

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)**

Executive Summary of Australia's Appellee Submission

Geneva, 2 October 2018

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

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

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

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

5. The appellants' contentions are, however, utterly belied by the depth and thoroughness of the Panel's 1,266 page report.² Instead of rushing to judgment, as the appellants contend, the Panel engaged in a comprehensive review of over 5,000 pages of party submissions, over 1,600 exhibits, and over 80 expert reports.³ In Australia's

¹ Honduras's appellant's submission, para. 11. See also Dominican Republic's appellant's submission, para. 1245.

² The Panel Report consists of 889 pages in the main body of the Report, plus 152 pages of analysis of the post-implementation evidence and 226 pages of annexures.

³ 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.

view, it is fair to say that the Panel Report before the Appellate Body represents the most far-reaching assessment of an evidentiary record in the history of the DSB, encompassing, *inter alia*, complex issues of public health, behavioural theory, marketing, and econometrics.

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

I. THE CONTEXT OF THIS APPEAL

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

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

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

- the pre-implementation evidence, as contained in numerous studies published in peer-reviewed journals, was not of "a quality or methodological rigour" sufficient to provide a reliable basis for implementing the TPP measures;

- tobacco packaging is *not* a form of advertising or promotion, despite tobacco industry documents confirming that it is, and has been used as such over decades;
- even if tobacco packaging *is* a form of advertising or promotion, it cannot serve this function in the context of Australia's dark market; and
- even if branding on tobacco packaging influences consumer behaviour, this influence is limited to *existing* consumers' choices to smoke one brand over another (secondary demand) as opposed to attracting *new* smokers to initiate smoking (primary demand).

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

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

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

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

- failed to demonstrate that the pre-implementation evidence was so fundamentally flawed as to provide *no* support for the operation of the TPP measures;
- failed to persuade the Panel that tobacco packaging has *no* influence on smoking behaviours, particularly in a dark market like Australia;

- failed to persuade the Panel that the effects of branding on tobacco packaging are limited to secondary demand, to the exclusion of primary demand for such products;
- failed to demonstrate that the TPP measures would not be capable of reducing the appeal of tobacco products and, consequently, affect smoking behaviours;
- failed to demonstrate that existing levels of health knowledge and risk awareness in Australia were such that they could not be increased by enhancing the effectiveness of graphic health warnings ("GHWs") and, consequently, affect smoking behaviours; and
- failed to demonstrate that the TPP measures, by design, would not be capable of reducing the ability of tobacco packaging to mislead consumers and, consequently, affect smoking behaviours.

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

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

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

- packaging *does* function as advertising and promotion, and operates to sustain primary demand for tobacco products to replace those smokers who quit or die;
- tobacco plain packaging affects consumer behaviour;

⁴ Panel Report, para. 7.636.

⁵ Panel Report, para. 7.1037.

- tobacco plain packaging has reduced the appeal of tobacco products and increased the effectiveness of GHWs in precisely the manner intended; and
- the TPP measures have not backfired, and that rates of prevalence and consumption in Australia continued to *decline* following the implementation of the measures.

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

II. CLAIMS UNDER THE TRIPS AGREEMENT

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

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

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

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

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

⁶ Panel Report, para. 7.1974.

⁷ Panel Report, para. 7.1974.

⁸ Honduras's appellant's submission, para. 349.

⁹ Honduras's appellant's submission, para. 429.

22. 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, and should be rejected by the Appellate Body for the same reasons. As the Panel properly found, nothing in the text of Article 16.1 suggests that Members must "maintain market conditions that would enable the circumstances set out in this provision, including a likelihood of confusion, to actually occur in any particular situation. Rather, Members must ensure that in the event that these circumstances *do* arise, a right to prevent such use is provided."¹⁰

23. 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".¹¹ 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.¹² 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*.

24. 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 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.

25. 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."¹³ In that event, Honduras argues that the Panel erred by not interpreting the term "unjustifiably" "as requiring that less trademark encumbering alternative measures that provide an equivalent contribution be preferred."¹⁴

26. 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

¹⁰ Panel Report, para. 7.2000 (emphasis original).

¹¹ Honduras's appellant's submission, para. 52.

¹² Honduras's appellant's submission, para. 146.

¹³ Honduras's appellant's submission, para. 54.

¹⁴ Honduras's appellant's submission, para. 231.

complainants. In other words, the Panel did what Honduras alleges it was required to do.

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

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

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

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

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

III. CLAIMS UNDER THE TBT AGREEMENT

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

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

32. At the core of the appellants' claim of error lies a disagreement as to whether any limitations on "competitive opportunities" in the marketplace, and in particular the reduced opportunity to compete on the basis of brand differentiation, sufficed to

¹⁵ Honduras's appellant's submission, para. 266.

¹⁶ Panel Report, para. 7.2563 (emphasis added).

establish that the TPP measures are "trade-restrictive" under Article 2.2 of the TBT Agreement. In Australia's view, the "competitive opportunities" standard of trade-restrictiveness espoused by the appellants finds no basis in either the text of Article 2.2, properly interpreted, or in the Appellate Body's findings in prior cases. This overly broad legal standard would read the terms "trade-restrictive" and "obstacles to international trade" out of the text of Article 2.2.

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

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

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

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

¹⁸ Appellate Body Report, *US – COOL*, para. 477.

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

²⁰ Panel Report, para. 7.1074.

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

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

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

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

39. The Panel neither compromised the Dominican Republic's due process rights nor "made the case" for Australia in its graphical analysis in Figure E.6. A panel has the authority under Article 11 of the DSU to develop its own reasoning and is not required to restrict itself to the evidence and arguments presented by the parties.²¹ 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.²² Moreover, the Panel is "not required to test its intended reasoning with the parties",²³ and any concerns the Dominican Republic might have had about Figure E.6 could have been raised in the interim review stage under Article 15 of the DSU.

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

²¹ Appellate Body Report, *EC – Hormones*, para. 156.

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

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

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

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

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

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

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

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

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

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

The Panel correctly found that neither of these alternatives would have any effect on the communication functions of the pack, while the TPP measures have the effect of increasing the effectiveness of GHWs by increasing their salience, making them easier to see, more noticeable, and perceived as more credible and more serious.

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

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

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

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

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

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

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

52. The appellants' assurance that they have followed "the Appellate Body's guidance" and "carefully considered whether, and in which specific instances, to challenge the lack of objectivity of the Panel's assessment of the matter" rings hollow

given both the scale and nature of their Article 11 claims.²⁴ Together, the appellants have alleged, *inter alia*, that the Panel: denied them due process because they were denied any meaningful opportunity to comment on various aspects of the Panel's evaluation of the expert evidence; denied them due process by relying on the technical staff of the WTO Secretariat (disparagingly referred to as a "ghost expert") instead of appointing an expert; lacked "even-handedness" in its approach to the evidence; and failed to provide reasoned and adequate explanations for its findings. In making these far-reaching claims, the appellants' strategy appears to be to re-litigate factual issues that they lost before the Panel.

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

- A premise of many of the appellants' claims is that the Panel was required to test all of its reasoning with the parties in order to afford due process. The Appellate Body has previously rejected this proposition.²⁵ 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", 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."²⁶ While the appellants assert that the Panel "depart[ed] ... radically" from the evidence and arguments presented by the parties, the evidentiary record demonstrates otherwise.
- The complainants did not utilise the interim review process to raise substantive concerns about the evaluation of the evidence, as provided for under Article 15 of the DSU. Neither appellant raised concerns regarding the Panel's assessment of the factual evidence or identified errors with respect to the Panel's evaluation of the statistical or econometric evidence when they provided their written comments on the interim report, nor did either appellant request a further meeting with the Panel to discuss any aspect of that evaluation. In these circumstances, there was no failure to accord due process.
- The complainants made no request for the Panel to exercise its authority to appoint an expert or group of experts during the course of the proceedings under Article 14.2 of the TBT Agreement or Article 13.2 of the DSU. In light of this, the appellants' arguments that the Panel failed to afford them due process by not appointing an expert, and criticising the Panel for utilising the WTO Secretariat (as the "ghost expert") for technical support, as contemplated under Article 27 of the DSU, must be rejected.
- The complainants entirely ignore that they bore the burden of proving that the TPP measures are *incapable* of contributing to Australia's objective, as

²⁴ See Dominican Republic's appellant's submission, para. 33.

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

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

outlined below, and that the Panel properly scrutinised both parties' evidence for the purpose for which it was provided.

- The complainants' claims that the Panel failed to provide reasoned and adequate explanations are unfounded given that the Panel Report included over 300 pages of detailed analysis of the evidence relating to the contribution of the TPP measures.²⁷

A. Legal Standard for Article 11 of the DSU

54. Under Article 11 of the DSU, a panel must "consider all the evidence presented to it, assess its credibility, determine its weight and ensure that its factual findings have a proper basis in that evidence."²⁸ The Appellate Body has repeatedly stated that "panels enjoy a 'margin of discretion' as triers of fact",²⁹ 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.'"³⁰

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

- First, that the Panel erred by "exceed[ing] the bounds of its discretion, as the trier of facts".³¹ This discretionary authority includes, *inter alia*, weighing the evidence, developing reasoning independent of the parties, framing the explanation for its findings, and balancing due process rights.
- Second, that the error is so material that it "undermine[s] the objectivity of the panel's assessment of the matter before it".³² That is, even if the appellants could establish that the Panel exceeded the bounds of its discretion, they would still need to demonstrate that the Panel's errors *materially* undermined its findings, by invalidating or vitiating the basis for those findings.³³

56. As explained below, none of the appellants' alleged errors, individually or cumulatively, materially undermine the Panel's ultimate legal conclusion that the

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

²⁸ 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.

²⁹ See Appellate Body Report, *Japan – Apples*, para. 221.

³⁰ See Appellate Body Report, *Japan – Apples*, para. 222.

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

³² Appellate Body Report, *US – Aircraft*, para. 992.

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

complainants failed to meet their burden of proving that the TPP measures are not apt to make a contribution to Australia's legitimate objective.

B. The Complainants' Burden of Proof

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

58. The complainants sought to make their *prima facie* case under Article 2.2 of the TBT Agreement by arguing, *inter alia*, that the TPP measures "*cannot contribute to their objective* through the mechanisms identified in the TPP Act, and that post-implementation evidence shows that *smoking prevalence has not in fact been reduced* as a result of the TPP measures."³⁵ 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.³⁶

59. The complainants undertook this burden in the particular circumstances of this dispute, in which it was undisputed that Australia's market for tobacco products is *entirely* sourced from imports.³⁷ 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.

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

³⁵ Panel Report, para. 7.485 (emphasis added).

³⁶ 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.

³⁷ Panel Report, para. 7.1207.

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

61. The Panel approached its assessment of the pre- and post-implementation evidence submitted by the parties in light of the burden of proof that the complainants undertook. In relation to the design, structure and operation of the TPP measures, the Panel explained that it was not persuaded that, "*as the complainants argue, [the measures] would not be capable of contributing to Australia's objective*".³⁸

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

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

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

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

C. Materiality of Alleged Errors

66. Australia will demonstrate below that the appellants' claims under Article 11 of the DSU are without merit. However, even if the appellants could establish that the Panel "exceeded the bounds of its discretion, as the trier of facts" in relation to the

³⁸ Panel Report, para. 7.929 (emphasis added).

³⁹ Panel Report, para. 7.1036.

⁴⁰ Panel Report, para. 7.1037.

⁴¹ Panel Report, para. 7.1025 (emphasis added).

alleged errors, the appellants would still need to demonstrate that the Panel's errors *materially* undermine its findings.⁴²

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

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

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

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

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

72. With respect to the evidence on smoking prevalence and consumption (Appendices C and D), the Panel explained that "overall", it found this evidence

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

⁴³ See, e.g. Dominican Republic's appellant's submission, para. 626.

⁴⁴ Panel Report, para. 7.938.

"consistent with a finding that the TPP measures contribute to a reduction in the use of tobacco products,"⁴⁵ but did not state that this conclusion was necessary to its overall conclusion that the complainants had failed to demonstrate that the TPP measures are not apt to contribute to Australia's objective.

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

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

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

⁴⁵ Panel Report, para. 7.1037.

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

⁴⁷ Panel Report, para. 7.1025 (emphasis added).

D. Claims Regarding the Pre-Implementation Evidence

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

75. As outlined in brief above, the Panel began its contribution analysis by examining the design, structure, and operation of the TPP measures, and accepted that the evidence available to Australia prior to the implementation of the measures supported the operation of the "causal chain" model under the TPP Act. In relation to the three causal mechanisms of the TPP measures (reducing the appeal of tobacco products, increasing the effectiveness of GHWs and reducing the ability of the pack to mislead consumers about the harmful effects of smoking), the Panel concluded on the basis of the pre-implementation evidence that:

- The complainants had not persuaded the Panel that the TPP measures would not be capable of reducing the appeal of tobacco products (the first mechanism) and thereby contribute to Australia's objective by affecting smoking behaviours such as initiation, cessation and relapse.⁴⁸ In reaching this conclusion, the Panel made a series of intermediate findings that: (i) branded packaging *can* act as an advertising or promotional tool, and *has* been utilised as such by tobacco companies operating in Australia's dark market;⁴⁹ (ii) there is a body of evidence emanating from qualified sources supporting the proposition that the plain packaging of tobacco products reduces the appeal of those products to consumers;⁵⁰ and (iii) the complainants had not shown that this reduction in appeal would not be capable of influencing young people's perceptions and decision-making to impact upon initiation of tobacco use, or that tobacco plain packaging would not be capable of affecting the ability of smokers to quit smoking or to remain quit.⁵¹
- The complainants had not persuaded the Panel that the TPP measures would not be capable of increasing the effectiveness of GHWs (the second mechanism) and thereby contribute to Australia's objective by affecting smoking behaviours such as initiation, cessation and relapse.⁵² In reaching this conclusion, the Panel likewise made a series of intermediate findings that: (i) the complainants had failed to establish that GHWs could not be made *more* effective, despite the high level of knowledge or risk awareness in Australia;⁵³ (ii) there was evidence supporting the proposition that, in the presence of tobacco plain packaging, the impact and effectiveness of GHWs was increased;⁵⁴ and (iii) the complainants had

⁴⁸ Panel Report, paras. 7.777, 7.778.

⁴⁹ Panel Report, paras. 7.655-7.662, 7.659, 7.638.

⁵⁰ Panel Report, paras. 7.667, 7.682, 7.683.

⁵¹ Panel Report, paras. 7.774-7.778.

⁵² Panel Report, para. 7.869.

⁵³ Panel Report, para. 7.843.

⁵⁴ Panel Report, para. 7.825.

not demonstrated that the removal of branding elements which communicate messages which compete with or detract from GHWs could not be capable of influencing smoking behaviours, including initiation and cessation.⁵⁵

- The complainants had not persuaded the Panel that the TPP measures, by reducing the ability of tobacco packaging to mislead consumers about the harmful effects of smoking (the third mechanism), would not be capable of impacting smoking cessation.⁵⁶ In reaching this conclusion the Panel again made a series of intermediate findings that: (i) the complainants had not demonstrated that the TPP measures were not capable of reducing the ability of the pack to mislead consumers about the harmfulness of tobacco use;⁵⁷ (ii) the complainants had not persuaded the Panel that the TPP measures could not operate as intended to a greater extent than what was already possible under existing laws;⁵⁸ and (iii) the complainants had not demonstrated that the TPP measures, by reducing the ability of tobacco packaging to mislead consumers about the harmful effects of smoking, would not have an effect on smoking behaviours, such as cessation.⁵⁹

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

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

77. The Dominican Republic claims that the Panel acted inconsistently with Article 11 of the DSU by failing to engage with evidence demonstrating that branded tobacco packaging *in Australia* was not appealing.⁶⁰ The Dominican Republic also claims that the Panel's reasoning was "internally incoherent", because the Dominican Republic alleges that its evidence directly contradicts the Panel's finding that tobacco packaging is used to convey positive associations to the consumers.⁶¹ These claims are unsustainable.

78. The Panel expressly took into account evidence specific to the Australian market *and* acknowledged the Dominican Republic's argument that "even before the

⁵⁵ Panel Report, paras. 7.860, 7.863.

⁵⁶ Panel Report, para. 7.924.

⁵⁷ Panel Report, para. 7.904.

⁵⁸ Panel Report, para. 7.917.

⁵⁹ Panel Report, para. 7.924.

⁶⁰ Dominican Republic's appellant's submission, para. 700.

⁶¹ Dominican Republic's appellant's submission, para. 740.

TPP measures were introduced, Australia's packaging had negative appeal".⁶² Moreover, the Dominican Republic's argument regarding the internal coherence of the Panel's findings implies that the perception of tobacco products prior to the introduction of the TPP measures *was as negative as Australia could reasonably hope to achieve*. The Dominican Republic's claim that the pre-implementation evidence demonstrated that the appeal of tobacco packaging could not be further reduced in Australia is also irreconcilable with the findings of its own expert that the TPP measures *have in fact reduced the appeal of tobacco packaging in Australia*.⁶³

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

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

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

E. Claims Regarding the Post-Implementation Evidence

82. The appellants have focused the bulk of their extensive claims under Article 11 on the Panel's analysis of the empirical evidence relating to the application of the measures following their entry into force in December 2012 (i.e. the "post-implementation evidence"). Australia will address the appellants' claims in relation to the Panel's analysis of the evidence concerning "proximal" outcomes (Appendix A) and "distal" outcomes (Appendix B) in Part IV.E.1 below, and will

⁶² Panel Report, paras. 7.657, 7.436.

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

⁶⁴ Honduras's appellant's submission, para. 800.

⁶⁵ Honduras's appellant's submission, para. 801.

⁶⁶ Dominican Republic's appellant's submission, para. 747-779; Honduras's appellant's submission, paras. 806-814.

⁶⁷ Panel Report, para. 7.1036 (emphasis added).

address the appellants' claims in relation to the Panel's analysis of the evidence relating to smoking behaviours (Appendices C and D) in Part IV.E.2 below.

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

83. The Panel commenced its analysis of the post-implementation evidence in Appendix A by assessing the studies that focused on the impact of the TPP measures and enlarged GHWs on non-behavioural proximal outcomes (i.e. reduced appeal of tobacco products, increased effectiveness of GHWs, and reduced ability of the pack to mislead consumers about the harmful effects of smoking). The Panel concluded that there was empirical evidence, supported by findings of the complainants' own experts, that the TPP measures have reduced the appeal of tobacco products and increased the noticeability of GHWs.⁶⁸ The Panel considered that this evidence "confirms, rather than discredits, the 'hypothesized direction'" of the TPP measures.⁶⁹

84. Having made these findings, the Panel then considered the impact of the TPP measures on "distal outcomes" in Appendix B (i.e. quitting-related cognitions, pack concealment, quit attempts, etc.). Despite the inherent challenges in the data, as identified by the Panel,⁷⁰ the Panel nonetheless concluded that while some of the results were "limited" or "limited and mixed", the available post-implementation empirical evidence on the "distal" outcomes suggests that the TPP measures are operating as expected in terms of statistically significant effects on avoidant behaviours and increased calls to Quitline.⁷¹ Furthermore, the Panel rejected the complainants' argument that, even if the TPP measures had the expected effects on antecedent behaviours (which they maintained, it had not), then these effects would be susceptible to "wear out".⁷²

85. The appellants' claims under Article 11 of the DSU in relation to the Panel's analysis of the evidence in Appendices A and B also lack merit and should be rejected.

86. First, both appellants argue that the Panel's findings are "incoherent" or lack a "reasoned and adequate basis".⁷³ Specifically, the appellants argue that, in its holistic

⁶⁸ Panel Report, para. 7.955; Panel Report, Appendix A, para. 29.

⁶⁹ Panel Report, para. 7.954.

⁷⁰ Panel Report, Appendix B, para. 118 (the Panel noted that the survey data used in the studies may be more suited to analysing the impact of the TPP measures and enlarged GHWs on "proximal" outcomes than more "distal" outcomes, especially because none of the survey datasets "track non-smokers who might have taken up smoking in the absence of the TPP measures and enlarged GHWs.").

⁷¹ Panel Report, para. 7.963.

⁷² Panel Report, para. 7.941. The Panel noted that it was not persuaded that the examples cited by the complainants to support this argument were directly transposable to the effects of the TPP measures on relevant behavioural outcomes.

⁷³ See, e.g. Dominican Republic's appellant submission, paras. 893-919; Honduras's appellant submission, paras. 755-794.

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.⁷⁴

87. What the appellants are challenging is the Panel's discretion to assess the credibility, determine the weight, and make findings on the basis of the evidence on the panel record. The appellants ignore the fact that the Panel weighed the evidence in Appendices A and B cognizant of the limitations of the post-implementation data and in relation to the complainants' undisputed burden of proving that the TPP measures are *incapable* of contributing to Australia's objective through the operation of the proposed "causal chain". The evidence in Appendices A and B was more than sufficient to support the Panel's overall finding that the complainants had not met this *prima facie* burden.

88. Second, the Dominican Republic argues that the Panel's summary of the effect of the TPP measures on distal outcomes "lacks coherence" with the Panel's own findings in Appendix B of its Report.⁷⁵ These arguments need not detain the Appellate Body long. Each of the Dominican Republic's allegations under this "second claim of error" relies on a selective reading of the Panel's analysis and conclusions. Once the Dominican Republic's misrepresentations are corrected, its arguments lack any foundation.

89. Third, the Dominican Republic argues that the Panel's assessment of the robustness of certain of the parties' evidence in Appendix B was inconsistent with Article 11 of the DSU. Given that these claims of error are self-evidently not material to the Panel contribution findings,⁷⁶ Australia does not believe that they merit further attention.

90. In sum, the appellants' claims under Article 11 with respect to "proximal" and "distal" outcomes are wholly lacking in merit, and should be rejected.

2. The Appellants' Claims Regarding Appendices C and D Are Unfounded

91. Having found that the early post-implementation evidence on proximal and distal outcomes confirmed that the TPP measures were operating "as intended", the Panel proceeded to examine the post-implementation evidence concerning rates of tobacco smoking (prevalence) and the volume of tobacco products sold

⁷⁴ See, e.g. Dominican Republic's appellant's submission, paras. 877-878, 881; Honduras's appellant's submission, paras. 773-775.

⁷⁵ Dominican Republic's appellant's submission, section II.F.3.c.

⁷⁶ The Dominican Republic expressly acknowledges in relation to its first "robustness claim" that "[f]rom a 'big picture' perspective, this difference [in duration of the statistically significant increase in calls to Quitline] is not material to an assessment of the success of the TPP measures." Dominican Republic's appellant's submission, para. 971. Nonetheless, the Dominican Republic devotes nearly 20 pages of its appellant submission to its argument that the Panel erred in its assessment of the Quitline calls evidence.

(consumption). The Panel detailed its findings on prevalence and consumption in Appendices C and D, respectively.

92. Initially, the complainants sought to demonstrate that the TPP measures are not apt to contribute to Australia's legitimate objective because the measures had "backfired" by causing an *increase* in at least certain categories of prevalence and consumption. The complainants abandoned this position when the evidence established that rates of prevalence and consumption had continued to *decline* following the implementation of the TPP measures. The complainants then changed tactics and sought to prove that *no portion* of the observed declines in prevalence and consumption could be *attributed* to the effects of the TPP measures. To this end, the complainants sought to prove, first, that declines in prevalence and consumption had not *accelerated* since the implementation of the TPP measures in December 2012.⁷⁷ Second, the complainants submitted econometric models purporting to show that the TPP measures had not made a statistically significant contribution to the observed declines.⁷⁸

93. In its assessment of the evidence on prevalence (Appendix C) and consumption (Appendix D), the Panel divided its analysis into three steps. First, the Panel examined evidence relating to whether prevalence or consumption "has decreased following the implementation of the TPP measures".⁷⁹ Second, the Panel examined evidence relating to whether the reduction in prevalence or consumption "has accelerated" following the implementation of the TPP measures.⁸⁰ Third, the Panel examined evidence relating to whether the TPP measures "have contributed to a reduction" in smoking prevalence or consumption, "by isolating and quantifying the different factors that can explain the evolution" of prevalence and consumption.⁸¹

94. With respect to the first and second steps in its analyses, the Panel found that prevalence and consumption had *declined* and the rate of decline had *accelerated* following the implementation of the TPP measures. The appellants do not challenge the first finding. Only the Dominican Republic challenges the finding of *acceleration* in the case of prevalence, but this challenge is based on a blatant mischaracterisation of the Panel's earlier findings. In Australia's view, there is no credible dispute that prevalence and consumption declined following the implementation of the TPP measures, and that the rates of decline accelerated in both cases.

95. With respect to the third step in its analyses, the Panel identified multiple flaws in the complainants' econometric models purporting to demonstrate that *no portion* of the observed declines in prevalence and consumption could be attributed to the TPP measures, as opposed to other factors that affect prevalence and consumption. Among the principal flaws that the Panel identified was the fact that

⁷⁷ Panel Report, para. 7.971(b); Panel Report, para. 7.977(b).

⁷⁸ Panel Report, para. 7.971(c); Panel Report, para. 7.977(c).

⁷⁹ Panel Report, Appendix C, para. 5; Panel Report, Appendix D, para. 6.

⁸⁰ Panel Report, Appendix C, para. 5; Panel Report, Appendix D, para. 6.

⁸¹ Panel Report, Appendix C, para. 5; Panel Report, Appendix D, para. 6.

many of the complainants' prevalence models suggested that *undisputed* determinants of prevalence – such as the price of tobacco products and increases in excise taxes – did not have a statistically significant effect upon rates of prevalence. The Panel identified similar flaws in the complainants' consumption models, including the fact that many of these models sought to control for tobacco prices as a separate determinant of consumption without acknowledging that the TPP measures themselves affect tobacco prices. The Panel questioned the validity and probative value of econometric evidence that produced these types of anomalous results and that contained these types of flaws, while purporting to prove that the TPP measures had made *no* contribution to the observed declines in prevalence and consumption.

96. During the course of the panel proceedings, Australia's econometric experts, principally Dr Tasneem Chipty, submitted rebuttal evidence identifying flaws in the complainants' econometric models and further demonstrating that, once the principal flaws in these models were corrected, the model results were consistent with a negative and statistically significant contribution of the TPP measures to the observed declines in prevalence and consumption. The Panel found that Dr Chipty's modifications of the complainants' models had addressed "some" or "a number of" the concerns that the Panel had identified while reviewing those models.⁸² So modified, and in light of all the econometric evidence on the record, the Panel considered that there was "some econometric evidence" suggesting that the TPP measures had contributed, along with enlarged GHWs, to the observed declines in prevalence and consumption.⁸³

97. The appellants' challenges to the Panel's factual findings on prevalence and consumption relate overwhelmingly to the third step of its analyses, i.e. to the Panel's evaluation of the complainants' evidence that purported to isolate and quantify the determinants of prevalence and consumption, and thereby prove that no portion of the observed declines in prevalence and consumption could be attributed to the TPP measures. Most of the appellants' claims under Article 11 of the DSU in respect of these findings involve a challenge to the manner in which the Panel evaluated complex econometric evidence. These claims centre on issues such as the appropriate econometric controls for the effects of tobacco prices and taxes, the proper specification of time trends within econometric models, whether certain variables within the models were correlated and therefore conveyed the same information, and whether certain explanatory and dependent variables were potentially endogenous.

98. In lieu of summarising Australia's rebuttal on each and every one of these technical issues, it suffices to note that the appellants' challenges to the Panel's factual findings are based on several recurring errors by the appellants.

99. The appellants' claims are based on **mischaracterisations of what the Panel found**. A prime example of this phenomenon is the Dominican Republic's claim that the Panel failed to undertake an objective assessment of the "benchmark rate of decline" in steps 2 and 3 of its prevalence analysis. This claim is based on the

⁸² Panel Report, Appendix D, para. 115; Appendix C, para. 120.

⁸³ Panel Report, Appendix C, para. 123(c); Appendix D, 137(c).

premise that the Panel identified a "benchmark rate of decline" in the first step of its analysis, when in fact it did not.

100. The appellants **misapprehend the Panel's role as trier of fact**. Many of the appellants' claims presuppose that the Panel was required to act as a mere passive recipient of evidence submitted by the parties and was not allowed to engage meaningfully with that evidence. The appellants' claims ignore the Appellate Body's prior recognition that, in order to discharge its duty as the trier of fact, a panel must properly "scrutinize" econometric evidence and "reach conclusions with respect to the probative value it accords".⁸⁴ That is exactly what the Panel did in this dispute.

101. The appellants' claims **misapprehend the burden of proof** and the role that it played in the Panel's assessment of the statistical and econometric evidence. The Panel properly understood that the complainants submitted econometric evidence to *prove* that no portion of the observed declines in prevalence and consumption could be attributed to the TPP measures. The Panel also understood that Australia's econometric evidence was *rebuttal* evidence submitted to show that the complainants' models did not prove what they purported to prove. The appellants repeatedly mischaracterise the nature of the Panel's findings in respect of Australia's rebuttal evidence. The Panel did not find, and had no need to find, that Australia's rebuttal evidence had fully resolved *all* of the concerns that the Panel had identified in respect of the *complainants'* econometric evidence in order to conclude that the complainants' evidence, as modified by Dr Chipty, provided "some econometric evidence" in support of the conclusion that the TPP measures had contributed to the observed declines in prevalence and consumption.

102. Many of the appellants' claims overlook the well-settled principle that a panel is **not required to test its reasoning** with the parties in advance of circulating its report.⁸⁵ A panel does not violate due process so long as its reasoning does not "depart so radically" from issues and evidence presented to the panel that the parties were "left guessing as to what proof they would have needed to adduce."⁸⁶ The allegedly "new" issues raised in the Panel Report that the appellants now challenge, such as the Panel's references to potential multicollinearity and non-stationarity in their models, were issues that emerged directly from the parties' extensive expert submissions. The appellants had more than ample opportunity to persuade the Panel of the validity and probative value of their econometric evidence, and ultimately were unable to do so.

103. The appellants' claims that they were "denied an opportunity to comment" on certain of the Panel's findings, and thereby deprived of their right to due process, overlook **the availability of interim review under Article 15.2 of the DSU**. The appellants raised none of the issues that they now identify on appeal during the interim review stage, even though every one of these issues is a type of issue that parties to other disputes have raised in prior interim reviews. To whatever extent the

⁸⁴ Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 357.

⁸⁵ See e.g. Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.177.

⁸⁶ Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, para. 7.177.

Panel identified issues in its interim report that the appellants could not reasonably have anticipated, the appellants had an opportunity to raise their concerns with the Panel and elected not to do so.

104. The appellants overlook the fact that the Panel evaluated the validity and probative value of their econometric evidence in light of **the constantly changing nature of the complainants' evidence**. The Panel identified numerous instances in which the complainants' experts changed their positions on important methodological issues, often with the effect of invalidating the results reported in their prior submissions. Instead of confronting the implications of flaws identified in their earlier model specifications, the complainants' experts frequently changed *other* aspects of their models, or abandoned prior models altogether, in an attempt to move the goalposts and start the debate all over again. The Panel appropriately took this consideration into account when evaluating the weight to accord to the complainants' econometric evidence.

105. Finally, many of the appellants' challenges to the Panel's factual findings on prevalence and consumption are a thinly-disguised attempt to **re-litigate factual issues or have the Appellate Body re-weigh the evidence**.

106. Each of the appellants' challenges to the Panel's findings on prevalence and consumption are unfounded for one or more of the reasons enumerated above.

107. In addition to their failure to establish a lack of objective assessment in any respect, the appellants do not even *attempt* to demonstrate, beyond sheer assertion, that any one of the alleged errors of objective assessment, or any combination thereof, was *material* to the Panel's intermediate findings on prevalence and consumption. As summarised in Part IV.C above, the appellants' claims that the Panel's findings on prevalence and consumption reflect a lack of objective assessment are a key input to their challenge to the Panel's *overall* finding on contribution. The appellants have failed to establish the essential predicate of this broader challenge.

F. CONCLUSION

108. Australia submits that the appellants' requests for reversal of the Panel's findings should be dismissed in their entirety, for the reasons outlined above.

109. The appellants' claims of legal error are specious, and their numerous claims that the Panel acted inconsistently with Article 11 of the DSU in its assessment of contribution are unfounded. As is evident from the foregoing, the appellants have failed to establish that the Panel exceeded the bounds of its discretion as the trier of fact under Article 11 of the DSU in finding that the complainants failed to demonstrate that the TPP measures are not apt to make a contribution to Australia's public health objectives.⁸⁷

⁸⁷ Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (11 March 2015), Australia indicates that this executive summary contains 11,767 words (including footnotes), and that this is ten percent or less of the total word count of Australia's appellee submission, which is 129,096 words.