

<sup>1147</sup> Panel Report, para. 7.499 (emphasis added).

<sup>1148</sup> Panel Report, para. 7.1034.

899. The Panel then turned its attention to the post-implementation evidence. As described in detail in Part F above, the Panel was conscious of the inherent limitations of this 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>1149</sup>

900. Following its exhaustive review of the post-implementation evidence in Appendices A-D of its Report, the Panel concluded based on the totality of the evidence before it 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>1150</sup>

901. In support of its *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 Panel devoted two pages to summarising its assessment of the pre-implementation evidence and two paragraphs to the post-implementation evidence. 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, to the extent that it suggests that, together with the enlarged GHWs introduced at the same time, plain packaging has resulted in a reduction in smoking prevalence and in consumption of tobacco products.<sup>1151</sup>

902. As noted above, the Panel's conclusion was that the post-implementation evidence on smoking behaviours overall was "*consistent* with a finding that the TPP measures contribute to a reduction in the use of tobacco products". The Panel did not conclude that this evidence was *necessary* to a finding that the TPP measures contribute to Australia's objective.

903. Moreover, the Panel's *overall* contribution finding is located in the first sentence of paragraph 7.1025 of its report, where the Panel explains 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>1152</sup> This finding reflects the Panel's consideration of the *totality* of the evidence, not just its conclusions with respect to Appendices C and D.

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<sup>1149</sup> Panel Report, para. 7.938.

<sup>1150</sup> Panel Report, para. 7.1025.

<sup>1151</sup> Panel Report, para. 7.1037.

<sup>1152</sup> Panel Report, para. 7.1025 (emphasis added).

904. In light of the Panel's approach to its assessment of the evidence, and in light of its particular findings, there is no credible basis for the Dominican Republic's assertion that the disputed Panel findings in Appendices C and D were "necessary" for or "indispensable" to its *overall* finding that the complainants had failed to demonstrate that the TPP measures are incapable of contributing to Australia's public health objective. Rather, as Australia will proceed to demonstrate, the body of pre- and post-implementation evidence that is essentially uncontested on appeal was more than sufficient for the Panel to conclude that the complainants had failed to discharge their burden.

3. The Body of Pre- and Post-Implementation Evidence that Is Virtually Unchallenged on Appeal Substantiates the Panel's Overall Contribution Finding

905. The flip-side of the Dominican Republic's argument that the disputed Panel findings in relation to the post-implementation evidence on smoking behaviours were "*necessary*" to the Panel's overall contribution finding is its argument that the Panel's findings in relation to the pre-implementation evidence and the other undisputed post-implementation evidence were *insufficient* to sustain the Panel's overall contribution finding. Contrary to this claim, and as demonstrated throughout Australia's submission, this evidence was more than sufficient to substantiate the Panel's conclusion that the complainants had *failed* to demonstrate 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>1153</sup>

906. Australia recalls that, in relation to the pre-implementation evidence, the Panel made the following key findings:

- the complainants failed to establish that the "largely convergent conclusions" reflected in the pre-implementation evidence should be considered so "fundamentally flawed as to provide no support" for the proposition that tobacco plain packaging results in reduced appeal of tobacco products, increases the effectiveness of GHWs, and reduces the ability of the pack to mislead consumers about the health risks of tobacco use;<sup>1154</sup>
- the complainants failed to persuade the Panel that "tobacco packaging can have *no* influence on smoking behaviours", especially in a dark market like Australia;<sup>1155</sup>
- the complainants 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;<sup>1156</sup>

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<sup>1153</sup> Panel Report, para. 7.1025.

<sup>1154</sup> Panel Report, para. 7.1027

<sup>1155</sup> Panel Report, para. 7.1032 (emphasis in original).

- the complainants failed to demonstrate that tobacco plain packaging would not be capable of reducing the appeal of tobacco products<sup>1157</sup> and, as a result, the complainants failed to demonstrate that tobacco plain packaging is not capable of influencing smoking behaviours such as youth initiation and smoking cessation and relapse;<sup>1158</sup>
- the complainants failed to demonstrate that tobacco plain packaging could not increase the effectiveness of GHWs by increasing their noticeability and salience, or that the existing levels of health knowledge and risk awareness in Australia are such that they could not be *increased* by enhancing the effectiveness of GHWs;<sup>1159</sup>
- the complainants failed to demonstrate that there is no correlation between increases in the effectiveness of GHWs and changes in smoking behaviours such as initiation, cessation and relapse;<sup>1160</sup>
- the complainants failed to demonstrate that the TPP measures, by design, would not be capable of reducing the ability of tobacco packaging to mislead consumers about the harmful effects of smoking;<sup>1161</sup> and
- the complainants failed to demonstrate that the TPP measures, by changing the ability of packaging to mislead consumers, would not have an effect on initiation or cessation.<sup>1162</sup>

907. In relation to the pre-implementation evidence, the appellants have not challenged the Panel's findings that packaging functions as advertising and promotion, or that tobacco packaging is capable of influencing smoking behaviour (i.e. initiation, cessation, and relapse). Rather, the appellants' limited claims of error in relation to the Panel's pre-implementation findings concern: (1) the Panel's alleged failure to engage with evidence of negative perceptions of tobacco packaging in Australia prior to the TPP measures; (2) the Panel's alleged failure to provide a reasoned and adequate explanation of the probative value of the pre-implementation studies; and (3) the Panel's alleged failure to assess the pre-implementation evidence in light of the post-implementation evidence.<sup>1163</sup>

908. For the reasons described in Part E above, each of these claims is baseless: the Panel expressly engaged with the evidence of negative perceptions highlighted by

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<sup>1156</sup> Panel Report, para. 7.1032.

<sup>1157</sup> Panel Report, para. 7.777

<sup>1158</sup> Panel Report, paras. 7.1032-7.1033.

<sup>1159</sup> Panel Report, paras. 7.825, 7.845.

<sup>1160</sup> Panel Report, para. 7.863.

<sup>1161</sup> Panel Report, para. 7.904.

<sup>1162</sup> Panel Report, paras. 7.923-7.924.

<sup>1163</sup> See Part VII.E.3(d).

the Dominican Republic; provided an exceptionally detailed explanation of the probative value of the pre-implementation studies; and found that the post-implementation evidence was consistent with the anticipated effect of the TPP measures in the pre-implementation evidence. The Panel's findings in relation to the pre-implementation evidence therefore stand unchallenged in any credible respect.

909. In relation to the undisputed post-implementation evidence, Australia recalls that, in support of its overall conclusion in the body of its Report, the Panel cited the post-implementation evidence for two propositions:<sup>1164</sup>

- first, with respect to the evidence on "proximal" outcomes (Appendix A), the Panel explained 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>1165</sup> and
- second, with respect to the evidence on smoking behaviours (Appendices C and D), the Panel explained that "overall", it found this evidence was "consistent with a finding that the TPP measures contribute to a reduction in the use of tobacco products", suggesting that the measures "have resulted in a reduction in smoking prevalence and in consumption of tobacco products."<sup>1166</sup>

910. In relation to the post-implementation evidence on "proximal" outcomes (Appendix A), the appellants have not challenged the Panel's finding that the evidence suggests that the introduction of tobacco plain packaging "has, in fact, reduced the appeal of tobacco products, as anticipated" and has "had some impact on the effectiveness of GHWs."<sup>1167</sup>

911. In relation to the post-implementation evidence on prevalence and consumption (Appendices C and D), Australia has described in Part G above that the Panel divided its assessment of the evidence into three steps. In the first step, the Panel found that prevalence and consumption had both *declined* following the implementation of the TPP measures.<sup>1168</sup> In the second step, the Panel found that the rate of decline had *accelerated* in both cases following the implementation of the TPP measures.<sup>1169</sup> In the third step, the Panel found that once the principal flaws in the

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<sup>1164</sup> The appellants emphasise that the Panel did not cite its findings in Appendix B in support of its *overall* conclusion on contribution. Australia has demonstrated in Part VII.I.2 above, however, that the Panel did not need to expressly rely on these findings in order to conclude that the complainants had failed to discharge their burden of demonstrating that the TPP measures are incapable of contributing to Australia's public health objectives.

<sup>1165</sup> Panel Report, para. 7.1036.

<sup>1166</sup> Panel Report, para. 7.1037.

<sup>1167</sup> Panel Report, para. 7.1036. See also Dominican Republic's appellant's submission, para. 950.

<sup>1168</sup> Panel Report, Appendix C, para. 123(a); Panel Report, Appendix D, para. 137(a).

<sup>1169</sup> Panel Report, Appendix C, para. 123(b); Panel Report, Appendix D, para. 137(b).

complainants' econometric models were corrected, those models produced results *consistent with* the conclusion that the TPP measures had contributed to the observed declines in prevalence and consumption in the three-year period following their implementation.<sup>1170</sup>

912. As described in Part G above, the appellants' claims of error relate overwhelmingly to the Panel's analysis in step 3. Neither the Dominican Republic nor Honduras contests the Panel's factual finding that prevalence and consumption declined following the implementation of the TPP measures (step 1); nor do they contest the Panel's factual finding that the decline in smoking consumption *accelerated* following the implementation of the TPP measures (step 2). While the Dominican Republic does contest the Panel's factual finding that the decline in smoking prevalence *accelerated* following the implementation of the TPP measures, Australia has demonstrated in Part G above that this claim is based on a blatant mischaracterisation of what the Panel actually found. As such, there is no credible dispute that prevalence and consumption declined following the implementation of the TPP measures, or that the rate of decline accelerated in both cases relative to the pre-existing rate of decline.

913. As described in greater detail in Part B above, the Appellant Body has made clear that an error is not material if a sufficient basis for the Panel's finding can still be identified.<sup>1171</sup> As Australia has demonstrated in this Part, *even if* the appellants could sustain their claims of error, 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 impacting 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.

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<sup>1170</sup> Panel Report, Appendix C, para. 123(c); Panel Report, Appendix D, para. 137(c).

<sup>1171</sup> See Appellate Body Report, *US – Clove Cigarettes*, paras. 153-155.

914. 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>1172</sup> This overall finding would therefore still stand in the absence of the Panel findings contested by the appellants.

#### **J. Conclusion to Section VII**

915. For all of the foregoing reasons, the appellants have failed to establish that the Panel acted inconsistently with Article 11 of the DSU in finding that they had failed to establish a *prima facie* case that the TPP measures are incapable of contributing to Australia's objective of reducing the use of, and exposure to, tobacco products. Moreover, the appellants have failed to establish that any purported error in the Panel's appreciation of the evidence on contribution is so material as to call into question the objectivity of the Panel's assessment of that evidence. Accordingly, Australia requests that the Appellate Body reject in their entirety the appellants' claims of error under Article 11 of the DSU in relation to the Panel's contribution analysis.

#### **VIII. CONCLUSION**

916. On the basis of all of the foregoing, Australia respectfully requests that the Appellate Body reject the appellants' claims of error in their entirety.

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<sup>1172</sup> Panel Report, para. 7.1025 (emphasis added).

## ANNEX 1: CLAIMS REGARDING NON-CIGARETTE PRODUCTS

917. The appellants raise a number of claims under Article 11 of the DSU in respect of the Panel's contribution findings as they relate to non-cigarette products, suggesting that the Panel was inconsistent and unreasoned in its assessment, and that it failed to make an objective assessment in its evaluation of that evidence.<sup>1173</sup> The appellants' arguments with respect to the Panel's specific findings are discussed below.

918. At the outset, Australia recalls that the Panel was clear in its approach to assessing the contribution of the TPP measures with respect to non-cigarette products, stating that:

To the extent that the objective pursued, and the mechanisms through which the TPP measures are intended to contribute to this objective, are the same in respect of the various products covered by the TPP measures, we see no reason to assume that a different approach would be required, in considering the contribution of the measures to Australia's objective in relation to different types of tobacco products.<sup>1174</sup>

919. The Panel also notes that "[n]one of the parties suggests that the approach of the Panel should differ, in respect of its analysis of the contribution of the TPP measures in respect of different tobacco products."<sup>1175</sup> Neither appellant has contested this general approach of the Panel to its consideration of the evidence on contribution.

920. For this reason, even if the appellants were correct in their assertions that the Panel did not make an objective assessment of the evidence on non-cigarette tobacco products, the claimed errors could not be material to the Panel's overall conclusion. The evidence relating to non-tobacco products provided additional support, but was not necessary, for the Panel's findings on contribution.

921. As Australia has clearly shown, the complainants assumed the burden of proving that the TPP measures were *incapable* of contributing to its objective. Having demonstrably failed to meet that burden, the appellants now seek to isolate aspects of the Panel's analysis and assert – without legal foundation – that *Australia* was required to affirmatively establish that the TPP measures, *including* its application to non-cigarette tobacco products, contribute to its objective.<sup>1176</sup> This proposition is fundamentally incorrect. Australia's evidence on the impact of the TPP measures on non-cigarette products was submitted in the context of rebutting the *prima facie* case that the complainants failed to establish.

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<sup>1173</sup> Dominican Republic's appellant's submission, paras. 780-821, 1050-1114; Honduras's appellant's submission paras. 848-869.

<sup>1174</sup> Panel Report, para. 7.505.

<sup>1175</sup> Panel Report, para. 7.504.

<sup>1176</sup> Dominican Republic's appellant's submission, paras. 1053, 1060; Honduras's appellant's submission, para. 856.

### A. The Panel's Analysis of the Pre-Implementation Evidence and the Impact on "Proximal" and "Distal" Outcomes

922. Both appellants claim that the Panel failed to provide a reasoned and adequate explanation of the probative weight it gave to certain evidence, specifically studies by Parr et al. and Miller et al., in light of the criticisms presented by the complainants during the course of the panel proceedings.<sup>1177</sup> Contrary to these claims, the Panel in fact considered these studies in detail in assessing both the pre-implementation body of evidence and the impact of the TPP measures on both "proximal" and "distal" outcomes as set out in Appendices A and B.<sup>1178</sup>

923. With respect to the pre-implementation evidence, the Panel considered Parr et al. in the context of evidence showing that: (i) the most successful tobacco control strategies encompass all tobacco products, to minimise any regulatory gaps;<sup>1179</sup> (ii) cigars are becoming increasingly associated with "upscale status, luxury, affluence, sophistication and style"<sup>1180</sup> to appeal to younger consumers; and (iii) packaging of cigar products is used in the same way as cigarette products to appeal to younger smokers through the use of, for example, exclusive tubes, brightly coloured foil packs, and celebrity endorsements.<sup>1181</sup> This evidence was accepted by the Panel, and has not been contested by the appellants.

924. With respect to the findings on "proximal outcomes" in relation to the post-implementation evidence, the Panel noted that the findings by Miller et al. were consistent with its broader conclusions on the evidence. Furthermore, these findings are consistent with the findings of the *complainants'* own experts, who explicitly acknowledged that Miller et al. made *positive findings* with respect to the mechanisms through which tobacco plain packaging is intended to operate, including that "the new packaging was perceived to be unattractive and the large graphic health warnings were more noticeable."<sup>1182</sup> In light of this admission, the appellants have no basis to contest the Panel's findings in Appendix A.

925. Finally, with respect to the findings on "distal outcomes", the Panel found that the TPP measures "increased decanting or concealing of cigar packaging, and only for 'non-premium cigarillo smokers', increased 'contemplating quitting'".<sup>1183</sup> The Dominican Republic does not appear to contest this finding, but instead claims the Panel *did not engage* with the complainants' evidence showing no impact of other

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<sup>1177</sup> See, e.g. Dominican Republic's appellant's submission, paras. 780-822, 1050-1101; Honduras's appellant's submission, paras. 853-864.

<sup>1178</sup> See, e.g. Panel Report, paras. 7.620-7.622, 7.678-7.681; Panel Report, Appendix A, paras. 24-27, 32, 58-61, 71; Panel Report, Appendix B, paras. 30-32, 40, 66-67, 76.

<sup>1179</sup> Panel Report, paras. 7.1356, 7.1463.

<sup>1180</sup> Panel Report, para. 7.753.

<sup>1181</sup> Panel Report, para. 7.754.

<sup>1182</sup> Ajzen et al. Data Report (DOM/IDN-2), para. 256.

<sup>1183</sup> Dominican Republic's appellant's submission, para. 1099.

distal outcomes such as "thoughts about quitting [and] attempts to quit".<sup>1184</sup> Consistent with the appellants' broader approach to the Panel's findings in Appendix B, this argument is baseless. The Panel *expressly considered* the arguments made by the complainants' experts in Appendix B,<sup>1185</sup> and in fact agreed with the complainants' expert on this particular point. However, based on its analysis of *all* the evidence before it, the Panel concluded that it saw "no basis to reject Miller et al.'s findings on the basis of Ajzen et al.'s criticism".<sup>1186</sup>

926. The appellants also argue more broadly that the Panel treated the parties' evidence inconsistently because it: (i) accepted studies relied upon by Australia but rejected the complainants' evidence based on a "similar" failure to "control" for particular factors;<sup>1187</sup> (ii) considered the acknowledgement of limitations by the studies relied upon by Australia to be a "virtue" while using similar acknowledgments as a reason to reject evidence by the complainants' experts;<sup>1188</sup> and (iii) accepted the studies relied upon by Australia on the basis that it was the "only study" on the issue, but rejected evidence on GHWs in Canada even though it was also the only study presented on that question.<sup>1189</sup>

927. All three arguments disregard both the context of the Panel's consideration of this evidence and the Panel's discretion to weigh and balance the evidence as the initial trier of fact. The first two allegations ignore the fundamental difference between the evidence commissioned by the complainants for the purposes of this dispute on the one hand, and the peer-reviewed studies that were submitted by Australia on the other. This distinction would reasonably inform the Panel's consideration of that evidence. In addition, the Panel considered that the evidence on Canadian GHWs – the appellants' third point – was not directly applicable to the Australian context, unlike evidence (including the Parr and Miller studies) relating directly to the effects of the TPP measures in Australia. Thus, the Panel did not reject the study on Canadian GHWs because it was the "only study" on the issue, but rather because it was "not persuaded that the experience with GHWs in the Canadian context would necessarily be directly transposable to the Australian current context relating to the introduction of the TPP measures."

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<sup>1184</sup> Dominican Republic's appellant's submission, para. 1100.

<sup>1185</sup> See, e.g. Panel Report, Appendix B, paras. 32, 40, 67, 76.

<sup>1186</sup> Panel Report, Appendix B, para. 40. The Panel further elaborated upon its consideration of Professor Ajzen's criticisms of Miller et al. in Appendix A, para. 32.

<sup>1187</sup> Dominican Republic's appellant's submission, paras. 1078-1081.

<sup>1188</sup> Dominican Republic's appellant's submission, paras. 1082-1086.

<sup>1189</sup> Dominican Republic's appellant's submission, paras. 1087-1093. See Honduras's appellant's submission, para. 869, where Honduras broadly asserts that "the Panel applied a double-standard of proof by failing to critically assess the rigor and quality of the Parr and Miller studies against its promulgated evidentiary standard, while apply that very same standard to the complainants' evidence in other contexts", without providing any further factual detail of this allegation.

928. Accordingly, the appellants have failed to establish that the Panel acted inconsistently with Article 11 of the DSU with respect to its assessment of the pre- and early post-implementation evidence on non-cigarette tobacco products.

**B. The Panel's Analysis of Prevalence Rates of Non-Cigarette Tobacco Products**

929. The appellants also argue that the Panel failed to undertake an objective assessment of the post-implementation evidence on prevalence for non-cigarette tobacco products.

930. The Dominican Republic, in particular, alleges that the Panel failed to undertake an objective assessment of what the Dominican Republic calls the "benchmark rate of decline" in cigar smoking prevalence.<sup>1190</sup> The Dominican Republic argues that the Panel "failed to engage" with the Dominican Republic's evidence on this issue, and that the Panel treated the parties' evidence "inconsistently". Both of these arguments are unfounded.

931. As with its parallel argument concerning the "benchmark rate of decline" in cigarette smoking prevalence, the Dominican Republic's arguments on cigar prevalence are based on a mischaracterisation of the purpose for which each party submitted evidence, as well as the conclusions that the Panel drew from that evidence.

932. To recall the discussion in Part VII.G.1 of this submission, the Panel found in step 1 of its analysis in Appendix C that overall smoking prevalence had *declined* following the implementation of the TPP measures, and found in step 2 of its analysis that the rate of decline had *accelerated*. The Panel did not separately analyse cigarette and non-cigarette products when making these findings, and it is undisputed that none of the complainants requested that the Panel make separate findings in this regard. As explained below, the Panel specifically discussed IPE's cigar prevalence model in step 3 of its analysis. The Panel found in step 3 that there is econometric evidence suggesting that *TPP measures contributed* to the reduction in overall smoking prevalence, and that a similar conclusion applies to cigar smoking prevalence.

933. The Dominican Republic's expert, IPE, submitted models based on the RMSS data purporting to show that no portion of the decline in *cigar* smoking prevalence was caused by the TPP measures. No other complainant submitted evidence seeking to prove this assertion. Notably, in its second iteration, IPE's own models estimated a *negative* but statistically insignificant effect of the TPP measures upon cigar smoking prevalence.<sup>1191</sup> Australia's expert, Dr Chipty, submitted rebuttal evidence identifying flaws in IPE's revised model and demonstrating that, once corrected, IPE's modified

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<sup>1190</sup> Dominican Republic's appellant's submission, Section II(D)(3)(b)(ii).

<sup>1191</sup> IPE Updated Report (DOM-303), pp. 51-52.

trend model was consistent with a negative and statistically significant effect of the TPP measures upon cigar smoking prevalence.<sup>1192</sup>

934. The Dominican Republic's first contention is that the Panel "failed to engage" with evidence and arguments that the Dominican Republic presented concerning the proper sample period for the RMSSS data when determining the "benchmark rate of decline" and estimating the TPP measures' effect upon cigar smoking prevalence (i.e. whether the sample period for those data should begin in 2001 or July 2006). This is incorrect. As the Dominican Republic itself notes, "the Panel did not analyze separately the evidence on cigar smoking prevalence", and did not "make any explicit findings on the rate of decline in cigar smoking prior to the introduction of the TPP measures."<sup>1193</sup> The Panel did, however, address in detail the proper sample period for models based on the RMSS data, and "concur[red] with Australia that a larger number of observations is likely to increase the precision of the estimates."<sup>1194</sup> The Panel's finding applies equally to cigarette and non-cigarette models based on the RMSS data. Thus, the Panel agreed with Australia that the sample period for models based on the RMSS data, including IPE's cigar model and Dr Chifty's corrections to that model, should begin in 2001.

935. Figure 16 in the Dominican Republic's submission is another example of a figure in which the Dominican Republic depicts two types of trend lines that are not comparable. The green line on the Dominican Republic's chart is the raw data trend line, with a structural break imposed in 2006. The red line is the regression-adjusted trend line produced by Dr Chifty's modifications to the IPE model, where she replaced their price variable with three indicator variables to denote excise tax increases in 2010, 2013, and 2014 (thereby creating the level shifts, or "steps", in the regression-adjusted trends). The Dominican Republic implies that there is something "wrong" with the regression-adjusted trend line, e.g. that it is being used in a misleading way to "catch up" with the raw data. But each shift in the regression-adjusted trend line corresponds to the estimated effect of a tax increase on smoking prevalence. The trend line therefore accurately depicts the effects of the excise tax increases.

936. The Dominican Republic quotes its expert, IPE, for the proposition that "[w]henver a researcher uses a secular trend as a control variable, that trend must be consistent with the underlying data".<sup>1195</sup> If the suggestion is that a trend must be specified so that it does not ever need reflect the effects of a policy, no econometric model of the type put forward by the Dominican Republic's own experts could *ever*

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<sup>1192</sup> Chifty Surrebuttal Report (AUS-586), paras. 58-60. Dr Chifty identified two flaws, in particular, with IPE's revised cigar model: (1) IPE's failure to use all available RMSS data dating back to 2001 (i.e. IPE's decision to limit the sample period from July 2006 onward); and (2) IPE's use of a price variable, which it had not used in its initial cigar model. Dr Chifty showed that, as modified, IPE's own model consistently demonstrated a negative and statistically significant effect of the TPP measures upon cigar smoking prevalence.

<sup>1193</sup> Dominican Republic's appellant's submission, para. 222.

<sup>1194</sup> Panel Report, Appendix C, para. 99.

<sup>1195</sup> Dominican Republic's appellant's submission, para. 234.

detect the effect of a policy. It is telling that neither the Dominican Republic nor its expert, IPE, can point to any policy, economic or otherwise, that would cause a break in the trend in July 2006, but appear to acknowledge that Dr Chipty's regression-adjusted trend line captures the effects of known impacts upon cigar prevalence, such as excise tax increases. The Dominican Republic's figure simply highlights the ability of Dr Chipty's regression-adjusted trend line to detect the effect of policies on cigar smoking prevalence.

937. The Dominican Republic's argument that the Panel did not "engage" with the Dominican Republic's evidence on cigar prevalence is, in essence, an argument that the Panel was *required* to address the issue of how to control for time/trend variables *in the specific context of IPE's cigar model, as modified by Dr Chipty*, notwithstanding the fact that the Panel made clear at the outset of its prevalence analysis that it would not separately evaluate the evidence relating to *different* tobacco products. The Panel did, in fact, evaluate the proper choice of sample periods in the RMSS data and different issues associated with the use of time/trend variables, and those findings would apply equally to IPE's cigar model. Moreover, the Panel made specific findings in respect of IPE's cigar model, finding, for example, that "[s]ome results of IPE's modified trend analysis even suggest that the TPP measures have led to statistically significant increase in cigar smoking prevalence."<sup>1196</sup> In concluding step 3 of its analysis of whether the TPP measures contributed to the reduction in smoking prevalence, the Panel specifically stated that "[a] similar conclusion applies also to cigar smoking prevalence" after concluding that the measures contributed to the reduction in overall prevalence.<sup>1197</sup> The Panel was not required under Article 11 of the DSU to refer to each and every argument and piece of evidence in order to undertake an objective assessment of the matter.<sup>1198</sup>

938. As for the Dominican Republic's claim of a lack of "even-handedness", this argument misapprehends, once again, the purpose for which each side submitted evidence in this dispute. Australia did not set out to prove, and had no need to prove, that a portion of the observed declines in smoking prevalence could be attributed to a decline in *cigar* smoking prevalence. As with its other rebuttal evidence, Australia's expert identified flaws in the *complainants'* econometric models and showed that, once their principal flaws were corrected, these models were consistent with an effect of the TPP measures upon cigar smoking prevalence. The Panel did not need to find that Dr Chipty had resolved *all* issues with the complainants' econometric evidence in order to find that there was "some econometric evidence suggesting that the TPP measures ... contributed to the reduction ... in cigar smoking prevalence observed after their entry into force."<sup>1199</sup>

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<sup>1196</sup> Panel Report, Appendix C, para. 108.

<sup>1197</sup> Panel Report, Appendix C, para. 122.

<sup>1198</sup> See Appellate Body Report, *Brazil – Retreaded Tyres*, para. 202. See also Appellate Body Report, *China – Rare Earths*, para. 5.221 ("[T]he fact that the Panel did not specifically refer to this evidence simply indicates that the Panel did not consider it relevant to the specific issue before it, or did not attribute to it the weight or significance that China considers it should have.").

<sup>1199</sup> Panel Report, Appendix C, para. 123(c).

## ANNEX 2: HONDURAS'S CLAIMS REGARDING PROFESSOR KLICK'S SUBMISSIONS

939. In an annex to its submission, Honduras "elaborate[s]" on its claim, set out in Section VIII.2.2 of its appellant's submission, that the Panel "disregarded, misrepresented, and distorted" Honduras's evidence.<sup>1200</sup> In this annex, Honduras devotes 23 pages to a review of the arguments presented to the Panel by its expert, Professor Klick.<sup>1201</sup>

940. While there is no need for the Appellate Body to engage with this "supplement" to Honduras's claim,<sup>1202</sup> for the sake of completeness, Australia briefly explains why it lends no support to Honduras's claim of error.

941. First, as a factual matter, Australia notes that the Panel *did* in fact examine the arguments presented by Professor Klick that Honduras claims it "disregarded". As Australia explained in Section VII.E through G, the Panel's findings in the Appendices spell out why it was *not persuaded* by the complainants' experts, including Professor Klick and his preferred methodologies for assessing smoking prevalence. In particular, Professor Klick failed to persuade the Panel that the use of a quadratic trend variable instead of a linear trend variable,<sup>1203</sup> or use of a price variable instead of a tax dummy variable,<sup>1204</sup> was appropriate. Nor was the Panel prepared to rely on the results of Professor Klick's proposed difference-in-difference model for the reasons it explained.<sup>1205</sup>

942. In reiterating Professor Klick's failed arguments on these issues, it is Honduras that "disregards" the Panel's carefully documented reasons for rejecting Professor Klick's evidence.<sup>1206</sup> The Panel repeatedly "question[ed] the validity"<sup>1207</sup> of

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<sup>1200</sup> See Honduras's appellant's submission, para. 1082.

<sup>1201</sup> See Honduras's appellant's submission, para. 1082.

<sup>1202</sup> See Honduras's appellant's submission, para. 1082.

<sup>1203</sup> See Panel Report, Appendix C, para. 112.

<sup>1204</sup> See Panel Report, Appendix C, para. 120.

<sup>1205</sup> See Panel Report, Appendix C, para. 114. See also Panel Report, Appendix A, para. 72.

<sup>1206</sup> See Honduras's appellant's submission, Annex, p.339 ("Professor Klick provides rebuttal arguments to Chipty's groundless critique of his use of a quadratic trend instead of a linear trend. ... The Panel disregards such points and fails to address them."); p.327 ("the Panel disregards material evidence presented by Honduras in respect of Dr Chipty's econometric analysis of the RMSS data. ... For example, Professor Klick points out the problematic aspects of Dr Chipty's methodological approach relating to her use of controls for excise tax increases rather than price."); p. 338 ("the Panel disregards important rebuttals by Professor Klick in relation to Dr Chipty's criticisms that New Zealand is not a proper counterfactual to Australia.").

<sup>1207</sup> See Panel Report, Appendix C, para. 114. See also Panel Report, Appendix A, para. 69 (finding it to be "unclear to what extent Professor Klick's findings are the result of his model specification", "unclear why Professor Klick decided to discard data from April 2006 to December 2008", and "unclear if Professor Klick's findings are affected by the changes in the survey's sampling methods", and further noting that "Professor Klick also did not provide an explanation as to why the TPP measures would decrease GHW effectiveness, as suggested by some of his counter-intuitive results."); Panel Report, Appendix B, para. 73 ("[W]e are not persuaded by Professor Klick's claim that

(continued)

Professor Klick's models and expressed its concern at his "puzzling" results,<sup>1208</sup> which at times were so contradictory as to be "at odds with the view shared by all the experts of the Dominican Republic, Honduras and Indonesia, *including Professor Klick*".<sup>1209</sup> The Panel made no secret of its concerns regarding the reliability of Professor Klick's results.<sup>1210</sup> In light of these documented concerns, Australia is surprised by Honduras's apparent desire for the Panel to have spent *more* time in its final report discussing Professor Klick's submissions.

943. Second, Australia has already explained that the types of grievances alleged by Honduras with respect to the Panel's treatment of Professor Klick's evidence do not constitute errors under Article 11 of the DSU. In Section VII.B, Australia detailed the scope of a panel's discretionary authority to weigh the evidence and explain its findings. Australia explained that "[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."<sup>1211</sup> Nor then does a panel err because it declines to accord to the evidence the weight that *one of the parties' experts* believes should be accorded to it. Australia also explained that a panel does not err in only citing select expert opinions in its final report, and that a panel has discretion in choosing the evidence on which it relies.<sup>1212</sup> Finally, Australia established that "it is incumbent on a participant raising a claim under Article 11 on appeal to explain *why* the alleged error meets the standard of review under that provision" – simply *asserting* that an error is "material" is insufficient.<sup>1213</sup>

944. Accordingly, Honduras has again failed to discharge its burden under Article 11 of the DSU. The Panel's treatment of Professor Klick's evidence lies squarely within the bounds of its proper discretionary authority. Honduras's allegations that the Panel "materially misrepresented" and "distorted" Professor Klick's evidence, and

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unadjusted models, which do not control for individual characteristics and tobacco control policies, should be considered at least equally valid compared to adjusted models"); Panel Report, Appendix C, para. 112 ("[A] review of the econometric results based on the RMSS data reported by Professor Klick leads us to question their robustness"); Panel Report, Appendix C, para. 113. ("Our review of Professor Klick's econometric analyses of the TPP measures' impact on smoking prevalence and incidence based on the other datasets leads us also to question his results.").

<sup>1208</sup> Panel Report, Appendix C, para. 117.

<sup>1209</sup> Panel Report, Appendix C, para. 116 (emphasis added). See also Panel Report, Appendix D, fn 27 (noting that "Professor Klick is the only one of the complainants' experts to reject the claim that the Aztec dataset's market coverage has increased.").

<sup>1210</sup> Panel Report, Appendix C, para. 116 (finding that several of Professor Klick's results "suggest that the TPP measures 'backfired'" and that "[i]t is unclear what such results can be attributed to, and for that reason we cannot consider these results as relevant."), para 118 (expressing "reservations regarding Professor Klick's methodologies and therefore question[ing] his contradictory results").

<sup>1211</sup> See, e.g. Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.219.

<sup>1212</sup> See, e.g. *EC – Hormones*, paras. 135, 138.

<sup>1213</sup> See Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – United States)*, para. 5.157, quoting Appellate Body Report, *EC – Fasteners*, para. 442 (emphasis in original).

did not "objectively assess" Professor Klick's critiques of Australia's evidence,<sup>1214</sup> do nothing more than challenge the *weight* that the Panel accorded to his evidence.<sup>1215</sup> Likewise, Honduras's numerous allegations that the Panel "disregarded" Professor Klick's rebuttals do nothing more than challenge the particular evidence that the Panel chose to rely upon and cite in its final report.<sup>1216</sup> Since such allegations fail to meet the requirements of an Article 11 claim, they must be rejected.

945. Moreover, since the annex to Honduras's submission is merely an attempt to rehabilitate the reports submitted by Professor Klick, which the Panel examined and properly rejected, the Appellate Body should reject Honduras's claim of error in Section VIII.2.2 of its submission, as "elaborate[d]" in its annex, in its entirety.

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<sup>1214</sup> See, e.g. Honduras's appellant's submission, Annex, p. 319 ("These are important reasons to reject the affirmative conclusions by Dunlop et al. 2014 ... However, nowhere in the report does the Panel reflect, let alone objectively assess, this material evidence."); p. 318 ("the Panel merely refers to one of prof Klick's findings in relation to 'thought about enjoying smoking' and states that 'we are also not persuaded that [it] is directly relevant to assess the impact of the appeal of tobacco products', but fails in its entirety to examine his pertinent general criticism of the evidence relied on by Australia."); p. 337 ("Professor Klick finds, even when addressing all of Dr Chifty's concerns, 'that plain packaging is not associated with a decline in the retail sales of cigarettes in Australia'. However, nowhere in the Panel Report are these material rebuttals by Professor Klick reflected, let alone objectively examined, by the Panel."); pp. 321, 324, 325 ("the Panel disregards and misrepresents important findings by Professor Klick in relation to Durkin *et. al.* 2015, as presented by Australia."); p. 328 ("In a single sentence the Panel states that 'Professor Klick raise[s] a number of criticisms of Dr Chifty's econometric approaches', but then never reflects – let alone objectively examines – what these 'criticisms' are."); p.340 ("Professor Klick demonstrates that the reported drop in cigarette sales volumes since the implementation of the TPP measures, as reported in Chifty's analysis of the IMS/EOS data, is smaller than drops in the recent past in Australia or compared to New Zealand. However, the Panel does not reflect, let alone objectively examine[d], this critical aspect of Honduras's presentation of its case.").

<sup>1215</sup> See, e.g. Honduras's appellant's submission, Annex, pp. 319-20 (claiming that the Panel "misrepresents and distorts" the findings by Professor Klick on the effectiveness of the GHWs); p. 320 (claiming that the Panel "distorts" the arguments and findings by Professor Klick relating to the ability of tobacco packaging to mislead consumers); p. 324 (claiming that the Panel "materially misrepresents and distorts the evidence presented by Honduras relating to pack concealment").

<sup>1216</sup> See, e.g. Honduras's appellant's submission, Annex, p.318 ("the Panel fails to reflect and address relevant expert evidence prepared by Professor Klick rebutting arguments by Australia's expert, Professor Chaloupka, in relation to his NTPPTS findings"); p. 337 ("the Panel disregards important rebuttals by Professor Klick to Dr Chifty's groundless argument that his analysis of the IMS/EOS data was misleading as it failed to account for alleged 'strategic inventory management that likely took place on the eve of the December 2013 tax increase in the post-TPP period.'); p.330 ("the Panel disregards important rebuttals by Professor Klick to Dr Chifty's argument that the Roy Morgan Research data shows that Australians cited health as the primary reason for quitting whereas New Zealanders cited costs as the primary reason. Indeed, Professor Klick addresses this groundless argument..."); p.337 ("the Panel disregards important rebuttals by Professor Klick to Dr Chifty's groundless argument that his analysis of Nielsen data is 'uninformative' because the cigarette sales volume misleading is 'trending down faster' in New Zealand compared to Australia.").