



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

AB-2018-4  
AB-2018-6

*Reports of the Appellate Body*

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Note:

The Appellate Body is issuing these Reports in the form of a single document constituting two separate Appellate Body Reports: WT/DS435/AB/R; and WT/DS441/AB/R. The cover page, preliminary pages, sections 1 through 7, and the annexes are common to both Reports. The page header throughout the document bears the two document symbols WT/DS435/AB/R and WT/DS441/AB/R.

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**ABBREVIATIONS USED IN THESE REPORTS**

<b>Abbreviation</b>	<b>Description</b>
ASSAD	Australian Secondary Students Alcohol Smoking and Drug
CCA	Cancer Council Australia
CCQ	Cancer Council Queensland
CCV	Cancer Council Victoria
CPMA	Consumer Packaging Manufacturers Alliance
Doha Declaration	Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2 (14 November 2001)
DSB	Dispute Settlement Body
DSU	Understanding on the Rules and Procedures Governing the Settlement of Disputes
FCTC	Framework Convention on Tobacco Control
GATT 1994	General Agreement on Tariffs and Trade 1994
GHW	graphic health warnings
GI	geographical indications
HAC	heteroskedasticity- and autocorrelation-consistent
IMS/EOS	In-Market-Sales/Exchange of Sales
INTA	International Trademark Association
IPE	Institute for Policy Evaluation
MLPA	minimum legal purchasing age
NHS	National Health Survey
NPHT	National Preventative Health Taskforce
NSWPHS	New South Wales Population Health Survey
NTPPTS	National Tobacco Plain Packaging Tracking Survey
Paris Convention	Paris Convention for the Protection of Industrial Property
Paris Convention (1967)	Stockholm Act of the Paris Convention for the Protection of Industrial Property of 14 July 1967
RMSE	root mean squared error
RMSS	Roy Morgan Single Source
SCI	strictly confidential information
TBT Agreement	Agreement on Technical Barriers to Trade
TM Act	Trade Marks Act 1995 (Cth)
TMA Act	Trade Marks Amendment (Tobacco Plain Packaging) Act 2011 (Cth)
TMA Bill	Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 (Cth)
TPA	Taxpayers Protection Alliance
TPP Act	Tobacco Plain Packaging Act 2011 (Cth)
TPP Bill	Tobacco Plain Packaging Bill 2011 (Cth)
TPP literature	tobacco plain packaging literature
TPP measures	Tobacco Plain Packaging Act 2011 (Cth); Tobacco Plain Packaging Regulations 2011 (Cth), as amended by the Tobacco Plain Packaging Amendment Regulation 2012 (No. 1) (Cth); Trade Marks Amendment (Tobacco Plain Packaging) Act 2011 (Cth)
TPP Regulations	Tobacco Plain Packaging Regulations 2011 (Cth), as amended by the Tobacco Plain Packaging Amendment Regulation 2012 (No. 1) (Cth)

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Abbreviation	Description
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights (as amended on 23 January 2017)
UICC	Union for International Cancer Control
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331
VIF	variance inflation factors
Working Procedures	Working Procedures for Appellate Review
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

**PANEL EXHIBITS CITED IN THESE REPORTS**

<b>Exhibit Number</b>	<b>Short Title</b>	<b>Description</b>
AUS-1, JE-1	TPP Act	Tobacco Plain Packaging Act 2011 (Cth)
AUS-2, JE-7	TPP Bill Explanatory Memorandum	Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth)
AUS-3, JE-2	TPP Regulations	Tobacco Plain Packaging Regulations 2011 (Cth), as amended by the Tobacco Plain Packaging Amendment Regulation 2012 (No. 1) (Cth)
AUS-4, JE-3	TMA Act	Trade Marks Amendment (Tobacco Plain Packaging) Act 2011 (Cth)
AUS-5, JE-5	TMA Bill Explanatory Memorandum	Explanatory Memorandum, Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 (Cth)
AUS-7	Samet Report	Expert Report of J. Samet (5 March 2015)
AUS-9		F. Chaloupka, Expert Report on Australia's Plain Packaging Legislation (7 March 2015)
AUS-10	Tavassoli Report	N. Tavassoli, Report on the World Trade Organization Dispute Settlement Proceedings Concerning Australia's Tobacco Plain Packaging Legislation (10 March 2015)
AUS-11		Expert Report of Dr Jean-Pierre Dubé (9 March 2015)
AUS-12	Slovic Report	Expert Report of Dr Paul Slovic (4 March 2015)
AUS-14	Fong Report	Expert Report of Dr Geoffrey T. Fong (4 March 2015)
AUS-18	Katz Report	M. Katz, An Economic Assessment of the Effects of Tobacco Plain Packaging (9 March 2015)
AUS-19 (SCI)		HoustonKemp, Competition and Trade for Tobacco Products in Australia (9 March 2015)
AUS-23		British American Tobacco, Packaging Brief (2 January 2001), Bates Nos. 325211963-3252121964
AUS-38		Union for International Cancer Control and Cancer Council Australia, Written Submission of Non-Party <i>Amici Curiae</i> (11 February 2015)
AUS-42 (revised)		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-44, JE-19	FCTC	World Health Organization, Framework Convention on Tobacco Control (2003)
AUS-67, JE-14	NPHT – The Roadmap for Action	National Preventative Health Taskforce, <i>Australia: The Healthiest Country by 2020 – National Preventative Health Strategy – The Roadmap for Action</i> , Australian Government (30 June 2009)
AUS-76		US Department of Health and Human Services, <i>Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General</i> (Atlanta, 2012)
AUS-81, CUB-61	Chantler Report	C. Chantler, Standardised Packaging of Tobacco: A Report of the Independent Review Undertaken by Sir Cyril Chantler (April 2014)
AUS-140, HND-130, CUB-59	Stirling Review	C. Moodie, M. Stead, L. Bauld, A. McNeill, K. Angus, K. Hinds, I. Kwan, J. Thomas, G. Hastings, and A. O'Mara-Eves, Plain Tobacco Packaging: A Systematic Review, UK Centre for Tobacco Control Studies, University of Stirling (2012)
AUS-186, DOM-235	White et al. 2015a	V. White, T. Williams, and M. Wakefield, "Has the Introduction of Plain Packaging with Larger Graphic Health Warnings Changed Adolescents' Perceptions of Cigarette Packs and Brands?" <i>Tobacco Control</i> , Vol. 24 (2015), ii42-49

Exhibit Number	Short Title	Description
AUS-206, DOM-306	Wakefield et al. 2015	M. Wakefield, K. Coomber, M. Zacher, S. Durkin, M. Brennan, and M. Scollo, "Australian Adult Smokers' Responses to Plain Packaging with Larger Graphic Health Warnings One Year After Implementation: Results from a National Cross-Sectional Tracking Survey", <i>Tobacco Control</i> , Vol.24 (2015), ii17-ii25
AUS-207, HND-132, DOM-199	Dunlop et al. 2014	S. Dunlop, T. Dobbins, J. Young, D. Perez, and D. Currow, "Impact of Australia's Introduction of Tobacco Plain Packs on Adult Smokers' Pack-Related Perceptions and Responses: Results from a Continuous Tracking Survey", <i>BMJ Open</i> , Vol. 4 (2014), doi:10.1136/bmjopen-2014-005836
AUS-215 (revised), DOM-305	Durkin et al. 2015	S. Durkin, E. Brennan, M. Coomber, M. Zacher, M. Wakefield, and M. Scollo, "Short-Term Changes in Quitting-Related Cognitions and Behaviours After the Implementation of Plain Packaging with Larger Health Warnings: Findings from a National Cohort Study with Australian Adult Smokers", <i>Tobacco Control</i> , Vol. 24 (2015), ii26-ii32
AUS-216, CUB-60	Stirling Review 2013 Update	C. Moodie, K. Angus, M. Stead, and L. Bauld, "Plain Tobacco Packaging Research: An Update", Centre for Tobacco Control Research, Institute for Social Marketing, University of Stirling (2013)
AUS-234		Letter dated 6 July 1994 from D. Latham of Lovell, White, Durrant to J. Smithson, Public Affairs Manager, Rothmans International Services Limited, attaching letter dated 5 July 1994 from L. Baeumer, Director, Industrial Property Law Department, WIPO, to D. Latham of Lovell, White, Durrant, Bates Nos. 502592535-502592536
AUS-259		Acts Interpretation Act 1901 (Cth)
AUS-501		S. Ulucanlar, G. Fooks, J. Hatchard, and A. Gilmore, "Representation and Misrepresentation of Scientific Evidence in Contemporary Tobacco Regulation: A Review of Tobacco Industry Submissions to the UK Government Consultation on Standardised Packaging", <i>PLoS Medicine</i> , Vol. 11 (2014), doi:101371/journal.pmed.1001629
AUS-515		Healthy Caribbean Coalition, <i>Amicus Curiae Brief</i> (22 April 2015)
AUS-531	Fong Supplemental Report	G. Fong, Supplemental Report in Response to Professor Ajzen (8 September 2015)
AUS-535 (SCI)	Chipty Rebuttal Report	Rebuttal Report of Dr Tasneem Chipty (14 September 2015)
AUS-555	Hammond Review	D. Hammond, Standardized Packaging of Tobacco Products: Evidence Review, prepared for the Irish Department of Health (March 2014)
AUS-582		F. Chaloupka, Rebuttal Report on Selected Issues Raised in Ongoing Challenges to Australia's Tobacco Plain Packaging Measure (26 October 2015)
AUS-585	Fong Second Supplemental Report	G. Fong, Supplementary Report in Response to Professors Inman and Kleijnen (27 October 2015)
AUS-586		Surrebuttal Report of Dr Tasneem Chipty (26 October 2015)
AUS-588		N. Tavassoli, Rebuttal to Arguments Raised in Exhibit DOM/HND-14 (26 October 2015)
AUS-590		F. Chaloupka, Report on Selected Issues Raised in Ongoing Challenges to Australia's Tobacco Plain Packaging Measure (7 December 2015)
AUS-591	Chipty Second Rebuttal Report	Second Rebuttal Report of Dr Tasneem Chipty (8 December 2015)
AUS-605	Chipty Third Rebuttal Report	Third Rebuttal Report of Dr Tasneem Chipty (1 February 2016)



Exhibit Number	Short Title	Description
AUS-624	Tobacco Plain Packaging PIR	Department of Health, Post-Implementation Review: Tobacco Plain Packaging 2016, Australian Government (2016)
CUB-58		M. Stead, C. Moodie, K. Angus, L. Bauld, A. McNeill, J. Thomas, G. Hastings, K. Hinds, A. O'Mara-Eves, I. Kwan, R. Purves, and S. Bryce, "Is Consumer Response to Plain/Standardised Tobacco Packaging Consistent with Framework Convention on Tobacco Control Guidelines? A Systematic Review of Quantitative Studies", <i>PLoS One</i> , Vol. 8 (2013), doi:10.1371/journal.pone.0075919
DOM-65		WIPO, <i>WIPO Intellectual Property Handbook</i> , 2nd edn (Geneva, 2004; reprinted 2008)
DOM-100	IPE Report	D. Afshartous, M. Hagedorn, A. Kaul, and M. Wolf, Empirical Assessment of Australia's Plain Packaging Regime, Institute for Policy Evaluation (7 October 2014)
DOM-232		R. Bonnie, K. Stratton, and L. Kwan (eds.), <i>Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products</i> , US Institute of Medicine (The National Academies Press, 2015) (Pre-publication copy: uncorrected proofs)
DOM-303	IPE Updated Report	D. Afshartous, M. Hagedorn, A. Kaul, and M. Wolf, Updated Empirical Assessment of Australia's Plain Packaging Regime, Institute for Policy Evaluation (14 September 2015)
DOM-361	IPE Second Updated Report	D. Afshartous, M. Hagedorn, A. Kaul, and M. Wolf, Updated Empirical Assessment of Australia's Plain Packaging Regime, Institute for Policy Evaluation (27 October 2015)
DOM-375	IPE Third Updated Report	D. Afshartous, M. Hagedorn, A. Kaul, and M. Wolf, Empirical Assessment of Australia's Plain Packaging Regime, Institute for Policy Evaluation (8 December 2015)
DOM-379	IPE Summary Report	D. Afshartous, M. Hagedorn, A. Kaul, and M. Wolf, Summary of Findings: Empirical Assessment of Australia's Plain Packaging Regime, Institute for Policy Evaluation (1 February 2016)
DOM-382	Yong et al. 2015	H. Yong, R. Borland, D. Hammond, J. Thrasher, K. Cummings, and G. Fong, "Smokers' Reactions to the New Larger Health Warning Labels on Plain Cigarette Packs in Australia: Findings from the ITC Australia Project", <i>Tobacco Control</i> (19 February 2015), doi:10.1136/tobaccocontrol-2014-05197
DOM/HND-3	Inman et al. Peer Review Report	J. Inman, Plain Packaging Literature Peer Review Project (3 October 2014)
DOM/HND-4	Kleijnen Systematic Review	J. Kleijnen, A. Bryman, and M. Bosnjak, Quality of the Empirical Evidence Testing the Impact of Plain Packaging on Tobacco Consumption: A Systematic Review (6 October 2014)
DOM/HND-10	Steinberg Rebuttal Report	L. Steinberg, Adolescent Decision-Making and the Prevention of Underage Smoking: The Role of Plain Packaging: A Response to Expert Evidence Submitted on Behalf of Australia (3 July 2015)
DOM/HND-15	Steinberg Second Rebuttal Report	L. Steinberg, Adolescent Decision-Making and the Prevention of Underage Smoking: The Role of Plain Packaging: A Second Response to Expert Evidence Submitted on Behalf of Australia (23 October 2015)
DOM/HND/IDN-1		<i>Amicus curiae</i> submissions from intellectual property and business associations supporting the arguments of the Dominican Republic
DOM/HND/IDN-2		Moldova's third party submission
DOM/HND/IDN-3	Ajzen Report	I. Ajzen, Examination of Australia's Reliance on Behavioral Theories to Support its Tobacco Plain Packaging Legislation" (31 May 2015)

Exhibit Number	Short Title	Description
DOM/HND/IDN-4	Ajzen Supplemental Report	I. Ajzen, Supplemental Report: Pre-Implementation Empirical Testing of Behavioral Theories Relied on by Australia to Justify Plain Packaging (7 July 2015)
DOM/HND/IDN-5	Ajzen Rebuttal Report	I. Ajzen, The Role of Theory and Empirical Evidence in Evaluating the Effectiveness of Plain Packaging: Response to Australia and its Experts (27 October 2015)
DOM/HND/IDN-6	Ajzen Response to Panel question Nos. 146, 202, and 203	I. Ajzen, Response to Questions 146, 202, and 203 by the Panel (8 December 2015)
DOM/IDN-1	List Report	J. List, A Consideration of the Empirical Evidence on the Effects of Australia's Tobacco Plain Packaging Legislation (1 June 2015)
DOM/IDN-2	Ajzen et al. Data Report	I. Ajzen, A. Hortaçsu, J. List, and A. Shaikh, Reconsideration of Empirical Evidence on the Effectiveness of Australian Plain Packaging Legislation: Evidence from the National Plain Packaging Tracking Survey (NPPTS) and Other Datasets (15 September 2015)
DOM/IDN-3	List Rebuttal Report	J. List, A Further Consideration of the Empirical Evidence on the Effects of Australia's Tobacco Plain Packaging Legislation (16 September 2015)
DOM/IDN-5	List Second Supplemental Report	J. List, A Synthesis of the Evidence on Australia's Plain Packaging Policy (28 October 2015)
DOM/IDN-7	List Third Supplemental Report	J. List, A Further Synthesis of the Newly-Available Evidence on Australia's Plain Packaging Policy (8 December 2015)
DOM/IDN-9	List Summary Report	J. List, Concluding Summary on Australia's Plain Packaging Policy (2 February 2016)
HND-2, DOM-50		Australian Government Preventative Health Taskforce, "Terms of Reference", available at <a href="http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/terms-of-reference-1lp">http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/terms-of-reference-1lp</a> (accessed 7 October 2014)
HND-118		J. Klick, Rebuttal Report – A Reply to Dr Chipty (8 July 2015)
HND-122		J. Klick, Supplemental Rebuttal Report – A Review of New and Updated Australian Survey and Market Data (16 September 2015)
HND-133, DOM-237, DOM-311	Scollo et al. 2015a	M. Scollo, M. Zacher, K. Coomber, M. Bayly, and M. Wakefield, "Changes in Use of Types of Tobacco Products by Pack Sizes and Price Segments, Prices Paid and Consumption Following the Introduction of Plain Packaging in Australia", <i>Tobacco Control</i> , Vol. 24 (2015)
HND-165	Klick Second Supplemental Rebuttal Report	J. Klick, Second Supplemental Rebuttal Report – A Review of Australian Survey Data From New South Wales (28 October 2015)
HND-166	Klick Third Supplemental Rebuttal Report	J. Klick, Third Supplemental Rebuttal Report – A Reply to Dr Chipty and Professor Chaloupka (8 December 2015)
HND-169	Klick Fourth Supplemental Rebuttal Report	J. Klick, Fourth Supplemental Rebuttal Report – Comments on Additional Arguments Raised by Dr Chipty (3 February 2016)
JE-6	TM Act	Trade Marks Act 1995 (Cth)
JE-20		Guidelines for Implementation of Article 11 (Packaging and Labelling of Tobacco Products), Document FCTC/COP3(10), excerpted from Conference of the Parties to the WHO FCTC, "Decisions", Third Session, held in Durban, South Africa, 17 to 22 November 2008, Document FCTC/COP3/DIV/3 (16 February 2009)

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Exhibit Number	Short Title	Description
JE-22	TPPA Regulation Explanatory Statement	Explanatory Statement, Tobacco Plain Packaging Amendment Regulation 2012 (No. 1) (Cth)
UKR-5		J. Klick, The Effect of Australia's Plain Packaging Law on Smoking: Evidence from Survey and Market Data (26 July 2014)
UKR-6	Klick TPP Literature Report	Report by J. Klick on Plain Packaging Literature and Research Methodology (2 October 2014)

## CASES CITED IN THESE REPORTS

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
<i>Australia – Apples</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Australia – Salmon</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS18/AB/R, DSR 1998:VIII, p. 3407
<i>Australia – Tobacco Plain Packaging</i> (Panel Report)	Panel Report, <i>Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging</i> , WT/DS435/R, Add.1 and Suppl.1, circulated to WTO Members 28 June 2018 [appealed by Honduras 19 July 2018] Panel Report, <i>Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging</i> , WT/DS441/R, Add.1 and Suppl.1, circulated to WTO Members 28 June 2018 [appealed by the Dominican Republic 23 August 2018] Panel Report, <i>Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging</i> , WT/DS458/R, Add.1 and Suppl.1, adopted 27 August 2018 Panel Report, <i>Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging</i> , WT/DS467/R, Add.1 and Suppl.1, adopted 27 August 2018
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Brazil – Retreaded Tyres</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, p. 1649
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
<i>Canada – Continued Suspension</i>	Appellate Body Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS321/AB/R, adopted 14 November 2008, DSR 2008:XIV, p. 5373
<i>Canada – Continued Suspension</i>	Panel Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS321/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS321/AB/R, DSR 2008:XV, p. 5757
<i>Canada – Dairy (Article 21.5 – New Zealand and US II)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, p. 213
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i>	Appellate Body Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513

Short Title	Full Case Title and Citation
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
<i>China – Intellectual Property Rights</i>	Panel Report, <i>China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights</i> , WT/DS362/R, adopted 20 March 2009, DSR 2009:V, p. 2097
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, p. 7425
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Fasteners (China) (Article 21.5 – China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS397/AB/RW and Add.1, adopted 12 February 2016, DSR 2016:I, p. 7
<i>EC – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
<i>EC – Trademarks and Geographical Indications (Australia)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia</i> , WT/DS290/R, adopted 20 April 2005, DSR 2005:X, p. 4603
<i>EC – Trademarks and Geographical Indications (US)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States</i> , WT/DS174/R, adopted 20 April 2005, DSR 2005:VIII, p. 3499

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<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>EC and certain member States – Large Civil Aircraft (Article 21.5 – US)</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS316/AB/RW and Add.1, adopted 28 May 2018
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
<i>India – Solar Cells</i>	Panel Report, <i>India – Certain Measures Relating to Solar Cells and Solar Modules</i> , WT/DS456/R and Add.1, adopted 14 October 2016, as modified by Appellate Body Report WT/DS456/AB/R, DSR 2016:IV, p. 1941
<i>Indonesia – Import Licensing Regimes</i>	Panel Report, <i>Indonesia – Importation of Horticultural Products, Animals and Animal Products</i> , WT/DS477/R, WT/DS478/R, Add.1 and Corr.1, adopted 22 November 2017, as modified by Appellate Body Report WT/DS477/AB/R, WT/DS478/AB/R, DSR 2017:VII, p. 3131
<i>Indonesia – Iron or Steel Products</i>	Panel Report, <i>Indonesia – Safeguard on Certain Iron or Steel Products</i> , WT/DS490/R, WT/DS496/R, and Add.1, adopted 27 August 2018, as modified by Appellate Body Report WT/DS490/AB/R, WT/DS496/AB/R
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
<i>Japan – Alcoholic Beverages II</i>	Panel Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, p. 125
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
<i>Japan – DRAMs (Korea)</i>	Panel Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, p. 2805
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
<i>Korea – Pneumatic Valves (Japan)</i>	Appellate Body Report, <i>Korea – Anti-Dumping Duties on Pneumatic Valves from Japan</i> , WT/DS504/AB/R and Add.1, adopted 30 September 2019
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
<i>Peru – Agricultural Products</i>	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R and Add.1, adopted 31 July 2015, DSR 2015:VI, p. 3403
<i>Philippines – Distilled Spirits</i>	Appellate Body Reports, <i>Philippines – Taxes on Distilled Spirits</i> , WT/DS396/AB/R / WT/DS403/AB/R, adopted 20 January 2012, DSR 2012:VIII, p. 4163



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<i>Russia – Commercial Vehicles</i>	Appellate Body Report, <i>Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy</i> , WT/DS479/AB/R and Add.1, adopted 9 April 2018
<i>Thailand – Cigarettes (Philippines)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751
<i>US – Clove Cigarettes</i>	Panel Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012:XI, p. 5865
<i>US – Continued Suspension</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, p. 3507
<i>US – Continued Suspension</i>	Panel Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS320/AB/R, DSR 2008:XI, p. 3891
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009, DSR2009:III, p. 1291
<i>US – Continued Zeroing</i>	Panel Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/R, adopted 19 February 2009, as modified as Appellate Body Report WT/DS350/AB/R, DSR 2009:III, p. 1481
<i>US – COOL</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
<i>US – COOL</i>	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
<i>US – COOL (Article 21.5 – Canada and Mexico)</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico</i> , WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015, DSR 2015:IV, p. 1725
<i>US – COOL (Article 21.5 – Canada and Mexico)</i>	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico</i> , WT/DS384/RW and Add.1 / WT/DS386/RW and Add.1, adopted 29 May 2015, as modified by Appellate Body Reports WT/DS384/AB/RW / WT/DS386/AB/RW, DSR 2015:IV, p.2019
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
<i>US – FSC (Article 21.5 – EC)</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, p. 119

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<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
<i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
<i>US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS381/AB/RW/USA and Add.1 / <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/AB/RW2 and Add.1, adopted 11 January 2019
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
<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 – Washing Machines</i>	Appellate Body Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/AB/R and Add.1, adopted 26 September 2016, DSR 2016:V, p. 2275
<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
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323



WORLD TRADE ORGANIZATION  
APPELLATE BODY

**Australia – Certain Measures Concerning  
Trademarks, Geographical Indications and  
Other Plain Packaging Requirements  
Applicable to Tobacco Products and  
Packaging**

Honduras, *Appellant*<sup>1</sup>  
Dominican Republic, *Appellant*<sup>2</sup>  
Australia, *Appellee*

Argentina, *Third Participant*  
Brazil, *Third Participant*  
Canada, *Third Participant*  
Chile, *Third Participant*  
China, *Third Participant*  
Dominican Republic, *Third Participant*<sup>3</sup>  
Ecuador, *Third Participant*  
European Union, *Third Participant*  
Guatemala, *Third Participant*  
India, *Third Participant*  
Indonesia, *Third Participant*  
Japan, *Third Participant*  
Korea, *Third Participant*  
Malawi, *Third Participant*  
Malaysia, *Third Participant*  
Mexico, *Third Participant*  
New Zealand, *Third Participant*  
Nicaragua, *Third Participant*  
Nigeria, *Third Participant*  
Norway, *Third Participant*  
Oman, *Third Participant*  
Panama, *Third Participant*  
Peru, *Third Participant*  
Philippines, *Third Participant*  
Russian Federation, *Third Participant*  
Singapore, *Third Participant*  
South Africa, *Third Participant*  
Chinese Taipei, *Third Participant*  
Thailand, *Third Participant*  
Turkey, *Third Participant*  
Ukraine, *Third Participant*  
United States, *Third Participant*  
Uruguay, *Third Participant*  
Zambia, *Third Participant*  
Zimbabwe, *Third Participant*

AB-2018-4  
AB-2018-6

Appellate Body Division:

Servansing, Presiding Member  
Bhatia, Member  
Graham, Member

## 1 INTRODUCTION

1.1. Honduras and the Dominican Republic each appeal certain issues of law and legal interpretations developed in the Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products*

<sup>1</sup> In DS435 only.

<sup>2</sup> In DS441 only.

<sup>3</sup> In DS435.

*and Packaging*<sup>4</sup> (Panel Report<sup>5</sup>). The Panel was established to consider complaints by Honduras<sup>6</sup>, the Dominican Republic<sup>7</sup>, Cuba<sup>8</sup>, Indonesia<sup>9</sup>, and Ukraine<sup>10</sup> with respect to certain restrictions, imposed by Australia, on trademarks, geographical indications (GIs), and other plain packaging requirements, applicable to all tobacco products sold, offered for sale, or otherwise supplied in Australia. The measures at issue in these disputes (the TPP measures) are "one of the means by which the Australia[n] Government will give effect to Australia's obligations under the [World Health Organization Framework Convention on Tobacco Control (2003) (FCTC)]" and, in particular Articles 5, 11, and 13 of the FCTC.<sup>11</sup>

1.2. The factual aspects of these disputes are set forth in greater detail in section 2 of the Panel Report. The factual aspects pertaining to the products and measures at issue in these disputes are also set forth in section 5 of these Reports.

1.3. The Dispute Settlement Body (DSB) established separate panels to address the matters brought by each of the five complainants.<sup>12</sup> On 24 April 2014, Australia sent a communication to the Chair of the DSB on behalf of the parties to all five disputes.<sup>13</sup> This communication concerned certain arrangements for the establishment and composition of the panels, and the panels' timetable in these disputes. The communication stated, *inter alia*, that: (i) Australia would request the Director-General to compose the panels to address the complaints brought by the Dominican Republic and Cuba<sup>14</sup>; and (ii) pursuant to Article 9.3 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU), the parties had agreed to the harmonization of the timetable for the Panel proceedings in all five disputes.<sup>15</sup> On 5 May 2014, the Director-General composed five panels, with the same persons serving as panelists on each of the separate panels.<sup>16</sup>

1.4. On 7 May 2014, Australia submitted requests to the Panel for preliminary rulings with respect to the consistency, with Article 6.2 of the DSU, of the Dominican Republic's, Cuba's, and Indonesia's

<sup>4</sup> WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, 28 June 2018.

<sup>5</sup> The Panels that addressed the complaints by Honduras (DS435), the Dominican Republic (DS441), Cuba (DS458), and Indonesia (DS467) issued their Reports in the form of a single document constituting four separate Panel Reports. For ease of reference, the Panels and Panel Reports are herein collectively referred to as the Panel and the Panel Report, respectively. The Panel Report has a separate "Conclusions and Recommendations" section (section 8) with respect to each complaint. Thus, where these Appellate Body Reports make a reference to section 8 of the Panel Report, the Appellate Body Reports will specify which Panel Report is being referred to.

<sup>6</sup> Request for the Establishment of a Panel by Honduras, WT/DS435/16 (Honduras' panel request).

<sup>7</sup> Request for the Establishment of a Panel by Dominican Republic, WT/DS441/15 (Dominican Republic's panel request).

<sup>8</sup> Request for the Establishment of a Panel by Cuba, WT/DS458/14 (Cuba's panel request).

<sup>9</sup> Request for the Establishment of a Panel by Indonesia, WT/DS467/15 (Indonesia's panel request).

<sup>10</sup> Request for the Establishment of a Panel by Ukraine, WT/DS434/11 (Ukraine's panel request).

<sup>11</sup> Panel Report, para. 2.16 (quoting Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (Cth) (TPP Bill Explanatory Memorandum) (Panel Exhibits AUS-2, JE-7), p. 2 (emphasis omitted)). Article 5 of the FCTC requires each FCTC Party to develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes in accordance with this Convention and the Protocols to which it is a party. (Panel Report, para. 2.101) Part III of the FCTC, which includes Articles 11 and 13, addresses measures relating to the reduction of demand for tobacco. Article 11 concerns packaging and labelling of tobacco products, while Article 13 concerns tobacco advertising, promotion and sponsorship. (Panel Report, paras. 2.103-2.105 (quoting World Health Organization, Framework Convention on Tobacco Control (2003) (FCTC) (Panel Exhibits AUS-44, JE-19), Articles 11 and 13))

<sup>12</sup> Panel Report, paras. 1.10, 1.14, 1.18, and 1.22; WT/DSB/M/322.

<sup>13</sup> Australia's communication to the DSB was sent before the establishment of the panels in the disputes brought by the Dominican Republic and Cuba. The DSB established the panels to address the complaints by the Dominican Republic and Cuba on 25 April 2014. (Panel Report, paras. 1.13 and 1.17) With respect to Cuba's complaint, the DSB established the panel in a meeting at which Cuba's panel request first appeared as an item on the DSB agenda. (WT/DSB/M/344)

<sup>14</sup> On 24 March 2014, Ukraine requested the Director-General to determine the composition of the panel to hear its dispute (DS434). On 26 March and 23 April, respectively, Australia requested the Director-General to determine the composition of the panel to hear the disputes brought by Honduras (DS435) and Indonesia (DS467). On 25 April 2014, Australia requested the Director-General to determine the composition of the panels to hear the disputes brought by the Dominican Republic (DS441) and Cuba (DS458). (WT/DS434/12, WT/DS435/17, WT/DS441/16, WT/DS458/15, WT/DS467/16)

<sup>15</sup> Panel Report, para. 1.26.

<sup>16</sup> Panel Report, para. 1.27.

panel requests.<sup>17</sup> On 19 August 2014, the Panel issued its preliminary rulings to the parties and the third parties, with an indication that these would become an integral part of the Panel Report, subject to any modifications or elaboration of the reasoning, either in a subsequent ruling or in the Panel Report.<sup>18</sup> These preliminary rulings were circulated to the DSB on 27 October 2014.<sup>19</sup>

1.5. The Panel adopted its Working Procedures<sup>20</sup> and timetable on 17 June 2014. The Panel's Working Procedures were amended on 1 October 2014, to reflect the Panel's adoption of additional procedures for the protection of strictly confidential information (SCI)<sup>21</sup>. The Panel's Working Procedures were further amended on 15 December 2014, to reflect the Panel's decision to grant the third parties the following additional rights: (i) access to the parties' rebuttal submissions; and (ii) access to the final written versions of the parties' opening and closing statements at the first and second substantive meetings.<sup>22</sup>

1.6. On 28 May 2015, the Panel received a request from Ukraine to suspend the Panel proceedings in DS434 pursuant to Article 12.12 of the DSU. In a letter dated 29 May 2015, Australia indicated that it "support[ed] the request by Ukraine to suspend proceedings, on the basis that ... the suspension will be 'with a view to finding a mutually agreed solution'".<sup>23</sup> On 30 May 2015, after consulting with the parties in DS435, DS441, DS458, and DS467, the Panel sent a communication to the parties informing them that it had accepted Ukraine's request and had suspended the work in DS434. In its communication, the Panel noted that Ukraine remained entitled to participate in the Panel proceedings, as a third party, in disputes DS435, DS441, DS458, and DS467. The Panel also took note of the shared understanding between Ukraine and the other parties that Ukraine's first written submission in DS434, and related evidence, would remain on the record as validly filed third-party submissions in DS435, DS441, DS458, and DS467.<sup>24</sup>

1.7. The Panel in DS434 was not requested to resume its work during the 12 months following suspension. Pursuant to Article 12.12 of the DSU, the authority for the establishment of the Panel in DS434 lapsed on 30 May 2016.<sup>25</sup>

1.8. Following consultation with the parties, the Panel contacted Ecuador, Egypt, and Moldova. These three WTO Members were third parties in the dispute initiated by Ukraine, but not in the disputes initiated by Honduras, the Dominican Republic, Cuba, or Indonesia. The Panel informed Ecuador, Egypt, and Moldova that they would need to notify their interest to the DSB pursuant to Article 10.2 of the DSU with respect to DS435, DS441, DS458, and DS467 should they wish to participate in the proceedings of one or more of these disputes, including the third-party session of the first substantive meeting. Ecuador notified its third-party interest with respect to DS435, DS441,

<sup>17</sup> Panel Report, para. 1.33.

<sup>18</sup> Panel Report, para. 1.37. As regards the Dominican Republic's, Cuba's, and Indonesia's panel requests, the Panel found that "the terms 'including', 'complement' and 'add to', as used in [these] panel request[s], are not, on their face, inconsistent with the requirement under Article 6.2 of the DSU to identify the specific measures at issue." (Panel Report, para. 1.38) With respect to Cuba's panel request, the Panel also held that the additional claims introduced by Cuba in its panel request were closely related to those that formed the legal basis of its request for consultations and could reasonably be said to have evolved from the legal basis that formed the subject of consultations. Therefore, the Panel considered that Cuba's claims under Article 16.3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Article 6*bis* of the Paris Convention (through Article 2.1 of the TRIPS Agreement) remained "within the bounds of the 'measure of flexibility' accorded to Members in formulating their complaints in their panel request". (Panel Report, para. 1.39 (quoting Communication from the Panel, dated 27 October 2014, WT/DS458/18, para. 3.53))

<sup>19</sup> Panel Report, para. 1.40 (referring to Communications from the Panel, dated 27 October 2014, WT/DS441/19, WT/DS458/18, and WT/DS467/19).

<sup>20</sup> Panel Report, para. 1.30, and Annex A-1.

<sup>21</sup> Panel Report, paras. 1.30 and 1.41, and Annex A-2. None of the participants in these appellate proceedings requested us to adopt additional procedures for the protection of SCI.

<sup>22</sup> Panel Report, paras. 1.30 and 1.42-1.43.

<sup>23</sup> Panel Report, para. 1.51.

<sup>24</sup> Panel Report, para. 1.52.

<sup>25</sup> Panel Report, para. 1.54 (referring to Lapse of Authority for the Establishment of the Panel, 30 June 2016, WT/DS434/17).

DS458, and DS467 to the Chair of the DSB. By contrast, Moldova informed the Panel that it did not wish to participate in these disputes as a third party.<sup>26</sup>

1.9. A number of *amici curiae* submissions were presented to the Panel. On 20 August 2014, the Panel received an unsolicited *amicus curiae* submission from a group of US business organizations.<sup>27</sup> On 15 December 2014, the Panel informed the parties and third parties that it "would not be in a position to consider unsolicited information submitted to it after 27 April 2015".<sup>28</sup> The Panel received 35 additional unsolicited *amici curiae* submissions on or before 27 April 2015 and five unsolicited *amici curiae* submissions after that date.<sup>29</sup> Australia submitted, as exhibits, three of the *amici curiae* submissions, provided by the World Health Organization (WHO) and the FCTC Secretariat<sup>30</sup>; the Healthy Caribbean Coalition; and the Union for International Cancer Control (UICC) and Cancer Council Australia (CCA).<sup>31</sup> The Dominican Republic, Honduras, and Indonesia submitted, as an exhibit, 36 *amici curiae* submissions.<sup>32</sup>

<sup>26</sup> Panel Report, para. 1.53. The text of Moldova's third-party submission was submitted by Honduras, the Dominican Republic, and Indonesia as an exhibit in the Panel proceedings on 1 June 2015. (Panel Report, fn 55 to para. 1.53 (referring to Moldova's third-party submission (Panel Exhibit DOM/HND/IDN-2))) Additionally, it appears that Egypt did not respond to the Panel's prompting about Egypt's continued participation as a third party.

<sup>27</sup> This submission was made jointly by the following organizations: Emergency Committee for American Trade; National Association of Manufacturers of the United States; National Foreign Trade Council; Paperboard Packaging Council; Printing Industries of America; Independent Packaging Association; United States Chamber of Commerce; and United States Council for International Business.

<sup>28</sup> Panel Report, para. 1.48 (quoting letter from the Panel to the parties and third parties dated 15 December 2014 concerning, *inter alia*, *amicus curiae* briefs).

<sup>29</sup> Panel Report, para. 1.49 and fn 47 thereto. The Panel received *amici curiae* submissions dated on or before 27 April 2015 from: Emergency Committee for American Trade, National Association of Manufacturers of the United States, National Foreign Trade Council, Paperboard Packaging Council, Printing Industries of America, Independent Packaging Association, United States Chamber of Commerce, and United States Council for International Business; Associação Brasileira da Propriedade Intelectual; American Chamber of Commerce in the Netherlands; Federation of Philippine Industries; Confederação Nacional da Indústria (Brazil); Federation of Attica and Piraeus Industries; Cámara Nacional de Comercio y Servicios del Uruguay; Federação das Industrias do Estado da Bahia; Japan Business Federation; Association of South-East Asian Nations (ASEAN) Intellectual Property Association; Institute of Public Affairs; Cámara de Industria de Guatemala; Trade-related IPR Protection Association; Indonesian Chamber of Commerce and Industry; Montenegrin Employers Federation; Taxpayers Association of Europe; International Trademark Association; Australian Retailers Association; Japan Intellectual Property Association; Association of European Businesses in Russia, American Chamber of Commerce in Russia, and RusBrand; International Tobacco Growers' Association; Patent and Trademark Attorneys Association – Turkey; Aegean Exporters Association; European Association of Trade Mark Owners (MARQUES); United States Chamber of Commerce; EU-ASEAN Business Council, EU-Malaysia Chamber of Commerce and Industry, European Chamber of Commerce in Singapore, European Chamber of Commerce of the Philippines, European Chamber of Commerce and Industry in Lao PDR, and European Association of Business and Commerce in Thailand; American Chamber of Commerce in Thailand; Romanian Small and Medium Retailers Association; Association of Trademarks and Design Rights Practitioners; Canadian Manufacturers and Exporters; Federation of Korean Industries; Polish Chamber of Trade; Union des Fabricants; Healthy Caribbean Coalition; Union for International Cancer Control; Cancer Council Australia; and World Health Organization and WHO Framework Convention on Tobacco Control Secretariat. The Panel received *amici curiae* submissions dated after 27 April 2015 from: Russian Union of Industrialists and Entrepreneurs; Graphic Association Denmark; American Chamber Mexico; Malaysian International Chamber of Commerce and Industry; and Confederation of Danish Industry.

<sup>30</sup> Panel Report, para. 1.50 and fn 48 thereto. 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) (Panel Exhibit AUS-42 (revised)).

<sup>31</sup> Healthy Caribbean Coalition, *Amicus Curiae Brief* (22 April 2015) (Panel Exhibit AUS-515); Union for International Cancer Control and Cancer Council Australia, Written Submission of Non-Party *Amici Curiae* (11 February 2015) (Panel Exhibit AUS-38).

<sup>32</sup> Panel Report, para. 1.50 and fn 50 thereto. Briefs from the following *amicus curiae* were submitted as Exhibit DOM/HND/IDN-1: Emergency Committee for American Trade, National Association of Manufacturers of the United States, National Foreign Trade Council, Paperboard Packaging Council, Printing Industries of America, Independent Packaging Association, United States Chamber of Commerce, and United States Council for International Business; Associação Brasileira da Propriedade Intelectual; American Chamber of Commerce in the Netherlands; Federation of Philippine Industries; Confederação Nacional da Indústria (Brazil); Federation of Attica and Piraeus Industries; Cámara Nacional de Comercio y Servicios del Uruguay; Federação das Industrias do Estado da Bahia; Japan Business Federation; ASEAN Intellectual Property Association; Institute of Public Affairs; Cámara de Industria de Guatemala; Trade-related IPR Protection Association; Indonesian Chamber of Commerce and Industry; Montenegrin Employers Federation; Taxpayers Association of Europe;

1.10. Additionally, the parties requested the Panel to exercise its authority to seek information under Article 13 of the DSU on various occasions, regarding information relating to evidence submitted by another party. The Panel also exercised its authority under Article 13 to seek information from the WHO and the FCTC Secretariats, the International Bureau of the World Intellectual Property Organization (WIPO), Cancer Council Queensland (CCQ), and Cancer Council Victoria (CCV).<sup>33</sup>

1.11. Honduras requested the Panel to find that Australia's plain packaging trademark restrictions in the TPP measures are inconsistent with Article 2.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (incorporating Article 6*quinquies* of the Stockholm Act of the Paris Convention for the Protection of Industrial Property of 14 July 1967) (Paris Convention (1967)) and Articles 15.4, 16.1, 17, 20, 22.2(b), and 24.3 of the TRIPS Agreement. Honduras also requested the Panel to find that Australia's plain packaging measures are inconsistent with Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement). Additionally, Honduras requested the Panel to find that Australia had acted inconsistently with Article 10*bis* of the Paris Convention (1967) (as incorporated into the TRIPS Agreement through Article 2.1) and Articles 22.2(b) and 24.3 of the TRIPS Agreement.<sup>34</sup>

1.12. The Dominican Republic requested the Panel to find that, by its adoption and imposition of the TPP measures, Australia had acted inconsistently with Article 2.2 of the TBT Agreement, Article 10*bis* of the Paris Convention (1967) (as incorporated into the TRIPS Agreement through Article 2.1), and Articles 15.4, 16.1, 16.3, 20, 22.2(b), and 24.3 of the TRIPS Agreement.<sup>35</sup>

1.13. Cuba requested the Panel to find that the TPP measures are inconsistent with Article 2.2 of the TBT Agreement, Article 10*bis* of the Paris Convention (read with Article 2.1 of the TRIPS Agreement), Articles 15.4, 16.1, 16.3, 20, 22.2(b), and 24.3 of the TRIPS Agreement, as well as Article IX:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994).<sup>36</sup> Indonesia requested the Panel to find that the TPP measures, collectively and individually, are inconsistent with Article 2.2 of the TBT Agreement, Article 2.1 of the TRIPS Agreement (incorporating Article 10*bis* of the Paris Convention), and Articles 15.4, 16.1, 16.3, 20, 22.2(b), and 24.3 of the TRIPS Agreement. Indonesia also requested the Panel to find that the TPP measures, collectively and individually, are inconsistent with Article XXIII:1(a) of the GATT 1994 because they have nullified or impaired benefits accruing directly or indirectly to Indonesia under the TBT Agreement.<sup>37</sup>

1.14. The Panel circulated its Report to Members of the World Trade Organization (WTO) on 28 June 2018. In its Report, the Panel found that Honduras, the Dominican Republic, Cuba, and Indonesia (the complainants) had not demonstrated that Australia's measures are inconsistent with Article 2.2 of the TBT Agreement, Articles 6*quinquies* and 10*bis* of the Paris Convention (1967) (read in conjunction with Article 2.1 of the TRIPS Agreement), Articles 15.4, 16.1, 16.3, 20, 22.2(b), and 24.3 of the TRIPS Agreement, and Article IX:4 of the GATT 1994. In light of these findings, the Panel declined the complainants' requests that the Panel recommend that Australia bring its measures into conformity with its obligations under the TRIPS Agreement, the TBT Agreement, and the GATT 1994.<sup>38</sup>

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International Trademark Association; Australian Retailers Association; Japan Intellectual Property Association; Association of European Businesses in Russia, American Chamber of Commerce in Russia, and RusBrand; International Tobacco Growers' Association; Patent and Trademark Attorneys Association – Turkey; Aegean Exporters Association; European Association of Trade Mark Owners (MARQUES); United States Chamber of Commerce; EU-ASEAN Business Council, EU-Malaysia Chamber of Commerce and Industry, European Chamber of Commerce in Singapore, European Chamber of Commerce of the Philippines, European Chamber of Commerce and Industry in Lao PDR, and European Association of Business and Commerce in Thailand; American Chamber of Commerce in Thailand; Romanian Small and Medium Retailers Association; Association of Trademarks and Design Rights Practitioners; Canadian Manufacturers and Exporters; Federation of Korean Industries; Polish Chamber of Trade; Union des Fabricants; Russian Union of Industrialists and Entrepreneurs; American Chamber Mexico; and Malaysian International Chamber of Commerce and Industry.

<sup>33</sup> Panel Report, paras. 1.56-1.57.

<sup>34</sup> Panel Report, para. 3.1.

<sup>35</sup> Panel Report, para. 3.3.

<sup>36</sup> Panel Report, para. 3.5.

<sup>37</sup> Panel Report, para. 3.7.

<sup>38</sup> Panel Report, section 8.

1.15. On 19 July 2018, Honduras notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report in DS435, and certain legal interpretations developed by the Panel, and filed a Notice of Appeal<sup>39</sup> and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review<sup>40</sup> (Working Procedures). On 23 August 2018, the Dominican Republic notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report in DS441, and certain legal interpretations developed by the Panel, and filed a Notice of Appeal<sup>41</sup> and an appellant's submission, pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures.<sup>42</sup> On 2 October 2018, Australia filed an appellee's submission in response to the appeals by Honduras and the Dominican Republic.<sup>43</sup>

1.16. On 11-12 October 2018, 19 WTO Members – Argentina, Brazil, Canada, China, Dominican Republic<sup>44</sup>, European Union, Indonesia, Japan, Malawi, Mexico, New Zealand, Nigeria, Norway, Philippines, Singapore, Thailand, United States, Zambia, and Zimbabwe<sup>45</sup> – each filed a third participant's submission.<sup>46</sup> On 12 October 2018, 10 WTO Members – Chile, Guatemala, India, Korea, Malaysia, Peru, Russian Federation (Russia), South Africa, Chinese Taipei, and Uruguay – notified their intention to appear at the oral hearing as third participants.<sup>47</sup> Between 15 October 2018 and 19 November 2019, six WTO Members – Ecuador, Oman, Nicaragua, Panama, Turkey, and Ukraine – notified their intention to appear at the oral hearing as third participants.<sup>48</sup>

1.17. On 13 July 2018, after Honduras filed its appeal<sup>49</sup> but before the Dominican Republic did<sup>50</sup>, the Appellate Body received a joint communication from Australia, Honduras, and the Dominican Republic (the participants) in relation to these appellate proceedings. This communication was also sent to Cuba and Indonesia and to all the third parties in the four disputes before the Panel. In their joint communication, the participants requested that, in the event of multiple appeals, the Appellate Body allow Australia to file a single Notice of Other Appeal, a single other appellant's submission, and a single appellee's submission in relation to all appeals. The participants also requested the Appellate Body to consider adopting a schedule for the filing of appellees' and third participants' submissions that would give all participants and third participants sufficient time to review and respond to possible appeals from any of the participants. On 16 July 2018, the Chair of the Appellate Body, on behalf of the Appellate Body Division that would hear the appeals<sup>51</sup> (the Division), invited Cuba, Indonesia, and the third parties in the four disputes before the Panel to comment on the joint request. Brazil, Canada, China, Cuba, Indonesia, Japan, Korea, Mexico, New Zealand, and Russia submitted comments. None of them objected to the joint proposal by the participants. No comments were received from the other third parties.

1.18. On 23 July 2018, the Chair of the Appellate Body issued a Procedural Ruling on behalf of the Division. Given the envisaged consolidation of Honduras' appeal with any other appeals that would be filed by the other three complainants, the Division agreed to modify the filing of a Notice of Other Appeal, other appellant's submission, appellees' submissions, and third participants' submissions in

<sup>39</sup> WT/DS435/23.

<sup>40</sup> WT/AB/WP/6, 16 August 2010.

<sup>41</sup> WT/DS441/23.

<sup>42</sup> Cuba, Indonesia, and Australia did not appeal the Panel Reports in DS458 and DS467. Nor did Australia file other appeals with respect to the Panel Reports in DS435 and DS441.

<sup>43</sup> Pursuant to Rule 22 of the Working Procedures.

<sup>44</sup> In WT/DS435.

<sup>45</sup> Zimbabwe filed its third participant's submission on 11 October 2018.

<sup>46</sup> Pursuant to Rule 24(1) of the Working Procedures.

<sup>47</sup> Pursuant to Rule 24(2) of the Working Procedures.

<sup>48</sup> Pursuant to Rule 24(4) of the Working Procedures. On 6 and 7 June 2019, respectively, Ukraine and Panama submitted their delegation lists for the first oral hearing to the Appellate Body Secretariat and the participants and third participants in these disputes. On 14 and 19 November 2019, respectively, Panama and Oman submitted their delegation lists for the second oral hearing to the Appellate Body Secretariat and the participants and third participants in these disputes. For purposes of these appellate proceedings, we have interpreted Oman's, Panama's, and Ukraine's actions to be notifications expressing their intention to attend the oral hearings pursuant to Rule 24(4) of the Working Procedures.

<sup>49</sup> In WT/DS435/23.

<sup>50</sup> In WT/DS441/23.

<sup>51</sup> At the time of the issuance of this Procedural Ruling, the composition of the Division hearing the appeal in DS435 had not yet been announced. The composition of the Division was announced only after the Dominican Republic filed its Notice of Appeal in DS441.

order to ensure fairness and orderly procedure in the conduct of these appeals. Moreover, in order to safeguard Australia's due process rights, which would risk being affected if a complaining party were to file its Notice of Appeal and appellant's submission after having seen Australia's first appellee's submission, the Division authorized Australia to file any Notice of Other Appeal and other appellant's submission in a single document no later than by 3 September 2018. In addition, the Division set a single deadline for appellees' submissions in these disputes for 2 October 2018. With respect to the extension of the deadline for filing third participants' submissions, the Division set a single deadline for third participants' submissions in these disputes for 12 October 2018.<sup>52</sup>

1.19. Between 25 July 2018 and 20 May 2019, the Appellate Body received eight *amici curiae* submissions in connection with these appellate proceedings. On 25 July 2018, the Appellate Body received an *amicus curiae* submission from the Consumer Choice Center. On 30 July 2018, the Appellate Body received an *amicus curiae* submission from Bienvenido S. Oplas, Jr., president of Minimal Government Thinkers. On 7 August 2018, the Appellate Body received two *amici curiae* submissions: from Sinclair Davidson, professor of institutional economics at the Blockchain Innovation Hub in Australia; and from the Consumer Packaging Manufacturers Alliance (CPMA). On 8 August 2018, the Appellate Body received a further two *amici curiae* submissions: from the Australian Taxpayers' Alliance; and from the Taxpayers Protection Alliance (TPA). On 28 November 2018, the Appellate Body received a joint *amicus curiae* submission from the UICC and CCA. Finally, on 10 January 2019, the Appellate Body received an *amicus curiae* submission from the International Trademark Association (INTA).<sup>53</sup>

1.20. By letter dated 17 September 2018, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Reports within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision, due to the exceptional size and complexity of these consolidated proceedings, the backlog of appeals pending with the Appellate Body at present, and the overlap in the composition of all divisions resulting in part from the reduced number of Appellate Body Members.<sup>54</sup> On 31 March 2020, the Presiding Member of the Division notified the Chair of the DSB that the Appellate Body Report in these proceedings would be circulated to WTO Members by early June 2020. The Presiding Member indicated that the Division would communicate the specific date in the weeks preceding such date of circulation.<sup>55</sup> On 4 June 2020, the Presiding Member of the Division notified the Chair of the DSB that the Appellate Body Report in these proceedings would be circulated to WTO Members no later than 9 June 2020.<sup>56</sup>

1.21. The two hearings in these appellate proceedings were held on 11-14 June 2019 and 19-22 November 2019, respectively. At both hearings, the participants and third participants made oral statements and responded to questions posed by the Members of the Division. At the request of Honduras, the Division allowed a member of Honduras' delegation to participate in the reading of the closing statements at the second hearing via video conference.

1.22. By letter dated 16 August 2019, Australia requested the Division to provide guidance on the presence and role of individuals that Australia referred to as "fact experts", at the second hearing of these appellate proceedings. Australia requested that the Division either: (i) exclude, from the second hearing, individuals who appeared as "fact experts" before the Panel; or (ii) issue clear guidance concerning the role of these individuals at the second hearing. On 20 August 2019, the Division invited the Dominican Republic, Honduras, and the third participants to comment on Australia's letter by 23 August 2019. The Dominican Republic, Honduras, Canada, the European Union, and the United States submitted comments on 23 August 2019. China submitted its comments on 26 August 2019.

1.23. By letter dated 30 August 2019, the Division reiterated the Presiding Member's clarification, provided at the first hearing, that each Member has the right to determine who will form part of its

<sup>52</sup> Procedural Ruling of 23 July 2018.

<sup>53</sup> Copies of these submissions were not simultaneously provided to the participants and third participants in these appellate proceedings. Therefore, as a matter of courtesy, the Appellate Body forwarded electronic copies of these eight *amici curiae* submissions to the participants and third participants. However, the Appellate Body emphasized that this transmission was without prejudice to the legal status or to any action the Appellate Body would take in connection with these submissions.

<sup>54</sup> WT/DS435/24 and WT/DS441/25.

<sup>55</sup> WT/DS435/25 and WT/DS441/26.

<sup>56</sup> WT/DS435/26 and WT/DS441/27.

delegation and who speaks on its behalf. The Division added that, when responding to questions from the Division, every individual member of a delegation responds as an advocate representing that participant. Moreover, as all individuals included in participants' delegations at the second hearing would be present as representatives of their governments, they would be subject to the provisions of the DSU, including the scope of appellate review as delineated by Article 17.6 of the DSU. In this regard, the Members of the Division indicated that they would be proactive in disciplining participants' responses to questions and would intervene whenever they deemed it necessary. The Division provided further guidance as to the conduct of the second hearing at the start of that hearing.

1.24. By letter dated 28 September 2018, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Chair of the Appellate Body had notified the Chair of the DSB of the Appellate Body's decision to authorize Appellate Body Member Mr Shree Baboo Chekitan Servansing to complete the disposition of these appeals, to which he had been assigned before the expiry of his term of office. On 10 December 2019, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Chair of the Appellate Body had informed the Chair of the DSB that Messrs Thomas R. Graham and Ujal Singh Bhatia would complete the disposition of these appeals, to which they had been assigned before the expiry of their second terms of office, and "for which hearings ha[d] been completed".<sup>57</sup>

## 2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.<sup>58</sup> The Notice of Appeal and the executive summaries of the participants' claims and arguments are contained in Annexes A and B of the Addendum to these Reports, WT/DS435/AB/R/Add.1, WT/DS441/AB/R/Add.1.

## 3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the third participants that filed a written submission<sup>59</sup> are reflected in the executive summaries of their written submissions provided to the Appellate Body<sup>60</sup> and are contained in Annex C of the Addendum to these Reports, WT/DS435/AB/R/Add.1, WT/DS441/AB/R/Add.1.

## 4 ISSUES RAISED IN THESE APPEALS

4.1. The following issues are raised in these appeals:

- a. whether the Panel erred in finding that the complainants had not demonstrated 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, specifically:
  - i. with respect to the contribution of the TPP measures to Australia's objective, whether the Panel erred in finding that the TPP measures, in combination with other tobacco-control measures maintained by Australia, are apt to, and do in fact, contribute to Australia's objective of reducing the use of, and exposure to, tobacco products. In this regard:
    - whether the Panel erred in its application of Article 2.2; and
    - whether the Panel failed to make an objective assessment of the facts of the case as provided for under Article 11 of the DSU, in its assessment of the evidence pertaining to the contribution of the TPP measures to Australia's objective;

<sup>57</sup> WT/DSB/79.

<sup>58</sup> Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

<sup>59</sup> See para. 1.16. above.

<sup>60</sup> Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).



- ii. with respect to the trade restrictiveness of the TPP measures, whether the Panel erred in finding that: (i) a reduction in the opportunity to differentiate among tobacco products on the basis of brands did not demonstrate the trade restrictiveness of the TPP measures; and (ii) the TPP measures did not affect the overall value of imported tobacco products. In this regard:
  - whether the Panel erred in its interpretation and application of Article 2.2; and
  - whether the Panel failed to make an objective assessment of the facts of the case as provided for under Article 11 of the DSU, in finding that the part of the downward substitution that occurred after the implementation of the TPP measures was attributable to the overall reduction in cigarette consumption caused by the TPP measures (Dominican Republic only);
- iii. with respect to the proposed alternative measures, whether the Panel erred in its findings concerning two of these alternatives, namely, an increase in the minimum legal purchasing age (MLPA) and an increase in taxation. In this regard:
  - whether the Panel erred in its interpretation and application of Article 2.2 in finding that the complainants had not demonstrated that the two proposed alternative measures are less trade-restrictive than the TPP measures;
  - whether the Panel erred in its interpretation and application of Article 2.2 in finding that, in the particular context of tobacco control and the regulatory efforts of Australia to improve public health, none of the alternatives proposed by the complainants would contribute to Australia's objective to an equivalent degree as would the TPP measures; and
  - whether the Panel failed to make an objective assessment of the matter, as provided for under Article 11 of the DSU (Dominican Republic only);
- b. whether the Panel erred in finding that the complainants had not demonstrated that the TPP measures are inconsistent with Article 16.1 of the TRIPS Agreement, specifically:
  - i. whether the Panel erred in its interpretation and application of Article 16.1; and
  - ii. whether the Panel failed to make an objective assessment of the matter as provided for under Article 11 of the DSU; and
- c. whether the Panel erred in finding that the complainants had not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement, specifically:
  - i. whether the Panel erred in its interpretation of the word "unjustifiably" in Article 20;
  - ii. whether the Panel erred in its application of Article 20; and
  - iii. whether the Panel acted inconsistently with Articles 7.1 and 11 of the DSU by failing to address the Dominican Republic's claim regarding cigarette sticks (Dominican Republic only).

## 5 RELEVANT BACKGROUND INFORMATION

### 5.1 The products at issue

5.1. The products at issue in these disputes are tobacco products. The term "tobacco product" is defined in the Tobacco Plain Packaging Act 2011 (TPP Act) to mean "processed tobacco, or any product that contains tobacco" that is "manufactured to be used for smoking, sucking, chewing or snuffing" and "not included in the Australian Register of Therapeutic Goods maintained under the

*Therapeutic Goods Act 1989*".<sup>61</sup> This definition encompasses not only cigarettes, but also "non-cigarette" products, such as cigars, little cigars (also known as cigarillos), and bidis.<sup>62</sup>

5.2. Before the Panel, Australia indicated that the total volumes of cigarette and cigar imports had increased steadily following the introduction of tobacco plain packaging. This increase in *imports* of tobacco products into Australia was mostly attributable to domestic producers moving production out of Australia and shifting production offshore.<sup>63</sup> The shifting of production offshore was a response to the Australian government's reduced-fire-risk requirements introduced in 2010, which negatively impacted local manufacturing.<sup>64</sup> The Panel observed that "imports will soon represent the entirety of Australia's tobacco product market, with domestic production being phased out."<sup>65</sup> Thus, Australia's domestic market for tobacco products "is supplied entirely through imported products".<sup>66</sup>

## 5.2 The measures at issue

### 5.2.1 Overview

5.3. The legislative process in Australia, which led to the adoption of the measures at issue in these disputes, started in 2008 with the establishment of the National Preventative Health Taskforce (NPHT). The NPHT was responsible for developing a "National Preventive Health Strategy", to "provide a blueprint for tackling the burden of chronic disease currently caused by obesity, tobacco, and excessive consumption of alcohol".<sup>67</sup> In 2009, the NPHT released its final report.<sup>68</sup> With respect to tobacco control, this report identified 11 "key action areas", including: (i) making tobacco products significantly more expensive; (ii) ending all remaining forms of advertising and promotion of tobacco products (which included a specific action to eliminate promotion of tobacco products through design of packaging); and (iii) eliminating exposure to second-hand smoke in public places.<sup>69</sup>

<sup>61</sup> Panel Report, para. 2.12 (quoting Tobacco Plain Packaging Act 2011 (Cth) (TPP Act) (Panel Exhibits AUS-1, JE-1), Section 4(1)). In footnote 189 thereto, the Panel noted that the definitions stated in paragraph 2.12 are also applicable to the TPP Regulations, in addition to its own list of definitions. (Tobacco Plain Packaging Regulations 2011 (Cth), as amended by the Tobacco Plain Packaging Amendment Regulation 2012 (No. 1) (Cth) (TPP Regulations) (Panel Exhibits AUS-3, JE-2), Note to Regulation 1.1.3; TPP Bill Explanatory Memorandum (Panel Exhibits AUS-2, JE-7), p. 9; FCTC (Panel Exhibits AUS-44, JE-19), Article 1(f)).

<sup>62</sup> Panel Report, para. 2.12 (quoting TPP Bill Explanatory Memorandum (Panel Exhibits AUS-2, JE-7), p. 9). Other covered "non-cigarette" products include roll-your-own (RYO) tobacco, kreteks, and dissolvable tobacco products, such as tablets containing tobacco for sucking. (Ibid.) Some of these types of tobacco products (such as cigarettes, cigars, and bidis), and their specific packaging, are also defined in the TPP Act and TPP Regulations. (Panel Report, fn 190 to para. 2.12 (referring to TPP Act (Panel Exhibits AUS-1, JE-1), Section 4(1); TPP Regulations (Panel Exhibits AUS-3, JE-2), Regulation 1.1.3))

<sup>63</sup> Australia's response to Panel question No. 5, paras. 29-30.

<sup>64</sup> Panel Report, para. 7.1217 (referring to Dominican Republic's second written submission to the Panel, para. 948; response to Panel question No. 5, paras. 36-39; Australia's response to Panel question No. 117, para. 125; HoustonKemp, Competition and Trade for Tobacco Products in Australia (9 March 2015) (Panel Exhibit AUS-19 (SCI)), pp. 27 and 50).

<sup>65</sup> Panel Report paras. 7.420 and 7.1145. See also paras. 7.1203-7.1204.

<sup>66</sup> Panel Report, para. 7.1196.

<sup>67</sup> Panel Report, para. 2.6 (quoting Australian Government Preventative Health Taskforce, "Terms of Reference", available at <http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/terms-of-reference-1lp> (accessed 7 October 2014) (Panel Exhibits HND-2, DOM-50)).

<sup>68</sup> Panel Report, para. 2.7 (referring to National Preventative Health Taskforce, *Australia: The Healthiest Country by 2020 – National Preventative Health Strategy – The Roadmap for Action*, Australian Government (30 June 2009) (NPHT – The Roadmap for Action) (Panel Exhibits AUS-67, JE-14)).

<sup>69</sup> Panel Report, para. 2.7 (referring to NPHT – The Roadmap for Action (Panel Exhibits AUS-67, JE-14), pp. 174 and 182).

5.4. In addressing these key action areas, Australia maintains a series of tobacco-control-related measures, most of which are not at issue in these disputes.<sup>70</sup> The Panel identified the measures at issue in these disputes as comprising the following:

- a. the Tobacco Plain Packaging Act 2011 (Cth)<sup>71</sup> (TPP Act);
- b. the Tobacco Plain Packaging Regulations 2011 (Cth), as amended by the Tobacco Plain Packaging Amendment Regulation 2012 (No. 1) (Cth)<sup>72</sup> (TPP Regulations)<sup>73</sup>; and
- c. the Trade Marks Amendment (Tobacco Plain Packaging) Act 2011 (Cth)<sup>74</sup> (TMA Act).<sup>75</sup>

5.5. The Panel used the term "TPP measures" to refer to these instruments taken together.<sup>76</sup> Tobacco products manufactured or packaged in Australia for domestic consumption were required to comply with the TPP measures from 1 October 2012. As of 1 December 2012, all tobacco products sold, offered for sale, or otherwise supplied in Australia were required to comply with the TPP measures.<sup>77</sup>

5.6. As the Panel noted, the TPP Act is, by its own terms, "[a]n Act to discourage the use of tobacco products, and for related purposes".<sup>78</sup> Pursuant to Section 3 of the TPP Act, this Act regulates the

<sup>70</sup> Section 2.2 of the Panel Report describes certain of Australia's tobacco-related measures that are not at issue in these disputes, but that are relevant to an understanding of the regulatory context within which the measures at issue operate.

<sup>71</sup> TPP Act (Panel Exhibits AUS-1, JE-1).

<sup>72</sup> TPP Regulations (Panel Exhibits AUS-3, JE-2). The amendment to the TPP Regulations was adopted on 8 March 2012. The "purpose of the regulation is to amend the Principal Regulations to expand their application to non-cigarette tobacco products and to prescribe specific requirements for the retail packaging and appearance of non-cigarette tobacco products". (Panel Report, fn 185 to para. 2.9 (quoting Explanatory Statement, Tobacco Plain Packaging Amendment Regulation 2012 (No. 1) (Cth) (TPPA Regulation Explanatory Statement) (Panel Exhibit JE-22), p. 1))

<sup>73</sup> Section 109 of the TPP Act provides that "[t]he Governor-General may make regulations prescribing matters: (a) required or permitted by this Act to be prescribed; or (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act". The TPP Regulations were made pursuant to this provision. (Panel Report, para. 2.14 (quoting TPP Act (Panel Exhibits AUS-1, JE-1), Section 109(1); referring to TPPA Regulation Explanatory Statement (Panel Exhibit JE-22), p. 2))

<sup>74</sup> The Trade Marks Amendment (Tobacco Plain Packaging) Act 2011 (Cth) (TMA Act) (Panel Exhibits AUS-4, JE-3). The TMA Act amends the Trade Marks Act 1995 (Cth) by inserting a new provision, Section 231A. According to the TMA Bill Explanatory Memorandum, the amendment was introduced so that, if necessary, the Australian government could quickly remedy any unintended interaction between the TPP Act and the Trade Marks Act 1995. The objective of any such exercise of power under the TMA Act would be to ensure that applicants for trade mark registration and registered owners of trade marks were not disadvantaged by the practical operation of the TPP Act. Regulations made under new Section 231A were not intended to have any effect on the operation of the Trade Marks Act in relation to goods or services not governed by the TPP Act. (Panel Report, paras. 2.45-2.47 (referring to TMA Act (Panel Exhibits AUS-4, JE-3); quoting Explanatory Memorandum, Trade Marks Amendment (Tobacco Plain Packaging) Bill 2011 (Cth) (TMA Bill Explanatory Memorandum) (Panel Exhibits AUS-5, JE-5), p. 1))

<sup>75</sup> Panel Report, paras. 2.1-2.4.

<sup>76</sup> An important aspect of the TPP measures is that the Explanatory Memoranda accompanied the respective Bills of Parliament before they were passed into law. As the Panel noted, the TPP Bill and TMA Bill were accompanied by Explanatory Memoranda. (TPP Bill Explanatory Memorandum (Panel Exhibits AUS-2, JE-7); TMA Bill Explanatory Memorandum (Panel Exhibits AUS-5, JE-5)) Such documents assist members of Parliament, officials, and the public to understand the objectives and detailed operation of the clauses of a Bill. In Australia, an Explanatory Memorandum may also serve as "extrinsic material" that can be used as an aid to judicial interpretation of Acts. (Panel Report, para. 2.13 (referring to Acts Interpretation Act 1901 (Cth) (Panel Exhibit AUS-259), Section 15AB(2)(e); Australia's first written submission to the Panel, fn 775 to para. 601)) The TPP Regulations were accompanied by a similar document, an Explanatory Statement, which may also serve as an extrinsic aid to judicial interpretation. (Panel Report, para. 2.13 (referring to TPPA Regulation Explanatory Statement (Panel Exhibit JE-22)))

<sup>77</sup> Panel Report, para. 2.10 (referring to Australia's first written submission to the Panel, para. 123; TPP Regulations (Panel Exhibits AUS-3, JE-2), Regulation 1.1.2; TPP Act (Panel Exhibits AUS-1, JE-1), Section 9).

<sup>78</sup> Panel Report, para. 2.11 (quoting TPP Act (Panel Exhibits AUS-1, JE-1)).

retail packaging and appearance of tobacco products in order to: (i) improve public health; and (ii) give effect to certain obligations in the WHO FCTC.<sup>79</sup>

## 5.2.2 Requirements for the retail packaging of tobacco products

5.7. Pursuant to the TPP measures, all outer and inner surfaces of certain retail packaging of tobacco products<sup>80</sup> must have a matt finish.<sup>81</sup> The TPP measures further stipulate that the outer surfaces of these packages must be the colour Pantone 448C (drab dark brown), and that the inner surfaces of a cigarette pack or cigarette carton must be white. The inner surface of these packages (other than a cigarette pack or cigarette carton) must be either white or the colour of the packaging material in its natural state. The lining of a cigarette pack must be silver-coloured foil with a white paper backing.<sup>82</sup> However, as the Panel noted, the colour requirements in the TPP measures do not apply to health warnings; the text of the brand, business or company name, or variant name; or the text of relevant legislative requirements.<sup>83</sup>

5.8. In addition, the TPP measures prohibit the appearance of trademarks<sup>84</sup> and marks anywhere on the retail packaging of tobacco products, with the exception of the brand name, business or company name, variant name, the relevant legislative requirements, and other trademarks and marks permitted by the TPP measures.<sup>85</sup> The TPP measures make provision for the appearance of origin marks, calibration marks, a measurement mark and trade description, a barcode, a fire-risk statement, a locally made product statement, the name and address of the person who packed the product or on whose behalf it was packed, and a consumer contact number.<sup>86</sup> These markings must not obscure any relevant legislative requirement, or constitute or provide access to tobacco advertising and promotion.<sup>87</sup>

5.9. Section 21 of the TPP Act, operating together with the TPP Regulations, prescribes the requirements for the manner in which the brand, business or company, or variant names for tobacco products may appear on the retail packaging of a tobacco product.<sup>88</sup> With respect to cigarette packaging, any of these names must be printed in the Lucida Sans typeface in fonts no larger than

<sup>79</sup> Panel Report, paras. 2.11 and 2.15 (referring to TPP Act (Panel Exhibits AUS-1, JE-1), Section 3). The TPP Act identifies certain safety or information standards that prevail to the extent of any inconsistency between them and the TPP Act. The Act also provides that it "does not exclude or limit the operation of a relevant tobacco law of a State or Territory that is capable of operating concurrently with this Act". (Panel Report, para. 2.43 (referring to TPP Act (Panel Exhibits AUS-1, JE-1), Sections 10-11))

<sup>80</sup> The TPP measures contain specific definitions for certain types of tobacco packaging, such as "cigarette pack", "cigarette carton", "cigar tube", and "pouch". A cigarette pack is "any container for retail sale in which cigarettes are directly placed". Reference to an outer surface of a cigarette pack (such as its "front outer surface") "is a reference to all of that outer surface, including the part of that outer surface that forms part of the flip-top lid". Further, the "inside lip" of a cigarette pack "means the part of the outer surfaces of the pack that is obscured when the flip-top lid is closed". A cigarette carton is "any container for retail sale that contains smaller containers in which cigarettes are directly placed". Additionally, "[i]f a cigarette carton has one or more flaps with surfaces that become visible only when the carton is opened, those surfaces are taken to be inner surfaces of the carton". A cigar tube means "a tube for packaging one cigar". A pouch means "primary packaging" that "is made from flexible material" and "takes the form of a rectangular pocket with a flap that covers the opening". (Panel Report, fn 202 to para. 2.17 (quoting TPP Act (Panel Exhibits AUS-1, JE-1), Sections 4(1), 6(1)-(2); TPP Regulations (Panel Exhibits AUS-3, JE-2), Regulation 1.1.3))

<sup>81</sup> Panel Report, para. 2.23.

<sup>82</sup> Panel Report, para. 2.23 (referring to TPP Act (Panel Exhibits AUS-1, JE-1), Section 19; TPP Regulations (Panel Exhibits AUS-3, JE-2), Regulation 2.2.1).

<sup>83</sup> Panel Report, para. 2.23 (referring to TPP Act (Panel Exhibits AUS-1, JE-1), Section 19(3)).

<sup>84</sup> Section 17 of the Trade Marks Act 1995 (Cth) (TM Act) defines a trademark as "a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by another person". The TM Act defines a "sign" as including "any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent", or any combination thereof. (Panel Report, paras. 2.77-2.78 (quoting TM Act (Panel Exhibit JE-6), Sections 6 and 17))

<sup>85</sup> Panel Report, para. 2.24 (referring to TPP Act (Panel Exhibits AUS-1, JE-1), Section 20).

<sup>86</sup> Panel Report, para. 2.24 (referring to TPP Regulations (Panel Exhibits AUS-3, JE-2), Regulations 2.3.1(1)-2.3.1(2) and 2.3.8(1)).

<sup>87</sup> Panel Report, para. 2.24 (referring to TPP Regulations (Panel Exhibits AUS-3, JE-2), Regulation 2.3.1(5)).

<sup>88</sup> Panel Report, para. 2.25 (referring to TPP Act (Panel Exhibits AUS-1, JE-1)). Section 21(5) of the TPP Act stipulates that Section 21 does not apply to wrappers, which are governed by Section 22. (Panel Report, fn 230 to para. 2.25)

14-point size (for a brand, business, or company name) or 10-point size (for a variant name). The font must be normal weighted and in the colour Pantone Cool Gray 2C. In addition, the first letter in each word must be capitalised. No other upper case letters may be used.<sup>89</sup> With respect to retail packaging other than retail packaging of cigarettes, names must meet the same specifications, but can be printed on the packaging or on an adhesive label fixed to the packaging.<sup>90</sup> Such adhesive label must be in the colour Pantone 448C (drab dark brown), be no larger than reasonably necessary to print the permitted names, be fastened firmly to the retail packaging so as not to be easily removable, and not obscure any relevant legislative requirement.<sup>91</sup>

5.10. Importantly, the requirements set out in the TPP Act and the TPP Regulations operate in conjunction with other legislative requirements that are not challenged in these disputes, including graphic health warnings (GHWs).<sup>92</sup>

### 5.2.3 Requirements for the appearance of tobacco products

5.11. In addition to regulating the appearance of the retail packaging of tobacco products, the TPP measures regulate various elements affecting the appearance of tobacco products themselves. Section 26 of the TPP Act provides that no trademark or mark may appear anywhere on a tobacco product, other than as permitted by the TPP Regulations. Section 27 of the TPP Act provides that the TPP Regulations may prescribe additional requirements in relation to the appearance of tobacco products to further the objects of the TPP Act.<sup>93</sup>

5.12. Pursuant to the TPP Regulations, the paper casing and lowered permeability band (if any) of cigarettes must be white, or white with an imitation cork tip.<sup>94</sup> No trademark may appear anywhere on a cigarette. However, a cigarette may be marked with an alphanumeric code, which may appear only once on the cigarette. The alphanumeric code must not: (i) constitute, or provide access to, tobacco advertising and promotion; (ii) be "false, misleading, deceptive or likely to create an erroneous impression about the cigarette's characteristics, health effects, hazards or emissions"; (iii) "directly or indirectly create a false impression that a particular tobacco product is less harmful than other tobacco products"; (iv) "represent, or be linked or related in any way to, the emission yields of the cigarette"; or (v) "represent, or be related in any way to, the brand or variant name of the cigarette".<sup>95</sup>

5.13. With respect to cigars, the TPP Regulations prescribe that a single band may appear around the circumference of a cigar in the colour Pantone 448C (drab dark brown). The band may feature the brand, business or company name, and variant name of the cigar; the name of the country in which the cigar was made or produced; and an alphanumeric code. These marks must appear only once on the band. The brand, business or company name, and variant name must be placed horizontally along the length of the band so that they run around the circumference of the cigar. Similar restrictions to those applied to the alphanumeric code that appears on a cigarette also apply to the alphanumeric code that appears on a cigar. In addition, the band of a cigar may contain a covert mark, not visible to the naked eye, that does not provide access to tobacco advertising and promotion.<sup>96</sup>

<sup>89</sup> Panel Report, para. 2.25 and fn 231 thereto (referring to TPP Regulations (Panel Exhibits AUS-3, JE-2), Regulation 2.4.1).

<sup>90</sup> Panel Report, para. 2.25 (referring to TPP Regulations (Panel Exhibits AUS-3, JE-2), Regulation 2.4.2(2)).

<sup>91</sup> Panel Report, para. 2.25 (referring to TPP Regulations (Panel Exhibits AUS-3, JE-2), Regulation 2.4.2(3)).

<sup>92</sup> Panel Report, para. 2.32.

<sup>93</sup> Panel Report, para. 2.33 (referring to TPP Act (Panel Exhibits AUS-1, JE-1), Sections 26 and 27(1)(b)).

<sup>94</sup> TPP Regulations (Panel Exhibits AUS-3, JE-2), Regulation 3.1.1.

<sup>95</sup> Panel Report, para. 2.34 (quoting TPP Regulations (Panel Exhibits AUS-3, JE-2), Regulation 3.1.2).

<sup>96</sup> Panel Report, paras. 2.35-2.37 (referring to TPP Regulations (Panel Exhibits AUS-3, JE-2), Regulation 3.2.1). A covert mark is a type of origin mark, similar to the alphanumeric code.

## 6 ANALYSIS OF THE APPELLATE BODY

6.1. Honduras appeals certain aspects of the Panel's findings under Article 2.2 of the TBT Agreement and Articles 16.1 and 20 of the TRIPS Agreement.<sup>97</sup> The Dominican Republic also appeals certain aspects of the Panel's findings under Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement.<sup>98</sup> We begin by addressing the appellants' claims that the Panel erred in its analysis under Article 2.2 of the TBT Agreement. Next, we discuss the appellants' claims of error relating to the Panel's interpretation and application of Articles 16.1 and 20 of the TRIPS Agreement.

### 6.1 Article 2.2 of the TBT Agreement

#### 6.1.1 Overview

6.2. Honduras and the Dominican Republic (the appellants) request us to reverse the Panel's conclusion that the appellants had "not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 2.2 of the TBT Agreement".<sup>99</sup> Article 2.2 provides that:

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. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

6.3. For purposes of establishing that a measure is inconsistent with Article 2.2, a complainant<sup>100</sup> must demonstrate that: (i) the measure at issue constitutes a "technical regulation" within the meaning of the TBT Agreement<sup>101</sup>; and (ii) the measure is "more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create". With respect to the second element, the Appellate Body has said that a panel must determine the objective that the Member seeks to achieve by means of the technical regulation at issue and whether that objective is "legitimate".<sup>102</sup> A panel must also determine whether the technical regulation is "more trade-restrictive than necessary" to fulfil the legitimate objective. The Appellate Body has said that the assessment of "necessity", in the context of Article 2.2, involves a "relational analysis" of the following factors: (i) the trade restrictiveness of the technical regulation; (ii) the degree of

<sup>97</sup> Honduras' Notice of Appeal, pp. 1-6. In its Notice of Appeal, the Dominican Republic states that it "incorporates by reference into this appeal the claims on appeal made by Honduras". (Dominican Republic's Notice of Appeal, para. 16) In addition, the "Introduction" section of its appellant's submission, in the context of summarizing its claim of error under Article 20 of the TRIPS Agreement, the Dominican Republic asserts that it "incorporates by reference into this appeal the claims on appeal, and arguments, made by Honduras." (Dominican Republic's appellant's submission, para. 30) Furthermore, in response to questioning at the first hearing of these appellate proceedings, the Dominican Republic confirmed that it incorporated all of Honduras' claims and arguments on appeal. Accordingly, any reference to Honduras' claims and arguments throughout these Reports should be understood as also including a reference to the claims and arguments of the Dominican Republic.

<sup>98</sup> Dominican Republic's Notice of Appeal, pp. 1-3.

<sup>99</sup> Honduras' Notice of Appeal, p. 6 (referring to Panel Report (DS435), paras. 7.1724-7.1732 and 8.1.a); Dominican Republic's Notice of Appeal, para. 5 (quoting Panel Report (DS441), paras. 7.1732 and 8.1.b.i.).

<sup>100</sup> The burden of proof under Article 2.2 rests on the complainant. (Appellate Body Report, *US – Tuna II (Mexico)*, para. 323)

<sup>101</sup> Annex 1.1 to the TBT Agreement defines a "technical regulation" as follows:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

<sup>102</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 314. The third sentence of Article 2.2 provides an illustrative list of "legitimate objectives", which includes "protection of human health".

contribution that the technical regulation makes to the achievement of a legitimate objective; and (iii) the risks non-fulfilment would create.<sup>103</sup>

6.4. The phrase in the second sentence of Article 2.2 that "technical regulations shall not be more trade-restrictive than necessary" implies that "some" trade restrictiveness is allowed.<sup>104</sup> Establishing whether a technical regulation is "more trade-restrictive than necessary" may involve a comparison between: (i) the trade restrictiveness and the degree of contribution of the measure at issue to the legitimate objective; and (ii) the trade restrictiveness and the degree of contribution of possible alternative measures that are reasonably available to the legitimate objective – taking account of the risks non-fulfilment would create.<sup>105</sup> However, there are certain instances when such a comparative analysis might not be required, such as, when the measure is not trade-restrictive at all, or when a trade-restrictive measure makes no contribution to the achievement of the relevant legitimate objective.<sup>106</sup> Likewise, a comparative analysis might not be required where it can be demonstrated that, by its design, a trade-restrictive measure is incapable of contributing to the achievement of the relevant legitimate objective.<sup>107</sup>

6.5. Before the Panel, the complainants claimed that the TPP measures are inconsistent with Article 2.2 because they are more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. The complainants submitted two sets of arguments in support of their claims under Article 2.2. In their main set of arguments, the complainants asserted that the TPP measures are not apt to contribute, and make no contribution, to Australia's objective.<sup>108</sup> In their alternative set of arguments, the complainants contended that, even if the TPP measures make some contribution to Australia's objective, the TPP measures are more trade-restrictive than necessary because "certain *less* trade-restrictive alternative measures would be reasonably available to Australia to achieve an equivalent contribution to its objective, taking account of the risks that non-fulfilment of the objective would create."<sup>109</sup> Australia responded to the complainants' claims by asserting that the TPP measures fall outside the scope of Article 2.2 and, to the extent that they do fall within the scope of this provision, the complainants failed to make a *prima facie* case that they are inconsistent with Article 2.2.<sup>110</sup>

6.6. The Panel accepted that the TPP measures fall within the scope of the TBT Agreement<sup>111</sup> and that these measures constitute a technical regulation within the meaning of that Agreement.<sup>112</sup> The Panel also found that Australia had not demonstrated that the TPP measures are "in accordance with relevant international standards" for the purpose of the second sentence of Article 2.5 of the

<sup>103</sup> Appellate Body Reports, *US – COOL*, para. 374 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 318).

<sup>104</sup> Appellate Body Reports, *US – COOL*, para. 375.

<sup>105</sup> Appellate Body Reports, *US – COOL*, para. 376 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, paras. 320-322). The Appellate Body has said that the comparison with reasonably available alternative measures is merely a "conceptual tool" to be used for the purpose of ascertaining whether a challenged measure is more trade-restrictive than necessary. (Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.328, 5.334, and 5.338; *US – COOL*, fn 749 to para. 376; *US – Tuna II (Mexico)*, para. 320)

<sup>106</sup> Appellate Body Reports, *US – COOL*, fn 748 to para. 376 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, fn 647 to para. 322).

<sup>107</sup> In *Colombia – Textiles*, when addressing a defence under Article XX(a) of the GATT 1994, the Appellate Body considered that, "[w]ith respect to the analysis of the 'design' of the measure", an initial threshold examination should be conducted "to determine whether there is a relationship between an otherwise GATT-inconsistent measure" and the objective it purports to achieve. The Appellate Body explained that if the "threshold examination reveals that the measure is incapable" of contributing to the objective, then further examination as to whether this measure is "necessary" to achieve the stated objective "would not be required". (Appellate Body Report, *Colombia – Textiles*, para. 5.68) We consider this reasoning to be equally apposite to the analysis under Article 2.2 of the TBT Agreement.

<sup>108</sup> Panel Report, paras. 7.426, 7.437-7.438, and 7.485.

<sup>109</sup> Panel Report, para. 7.1325. (emphasis original) In response to questioning at the second hearing, the appellants confirmed that: (i) their main assertion before the Panel was that the TPP measures are "more trade-restrictive than necessary" because they do not, and are not apt to, make any contribution to Australia's objective while being trade-restrictive; and (ii) they had argued, in the alternative, that, even if the TPP measures were found to make some contribution, they would still be "more trade-restrictive than necessary" in light of the proposed alternative measures.

<sup>110</sup> Panel Report, paras. 7.16 and 7.48.

<sup>111</sup> Panel Report, para. 7.106.

<sup>112</sup> Panel Report, para. 7.182.



TBT Agreement.<sup>113</sup> Therefore, the Panel found that the TPP measures could not be "rebuttably presumed not to create an unnecessary obstacle to international trade".<sup>114</sup> These Panel findings are not challenged on appeal.

6.7. Additionally, before the Panel, it was undisputed among the parties that "the objective of the TPP measures relates to public health protection and more specifically to the protection of public health in relation to the use of tobacco products in Australia."<sup>115</sup> However, the parties differed in their understanding of the particular objective of the TPP measures.<sup>116</sup> Following its evaluation of the parties' arguments and the relevant evidence before it, the Panel considered "the objective pursued by Australia by means of the TPP measures to be to improve public health by reducing the use of, and exposure to, tobacco products".<sup>117</sup> The Panel's finding regarding Australia's objective is not challenged on appeal.

6.8. Having identified Australia's objective, the Panel indicated that it would "conduct a relational analysis of different factors, including the degree to which the TPP measures contribute to this objective, the extent to which they are trade-restrictive, and the nature of the risks of non-fulfilment of the objective pursued and the gravity of the consequences that would arise from such non-fulfilment".<sup>118</sup> The Panel considered it appropriate to examine the following factors<sup>119</sup>: (i) the degree of contribution of the TPP measures to Australia's objective<sup>120</sup>; (ii) the trade restrictiveness of the TPP measures<sup>121</sup>; (iii) the nature and gravity of the "risks of non-fulfilment" within the meaning of the second sentence of Article 2.2 of the TBT Agreement<sup>122</sup>; and (iv) whether any less trade-restrictive alternative measures capable of making an equivalent contribution are reasonably available to Australia.<sup>123</sup>

6.9. The Panel found that:

- a. 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>124</sup>;
- b. The evidence before the Panel, 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>125</sup>;
- c. 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>126</sup>;
- d. While it is plausible that the TPP measures may also, over time, affect the overall *value* of tobacco imports, the evidence before the Panel did not show this to have been the case yet. The Panel was also not persuaded that the complainants had demonstrated that the TPP measures impose conditions on the sale of tobacco products in Australia or compliance costs of such magnitude that they would amount to a limiting effect on trade<sup>127</sup>;

<sup>113</sup> Panel Report, para. 7.397.

<sup>114</sup> Panel Report, para. 7.402.

<sup>115</sup> Panel Report, para. 7.213.

<sup>116</sup> Panel Report, para. 7.214.

<sup>117</sup> Panel Report, para. 7.232. See also *ibid.*, paras. 7.243, 7.246, 7.251, and 7.495.

<sup>118</sup> Panel Report, para. 7.419.

<sup>119</sup> Panel Report, paras. 7.420-7.422.

<sup>120</sup> Panel Report, section 7.2.5.3.

<sup>121</sup> Panel Report, section 7.2.5.4.

<sup>122</sup> Panel Report, section 7.2.5.5.

<sup>123</sup> Panel Report, section 7.2.5.6.

<sup>124</sup> Panel Report, para. 7.1025.

<sup>125</sup> Panel Report, paras. 7.1025 and 7.1043.

<sup>126</sup> Panel Report, paras. 7.1208 and 7.1255.

<sup>127</sup> Panel Report, para. 7.1255.



- e. The risk that non-fulfilment of the objective of the TPP measures would create is that public health would not be improved as the use of, and exposure to, tobacco products would not be reduced. Such public health consequences of not fulfilling this objective are particularly grave<sup>128</sup>; and
- f. The complainants had not demonstrated that any of the four proposed alternative measures is a less trade-restrictive alternative measure that is reasonably available to Australia that would make a contribution to the objective equivalent to that of the TPP measures<sup>129</sup>, nor had Honduras or the Dominican Republic established that the "cumulative" application of these alternatives would constitute a less trade-restrictive alternative.<sup>130</sup>

6.10. Based on the foregoing, the Panel arrived at its overall conclusion that the complainants had not demonstrated that the TPP measures are more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create, within the meaning of Article 2.2.<sup>131</sup>

6.11. On appeal, the appellants claim that the Panel's intermediate and overall conclusions under Article 2.2 of the TBT Agreement should be reversed, because the Panel erred in its findings with respect to: (i) the contribution by the TPP measures to Australia's legitimate objective; (ii) the trade-restrictive nature of the TPP measures; and (iii) the availability of less trade-restrictive alternative measures that provide an equivalent contribution to Australia's legitimate objective. In addition, the appellants claim that the Panel failed to make an objective assessment of the matter, as required under Article 11 of the DSU, with respect to all the challenged aspects of its findings under Article 2.2 of the TBT Agreement.<sup>132</sup> We address the appellants' claims of error pertaining to each aspect of the Panel's analysis in turn. In doing so, we bear in mind that these aspects of the Panel's analysis relate to distinct but interrelated elements of the single legal standard applicable under Article 2.2, described in paragraphs 6.3. -6.4. above.

### 6.1.2 The contribution of the TPP measures to Australia's objective

6.12. Honduras argues that, while the Panel set out the correct legal standard under Article 2.2 of the TBT Agreement, the Panel "erred in law as it failed to apply this legal standard to the facts of the case" in making its findings on the degree of contribution of the TPP measures to Australia's objective.<sup>133</sup> However, the majority of the appellants' claims of error relating to this aspect of the Panel's analysis challenge the Panel's objectivity in its assessment of the facts of the case, with the appellants arguing that the Panel failed in its duty under Article 11 of the DSU.<sup>134</sup> Australia requests us to reject the claim under Article 2.2 of the TBT Agreement and the claims under Article 11 of the DSU in their entirety.<sup>135</sup>

6.13. In order to situate the appellants' claims in their proper context, we begin by providing a brief background to the Panel's analysis and findings on the degree of contribution of the TPP measures to Australia's objective. Next, we address Honduras' claim that the Panel erred in applying Article 2.2 of the TBT Agreement to the facts of this case. Thereafter, we introduce the appellants' claims under Article 11 of the DSU, setting out the order of analysis of these claims. This is followed by a discussion of the claims of error raised by the appellants under Article 11 of the DSU.

<sup>128</sup> Panel Report, para. 7.1322.

<sup>129</sup> Panel Report, paras. 7.1471, 7.1545, 7.1624, and 7.1716.

<sup>130</sup> Panel Report, paras. 7.1717-7.1723.

<sup>131</sup> Panel Report, para. 7.1732.

<sup>132</sup> Honduras' Notice of Appeal, pp. 3-6; Dominican Republic's Notice of Appeal, pp. 1-3.

<sup>133</sup> Honduras' appellant's submission, para. 552.

<sup>134</sup> Honduras' appellant's submission, paras. 695-1080 and 1082-1086; Honduras' appellant's submission, paras. 32-1216 and 1224-1243.

<sup>135</sup> Australia's appellee's submission, paras. 355 and 915.

### 6.1.2.1 Background to the Panel's analysis and findings on the contribution of the TPP measures to Australia's objective

6.14. Before the Panel, Honduras argued that the TPP measures make no contribution to Australia's objective, nor are they apt to do so.<sup>136</sup> The Dominican Republic contended that well-accepted axioms of social and medical science confirm that the TPP measures will not be effective in achieving Australia's stated goals.<sup>137</sup> The Dominican Republic also argued that, at this stage, evidence of actual operation of the TPP measures is far more valuable than mere expectations.<sup>138</sup> Australia argued that the TPP measures improve public health by impacting the three mechanisms identified in the TPP Act, namely: (i) reducing the attractiveness of tobacco packaging; (ii) reducing positive perceptions of taste; and (iii) reducing positive perceptions of smokers.<sup>139</sup> Australia argued further that, with regard to the nature of the objective of the TPP measures, their characteristics as revealed by their design and structure, and the nature, quantity, and quality of evidence available, the Panel should determine the measure's degree of contribution in qualitative terms.<sup>140</sup>

6.15. The Panel sought to determine the degree to which the TPP measures, "as written and applied, contribute, if at all, to Australia's legitimate objective of improving public health by reducing the use of, and exposure to, tobacco products".<sup>141</sup> Although the Panel conducted its analysis in several steps, it emphasized that its overall assessment would "be based on the entirety of the relevant evidence, taken together".<sup>142</sup> The Panel indicated that it would assess the evidence before it on the design, structure, and intended operation of the TPP measures, before addressing the evidence relating to their actual application. In carrying out its analysis, the Panel considered that it had a duty to examine all the evidence before it and to "evaluate the relevance and probative force of each piece thereof".<sup>143</sup> Of particular relevance to how the Panel approached its analysis was Australia's indication that the TPP measures are intended to contribute to Australia's objectives in the following manner:

- a. Tobacco plain packaging is intended to: (i) reduce the appeal of tobacco products to consumers; (ii) increase the effectiveness of the health warnings; and (iii) reduce the ability of the packaging to mislead consumers about the harmful effects of smoking. Australia referred to these processes as the TPP mechanisms, as did the Panel.<sup>144</sup>
- b. If the TPP measures operate as intended upon any one or any combination of the above three mechanisms, then Australian consumers are expected to be discouraged from taking up smoking (initiation) or resuming smoking (relapse), and to be encouraged to stop smoking (cessation) and reduce exposure to second-hand smoke. The Panel referred to initiation, relapse, and cessation as, more generally, *smoking behaviours* relating to the use of tobacco products.<sup>145</sup>

<sup>136</sup> Panel Report, para. 7.426.

<sup>137</sup> Panel Report, para. 7.437.

<sup>138</sup> Panel Report, para. 7.438. We take note of a tension in the appellants' claims of error on appeal. With respect to the Panel's assessment of the contribution of the TPP measures to Australia's objective, the appellants claim that the Panel erred, *inter alia*, by according too much weight to the evidence of the anticipated effects of the TPP measures, and insufficient weight to the evidence of actual effects of the TPP measures. Conversely, with respect to the Panel's assessment of the trade restrictiveness of the TPP measures, the appellants claim that the Panel erred, *inter alia*, by according too much weight to the evidence of the actual effects of the TPP measures, and insufficient weight to the evidence of the anticipated effects of the TPP measures. (See para. 6.423. and fn 1223 thereto below.)

<sup>139</sup> Panel Report, para. 7.451.

<sup>140</sup> Panel Report, para. 7.455.

<sup>141</sup> Panel Report, para. 7.424. See also *ibid.*, para. 7.483.

<sup>142</sup> Panel Report, para. 7.507.

<sup>143</sup> Panel Report, para. 7.517 (quoting Appellate Body Report, *Korea – Dairy*, para. 137).

<sup>144</sup> Panel Report, para. 7.490.

<sup>145</sup> The Panel explained that, for the purpose of its Report, "smoking behaviours" are those directly related to the use of tobacco products, including, for example, initiation, cessation, relapse, and consumption. "Smoking-related behaviours" are those associated with smoking behaviours, such as purchasing tobacco products, calling a Quitline, concealing a pack in public, and directing eye movements to GHWs. (Panel Report, fn 1442 to para. 7.490)

- c. As a consequence, positive public health outcomes – specifically reduced use of, and exposure to, tobacco products, and an associated reduction in tobacco-related disease and deaths – would arise.<sup>146</sup>

6.16. The Panel began by assessing the anticipated effect of the TPP measures, based on their design, structure, and expected operation.<sup>147</sup> Thereafter, the Panel assessed the evidence relating to the actual effects of the TPP measures following their entry into force. Specifically, the Panel assessed the impact of the TPP measures on: (i) "non-behavioural" or "proximal" outcomes (i.e. the appeal of packaging, the effectiveness of the GHWs, and the ability of packaging to mislead consumers)<sup>148</sup>; (ii) "distal" outcomes (i.e. intention and behavioural outcomes, such as increased intentions to quit and increased quit attempts)<sup>149</sup>; and (iii) smoking behaviour (i.e. prevalence and consumption).<sup>150</sup>

6.17. Throughout its analysis, the Panel emphasized that the operation of the TPP measures, including their contribution to Australia's objective, must be viewed in the broader context of other tobacco control measures maintained by Australia. The Panel explained that, while this broader context does not remove or reduce the need "to identify the contribution that the challenged measures themselves make to Australia's objective", it was a relevant consideration in the Panel's assessment, to the extent that "it informs and affects the manner in which the measures are applied and operate, as a component of a broader suite of complementary tobacco control measures."<sup>151</sup>

6.18. Following the Panel's examination of: (i) the design, structure, and intended operation of the TPP measures; (ii) the actual application of the TPP measures; and (iii) the impact of the TPP measures on illicit trade, the Panel concluded that:

7.1025. Overall ... 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 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.

...

7.1043. Taken as a whole, therefore, we consider that the evidence before us supports the view that, as applied in combination with the comprehensive range of other tobacco control measures maintained by Australia and not challenged in these proceedings, including a prohibition on the use of other means through which branding could otherwise contribute to the appeal of tobacco products and to misleading consumers about the harmful effects of smoking, the TPP measures are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products.<sup>152</sup>

6.19. The Panel emphasized that its conclusion was based on the evidence available to the Panel at the time of its assessment and was not intended to prejudge the future evolution of the contribution of the TPP measures to the reduction of the use of, and exposure to, tobacco products. At the same time, the Panel indicated that it was mindful that "the impact of the TPP measures may evolve over time."<sup>153</sup> In particular, the Panel considered "reasonable Australia's suggestion that the measures may be expected to have an impact in particular on future generations of young people whose

<sup>146</sup> Panel Report, para. 7.490.

<sup>147</sup> Panel Report, section 7.2.5.3.5.

<sup>148</sup> Panel Report, para. 7.491.

<sup>149</sup> The Panel noted that "distal" outcomes relate more closely to smoking behaviours such as initiation, relapse, cessation, and exposure to second-hand smoke. (Panel Report, para. 7.491)

<sup>150</sup> Panel Report, section 7.2.5.3.6. The Panel also examined the impact of the TPP measures on illicit trade. (Panel Report, section 7.2.5.3.7)

<sup>151</sup> Panel Report, para. 7.506 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 154).

<sup>152</sup> Panel Report, paras. 7.1025 and 7.1043.

<sup>153</sup> Panel Report, para. 7.1044.

exposure to tobacco advertising or promotion in Australia will have been generally limited, and that impacts on smoking cessation for existing smokers will also take some time to produce their full effects".<sup>154</sup>

### 6.1.2.2 Claim that the Panel erred in its application of Article 2.2 of the TBT Agreement

6.20. Honduras acknowledges that the Panel "set out the correct legal standard"<sup>155</sup> of how to assess the "degree to which a Member's technical regulation, as adopted, written, and applied, contributes to the legitimate objective pursued by that Member".<sup>156</sup> However, Honduras claims that the Panel erred in law because it failed to apply this legal standard to the facts of the case.<sup>157</sup> Honduras argues that, "generally", the Panel considered that an examination of the "totality of the evidence" meant that it was relieved of its obligation "to conduct a proper analysis of the probative value of the evidence regarding the measures' actual impact on the relevant smoking behaviour".<sup>158</sup> In response to questioning at the second hearing, Honduras expressed the view that if a panel sets a particular "legal standard" for how to approach and assess the evidence, then failing to adhere to that approach in its examination of the evidence would constitute an incorrect application of the law to the facts by the panel.

6.21. Australia submits that Honduras' claims relate to the Panel's appreciation of the evidence and arguments and the relative weight that the Panel attributed to specific pieces of evidence, rather than the Panel's engagement with issues of law and legal interpretation. In support of its assertion, Australia points to Honduras' "failure to develop legal arguments in relation to any of its purported application claims".<sup>159</sup> Accordingly, Australia requests the Appellate Body to reject Honduras' claim that the Panel erred in its application of Article 2.2 of the TBT Agreement in its assessment of the contribution of the TPP measures to Australia's objective.<sup>160</sup>

6.22. We observe that, in elaborating its claims that the Panel erred under Article 2.2 of the TBT Agreement in its analysis of the contribution of the TPP measures to Australia's objective, Honduras makes arguments that overlap entirely with those made in support of its claims under Article 11 of the DSU. Specifically, in support of its claim that the Panel failed to apply the correct legal standard under Article 2.2 to the facts of this case, Honduras submits that the Panel:

- a. 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;
- b. 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;
- c. 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;
- d. did not examine and consider the degree of contribution by evaluating "the relevance and probative force of each piece thereof"; rather, it simply summarized 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;
- e. did not engage in any serious or objective assessment of the "scientific and methodological rigor" of the evidence on the degree of contribution presented "in application of the

<sup>154</sup> Panel Report, para. 7.1044.

<sup>155</sup> Honduras' appellant's submission, para. 552.

<sup>156</sup> Honduras' appellant's submission, para. 549 (quoting Appellate Body Reports, *US – COOL*, para. 390).

<sup>157</sup> Honduras' appellant's submission, para. 552.

<sup>158</sup> Honduras' appellant's submission, para. 555.

<sup>159</sup> Australia's appellee's submission, para. 352.

<sup>160</sup> Australia's appellee's submission, para. 355.

SPS test" it considered to be applicable, but simply included all of the evidence – or at least all of the evidence that was submitted by Australia – and effectively gave it all equal weight; and

- f. despite its repeated statements about its approach to the econometric evidence, the Panel 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>161</sup>

6.23. In certain circumstances, some of the issues identified by Honduras' allegations may implicate a panel's application of the legal standard under Article 2.2 to the facts of the case.<sup>162</sup> Moreover, as the Appellate Body has said in the past, it is sometimes difficult to distinguish clearly between issues that are purely legal or purely factual or are mixed issues of law and fact.<sup>163</sup> However, in most cases, an issue will be *either* one of application of the law to the facts *or* an issue of the objective assessment of facts, but not both.<sup>164</sup>

6.24. In these appellate proceedings, several factors contribute to our view that Honduras' challenges to the Panel's analysis relate to the Panel's appreciation of the evidence before it, rather than to the Panel's application of the legal standard under Article 2.2 to the facts of this case. We highlight Honduras' use of the following terminology in the arguments that it makes in support of its claim that the Panel erred in applying the legal standard under Article 2.2 to the facts of this case: (i) "the Panel ... gave equal or more weight to perceptions and intentions not corroborated by evidence on actual behaviour"<sup>165</sup>; (ii) "[t]he Panel [did not evaluate] 'the relevance and probative force of each piece thereof'"<sup>166</sup>; (iii) "[the Panel] 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"<sup>167</sup>; (iv) "[t]he Panel did not engage in any serious or objective assessment of the 'scientific and methodological rigor' of the evidence"<sup>168</sup>; and (v) the Panel "conduct[ed] its own (flawed) econometric assessment of the evidence".<sup>169</sup> Moreover, the arguments raised by Honduras are accompanied by footnotes referencing Honduras' arguments made in support of its claims under Article 11 of the DSU.<sup>170</sup> In the same vein, Honduras indicates that the "Panel's actions", which are the subject of the claim that the Panel erred in its application of Article 2.2, "also amount to a failure to undertake an objective assessment of the matter" under Article 11 of the DSU.<sup>171</sup>

6.25. For these reasons, we consider that Honduras' claims implicate the Panel's appreciation of the facts and evidence, rather than its application of the legal standard under Article 2.2 to the facts of this case. Accordingly, we find that Honduras has not substantiated its claim that the Panel erred in its application of Article 2.2 to the facts of this case.

6.26. Rather, as mentioned in paragraph 6.24. above, in elaborating its claims that the Panel erred under Article 2.2 of the TBT Agreement in its analysis of the contribution of the TPP measures to Australia's objective, Honduras makes arguments that overlap entirely with those made in support

<sup>161</sup> Honduras' appellant's submission, para. 554.

<sup>162</sup> For instance, Honduras highlights that the Panel borrowed a standard that has been applied in cases involving the SPS Agreement, in reasoning that "[t]o the extent that scientific evidence is relied upon, [the Panel's] assessment may include in particular a consideration of whether such evidence ... has the 'necessary scientific and methodological rigor to be considered reputable science'." (Honduras response to questioning at the second hearing; Panel Report, para. 7.516 (quoting Appellate Body Report, *US – Continued Suspension*, para. 591)) According to Honduras, the Panel did not apply this test "but simply included all of the evidence – or at least all of the evidence that was submitted by Australia – and effectively gave it all equal weight". (Honduras' appellant's submission, para. 554.v)

<sup>163</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872.

<sup>164</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872. The Appellate Body made similar observations in *EC – Seal Products* and *China – Rare Earths*. See Appellate Body Reports, *EC – Seal Products*, para. 5.243; *China – Rare Earths*, para. 5.180.

<sup>165</sup> Honduras' appellant's submission, para. 554.i.

<sup>166</sup> Honduras' appellant's submission, para. 554.iv.

<sup>167</sup> Honduras' appellant's submission, para. 554.iv.

<sup>168</sup> Honduras' appellant's submission, para. 554.v.

<sup>169</sup> Honduras' appellant's submission, para. 554.vi.

<sup>170</sup> Honduras' appellant's submission, fns 303-308 to para. 554.

<sup>171</sup> Honduras' appellant's submission, fn 302 to para. 554.

of its claims under Article 11 of the DSU. Given the complete overlap between these two sets of arguments, and the focus of both sets of arguments on the Panel's engagement with the facts and appreciation of the evidence before it, we address all of Honduras' challenges to the Panel's contribution analysis under the rubric of its claims under Article 11 of the DSU.

### 6.1.2.3 Claims under Article 11 of the DSU

#### 6.1.2.3.1 Introduction

6.27. The appellants request us to reverse the Panel's conclusion that "the TPP measures are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products."<sup>172</sup> The appellants' request is based, primarily<sup>173</sup>, on their claims that the Panel failed in its duty under Article 11 of the DSU to make an objective assessment of the matter before it, with the appellants' focus being on the Panel's assessment of the facts of the case.

6.28. 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.

6.29. Honduras contends that "the Panel fail[ed] to conduct an 'objective examination' of the evidence on the plain packaging measures' contribution to the objective of reducing the use of tobacco products."<sup>174</sup> The Dominican Republic, for its part, appeals the Panel's "overall findings and intermediate findings" resulting from its assessment of the: (i) post-implementation evidence "on the *actual* impact of the TPP measures on smoking behaviours"<sup>175</sup>; (ii) pre-implementation evidence "on the *anticipated* impact of the TPP measures"<sup>176</sup>; (iii) post-implementation evidence "on the *actual* impact of the TPP measures on proximal and distal outcomes"<sup>177</sup>; and (iv) "potential future impact of the TPP measures".<sup>178</sup>

6.30. When introducing its claims under Article 11 of the DSU, the Dominican Republic indicates that, "[i]n accordance with the Appellate Body's guidance", the Dominican Republic has carefully considered whether, and in which specific instances, to challenge the lack of objectivity of the Panel's assessment of the matter.<sup>179</sup> The Dominican Republic states that it "challenges solely those errors for which the Panel has 'exceeded the bounds of its discretion, as the trier of facts', and that are consequential to the Panel's findings".<sup>180</sup> Honduras, for its part, contends that the "failures of the

<sup>172</sup> Honduras' appellant's submission, paras. 533, 615, 721, 740, and 766; Dominican Republic's appellant's submission, paras. 32, 587, and 1593 (quoting Panel Report, para. 7.1043).

<sup>173</sup> As discussed in section 6.1.2.2 above, Honduras also claims that the Panel erred in its application of Article 2.2 of the TBT Agreement to the facts of the case in its analysis of the contribution of the TPP measures to Australia's objective.

<sup>174</sup> Honduras' Notice of Appeal, p. 5, section III.

<sup>175</sup> Dominican Republic's Notice of Appeal, para. 7. (emphasis original; fns omitted)

<sup>176</sup> Dominican Republic's Notice of Appeal, para. 8. (emphasis original)

<sup>177</sup> Dominican Republic's Notice of Appeal, para. 9. (emphasis original)

<sup>178</sup> Dominican Republic's Notice of Appeal, para. 10. As described in footnote 97 above, in addition to these specific claims of error, the Dominican Republic, in its Notice of Appeal, states that it "incorporates by reference into this appeal the claims on appeal made by Honduras". (Dominican Republic's Notice of Appeal, para. 16) In response to questioning at the first hearing of these appellate proceedings, the Dominican Republic confirmed that it incorporated all of Honduras' claims and arguments on appeal. Accordingly, any reference to Honduras' claims and arguments throughout these Reports should be understood as also including a reference to the claims and arguments of the Dominican Republic.

<sup>179</sup> Dominican Republic's appellant's submission, para. 33 (referring to Appellate Body Reports, *China – Rare Earths*, para. 5.228).

<sup>180</sup> Dominican Republic's appellant's submission, para. 33 (quoting Appellate Body Reports, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.148; *US – Wheat Gluten*, para. 151).

Panel, taken individually and together", are of such a nature and magnitude as to cast serious doubt on the required "objective assessment" of the Panel in the context of this dispute.<sup>181</sup>

6.31. Australia asks us to reject all of the appellants' claims under Article 11 of the DSU, characterizing them as an "unprecedented assault on a panel's performance of its fact-finding function".<sup>182</sup> In Australia's view, 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 claims under Article 11 of the DSU.<sup>183</sup> Rather, Australia contends that the appellants' claims are an invitation to the Appellate Body to determine whether the Panel's factual findings are *correct*, rather than whether the Panel was *objective* in making its assessment of the facts of the case.<sup>184</sup> For Australia, the appellants' approach to their claims under Article 11 of the DSU undermines the Appellate Body's recognition that the "credibility and weight of the evidence is within the panel's discretion as the trier of facts".<sup>185</sup> In this regard, Australia recalls the Appellate Body's explanation that it would not "interfere lightly" with the panel's fact-finding authority<sup>186</sup>, and would not "second-guess the [p]anel in appreciating either the evidentiary value of ... studies or the consequences, if any, of alleged defects in [the evidence]".<sup>187</sup>

6.32. At the outset, we wish to highlight certain preliminary considerations that inform our approach to the appellants' claims under Article 11 of the DSU. These considerations pertain to: (i) the burden of proof under Article 2.2 with respect to the assessment of the contribution of the TPP measures to Australia's objective; (ii) the nature of the Panel's overall conclusion, and the scope of the appellants' appeals in respect thereof; and (iii) cross-cutting themes underpinning the appellants' claims under Article 11 of the DSU.

#### 6.1.2.3.1.1 Burden of proof

6.33. As noted in paragraph 6.5. above, before the Panel, the complainants claimed that the TPP measures are inconsistent with Article 2.2 because they are more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. The complainants submitted two sets of arguments in support of their claims under Article 2.2. In their main set of arguments, the complainants asserted that the TPP measures are not apt to contribute and make no contribution to Australia's objective.<sup>188</sup> In their alternative set of arguments, the complainants contended that, even if the TPP measures make some contribution to Australia's objective, the TPP measures are more trade-restrictive than necessary because "certain *less* trade-restrictive alternative measures would be reasonably available to Australia to achieve an equivalent contribution to its objective, taking account of the risks that non-fulfilment of the objective would create."<sup>189</sup>

<sup>181</sup> Honduras' appellant's submission, para. 697.

<sup>182</sup> Australia's appellee's submission, para. 424.

<sup>183</sup> Australia's appellee's submission, para. 424.

<sup>184</sup> Australia's appellee's submission, para. 431. See also Canada's third participant's submission, para. 52; New Zealand's third participant's submission, para. 15; United States' third participant's submission, para. 31.

<sup>185</sup> Australia's appellee's submission, para. 437 (quoting Appellate Body Reports, *US – Upland Cotton* (Article 21.5 – Brazil), fn 920 to para. 440; *EC – Hormones*, para. 132; *US – Wheat Gluten*, para. 151; *EC – Sardines*, para. 299; *US – Carbon Steel*, para. 142; *Japan – Apples*, para. 221).

<sup>186</sup> Australia's appellee's submission, para. 437 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1317).

<sup>187</sup> Australia's appellee's submission, fn 558 to para. 437 (quoting Appellate Body Report, *Korea – Alcoholic Beverages*, para. 161).

<sup>188</sup> Panel Report, paras. 7.426, 7.437-7.438, and 7.485.

<sup>189</sup> Panel Report, para. 7.1325. (emphasis original) In response to questioning at the second hearing, the appellants confirmed that: (i) their main assertion before the Panel was that the TPP measures are "more trade-restrictive than necessary" because they do not and are not apt to make any contribution to Australia's objective while being trade-restrictive; and (ii) they had argued, in the alternative, that, even if the TPP measures were found to make some contribution, they would still be "more trade-restrictive than necessary" in light of the proposed alternative measures.



6.34. It is well settled that "the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof."<sup>190</sup> Thus, the burden of proving that the TPP measures are inconsistent with Article 2.2 of the TBT Agreement rested on the complainants.<sup>191</sup> An implication of this allocation of the burden of proof is that, with respect to their main set of arguments, the complainants were required to adduce sufficient evidence to persuade the Panel that the TPP measures are *not* apt to, and do *not*, make any contribution to Australia's legitimate objective.<sup>192</sup>

6.35. In their alternative set of arguments, the complainants contended that, even if the TPP measures make some contribution to Australia's objective, the TPP measures are more trade-restrictive than necessary because "certain *less* trade-restrictive alternative measures would be reasonably available to Australia to achieve an equivalent contribution to its objective, taking account of the risks that non-fulfilment of the objective would create."<sup>193</sup> We recall that the degree of contribution is only one factor of a panel's overall weighing and balancing for determining "necessity" under Article 2.2, and there is no predetermined threshold of contribution for purposes of demonstrating an inconsistency with Article 2.2.<sup>194</sup> A panel's overall weighing and balancing exercise need not be quantitative, and is often a qualitative assessment. Indeed, the Appellate Body has said that "[i]n assessing the relevant factors with respect to the technical regulation itself, ... while a complainant must be held to fulfil its burden to present a *prima facie* case that the technical regulation is more trade restrictive than necessary under Article 2.2, it will not always be possible to quantify a particular factor, or to do so with precision."<sup>195</sup> Thus, with respect to the complainants' alternative set of arguments, we do not consider that the complainants needed to demonstrate a precise quantifiable degree of contribution that the TPP measures make to Australia's objective, in order to meet their burden of demonstrating that the TPP measures are "more trade-restrictive than necessary". Rather, the complainants had to demonstrate that the TPP measures are more trade-restrictive than necessary because an equivalent degree of contribution could be achieved through less trade-restrictive alternative means.

6.36. This leads us to our next consideration: the nature of the Panel's overall conclusion, and the scope of the appellants' appeals in respect thereof.

#### **6.1.2.3.1.2 The nature of the Panel's overall conclusion and the scope of the appellants' appeals**

6.37. We recall that, before the Panel, and in connection with the complainants' main set of arguments, Honduras argued that the TPP measures make no contribution to Australia's objective, nor are they apt to do so.<sup>196</sup> The Dominican Republic contended that well-accepted axioms of social and medical science confirm that the TPP measures will not be effective in achieving Australia's stated goals.<sup>197</sup> The Panel understood the parties' arguments as follows:

In essence, the complainants consider 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. Australia in essence responds that, contrary to the complainants' assertions, the measures are designed on the basis of a sound

<sup>190</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 335. See also Appellate Body Reports, *US – Carbon Steel (India)*, para. 446; *US – Gambling*, paras. 138-140; *US – Carbon Steel*, para. 157; *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66; *Japan – Apples*, para. 159; *EC – Hormones*, para. 98; *Japan – Agricultural Products II*, para. 129.

<sup>191</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 323. (fn omitted) See also Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208.

<sup>192</sup> This is in line with the Appellate Body's explanation that "under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-consistent, until sufficient evidence is presented to prove the contrary." (Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66) (emphasis original))

<sup>193</sup> Panel Report, para. 7.1325; Honduras' first written submission to the Panel, paras. 853, 859, and 911; Dominican Republic's first written submission to the Panel, paras. 736-737, 980, and 1019-1021.

<sup>194</sup> Appellate Body Reports, *US – COOL*, para. 374; *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.216.

<sup>195</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208.

<sup>196</sup> Panel Report, para. 7.426.

<sup>197</sup> Panel Report, para. 7.437.



evidence base, and that available post-implementation evidence confirms that the measures are contributing to their objective of reducing smoking.<sup>198</sup>

6.38. The Panel sought to determine the degree to which the TPP measures, "as written and applied, contribute, if at all, to Australia's legitimate objective of improving public health by reducing the use of, and exposure to, tobacco products".<sup>199</sup> In its overall conclusion, the Panel answered this question as follows:

7.1024. We have considered ... the evidence before us in relation to the contribution of the TPP measures to their objective of improving public health by reducing the use of, and exposure to, tobacco products. We have considered the relevant evidence relating both to the design, structure and intended operation of the TPP measures, and the available evidence relating to their application since their entry into force in December 2012.

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. 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 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.

...

7.1043. Taken as a whole, therefore, we consider that the evidence before us supports the view that, as applied in combination with the comprehensive range of other tobacco control measures maintained by Australia and not challenged in these proceedings, including a prohibition on the use of other means through which branding could otherwise contribute to the appeal of tobacco products and to misleading consumers about the harmful effects of smoking, the TPP measures are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products.<sup>200</sup>

6.39. We observe first that the Panel arrived at its "overall conclusion" following its consideration of the relevant evidence before it "relating both to the design, structure and intended operation of the TPP measures, and the available evidence relating to their application since their entry into force in December 2012".<sup>201</sup> Second, we note that paragraph 7.1025 contains two sentences. In the first sentence, the Panel concluded 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>202</sup> In the second sentence, the Panel continued to state that the evidence before it 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>203</sup> None of the appellants' submissions expressly referred to the first sentence of paragraph 7.1025. However, in response to questioning at the second hearing, the appellants, as well as Australia, all shared the view that the two sentences of paragraph 7.1025 were not to be read in isolation from each other. Rather, in their view, both sentences, read together, reflected the Panel's rejection of the complainants' proposition that the TPP measures are not apt to, nor do they, make a contribution to Australia's objective of

<sup>198</sup> Panel Report, para. 7.485. We note that the Panel's characterization of the parties' arguments is not challenged on appeal.

<sup>199</sup> Panel Report, para. 7.424. See also *ibid.*, para. 7.483.

<sup>200</sup> Panel Report, paras. 7.1024-7.1025 and 7.1043.

<sup>201</sup> Panel Report, para. 7.1024.

<sup>202</sup> Panel Report, para. 7.1025. (emphasis added)

<sup>203</sup> Panel Report, para. 7.1025.

reducing the use of, and exposure to, tobacco products. Honduras added that paragraph 7.1043 confirmed the Panel's main finding, as reflected in the second sentence of paragraph 7.1025.

6.40. We agree with the participants that both sentences of paragraph 7.1025, read together, are a rejection of the complainants' proposition that the TPP measures are not apt to, nor do they make a contribution to Australia's objective of reducing the use of, and exposure to, tobacco products. However, we do not share Honduras' view that the content of paragraph 7.1043 is the same as that of the second sentence of paragraph 7.1025. As we read it, there is an additional nuance to the Panel's finding in paragraph 7.1043. Between paragraphs 7.1025 and 7.1043, the Panel summarized the key points<sup>204</sup> that justify its conclusion that "the TPP measures are apt to, and do, make a *meaningful* contribution to Australia's objective of reducing the use of, and exposure to, tobacco products."<sup>205</sup> We do not consider the Panel's addition of the word "meaningful" to be happenstance. While paragraph 7.1025 addressed and rejected the proposition by the complainants that "the TPP measures are not apt to make a contribution to Australia's objective"<sup>206</sup>, the Panel's conclusion in paragraph 7.1043 goes further by speaking to the question of the "degree" of the contribution that the TPP measures, in concert with Australia's other tobacco-control measures, make to Australia's objective. In this regard, the Panel's conclusion that "the TPP measures are apt to, and do, make a *meaningful* contribution to Australia's objective of reducing the use of, and exposure to, tobacco products"<sup>207</sup> relates to the alternative set of the complainants' arguments. In other words, we understand the Panel to have made this conclusion as a gateway to addressing the complainants' alternative proposition that, even if the Panel were to conclude that the TPP measures make a contribution to Australia's objective, the TPP measures would still be "more trade-restrictive than necessary" because various alternative measures would be available to Australia that are less trade-restrictive and could achieve an *equivalent* degree of contribution to Australia's objective.<sup>208</sup> Indeed, the Panel highlighted this conclusion about the measures' "meaningful contribution to Australia's objective" in its assessment of the complainants' proposed alternative measures.<sup>209</sup>

#### 6.1.2.3.1.3 Cross-cutting themes underpinning the appellants' claims under Article 11

6.41. While the appellants have made numerous claims against specific statements, analyses, and findings of the Panel, they have largely addressed these claims under the rubric of broad cross-cutting themes. For instance, when introducing its claims under Article 11 of the DSU, Honduras claims that the Panel, in its assessment of the evidence, "acted in violation of Article 11 of the DSU" by failing to make an objective assessment of the matter before it, including an objective assessment of the evidence presented to it on the degree of *actual* contribution of the measures to the fulfilment of the legitimate objective of Australia.<sup>210</sup> Specifically, Honduras asserts that the Panel failed to make an objective assessment of the facts, as required under Article 11 of the DSU because the Panel allegedly, *inter alia*:

- a. failed to provide a reasoned and adequate explanation of how the facts supported the determination that the TPP measures resulted in a reduction in smoking prevalence and in consumption of tobacco products;
- b. disregarded, misrepresented, and distorted material pieces of Honduras' evidence;
- c. failed to examine the evidence in an even-handed manner, applying a double standard of proof; and
- d. failed to respect the basic principles of due process and procedural fairness in the following manner – rather than appointing an expert to assist it in a transparent manner in exercise of its powers under Article 13 of the DSU or Article 14.2 of the TBT Agreement, the Panel

<sup>204</sup> We observe that, in these paragraphs, the Panel emphasized the robust nature of the pre-implementation evidence before it, while highlighting the limitations of the evidence relating to the actual impact of the TPP measures following their entry into force.

<sup>205</sup> Panel Report, para. 7.1043. (emphasis added)

<sup>206</sup> Panel Report, para. 7.1025.

<sup>207</sup> Panel Report, para. 7.1043. (emphasis added)

<sup>208</sup> Honduras' first written submission to the Panel, para. 911; Dominican Republic's first written submission to the Panel, paras. 1019 and 1021 (referring to para. 736 *et seq.*, in particular para. 737).

<sup>209</sup> Panel Report, para. 7.1386.

<sup>210</sup> Honduras' appellant's submission, para. 695.

relied on a "ghost expert" who developed criticisms of the parties' evidence that the parties were never given an opportunity to comment on and that are never explained in the Panel Report thus shielding them from proper scrutiny.<sup>211</sup>

6.42. According to Honduras, "[t]hese failures of the Panel, taken individually and together, are of such a nature and magnitude as to cast serious doubt on the required 'objective assessment' of the Panel in the context of this dispute that related to a controversial product and possibly well-intended but in any case unlawful, ineffective, and disproportionate measures."<sup>212</sup>

6.43. For its part, the Dominican Republic asserts that, in assessing the contribution of the TPP measures to Australia's objective, the Panel allegedly committed errors of the following nature:

- a. the Panel failed to respect the requirements of due process, including the requirements to provide the parties with a meaningful opportunity to comment and to test evidence with the parties, and to seek further information if necessary, in order to determine whether the evidence satisfies a party's burden of proof;
- b. the Panel made the case for Australia;
- c. the Panel treated competing evidence submitted by the parties inconsistently;
- d. the Panel developed reasoning that is internally incoherent;
- e. the Panel failed to provide "reasoned and adequate explanations" for its findings;
- f. the Panel made findings that lack a basis in the evidence contained on the Panel record; and
- g. the Panel failed to engage with evidence from the Dominican Republic that was material to its case.<sup>213</sup>

6.44. In responding to the appellants' allegations, Australia also clusters its arguments around several cross-cutting themes, including: (i) the allocation of the burden of proof<sup>214</sup>; (ii) denial of due process<sup>215</sup>; (iii) the Panel's alleged failure to provide "'reasoned and adequate' explanations"<sup>216</sup>; and (iv) the materiality of the appellants' claims under Article 11 of the DSU.<sup>217</sup>

6.45. We recall that, with respect to the Panel's analysis of the contribution of the TPP measures to Australia's objective, the appellants' claims under Article 11 of the DSU concern the Panel's assessment of the facts of the case. Article 11 provides that, in carrying out its function to assist the DSB in discharging its responsibilities under the DSU, "a panel should make an objective assessment of the matter before it, including an objective assessment of the *facts* of the case."<sup>218</sup> In these appellate proceedings, the issue that we are required to address is whether the appellants have demonstrated that the Panel, in conducting its analysis leading to its overall conclusion on the contribution of the TPP measures to Australia's objective, made an objective assessment of the facts of the case in accordance with Article 11 of the DSU. The appellants' myriad claims and arguments pertain to this single issue, but are not in and of themselves, discrete "issues" within the meaning of Articles 17.6 and 17.12.<sup>219</sup> Accordingly, we need not address, separately, each claim of error

<sup>211</sup> Honduras' appellant's submission, para. 696.

<sup>212</sup> Honduras' appellant's submission, para. 697.

<sup>213</sup> Dominican Republic's appellant's submission, para. 34.

<sup>214</sup> Australia's appellee's submission, paras. 430 and 478.

<sup>215</sup> Australia's appellee's submission, paras. 428-430.

<sup>216</sup> Australia's appellee's submission, para. 431.

<sup>217</sup> Australia's appellee's submission, para. 449.

<sup>218</sup> Emphasis added.

<sup>219</sup> Article 17.6 of the DSU limits an appeal to "issues of law covered in the panel report and legal interpretations developed by the panel". Article 17.12 of the DSU provides that "[t]he Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding."

raised by the appellants under Article 11 of the DSU. Rather, we consider that it would suffice for us to address, jointly, clusters of claims based on cross-cutting themes underpinning these claims.

6.46. Still in connection with the cross-cutting themes underpinning the appellants' claims under Article 11, we take note of the Dominican Republic's assertion that, "[i]n accordance with the Appellate Body's guidance", the Dominican Republic has carefully considered whether, and in which specific instances, to challenge the lack of objectivity of the Panel's assessment of the matter.<sup>220</sup> The Dominican Republic states that it "challenges solely those errors for which the Panel has 'exceeded the bounds of its discretion, as the trier of facts', and that are consequential to the Panel's findings".<sup>221</sup> Honduras, for its part, contends that the "failures of the Panel, taken individually and together", are of such a nature and magnitude as to cast serious doubt on the required "objective assessment" of the Panel in the context of this dispute.<sup>222</sup>

6.47. We observe that the Panel's analysis of the contribution of the TPP measures to Australia's objective was quite detailed, covering 166 pages in its Report<sup>223</sup>, and 125 pages in Appendices A-D to its Report. Yet, as Australia points out, the appellants' claims under Article 11 of the DSU, challenging the Panel's analysis of the contribution of the TPP measures to Australia's objective, form the bulk of their appeal, "collectively comprising nearly 450 pages of their appellants' submissions".<sup>224</sup> Moreover, with the exception of the Panel's findings on the impact of the TPP measures on illicit trade, the appellants have challenged all of the intermediate findings that the Panel made in its analysis, as well as the Panel's overall conclusion on the contribution of the TPP measures to Australia's objective.

6.48. The sheer volume of the appellants' claims under Article 11 of the DSU in these appellate proceedings is unprecedented. We recall that a claim that a panel has failed to conduct an objective assessment of the matter before it is "a very serious allegation".<sup>225</sup> Not every error by a panel amounts to a failure by the panel to comply with its duties under Article 11, only those which, taken together or singly, undermine the *objectivity* of the panel's assessment of the matter before it.<sup>226</sup> Indeed, as an example of the grave implications of claims brought under Article 11, the Appellate Body has considered that a panel's "[d]isregard", "distortion", and "misrepresentation" of evidence, "in their ordinary signification in judicial and quasi-judicial processes, imply 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>227</sup> For these reasons, the Appellate Body has urged Members to consider carefully "when and to what extent to challenge a panel's assessment of a matter pursuant to Article 11".<sup>228</sup> This is in keeping with the objective of the prompt settlement of disputes, and the requirement in Article 3.7 of the DSU that Members "exercise judgement in deciding whether action under the WTO dispute settlement procedures would be fruitful".<sup>229</sup>

6.49. Furthermore, the Appellate Body has said that, in carrying out its duty to make an objective assessment of the facts of the case, a panel is required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that [the panel's] factual findings have a proper basis in that evidence".<sup>230</sup> Within these parameters, "it is generally within the discretion of

<sup>220</sup> Dominican Republic's appellant's submission, para. 33 (referring to Appellate Body Reports, *China – Rare Earths*, para. 5.228).

<sup>221</sup> Dominican Republic's appellant's submission, para. 33 (quoting Appellate Body Reports, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.148; *US – Wheat Gluten*, para. 151).

<sup>222</sup> Honduras' appellant's submission, para. 697.

<sup>223</sup> Panel Report, pp. 253-419.

<sup>224</sup> Australia's appellee's submission, para. 424; Dominican Republic's appellant's submission, pp. 25-321 and 346-358 (308 pages); Honduras' appellant's submission, pp. 193-315 and 317-340 (146 pages).

<sup>225</sup> Appellate Body Report, *Peru – Agricultural Products*, para. 5.66 (quoting Appellate Body Reports, *China – Rare Earths*, para. 5.227 (fn omitted)).

<sup>226</sup> Appellate Body Reports, *Peru – Agricultural Products*, para. 5.66; *EC and certain member States – Large Civil Aircraft*, para. 1318; *US – COOL*, paras. 300 and 321.

<sup>227</sup> Appellate Body Report, *EC – Hormones*, para. 133. (emphasis added)

<sup>228</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.228.

<sup>229</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.228.

<sup>230</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185; referring to Appellate Body Reports, *EC – Hormones*, paras. 132-133; *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170,

the [p]anel to decide which evidence it chooses to utilize in making findings."<sup>231</sup> Moreover, when assessing the probative value of the evidence, a panel is not required to "accord to factual evidence ... the same meaning and weight as do the parties".<sup>232</sup> As such, a challenge under Article 11 of the DSU "cannot be made out simply by asserting that a panel did not agree with arguments or evidence".<sup>233</sup>

6.50. In this vein, we emphasize that we will not entertain attempts by the appellants to resubmit their factual arguments under the guise of challenging the objectivity of the Panel's assessment of the facts of the case. In our view, entertaining such factual arguments would undermine the Panel in its role as the trier of facts and the adjudicator of first instance in WTO dispute settlement. To our minds, entertaining the appellants' factual arguments would not only fail to respect the role, and discretion, of the Panel as the trier of facts, but it would also not be in line with the Appellate Body's caution that we: (i) will not "interfere lightly" with the panel's fact-finding authority<sup>234</sup>; (ii) will not "second-guess the [p]anel in appreciating either the evidentiary value of ... studies or the consequences, if any, of alleged defects in [the evidence]"<sup>235</sup>; and (iii) will not reach "a finding of inconsistency under Article 11 simply on the conclusion that [we] might have reached a different factual finding from the one the panel reached".<sup>236</sup>

#### **6.1.2.3.1.4 Approach to addressing the appellants' claims under Article 11 of the DSU and order of analysis**

6.51. Based on the foregoing preliminary considerations, and our review of the participants' submissions, we do not consider it necessary to address, separately, each discrete claim raised by the appellants under Article 11 of the DSU. Rather, we address, jointly, clusters of claims based on cross-cutting themes underpinning these claims. That said, we have identified certain of the appellants' claims that are not captured sufficiently by the cross-cutting themes, and we shall address these discretely. We also consider the Panel's findings on the anticipated effects of the TPP measures to be so seminal to the Panel's overall conclusion<sup>237</sup> such that the appellants' challenges to these findings warrant discrete examination.

6.52. Additionally, we recall that Article 3.4 of the DSU indicates that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter." Article 3.7 states that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute." These overarching aims of the WTO dispute settlement mechanism suggest to us that, while we are required to *address* each issue on appeal in accordance with Article 17.12, we have the discretion not to *rule* on the substance of certain claims when doing so is not necessary to resolve the dispute.<sup>238</sup> We consider that we need not rule on the substance of certain of the appellants' claims in order to provide a positive solution to the dispute before us.

6.53. In sum, following our review of the participants' submissions, we consider it appropriate to address the appellants' claims on the basis of these three approaches: (i) a minority of the appellants' claims warrant discrete examination (the appellants' claims regarding anticipated effects of the TPP measures, as well as a few claims regarding the actual effects of the TPP measures); (ii) with respect to the majority of the appellants' claims under Article 11 of the DSU, we address, jointly, clusters of claims based on cross-cutting themes underpinning these claims; and (iii) with

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177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *EC – Selected Customs Matters*, para. 258).

<sup>231</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *EC – Hormones*, para. 135).

<sup>232</sup> Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.61.

<sup>233</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.227 (referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238).

<sup>234</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 881.

<sup>235</sup> Appellate Body Report, *Japan – Apples*, para. 222 (quoting Appellate Body Report, *EC – Asbestos*, para. 177, in turn quoting Appellate Body Report, *Korea – Alcoholic Beverages*, para. 161).

<sup>236</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 881. (fn omitted)

<sup>237</sup> See fn 204 above.

<sup>238</sup> Appellate Body Reports, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, para. 6.318; *US – Upland Cotton*, paras. 510-511.

respect to the remainder of the appellants' claims under Article 11 of the DSU, we need not rule on the substance of these claims in order to provide a positive solution to the dispute before us.

6.54. Accordingly, we proceed with the following order of analysis, addressing claims concerning: (i) the Panel's assessment of the pre-implementation evidence pertaining to the design, structure, and intended operation of the TPP measures; (ii) the Panel's assessment of the post-implementation evidence pertaining to the application of the TPP measures; (iii) the Panel's statements on the future impact of the TPP measures; (iv) the Panel's assessment of the post-implementation evidence, which need not be addressed in order to provide a positive resolution to the dispute before us; and (v) the Panel's overall conclusion.

#### **6.1.2.3.2 The Panel's assessment of the pre-implementation evidence pertaining to the design, structure, and intended operation of the TPP measures**

##### **6.1.2.3.2.1 Overview**

6.55. The appellants have brought several claims under Article 11 of the DSU in relation to the Panel's consideration of the evidence pertaining to the design, structure, and intended operation of the TPP measures (pre-implementation evidence<sup>239</sup>), as an element of the Panel's overall assessment of the degree of contribution of the TPP measures to Australia's objective.<sup>240</sup> The appellants' claims can be broadly categorized into two groups, namely: (i) claims pertaining to the validity of the Panel's *intermediate* conclusion<sup>241</sup>, reached on the basis of the pre-implementation evidence, that the complainants failed to demonstrate that the TPP measures would be incapable of contributing to Australia's public health objective through the three "mechanisms" by which the measures are designed to operate, i.e. reducing the appeal of tobacco products, enhancing the effectiveness of the GHWs, and reducing the ability of tobacco packaging to mislead consumers<sup>242</sup>; and (ii) claims pertaining to whether these intermediate conclusions, together with the evidence pertaining to the application of the TPP measures (or the "post-implementation" evidence), provided sufficient support to the Panel's *overall* conclusion on contribution<sup>243</sup> - that the complainants failed to demonstrate that the TPP measures are not apt to make a contribution to Australia's objective, but rather, they are apt to, and do, make a meaningful contribution to that objective, as applied in combination with other tobacco control measures maintained by Australia.<sup>244</sup>

6.56. In this section, we address the appellants' claims pertaining to whether the Panel acted inconsistently with Article 11 in reaching its intermediate conclusions based on its assessment of the pre-implementation evidence (i.e. item (i) above). The claims falling under item (ii) above are addressed in section 6.1.2.3.4 below, in which we determine whether the Panel failed to make an objective assessment of the matter in arriving at its overall conclusion on contribution.

6.57. Honduras and the Dominican Republic each challenge different aspects of the Panel's analysis leading to its intermediate conclusions based on the pre-implementation evidence. Honduras claims that, in reaching these intermediate conclusions, the Panel failed to provide a reasoned and adequate

<sup>239</sup> In their written submissions to the Panel, the parties used the term "pre-implementation evidence" to refer to the evidence pertaining to the TPP measures' design, structure, and intended operation, including in particular the studies that provided an evidentiary base for Australia's adoption of tobacco plain packaging measures (TPP literature). The parties used the term "post-implementation evidence" to refer to the evidence pertaining to the measures' application since their entry into force. At the same time, we note that although the Panel stated that the TPP literature "mostly" consists of studies predating the implementation of the TPP measures in Australia, the Panel observed that some of those studies were published after the implementation of the TPP measures. (See Panel Report, paras. 7.521 and 7.539) As such, technically speaking, the implied distinction between the terms "pre-implementation evidence" and "post-implementation evidence" may not be entirely accurate. However, given the practical utility of these terms, we also use them as a shorthand to refer to the evidence pertaining to the design, structure, and intended operation of the TPP measures, and to the evidence pertaining to their actual application since their entry into force, respectively.

<sup>240</sup> See Panel Report, section 7.2.5.3.5.

<sup>241</sup> Panel Report, paras. 7.929-7.930.

<sup>242</sup> Honduras' appellant's submission, section VIII.2.1.2(a) and paras. 1008-1014; Dominican Republic's appellant's submission, section II.E.2.

<sup>243</sup> Panel Report, paras. 7.1025 and 7.1043.

<sup>244</sup> Honduras' appellant's submission, sections VIII.2.1.2(b) and VIII.2.1.2(c); Dominican Republic's appellant's submission, section II.E.3.

explanation<sup>245</sup> and treated the evidence in a one-sided manner in favour of Australia<sup>246</sup>, when it reasoned that, while there may be "serious limitations" inherent in the individual studies that provided an evidentiary base for the adoption of the TPP measures, any such limitations can be overlooked by considering their "combined strength".<sup>247</sup> The Dominican Republic, for its part, claims that the Panel failed to engage with the Dominican Republic's evidence that directly contradicted the Panel's intermediate conclusion, and, by doing so, the Panel based its conclusion on "incoherent reasoning".<sup>248</sup>

#### 6.1.2.3.2.2 Summary of the Panel's findings

6.58. Before the Panel, Australia explained that the design of the TPP measures reflects a "causal chain model" or "mediational model"<sup>249</sup>, whereby the measures are intended to affect smoking behaviour through three "mechanisms" – or "proximal" or "non-behavioural" outcomes – identified in the TPP Act. These three mechanisms are: (i) reducing the appeal of tobacco products to consumers; (ii) enhancing the effectiveness of GHWs; and (iii) reducing the ability of the pack to mislead consumers about the harmful effects of smoking. According to the "causal chain" model, the three "proximal" outcomes are expected in turn to have an impact on "distal" outcomes, such as increased intentions to quit and increased quit attempts, which relate more closely to ultimate smoking behaviours, such as initiation, relapse, and cessation, and exposure to second-hand smoke.<sup>250</sup>

6.59. The complainants' main claim<sup>251</sup> before the Panel was that the TPP measures are more trade-restrictive than necessary within the meaning of Article 2.2 because they do not, and are not apt to, make any contribution to Australia's objective through any of the three mechanisms, while entailing considerable trade restrictiveness.<sup>252</sup> In this context, the complainants argued that the assumption underlying the adoption of tobacco plain packaging measures in Australia rests on fundamental misconceptions regarding behavioural theories.<sup>253</sup>

6.60. Specifically, the complainants argued that the body of studies – mostly predating the implementation of the TPP measures – that provided the evidentiary base for the adoption of the measures (the TPP literature<sup>254</sup>) was not of a quality or methodological rigour sufficient to provide a reliable basis to support the measures.<sup>255</sup> The complainants also argued that, even assuming that the measures would, as Australia argued, be apt to have an impact on the "proximal" outcomes (i.e. reduce the appeal of tobacco products, increase the effectiveness of GHWs, or limit the ability of packaging to mislead consumers about the harmful effects of smoking), this would not have an impact on relevant smoking behaviour.<sup>256</sup> Instead, the complainants contended that the proposition underlying the TPP measures had been refuted by the post-implementation empirical evidence

<sup>245</sup> Honduras' appellant's submission, paras. 796-797 and 802.

<sup>246</sup> Honduras' appellant's submission, paras. 1006 and 1018.

<sup>247</sup> Honduras' appellant's submission, paras. 799-801, 805, 1010-1011, and 1013.

<sup>248</sup> Dominican Republic's appellant's submission, section II.E.2 (see, in particular, para. 658).

<sup>249</sup> Panel Report, para. 7.488.

<sup>250</sup> Panel Report, para. 7.491 and fn 1443 thereto.

<sup>251</sup> The complainants argued in the alternative that, even if the Panel were to conclude that the TPP measures make *some* contribution to Australia's objective, the TPP measures would still be "more trade-restrictive than necessary" because various alternative measures would be available to Australia that are less trade-restrictive and could achieve an equivalent degree of contribution. (Honduras' first written submission to the Panel, para. 911; Dominican Republic's first written submission to the Panel, paras. 1019 and 1021 (referring to para. 736 *et seq.*, in particular para. 737))

<sup>252</sup> Panel Report, paras. 7.426 and 7.434.

<sup>253</sup> Panel Report, paras. 7.426 and 7.434.

<sup>254</sup> We note the Panel's explanation that the term "TPP literature" was used in the Panel Report "without implying a specific list of relevant studies". The Panel noted that the complainants had presented a set of 68 studies that they had referred to as "the PP literature" (Panel Exhibits JE-24(1)-(68)), as well as a number of expert reports containing reviews of relevant TPP-related studies. The Panel further noted that these lists overlapped partially with the literature referred to by Australia. The Panel stated that it referred to this body of studies generally as "the TPP literature". (Panel Report, fn 1485 to the title of section 7.2.5.3.5.1. See also *ibid.*, para. 7.522 and fn 1486 thereto)

<sup>255</sup> Panel Report, paras. 7.518-7.521.

<sup>256</sup> Panel Report, para. 7.520.

available at the time of the Panel proceedings, which purportedly demonstrated that smoking prevalence had not been reduced as a result of the TPP measures.<sup>257</sup>

6.61. The Panel began its assessment of the evidence pertaining to the design, structure, and intended operation of the TPP measures by addressing the complainants' overall critique of the TPP literature.<sup>258</sup> The Panel considered the complainants' critique to be unpersuasive, and instead found that "the studies forming the TPP literature come from respected and qualified sources, focus on relevant outcomes and have not been shown to be, overall, so methodologically flawed that they should be dismissed in their entirety as an unreliable evidentiary base in support of tobacco plain packaging."<sup>259</sup>

6.62. The Panel then proceeded to examine, with extensive references to the individual studies constituting the TPP literature, whether and to what extent the TPP measures were expected to have an impact on the three proximal outcomes (or mechanisms) and, ultimately, on smoking behaviour. With respect to the three proximal outcomes, the Panel was *not* persuaded that:

- a. the complainants had 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>260</sup>;
- b. the complainants had demonstrated that the TPP measures would not be capable of increasing the effectiveness of GHWs, and thereby contribute to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products<sup>261</sup>; and
- c. 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; or that any such contribution could add nothing to what can be achieved under the Australian Consumer Law.<sup>262</sup>

6.63. Accordingly, the Panel found that, overall, the complainants had failed to demonstrate that the TPP measures would be incapable 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 three mechanisms identified in the TPP Act, in combination with other relevant tobacco control measures applied by Australia.<sup>263</sup> Rather, the Panel considered that:

[I]n 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>264</sup>

6.64. The Panel stressed that these conclusions were intermediate in nature, and that the probative value of the pre-implementation evidence was to be assessed in light of the Panel's subsequent examination of the actual impact of the TPP measures, based on the evidence pertaining to their application following the measures' entry into force (i.e. the "post-implementation" evidence).<sup>265</sup>

<sup>257</sup> Panel Report, paras. 7.485-7.486.

<sup>258</sup> Panel Report, section 7.2.5.3.5.1.

<sup>259</sup> Panel Report, para. 7.639.

<sup>260</sup> Panel Report, para. 7.777.

<sup>261</sup> Panel Report, para. 7.868.

<sup>262</sup> Panel Report, para. 7.927.

<sup>263</sup> Panel Report, para. 7.929. See also *ibid.*, para. 7.1034.

<sup>264</sup> Panel Report, para. 7.1034. (emphasis original)

<sup>265</sup> See, for example, Panel Report, paras. 7.495-7.500, 7.644, 7.779, 7.870, and 7.928.



### 6.1.2.3.2.3 Whether the Panel acted inconsistently with Article 11 of the DSU by inappropriately attaching probative value to the TPP literature

6.65. Honduras claims that the Panel failed in its duty under Article 11 of the DSU – including by failing to provide a reasoned and adequate explanation and by treating the evidence in a one-sided manner in favour of Australia – because it inappropriately attached probative value to the studies forming the TPP literature.<sup>266</sup> In particular, Honduras highlights that the Panel acknowledged that the studies forming this literature focus on "non-behavioural" outcomes (i.e. "proximal" outcomes or the "mechanisms" of the TPP measures) and that, therefore, they alone are not informative of the ultimate question of whether the TPP measures contribute to Australia's objective of reducing the use of, and exposure to, tobacco products.<sup>267</sup> Honduras also notes that the Panel accepted that the ideal test for examining the effectiveness of the TPP measures would have been a randomized, longitudinal, and counterfactual study, but that this was not the methodology used in the pre-implementation studies.<sup>268</sup> Honduras observes that, notwithstanding the "serious limitations" of the pre-implementation studies, the Panel stated that such individual flaws were not "fatal" because the studies should not be assessed in isolation but, rather, in the wider context of the entire body of studies, taking into consideration their "combined strength" and consistency with the wider literature.<sup>269</sup> In Honduras' view, however, "[t]here is no logic in saying that one bad study would be more reliable if it is bundled with other bad studies", and, to the contrary, "no probative value or weight can be given" to such "bad" studies.<sup>270</sup>

6.66. Australia disagrees with Honduras' contention that the Panel failed to conduct an objective assessment of the matter before it by assigning probative value to the pre-implementation evidence despite its "serious limitations". As Australia sees it, Honduras' 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.<sup>271</sup> As such, Australia claims that Honduras is asking us to effectively reweigh that evidence.<sup>272</sup> Australia stresses that, contrary to Honduras' assertion, the Panel carefully scrutinized the complainants' criticisms of the TPP literature<sup>273</sup> – which were based on the focus of the TPP literature; the lack of randomized, longitudinal, and counterfactual studies; and the alleged lack of methodological rigour – and explained why it did not find these criticisms persuasive.<sup>274</sup>

6.67. We note at the outset that Honduras' claim concerns only a portion of the Panel's analysis of the evidence pertaining to the design, structure, and intended operation of the TPP measures, namely, the section of the Panel Report where the Panel assessed the *overall* quality and reliability of the TPP literature.<sup>275</sup> Indeed, in its appellant's submission, Honduras refers primarily to the paragraphs<sup>276</sup> of section 7.2.5.3.5.1 of the Panel Report, titled "Critique of the 'plain packaging literature' (TPP literature)", where the Panel addressed the complainants' pre-emptive argument that this body of evidence, as a whole, suffers from serious methodological flaws and lacks the

<sup>266</sup> Honduras' appellant's submission, paras. 800 and 805.

<sup>267</sup> Honduras' appellant's submission, para. 799 (quoting Panel Report, paras. 7.553, 7.564, and 7.642). See also *ibid.*, para. 1008 (quoting Panel Report, para. 7.562 and fn 1595 thereto, and para. 7.642).

<sup>268</sup> Honduras' appellant's submission, para. 799 (quoting Panel Report, paras. 7.557, 7.588, and 7.605, and fn 1681 to para. 7.605). See also *ibid.*, para. 1009.

<sup>269</sup> Honduras' appellant's submission, paras. 800 and 1010 (quoting Panel Report, paras. 7.627 and 7.641).

<sup>270</sup> Honduras' appellant's submission, para. 801. Honduras also argues that, by adopting a one-sided "totality of evidence" approach, the Panel allowed non-scientific and sub-standard evidence to remain included in the overall analysis whenever it supported Australia's case, while rejecting evidence submitted by the complainants as soon as it identified an individual flaw in it. (*Ibid.*, paras. 801-803. See also *ibid.*, paras. 1005-1006 and 1018).

<sup>271</sup> Australia's appellee's submission, para. 535.

<sup>272</sup> Australia's appellee's submission, para. 537.

<sup>273</sup> Australia's appellee's submission, para. 536 (referring to Panel Report, paras. 7.539-7.644).

<sup>274</sup> Australia's appellee's submission, para. 536 (referring to Panel Report, paras. 7.555, 7.561-7.562, 7.610, and 7.638-7.639).

<sup>275</sup> See Panel Report, para. 7.639.

<sup>276</sup> See, for example, Panel Report, paras. 7.499, 7.553, 7.557, 7.562, 7.564, 7.588, 7.605, 7.627, and 7.641.

scientific rigour and objectivity required to form a reliable evidentiary base for a policy intervention of this kind.<sup>277</sup>

6.68. As regards Honduras' contention that the Panel acknowledged the "serious limitations" inherent in the individual studies forming the TPP literature, we note that Honduras identifies two features of those studies as constituting such limitations: (i) the focus of the TPP literature on "proximal" or "non-behavioural" outcomes, rather than on the ultimate question of whether the TPP measures affect smoking behaviour; and (ii) the lack of randomized, longitudinal, and counterfactual studies that the Panel suggested would have been "ideal".<sup>278</sup>

6.69. We observe that, contrary to what Honduras asserts on appeal, the Panel *rejected*, rather than acknowledged, the view that these features constituted a flaw in the individual studies forming the TPP literature, of such nature as to fundamentally undermine their probative value.

6.70. Specifically, with respect to the focus of the TPP literature on non-behavioural outcomes (item (i) in paragraph 6.68. above), the Panel noted that much of the TPP literature focuses on the ability of plain packaging to have an impact on the three "mechanisms" (or "proximal" or "non-behavioural" outcomes) through which the TPP measures are intended to act, rather than on the measures' impact on smoking behaviour<sup>279</sup>, which is the ultimate target of the TPP measures. Nonetheless, the Panel considered that the focus of the TPP literature on non-behavioural outcomes "*does not ... constitute an inherent flaw*", provided that this is understood as constituting one component of a broader evidence base".<sup>280</sup> The Panel explained that the TPP measures were designed to act on these "non-behavioural" or "proximal" outcomes, with a view to ultimately affecting smoking behaviours, and that the three "mechanisms" identified in the TPP Act closely reflect the specific "non-behavioural" outcomes that were studied in a large portion of the TPP literature predating the measures' adoption.<sup>281</sup> The Panel also considered that, while a consideration of the impact of the measures on smoking behaviour is "directly relevant" to its assessment<sup>282</sup>, there is no reason to exclude, *ex ante*, that the evidence relating to "proximal" outcomes also informs that assessment, to the extent that it would inform the impact of the measures on smoking behaviour.<sup>283</sup>

6.71. With respect to the alleged lack of randomized, longitudinal, and counterfactual studies (item (ii) in paragraph 6.68. above), the Panel noted that there is "some convergence" among researchers that the "ideal test" of the effectiveness of plain packaging would have been "a longitudinal randomized controlled trial in a population-based setting, where packaging is manipulated in some markets but not in others".<sup>284</sup> However, the Panel observed that the evidence – including the Dominican Republic's own evidence<sup>285</sup> indicated that there are important limitations to the feasibility or utility of conducting such randomized controlled experiments, as well

<sup>277</sup> See Panel Report, para. 7.523. Honduras does not challenge particular aspects of the Panel's subsequent examination, with reference to the individual studies forming the TPP literature and other evidence, of whether and to what extent the TPP measures are expected to have an impact on each of the three "mechanisms" (or "proximal" outcomes) identified in the TPP Act (i.e. reducing the appeal of tobacco products, enhancing the effectiveness of GHWs, and reducing the ability of the pack to mislead consumers), and, in turn, on smoking behaviour.

<sup>278</sup> Honduras' appellant's submission, para. 799.

<sup>279</sup> Panel Report, paras. 7.552-7.553.

<sup>280</sup> Panel Report, para. 7.555. (emphasis added)

<sup>281</sup> Panel Report, para. 7.555.

<sup>282</sup> Panel Report, para. 7.495.

<sup>283</sup> Panel Report, para. 7.498.

<sup>284</sup> Panel Report, para. 7.557.

<sup>285</sup> For example, the Panel noted that one of the complainants' experts, Professor Ajzen, explained that "the difficulty lies in the fact that the experimental situation created prior to implementation of the [TPP] Act is not an exact reproduction of the situation that would be encountered afterwards" and that this can jeopardize the experiment's external validity. (Panel Report, para. 7.558 (quoting I. Ajzen, Supplemental Report: Pre-Implementation Empirical Testing of Behavioral Theories Relied on by Australia to Justify Plain Packaging (7 July 2015) (Ajzen Supplemental Report) (Panel Exhibit DOM/HND/IDN-4), para. 56) Professor Ajzen further observed that "a limitation on the study of smoking behavior is of an ethical nature", and that the "practical limitations of studying the impact of plain packaging on behavior prior to implementation of the [TPP] Act draw attention to the importance of the research ... regarding the impact of plain packaging on the *theoretical determinants* of smoking behavior". (Panel Report, paras. 7.559-7.560 (quoting Ajzen Supplemental Report (Panel Exhibit DOM/HND/IDN-4), paras. 57 and 59) (emphasis original)))

as ethical issues that would arise in conducting such experiments.<sup>286</sup> As such, the Panel was not persuaded that "the absence of a study, prior to the implementation of the measures, that utilized an 'ideal' experimental design allowing an observation of actual smoking behaviours constitutes a flaw in the TPP literature, of such nature as to fundamentally undermine its probative value and the evidentiary base underlying the adoption of the TPP measures."<sup>287</sup>

6.72. Accordingly, we disagree with Honduras that the Panel *acknowledged* that either of the two features of the studies forming the TPP literature constitutes an inherent flaw that is so fatal as to fundamentally undermine the probative value of the TPP literature as a whole.

6.73. Honduras also takes issue with the Panel's reasoning that, while some of the studies forming the TPP literature may suffer from certain methodological flaws or limitations, these limitations were not "fatal" when taking into account the studies' "combined strength" and consistency with the wider literature.<sup>288</sup> According to Honduras, "[t]here is no logic in saying that one bad study would be more reliable if it is bundled with other bad studies."<sup>289</sup>

6.74. We disagree. Indeed, rather than offering "no logic" in finding that the TPP literature comes from respected and qualified sources, the Panel offered a detailed explanation for why it considered that the studies forming this literature, as a whole, provided a reasonable basis in support of the proposition underlying the adoption of the TPP measures in Australia. For example, in the context of addressing the complainants' argument that the studies forming the TPP literature are biased and lack objectivity<sup>290</sup>, the Panel took note of Australia's suggestion that this body of studies, "taken together as a whole", supports the effectiveness of tobacco plain packaging.<sup>291</sup> The Panel agreed with Australia, stating that "to the extent that convergent research outcomes would reflect the results of a range of studies consistent with accepted standards in their respective fields, this may confirm the strength of the conclusions reached in individual studies, rather than demonstrate publication or researcher bias."<sup>292</sup> In doing so, the Panel cited specific evidence in support of its view, namely, several expert opinions suggesting that "consistency of association" and "coherence

<sup>286</sup> Panel Report, para. 7.558 (referring to Ajzen Supplemental Report (Panel Exhibit DOM/HND/IDN-4), paras. 56-57; G. Fong, Supplemental Report in Response to Professor Ajzen (8 September 2015) (Fong Supplemental Report) (Panel Exhibit AUS-531), paras. 167-168; C. Moodie, M. Stead, L. Bauld, A. McNeill, K. Angus, K. Hinds, I. Kwan, J. Thomas, G. Hastings, and A. O'Mara-Eves, Plain Tobacco Packaging: A Systematic Review, UK Centre for Tobacco Control Studies, University of Stirling (2012) (Stirling Review) (Panel Exhibits AUS-140, HND-130, CUB-59), pp. 17-18 and 88-89; M. Stead, C. Moodie, K. Angus, L. Bauld, A. McNeill, J. Thomas, G. Hastings, K. Hinds, A. O'Mara-Eves, I. Kwan, R. Purves, and S. Bryce, "Is Consumer Response to Plain/Standardised Tobacco Packaging Consistent with Framework Convention on Tobacco Control Guidelines? A Systematic Review of Quantitative Studies", *PLoS One*, Vol. 8 (2013), doi:10.1371/journal.pone.0075919 (Panel Exhibit CUB-58), p. 8; S. Ulucanlar, G. Fooks, J. Hatchard, and A. Gilmore, "Representation and Misrepresentation of Scientific Evidence in Contemporary Tobacco Regulation: A Review of Tobacco Industry Submissions to the UK Government Consultation on Standardised Packaging", *PLoS Medicine*, Vol. 11 (2014), doi:10.1371/journal.pmed.1001629 (Panel Exhibit AUS-501), p. 6; C. Chantler, Standardised Packaging of Tobacco: A Report of the Independent Review Undertaken by Sir Cyril Chantler (April 2014) (Chantler Report) (Panel Exhibits AUS-81, CUB-61), para. 1.19; D. Hammond, Standardized Packaging of Tobacco Products: Evidence Review, prepared for the Irish Department of Health (March 2014) (Hammond Review) (Panel Exhibit AUS-555), p. 35). See also *ibid.*, para. 7.561.

<sup>287</sup> Panel Report, para. 7.562.

<sup>288</sup> Honduras' appellant's submission, paras. 800 and 1010 (quoting Panel Report, paras. 7.627 and 7.641).

<sup>289</sup> Honduras' appellant's submission, para. 801.

<sup>290</sup> See Panel Report, paras. 7.543-7.551 (under the heading "Objectivity of the TPP literature").

<sup>291</sup> Panel Report, para. 7.536 (referring to Australia's first written submission to the Panel, Annex E, para. 4; Expert Report of Dr Geoffrey T. Fong (4 March 2015) (Fong Report) (Panel Exhibit AUS-14); G. Fong, Supplemental Report in Response to Professor Ajzen (8 September 2015) (Fong Supplemental Report) (Panel Exhibit AUS-531); G. Fong, Supplementary Report in Response to Professors Inman and Kleijnen (27 October 2015) (Fong Second Supplemental Report) (Panel Exhibit AUS-585), para. 8; Expert Report of J. Samet (5 March 2015) (Samet Report) (Panel Exhibit AUS-7); F. Chaloupka, Expert Report on Australia's Plain Packaging Legislation (7 March 2015) (Panel Exhibit AUS-9); F. Chaloupka, Report on Selected Issues Raised in Ongoing Challenges to Australia's Tobacco Plain Packaging Measure (7 December 2015) (Panel Exhibit AUS-590); Expert Report of Dr Paul Slovic (4 March 2015) (Slovic Report) (Panel Exhibit AUS-12)).

<sup>292</sup> Panel Report, para. 7.550. (fns omitted)

of association" are of "particular relevance to evaluating the evidence related to plain packaging", and that the TPP literature studies demonstrated both.<sup>293</sup>

6.75. In addition, the Panel examined several expert reports that reviewed the methodological rigour of the individual TPP studies, in the context of addressing the complainants' argument that these studies fail to meet the accepted standards of methodological rigour. These expert reports comprised: (i) three expert reports commissioned by the complainants, namely, the Inman et al. Peer Review Project<sup>294</sup>, the Kleijnen Systematic Review<sup>295</sup>, and the Klick TPP Literature Report<sup>296</sup>; and (ii) external reviews of the TPP literature conducted outside the Panel proceedings, including in particular the Stirling Review<sup>297</sup> and the Chantler Report.<sup>298</sup> The reviews commissioned by the complainants (item (i) above) concluded that the TPP studies do not provide a sound basis on which to base claims about the expected effects of the TPP measures in Australia<sup>299</sup>, whereas the Stirling Review and the Chantler Report (item (ii) above) concluded that the TPP literature reasonably suggests that plain packaging has the potential to contribute to reducing the harm caused by tobacco smoking.<sup>300</sup>

6.76. Having examined these expert reports, overall, the Panel "accord[ed] particular weight" to the assessments contained in the Chantler Report.<sup>301</sup> The Panel considered it significant that this report was commissioned outside the context of these disputes, and included a process whereby independent reviewers assessed the quality of individual studies comprising the TPP literature, as well as the quality of the systematic review of this literature in the Stirling Review.<sup>302</sup> By contrast, the Panel questioned the conclusions stated in the complainants' commissioned reviews. For example, the Panel noted that the Inman et al. Peer Review Project concluded that the plain packaging literature "is of surprisingly low quality", such that the studies forming this literature are "unacceptable for publication in a major consumer research journal in their current form".<sup>303</sup> In the Panel's view, however, the fact that most of the papers at issue had in fact been published in various specialized public health and medical journals raised "serious doubts" about the criteria and benchmarks used by Professor Inman.<sup>304</sup> The Panel considered that a similar criticism applied to the Kleijnen Systematic Review.<sup>305</sup> In short, we observe that, while the Panel ultimately lent more credence to the expert opinions in support of Australia's proposition (in particular the

<sup>293</sup> Panel Report, para. 7.550 (referring to Samet Report (Panel Exhibit AUS-7), paras. 117, 119, 125, and 128; Stirling Review (Panel Exhibits AUS-140, HND-130, CUB-59), p. 90; Fong Report (Panel Exhibit AUS-14), para. 71; Fong Second Supplemental Report (Panel Exhibit AUS-585), para. 31; Hammond Review (Panel Exhibit AUS-555), p. 31).

<sup>294</sup> J. Inman, Plain Packaging Literature Peer Review Project (3 October 2014) (Inman et al. Peer Review Report) (Panel Exhibit DOM/HND-3).

<sup>295</sup> J. Kleijnen, A. Bryman, and M. Bosnjak, Quality of the Empirical Evidence Testing the Impact of Plain Packaging on Tobacco Consumption: A Systematic Review (6 October 2014) (Kleijnen Systematic Review) (Panel Exhibit DOM/HND-4).

<sup>296</sup> Report by J. Klick on Plain Packaging Literature and Research Methodology (2 October 2014) (Klick TPP Literature Report) (Panel Exhibit UKR-6).

<sup>297</sup> Stirling Review (Panel Exhibits AUS-140, HND-130, CUB-59); C. Moodie, K. Angus, M. Stead, and L. Bauld, "Plain Tobacco Packaging Research: An Update", Centre for Tobacco Control Research, Institute for Social Marketing, University of Stirling (2013) (Stirling Review 2013 Update) (Panel Exhibits AUS-216, CUB-60).

<sup>298</sup> Chantler Report (Panel Exhibits AUS-81, CUB-61).

<sup>299</sup> Panel Report, paras. 7.567, 7.571, and 7.578.

<sup>300</sup> Panel Report, paras. 7.591 (referring to Stirling Review (Panel Exhibits AUS-140, HND-130, CUB-59), p. v; Stirling Review 2013 Update (Panel Exhibits AUS-216, CUB-60), p. 2) and 7.600 (referring to Chantler Report (Panel Exhibits AUS-81, CUB-61), para. 18).

<sup>301</sup> Panel Report, para. 7.635. See also *ibid.*, fn 2648 to para. 7.1028.

<sup>302</sup> Panel Report, para. 7.633.

<sup>303</sup> Panel Report, para. 7.567 (quoting Inman et al. Peer Review Report (Panel Exhibit DOM/HND-3), para. 69, p. 47).

<sup>304</sup> Panel Report, para. 7.569 (referring to Inman et al. Peer Review Report (Panel Exhibit DOM/HND-3), para. 13).

<sup>305</sup> Panel Report, para. 7.577. The Panel noted "the extreme nature of the results of the Kleijnen Systematic Review, which identified fatal flaws in each of the assessed 31 papers (most of which were otherwise published in peer-reviewed journals)". This caused the Panel to "question the standard by which the studies were judged, and whether the particular context of tobacco control research was taken into account". (*Ibid.*)

Chantler Report) than to the expert opinions commissioned by the complainants, it explained why the former are more reliable than the latter, instead of offering "no logic" in this regard.

6.77. In light of the foregoing, we do not agree with Honduras that the Panel erred because it failed to offer a reasoned and adequate explanation, or treated evidence in a one-sided manner, in reaching its conclusion that the TPP literature can be considered as coming from respected and qualified sources, and therefore should not be dismissed in its entirety.<sup>306</sup> Nor do we consider that any such alleged error would be so material as to undermine the objectivity of the Panel's assessment of the matter before it. In this regard, we emphasize that it was the complainants, not the Panel, who bore the burden of adducing credible evidence to prove their proposition that the TPP measures are incapable of contributing to Australia's objective. Thus, even assuming that the pre-implementation evidence had not been of sufficient probative value as argued by Honduras, it would not necessarily mean that the Panel erred in reaching its intermediate conclusion, based on that evidence, that the *complainants had failed to demonstrate* that the TPP measures would not be capable of contributing to Australia's objective.<sup>307</sup>

6.78. Accordingly, we find that Honduras has failed to demonstrate that the Panel acted inconsistently with Article 11 of the DSU by relying on the TPP literature as part of its broader evidentiary base for assessing the contribution of the TPP measures.

#### **6.1.2.3.2.4 Whether the Panel acted inconsistently with Article 11 of the DSU by disregarding the Dominican Republic's evidence**

6.79. The Dominican Republic claims that the Panel acted inconsistently with Article 11 of the DSU by disregarding the Dominican Republic's evidence that directly contradicted the Panel's intermediate conclusions that the TPP measures would be apt to affect smoking behaviour by: (i) reducing the appeal of tobacco products (the first mechanism of the TPP measures); and (ii) enhancing the effectiveness of GHWs (the second mechanism of the TPP measures).<sup>308</sup> On that basis, the Dominican Republic requests us to reverse these intermediate conclusions, as well as other related findings.<sup>309</sup>

6.80. The Dominican Republic highlights that the Panel's intermediate conclusion that the TPP measures would be capable of reducing the appeal of tobacco products (the first mechanism) was premised on its proposition that tobacco packaging can function as a means to convey *positive perceptions* to consumers.<sup>310</sup> Similarly, the Dominican Republic observes that the Panel relied on the same proposition when it concluded that the TPP measures would increase the effectiveness of GHWs (the second mechanism)<sup>311</sup> by "remov[ing], or at least significantly reduc[ing], 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>312</sup>

6.81. However, in the Dominican Republic's view, such a proposition was directly refuted by several pieces of evidence it submitted to the Panel<sup>313</sup>, which purportedly demonstrated that, based on

<sup>306</sup> Panel Report, paras. 7.638-7.639.

<sup>307</sup> Panel Report, para. 7.929.

<sup>308</sup> Dominican Republic's appellant's submission, paras. 657-658 (referring to Panel Report, para. 7.1034). We note that the Dominican Republic takes issue with the Panel's findings regarding the TPP measures' anticipated contribution through the first and second mechanisms only, and not the third mechanism (i.e. reducing the ability of the pack to mislead consumers). See Dominican Republic's appellant's submission, para. 726.

<sup>309</sup> Dominican Republic's Notice of Appeal, para. 8 (referring to Panel Report, paras. 7.518-7.929, 7.931, 7.1024-7.1034, and 7.1038).

<sup>310</sup> Dominican Republic's appellant's submission, paras. 685-694.

<sup>311</sup> Dominican Republic's appellant's submission, paras. 695-696.

<sup>312</sup> Dominican Republic's appellant's submission, para. 696 (quoting Panel Report, para. 7.860).

<sup>313</sup> In its appellant's submission, the Dominican Republic refers to five expert reports it submitted to the Panel as constituting the evidence that contradicted the Panel's conclusions. These expert reports are:

(i) I. Ajzen, Examination of Australia's Reliance on Behavioral Theories to Support its Tobacco Plain Packaging Legislation (31 May 2015) (Ajzen Report) (Panel Exhibit DOM/HND/IDN-3) (in particular paras. 22, 174-176, and 178); (ii) I. Ajzen, The Role of Theory and Empirical Evidence in Evaluating the Effectiveness of Plain Packaging: Response to Australia and its Experts (27 October 2015) (Ajzen Rebuttal Report) (Panel Exhibit DOM/HND/IDN-5) (in particular sections 3.2.2 and 3.2.3); (iii) I. Ajzen, Response to Questions 146, 202, and 203 by the Panel (8 December 2015) (Ajzen Response to Panel question Nos. 146, 202, and 203)

Australia's own surveys, tobacco packaging conveyed *negative*, rather than positive, perceptions to adults and adolescents in the context of Australia's market before the implementation of the TPP measures.<sup>314</sup> The Dominican Republic thus considers that, in reaching its intermediate conclusions by assuming that tobacco packaging can convey positive perceptions in Australia, the Panel failed to engage with evidence that was material to the Dominican Republic's case because it directly contradicted the Panel's conclusions.<sup>315</sup> The Dominican Republic also considers that the Panel's disregard of its evidence amounts to "incoherent" reasoning because the Panel failed to reconcile the importance it attached to the ability of tobacco packaging to convey positive associations in the Australian context, with the empirical evidence showing that partially branded tobacco packaging, with large GHWs, was actually perceived *negatively* in the Australian context before the implementation of the TPP measures.<sup>316</sup>

6.82. Australia considers that the Dominican Republic's claim that the Panel failed to engage with its evidence "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".<sup>317</sup> As Australia sees it, the Panel's findings are amply documented in the Panel Report and duly supported by credible evidence from recognized and reputable sources.<sup>318</sup> Thus, according to Australia, the Panel had not exceeded the bounds of its discretion under Article 11 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.<sup>319</sup> Australia also disagrees with the Dominican Republic's proposition that there is an 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 among many Australians prior to implementation of the TPP measures, on the other hand.<sup>320</sup> Australia notes in this context that White et al. 2015a (on which the Dominican Republic's evidence relied) found that tobacco plain packaging both "reduced the appeal of tobacco packs to adolescents" and "increased negative perceptions of packs"<sup>321</sup>, which in

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(Panel Exhibit DOM/HND/IDN-6) (in particular para. 49); (iv) L. Steinberg, Adolescent Decision-Making and the Prevention of Underage Smoking: The Role of Plain Packaging: A Response to Expert Evidence Submitted on Behalf of Australia (3 July 2015) (Steinberg Rebuttal Report) (Panel Exhibit DOM/HND-10) (in particular paras. 35 and 37); and (v) L. Steinberg, Adolescent Decision Making and the Prevention of Underage Smoking: The Role of Plain Packaging: A Second Response to Expert Evidence Submitted on Behalf of Australia (23 October 2015) (Steinberg Second Rebuttal Report) (Panel Exhibit DOM/HND-15) (in particular paras. 26, 33, and 39). (Dominican Republic's appellant's submission, fn 617 to para. 701) The Dominican Republic also cites various parts of its written submissions to the Panel in which it referred to this evidence, namely, Dominican Republic's second written submission to the Panel, paras. 443-456; response to Panel question No. 134, para. 134; opening oral statement at the second substantive meeting of the Panel, para. 50; comments on Australia's response to Panel question No. 170, paras. 273-274; comments on Australia's response to Panel question No. 196, paras. 585-601, 633-634, 663-665, and 669; comments on Australia's response to Panel question No. 200, paras. 783, 797, and 804-806; comments on Australia's response to Panel question No. 201, paras. 878-880; comments on Australia's response to Panel question No. 204, para. 898. (Ibid.)

<sup>314</sup> Dominican Republic's appellant's submission, paras. 703-704, 710, 713, 715, 731, 733, and 745.

<sup>315</sup> Dominican Republic's appellant's submission, paras. 701 and 728.

<sup>316</sup> Dominican Republic's appellant's submission, paras. 740-746.

<sup>317</sup> Australia's appellee's submission, para. 513.

<sup>318</sup> Australia's appellee's submission, paras. 514-516 (referring to Panel Report, para. 7.660, in turn referring to US Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* (Atlanta, 2012) (Panel Exhibit AUS-76); British American Tobacco, Packaging Brief (2 January 2001), Bates Nos. 325211963-325211964 (Panel Exhibit AUS-23); N. Tavassoli, Report on the World Trade Organization Dispute Settlement Proceedings Concerning Australia's Tobacco Plain Packaging Legislation (10 March 2015) (Tavassoli Report) (Panel Exhibit AUS-10); Expert Report of Dr Jean-Pierre Dubé (9 March 2015) (Panel Exhibit AUS-11); Slovic Report (Panel Exhibit AUS-12); N. Tavassoli, Rebuttal to Arguments Raised in Exhibit DOM/HND-14 (26 October 2015) (Panel Exhibit AUS-588), and para. 7.663).

<sup>319</sup> Australia's appellee's submission, para. 516.

<sup>320</sup> Australia's appellee's submission, para. 525.

<sup>321</sup> Australia's appellee's submission, para. 526 (quoting V. White, T. Williams, and M. Wakefield, "Has the Introduction of Plain Packaging with Larger Graphic Health Warnings Changed Adolescents' Perceptions of Cigarette Packs and Brands?", *Tobacco Control*, Vol. 24 (2015), ii42-49 (White et al. 2015a) (Panel Exhibits AUS-186, DOM-235), p. ii48).

Australia's view is consistent with the Panel finding that in the Australian context, branded packaging can be used to convey positive perceptions to consumers.<sup>322</sup>

6.83. While the Dominican Republic presents rather lengthy arguments as to how the Panel failed to make an objective assessment of the matter before it as required under Article 11 of the DSU<sup>323</sup>, these arguments hinge on its proposition that the body of evidence it presented to the Panel *directly contradicted* the Panel's intermediate conclusions that the measures would be apt to contribute to Australia's objective by reducing the appeal of tobacco packaging (the first mechanism) and by increasing the effectiveness of the GHWs (the second mechanism). Indeed, the Dominican Republic repeatedly asserts and explains that: (i) the Panel's conclusion rests on the assumption that tobacco packaging can function as a means to convey *positive* perceptions; and (ii) such an assumption was refuted by the Dominican Republic's evidence purportedly demonstrating that tobacco packaging conveyed *negative* perceptions in Australia before the implementation of the TPP measures.<sup>324</sup>

6.84. We review the relevant Panel findings, as well as the nature and scope of the evidence in question, in order to confirm whether there is indeed such a contradiction.

6.85. Looking first at the Panel's findings, we note that the Panel stated that a relevant assumption underlying the first mechanism through which the TPP measures are designed to contribute to Australia's objective (i.e. reducing the appeal of tobacco products to consumers) is that, where branding features are available on tobacco products or their retail packaging, they may act as advertising and thereby influence perceptions of tobacco products.<sup>325</sup> The Panel noted that the complainants disagreed with such an assumption, and alleged that packaging is not a form of advertising and does not have an impact on the decision to smoke.<sup>326</sup>

6.86. The Panel examined relevant evidence, and rejected the complainants' view that tobacco packaging cannot act as an advertising or promotional tool, "including in Australia's 'dark market'"<sup>327</sup>, i.e. in the market where product packaging is effectively the only means of brand communication due to the significant restrictions on advertising.<sup>328</sup> Rather, the Panel found that tobacco packaging "may be used, and has in fact been used" by the tobacco industry "to generate positive perceptions of tobacco products".<sup>329</sup> In making these findings, the Panel underscored that a number of documents coming from the tobacco industry itself recognize 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", and that, in order to attract new consumers, it is important to "mak[e] their products appealing to those most likely to initiate tobacco use (i.e. youth), including through branded packaging".<sup>330</sup> The Panel added that this observation is not affected by the presence of Australia's expanded GHWs, which occupy 75% of the front pack face.<sup>331</sup>

6.87. With respect to the second mechanism of the TPP measures (i.e. enhancing the effectiveness of GHWs), the Panel took note of paragraph 46 of the Article 11 FCTC Guidelines, which states that the adoption of plain packaging measures "may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others".<sup>332</sup> In this regard, the Panel observed that the negative message conveyed by GHWs could

<sup>322</sup> Australia's appellee's submission, para. 527 (referring to Panel Report, para. 7.1034). See also *ibid.*, paras. 528-531.

<sup>323</sup> Dominican Republic's appellant's submission, section II.E.2.

<sup>324</sup> Dominican Republic's appellant's submission, paras. 703, 707, 711-713, 715, 718, 724, 726-728, 730, 732, 740, and 743-746.

<sup>325</sup> Panel Report, para. 7.647.

<sup>326</sup> Panel Report, paras. 7.647 and 7.649.

<sup>327</sup> Panel Report, para. 7.663. (fn omitted)

<sup>328</sup> Panel Report, para. 7.659.

<sup>329</sup> Panel Report, para. 7.663. See also *ibid.*, para. 7.1032.

<sup>330</sup> Panel Report, paras. 7.660 and 7.1032. (emphasis added) See also *ibid.*, para. 7.732.

<sup>331</sup> Panel Report, para. 7.660.

<sup>332</sup> Panel Report, para. 7.800 (quoting Guidelines for Implementation of Article 11 (Packaging and Labelling of Tobacco Products), Document FCTC/COP3(10), excerpted from Conference of the Parties to the WHO FCTC, "Decisions", Third Session, held in Durban, South Africa, 17 to 22 November 2008, Document FCTC/COP3/DIV/3 (16 February 2009) (Panel Exhibit JE-20), Annex, para. 46).

be *contradicted* by the positive imagery conveyed by branding elements on tobacco packaging<sup>333</sup>, such that "the removal of the branding elements that may constitute a cause for adolescents to associate tobacco products with positive imagery and rewards ... would remove, or at least significantly reduce, the competition ... between the negative message conveyed by the GHW, and branding elements of the package."<sup>334</sup> The Panel also stated that, "in a regulatory context where tobacco packaging would otherwise be the only opportunity to convey a positive perception of the product through branding", it is not unreasonable to anticipate that the removal of the design features from tobacco packaging "would ... 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>335</sup>

6.88. The Panel's reasoning makes two points clear. First, the Panel found that *branding elements* on tobacco packaging may be used, and indeed have been used, to communicate positive imagery to attract consumers (especially youth) and affect their smoking behaviour (e.g. initiation, cessation, and relapse), including in Australia's "dark market" and in the presence of large GHWs. The Panel therefore considered that removing the branding elements from tobacco packaging would be apt to reduce the relative appeal of tobacco packaging (the first mechanism). Second, the Panel found that, in the presence of both branding elements and GHWs, tobacco packaging would carry two *conflicting* signals, namely, the positive imagery conveyed by the branding elements and the negative message conveyed by GHWs. Thus, removing the branding elements from tobacco packaging would allow GHWs to communicate the message about health risks more effectively, without being disturbed by the positive perceptions generated by the branding elements (the second mechanism).

6.89. In reaching these determinations, the Panel did not discuss, or make any finding regarding, whether tobacco packaging *as a whole* – encompassing both the branding elements and the GHWs – would, overall, be perceived positively or negatively by an average person. Instead, the Panel's findings speak only to whether the *portion* of tobacco packaging not covered by health warnings could be exploited for purposes of communicating positive imagery to consumers, so as to increase the relative appeal of tobacco packaging, and to mitigate or undermine the negative message conveyed by the GHWs.

6.90. Turning to the Dominican Republic's evidence to determine whether it directly contradicted the Panel's findings in question, we note that, in its appellant's submission, the Dominican Republic points to five reports prepared by two experts for the complainants (including the Dominican Republic), namely, Professor Ajzen and Professor Steinberg.<sup>336</sup> In these expert reports, both professors observe that tobacco packaging was perceived *negatively* by both adolescents<sup>337</sup> and adults<sup>338</sup> in the Australian market, before the implementation of the TPP measures. As the Dominican Republic highlights, these observations are based on Australia's survey data, namely, the results from the Australian Secondary Students Alcohol Smoking and Drug

<sup>333</sup> For example, the Panel noted Professor Tavassoli's discussion of the notion of "selective attention", meaning that human brains are not capable of attending to numerous elements that may simultaneously compete for attention. (Panel Report, para. 7.858 (referring to Tavassoli Report (Panel Exhibit AUS-10), paras. 110-113)) The Panel also noted the discussion of the theory of "goal competition", according to which plain packaging can increase GHWs' effectiveness by "allowing GHWs to activate more effectively already held beliefs at critical moments, i.e. by limiting the activation of competing goals that momentarily inhibit the goal of staying healthy", without "requir[ing] GHWs to change consumer beliefs about the health benefits of not smoking". (Ibid., para. 7.858 (quoting Tavassoli Report (Panel Exhibit AUS-10), para. 117))

<sup>334</sup> Panel Report, para. 7.860.

<sup>335</sup> Panel Report, para. 7.1034. (emphasis added; original emphasis omitted) See also *ibid.*, para. 7.860 (stating that, in the presence of tobacco plain packaging, "the *only* message communicated by the packaging is the GHW", and "no association with rewards is communicated" (emphasis original)).

<sup>336</sup> These expert reports are: (i) Ajzen Report (Panel Exhibit DOM/HND/IDN-3) (in particular paras. 22, 174-176, and 178); (ii) Ajzen Rebuttal Report (Panel Exhibit DOM/HND/IDN-5) (in particular sections 3.2.2 and 3.2.3); (iii) Ajzen Response to Panel question Nos. 146, 202, and 203 (Panel Exhibit DOM/HND/IDN-6) (in particular para. 49); (iv) Steinberg Rebuttal Report<sup>336</sup> (Panel Exhibit DOM/HND-10) (in particular paras. 35 and 37); and (v) Steinberg Second Rebuttal Report (Panel Exhibit DOM/HND-15) (in particular paras. 26, 33, and 39). (Dominican Republic's appellant's submission, fn 617 to para. 701)

<sup>337</sup> Ajzen Report (Panel Exhibit DOM/HND/IDN-3), paras. 22, 174, and 177; Steinberg Second Rebuttal Report (Panel Exhibit DOM/HND-15), para. 26.

<sup>338</sup> See, for example, Ajzen Response to Panel question Nos. 146, 202, and 203 (Panel Exhibit DOM/HND/IDN-6), para. 49.



(ASSAD) survey reported in White et al. 2015a (for adolescents)<sup>339</sup>, and the results from the National Tobacco Plain Packaging Tracking Survey (NTPPTS) (for adults).<sup>340</sup>

6.91. There is an important limitation in the scope of the evidence referred to by the Dominican Republic: the observations offered by Professors Ajzen and Steinberg in their respective expert reports address the appeal of tobacco packaging *as a whole*, encompassing *both* the branding elements *and* the GHWs, as opposed to the branding elements *alone*. Indeed, in the ASSAD survey<sup>341</sup> on which Professors Ajzen and Steinberg relied, the respondents were asked to rate the appeal of actual cigarette packs that they had seen in the previous six months, as well as of photographic images of four brands of Australian cigarettes.<sup>342</sup> Both the cigarette packs and the photographic images included a GHW as mandated at that time.<sup>343</sup> Thus, when Professors Ajzen and Steinberg state that tobacco packaging was perceived negatively by adolescents based on the results from the ASSAD survey, they are discussing whether the *overall* perception of tobacco packaging as a whole, including both the branding elements and GHWs, was positive or negative. The same observation applies also to the NTPPTS survey, on the basis of which Professor Ajzen observed that tobacco packaging was perceived negatively by adults before the implementation of the TPP measures.<sup>344</sup>

6.92. In light of these observations, we disagree with the Dominican Republic that there is a direct contradiction between the Panel's finding that tobacco packaging can be used, and indeed has been used, to convey positive perceptions, on the one hand, and the proposition of the Dominican Republic's evidence that tobacco packaging was perceived negatively before the implementation of the TPP measures, on the other hand. This is because, while the Panel's finding spoke to whether the *branding elements* of tobacco packaging can generate positive imagery, the Dominican Republic's evidence pertained to the *overall* perception of tobacco packaging, encompassing both the positive perceptions conveyed by the branding elements and the negative message conveyed by the GHWs. We do not consider that saying that the branding elements of tobacco packs can create positive imagery necessarily means that such positive imagery cannot, overall, be outweighed by the negative perception conveyed by the GHWs, such that the overall average appeal rating of tobacco packs remains negative.

6.93. We also do not see any problem with the Panel stating that removal of the branding elements by the TPP measures would reduce the appeal of tobacco packaging/products, even if the overall appeal rating of tobacco packs was not positive before the implementation of the TPP measures. Indeed, we would read such a statement simply to mean that tobacco packs that were not attractive (or had negative appeal) before the implementation of the TPP measures would become even less attractive (or have increased negative appeal) due to the TPP measures. Indeed, this is exactly what the Dominican Republic's own expert, Professor Ajzen, observed when he stated that "there was never any reason to doubt that plain packs, with larger GHWs, would be *less visually appealing* than the packs previously marketed with branding and smaller GHWs."<sup>345</sup> He confirmed that proposition empirically, explaining that the TPP measures and enlarged GHWs have resulted in degrees of

<sup>339</sup> Ajzen Report (Panel Exhibit DOM/HND/IDN-3), paras. 22 and 174 (referring to White et al. 2015a (Panel Exhibits AUS-186, DOM-235)); Steinberg Second Rebuttal Report (Panel Exhibit DOM/HND-15), para. 26 (referring to White et al. 2015a (Panel Exhibits AUS-186, DOM-235)).

<sup>340</sup> Ajzen Response to Panel question Nos. 146, 202, and 203 (Panel Exhibit DOM/HND/IDN-6), para. 49 (referring to the NTPPTS data). See also Dominican Republic's appellant's submission, para. 676.

<sup>341</sup> The data from this survey relate to adolescents' perceptions of cigarette packs and brand appeal, before and after the implementation of the TPP measures and the enlarged GHWs (i.e. in 2011 and 2013). (White et al. 2015a (Panel Exhibits AUS-186, DOM-235), p. ii43)

<sup>342</sup> White et al. 2015a (Panel Exhibits AUS-186, DOM-235), pp. ii43-ii44.

<sup>343</sup> As regards the perception of cigarette packs, we recall that GHWs were required for almost all tobacco products in Australia as of 1 March 2006. (Panel Report, para. 2.534). As regards the perception of brand appeal, White et al. 2015a explicitly states that the photographic images shown to the respondents included a GHW as mandated at the time. (White et al. 2015a (Panel Exhibits AUS-186, DOM-235), p. ii43)

<sup>344</sup> The NTPPTS survey assessed, *inter alia*, the extent to which the respondents liked the look of tobacco packs, as well as the relative perceptions by smokers of the appeal of the packaging of their current cigarettes or tobacco before and after the implementation of the TPP measures. (M. Wakefield, K. Coomber, M. Zacher, S. Durkin, M. Brennan, and M. Scollo, "Australian Adult Smokers' Responses to Plain Packaging with Larger Graphic Health Warnings One Year After Implementation: Results from a National Cross-Sectional Tracking Survey", *Tobacco Control*, Vol. 24 (2015), ii17-ii25 (Wakefield et al. 2015) (Panel Exhibits AUS-206, DOM-306), p. ii18)

<sup>345</sup> Ajzen Response to Panel question Nos. 146, 202, and 203 (Panel Exhibit DOM/HND/IDN-6), para. 44. (emphasis added) See also Ajzen Rebuttal Report (Panel Exhibit DOM/HND/IDN-5), para. 175.

"declines in appeal" of tobacco packs that are "statistically significant" for adolescents<sup>346</sup> and even larger for adult smokers.<sup>347</sup>

6.94. For these reasons, we disagree with the premise underlying the Dominican Republic's claim on appeal that the body of evidence that it identifies in these appellate proceedings directly contradicted the Panel's finding that the branding elements on tobacco packaging can convey positive perceptions to consumers, such that their removal would be apt to reduce the appeal of packaging (the first mechanism) and enhance the effectiveness of GHWs (the second mechanism). To the contrary, a careful review of the Panel's findings, as well as of the nature and scope of the Dominican Republic's evidence, reveals that the Dominican Republic's claim does not reflect a correct understanding of the Panel's reasoning or its own evidence.

6.95. Accordingly, we find that the Dominican Republic has failed to demonstrate that the Panel acted inconsistently with Article 11 of the DSU by disregarding the evidence that contradicted the Panel's conclusion, or by offering incoherent reasoning when it failed to address the evidence pertaining to the issue that the Panel itself acknowledged was crucial to its analysis.

#### **6.1.2.3.2.5 Conclusion**

6.96. We have found that Honduras has not demonstrated that the Panel failed to offer a reasoned and adequate explanation, or treated evidence in a one-sided manner, in reaching its conclusion that the TPP literature can be considered as coming from respected and qualified sources, and therefore should not be dismissed in its entirety.

6.97. We have also found that the Dominican Republic has not demonstrated that the Panel failed to engage with the Dominican Republic's evidence or to provide coherent reasoning. In particular, we have rejected the core premise underlying the Dominican Republic's claim that the evidence in question directly contradicted the Panel's intermediate conclusions that the TPP measures would be apt to reduce the appeal of tobacco products (the first mechanism) and to increase the effectiveness of the GHWs (the second mechanism).

6.98. Accordingly, we uphold the Panel's intermediate conclusion regarding the evidence pertaining to the design, structure, and intended operation of the TPP measures that the complainants failed to demonstrate that the TPP measures are incapable of contributing to Australia's objective through the three mechanisms by which the measures are designed to operate (i.e. reducing the appeal of tobacco products, enhancing the effectiveness of GHWs, and reducing the ability of the pack to mislead consumers) and that, to the contrary, this evidence is consistent with the proposition that the TPP measures are apt to affect smoking behaviour through these three mechanisms.<sup>348</sup>

#### **6.1.2.3.3 The Panel's assessment of the post-implementation evidence pertaining to the application of the TPP measures**

6.99. We recall that the Panel conducted its analysis of the contribution of the TPP measures to Australia's objective in several distinct steps. The Panel first examined evidence concerning the measures' design, structure, and intended operation.<sup>349</sup> The Panel then examined the impact of the TPP measures based on their application.<sup>350</sup> This evidence essentially looked at the actual effects of

<sup>346</sup> Ajzen Report (Panel Exhibit DOM/HND/IDN-3), para. 176.

<sup>347</sup> Ajzen Response to Panel question Nos. 146, 202, and 203 (Panel Exhibit DOM/HND/IDN-6), paras. 48-49. See also Ajzen Report (Panel Exhibit DOM/HND/IDN-3), figure 6, para. 175 (based on White et al. 2015a (Panel Exhibits AUS-186, DOM-235)).

We also note that, in the context of assessing the TPP measures' actual impact on proximal outcomes, the Panel stated that the available empirical evidence relating to the application of the TPP measures since their entry into force referred to by Ajzen et al. "*confirms, rather than discredits*, the 'hypothesized direction', i.e. the hypothesis reflected in the TPP literature that plain packaging would reduce the appeal of tobacco products". (Panel Report, para. 7.954 (referring to I. Ajzen, A. Hortaçsu, J. List, and A. Shaikh, Reconsideration of Empirical Evidence on the Effectiveness of Australian Plain Packaging Legislation: Evidence from the National Plain Packaging Tracking Survey (NPPTS) and Other Datasets (15 September 2015) (Ajzen et al. Data Report) (Panel Exhibit DOM/IDN-2), paras. 90-91) (emphasis added))

<sup>348</sup> Panel Report, paras. 7.929-7.931 and 7.1034.

<sup>349</sup> Panel Report, paras. 7.518-7.931.

<sup>350</sup> Panel Report, paras. 7.932-7.986 and Appendices A-E.

the TPP measures in Australia in the approximately three years from the implementation of the TPP measures up to the establishment of the Panel.<sup>351</sup> In this respect, the Panel examined the parties' evidence purporting to demonstrate the actual effects of the TPP measures on so-called "proximal" outcomes (Appendix A to the Panel Report) and "distal" outcomes (Appendix B to the Panel Report). The Panel also looked evidence regarding the effects of the TPP measures on "smoking behaviours" in Australia. The Panel's assessment of the impact of the TPP measures on smoking behaviour was based on data and analysis presented by the parties regarding *smoking prevalence* (Appendix C to the Panel Report) and *consumption* of tobacco products (Appendix D to the Panel Report). The Panel then assessed the parties' arguments and evidence regarding the impact of the TPP measures on illicit trade.<sup>352</sup> Finally, the Panel formed an overall conclusion regarding the degree of contribution of the TPP measures to Australia's objective.<sup>353</sup>

6.100. The Panel considered its findings in Appendices A-D, concerning the post-implementation evidence of actual effects of the TPP measures, to be relevant to its determination of the degree of contribution of the TPP measures.<sup>354</sup> The Panel stated that the evidence of the TPP measures' impact on proximal and distal outcomes 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>355</sup> Regarding smoking prevalence and consumption, the Panel considered 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>356</sup>

6.101. Overall, the Panel considered the evidence of actual smoking behaviour in Australia since the entry into force of the TPP measures to be "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>357</sup> The Panel found that this evidence, taken together with the evidence of the TPP measures' design, structure, and operation, supported the view that "the TPP measures are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products."<sup>358</sup>

6.102. The appellants argue that the Panel acted inconsistently with Article 11 of the DSU in its determination of the contribution of the TPP measures to Australia's objective. A large number of the appellants' arguments in support of this claim relate to the Panel's assessment of the post-implementation evidence, concerning the actual effects of the TPP measures in the three years from implementation to the establishment of the Panel.<sup>359</sup> In our view, a number of the appellants' claims and arguments share common themes, such that it is appropriate and sufficient for us to address these arguments thematically. At the same time, certain other arguments either do not implicate such common themes or are sufficiently nuanced such that a certain level of detail is required in our analysis of these issues. We therefore proceed with our analysis by addressing, in turn: (i) a number of discrete claims raised by the appellants; and (ii) certain claims and arguments that are grouped based on cross-cutting themes.

<sup>351</sup> The evidence covered the period from the entry into force of the measures in December 2012 up to September 2015, "with some variations in the exact period covered, depending on the data used". (Panel Report, para. 7.933)

<sup>352</sup> Panel Report, paras. 7.987-7.1023.

<sup>353</sup> Panel Report, paras. 7.1024-7.1045.

<sup>354</sup> Panel Report, para. 7.984.

<sup>355</sup> Panel Report, para. 7.985.

<sup>356</sup> Panel Report, para. 7.986.

<sup>357</sup> Panel Report, para. 7.1037.

<sup>358</sup> Panel Report, para. 7.1043.

<sup>359</sup> Honduras' appellant's submission, paras. 695-794 and 848-1086; Dominican Republic's appellant's submission, paras. 104-651 and 826-1151.

### 6.1.2.3.3.1 Discrete claims regarding the Panel's analysis of the actual effects of the TPP measures

6.103. In this section, we address a number of claims and arguments raised by the appellants regarding the actual effects of the TPP measures since implementation. We note, at the outset, that, with the exception of the parties' arguments regarding certain due process concerns underlying the Panel's assessment of the post-implementation evidence, the arguments and claims addressed in this section predominantly pertain to the Panel's analysis of the impact of the TPP measures on smoking behaviour, contained in Appendices C and D to the Panel Report.

6.104. To that end, we recall that the Panel's analysis of the evidence submitted by the parties regarding the contribution of the TPP measures to reducing *smoking prevalence* is set forth in Appendix C to the Panel Report.<sup>360</sup> The Panel conducted this analysis in three steps, assessing: (1) whether smoking prevalence decreased following the implementation of the TPP measures; (2) whether the decline in smoking prevalence *accelerated* after the implementation of the TPP measures; and (3) whether the TPP measures contributed to the decline in smoking prevalence. The Panel concluded that: (i) "[t]here is evidence that overall smoking prevalence in Australia continued to decrease following the introduction of the TPP measures; (ii) "[t]he downward trend in overall smoking prevalence in Australia appears to have accelerated in the post-TPP period"; and (iii) although it is not possible to distinguish between the impact of TPP and the impact of enlarged GHWs on the basis of the empirical evidence submitted, "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>361</sup>

6.105. In Appendix D to its Report, the Panel assessed the parties' evidence regarding the contribution of the TPP measures to reducing *consumption* of tobacco products.<sup>362</sup> The Panel distinguished in its analysis between the evidence related to cigarettes and the evidence concerning cigars.<sup>363</sup> With respect to cigarettes, similarly to its analysis of smoking prevalence, the Panel proceeded in three steps, assessing in turn: (1) whether cigarette consumption had declined (measured in terms of cigarette sales volumes) following the implementation of the TPP measures; (2) whether the decline in cigarette consumption had accelerated following the implementation of the TPP measures; and (3) whether the TPP measures contributed to the decline in cigarette consumption. The Panel then assessed separately the parties' evidence and arguments as they related to the impact of the TPP measures on consumption of cigars. The Panel concluded that: (i) "[t]here is some evidence that cigarette sales in Australia continued to decrease following the introduction of the TPP measures"; (ii) "[t]he downward trend in cigarette sales in Australia appears to have accelerated in the post-TPP period"; (iii) "[a]lthough it is impossible to distinguish between the impact of TPP and enlarged GHWs, 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"; and (iv) "[t]he evidence ... on the evolution of consumption of cigars in the post-TPP period is more limited" and did not allow the Panel "to draw clear conclusions on the effect of the TPP measures on cigar consumption in Australia".<sup>364</sup>

6.106. With this background in mind, we proceed to address, as *discrete claims*, the arguments raised by the appellants regarding: (i) step 1 of the Panel's analysis of smoking prevalence; (ii) step 2 of the Panel's analysis of cigarette consumption; (iii) step 3 of the Panel's analyses of both smoking prevalence and cigarette consumption; (iv) certain due process concerns underlying the Panel's analysis of the actual effects of the TPP measures; and (v) the consequences of any errors by the Panel.

<sup>360</sup> Panel Report, Appendix C, para. 1.

<sup>361</sup> Panel Report, para. 7.972; *ibid.*, Appendix C, para. 123.

<sup>362</sup> Panel Report, Appendix D, para. 1.

<sup>363</sup> The Panel noted that three of the complainants had initially argued that the TPP measures "'backfired' by increasing tobacco sales"; however, this argument was "not developed later in the proceedings". (Panel Report, Appendix D, para. 4) (fn omitted) The Panel also noted that the data pertaining to cigarette consumption primarily looked at cigarette sales volumes, although some studies looked at reported cigarette consumption. (*Ibid.*, para. 2)

<sup>364</sup> Panel Report, para. 7.979; *ibid.*, Appendix D, para. 137.

6.107. Before turning to address these issues, we briefly note, for the sake of clarity, that many of the parties' arguments addressed below relate to the evidence provided by experts on behalf of certain parties. These experts included: for the Dominican Republic, the Institute for Policy Evaluation (IPE) and Professor List; for Honduras, Professor Klick; and, for Australia, Dr Chipty.

### ***Step 1 of the Panel's smoking prevalence analysis***

6.108. In step 1 of its analysis of whether the TPP measures reduced smoking prevalence, the Panel assessed the parties' evidence regarding whether smoking prevalence decreased following the implementation of the TPP measures.<sup>365</sup> The Panel's review of the datasets revealed that "smoking prevalence fluctuates."<sup>366</sup> The Panel also noted that, "in the presence of small sample sizes ... it can be particularly difficult to interpret trends."<sup>367</sup> The Panel found, however, that "most of the datasets ..., including the [Roy Morgan Single Source] RMSS data, OECD Dataset on Non-Medical Determinants, and [National Health Survey] NHS, show continuing declines in smoking prevalence at the national level in the period following the introduction of the TPP measures."<sup>368</sup> The Panel concluded that "[t]here is evidence that overall smoking prevalence in Australia continued to decrease following the introduction of the TPP measures."<sup>369</sup>

6.109. The Dominican Republic argues that, in step 1 of its smoking prevalence analysis, the Panel "defined the rate of decline as 'a *downward trend* in smoking prevalence that has *accelerated since July 2006*'".<sup>370</sup> According to the Dominican Republic, in the second and third steps of its smoking prevalence analysis, the Panel did not take into account its finding in the first step that the rate of decline in smoking accelerated since July 2006.<sup>371</sup> The Dominican Republic argues that, in the absence of any explanation for this by the Panel, the Panel's reasoning is internally incoherent and inconsistent with the duty under Article 11 of the DSU to make an objective assessment of the matter.<sup>372</sup>

6.110. Australia submits that the focus of the Dominican Republic's arguments – the "pre-existing rate of decline" – was relevant only to the second and third steps of the Panel's analysis.<sup>373</sup> Australia submits that the Panel did not identify a pre-existing rate of decline in step 1 because step 1 merely examined whether smoking prevalence had declined following implementation of the TPP measures, meaning that it was unnecessary to identify a benchmark rate of decline.<sup>374</sup> Australia highlights that the Panel made no reference to a benchmark rate of decline in step 1 of its analysis and the Panel was 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'".<sup>375</sup> Australia considers that the Dominican Republic misrepresents the Panel's findings by superimposing a green trend line on Figure C.1 of the Panel's findings that is absent from the Panel's actual Figure C.1 contained in the Panel Report.<sup>376</sup> Since the Panel made no such finding in step 1 of its analysis, Australia asserts, there is no inconsistency in the Panel's findings.<sup>377</sup>

<sup>365</sup> Panel Report, Appendix C, section 1.

<sup>366</sup> Panel Report, Appendix C, para. 40. The Panel also noted "the usefulness of relying on the most recent available ... and comparable data to analyse trends in smoking prevalence", and considered this "particularly important", because the datasets provided by the parties did not always cover the same period. (Ibid., para. 39) The Panel further highlighted the importance of distinguishing between smoking prevalence and smoking incidence (smoking prevalence measures the proportion of smokers in the population; smoking incidence measures the proportion of smokers in a population of smokers and recent quitters). (Ibid.)

<sup>367</sup> Panel Report, Appendix C, para. 40.

<sup>368</sup> Panel Report, Appendix C, para. 40. (fn omitted)

<sup>369</sup> Panel Report, Appendix C, para. 123.a.

<sup>370</sup> Dominican Republic's appellant's submission, para. 187 (quoting Panel Report, Appendix C, para. 8). (emphasis added by the Dominican Republic)

<sup>371</sup> Dominican Republic's appellant's submission, paras. 181-184 and 188. The Dominican Republic elaborates that "in steps 2 and 3 of its analysis, without any acknowledgement or explanation, the Panel did not apply the rate of decline that it had defined in step 1". (Ibid., para. 188)

<sup>372</sup> Dominican Republic's appellant's submission, paras. 185-186 and 191.

<sup>373</sup> Australia's appellee's submission, para. 677.

<sup>374</sup> Australia's appellee's submission, para. 682.

<sup>375</sup> Australia's appellee's submission, para. 682. (emphasis original)

<sup>376</sup> Australia's appellee's submission, para. 683.

<sup>377</sup> Australia's appellee's submission, paras. 678 and 703.

6.111. We recall that the specific issue that the Panel addressed in step 1 of Appendix C was whether, *after* the implementation of the TPP measures, smoking prevalence had declined. In order to assess this straightforward question of whether smoking prevalence declined, it was only necessary for the Panel to compare smoking prevalence after the implementation of the TPP measures to smoking prevalence as it existed at the time of the TPP measures' implementation. Thus, in step 1 of its smoking prevalence analysis, the Panel was not required to make any findings regarding the rate of decline in smoking prevalence prior to the implementation of the TPP measures.<sup>378</sup>

6.112. We further note that the Dominican Republic's assertion that the Panel found that smoking prevalence had declined since July 2006 is based exclusively on the Panel's statement in paragraph 8 of Appendix C that: "the RMSS data reveal a downward trend in smoking prevalence that has accelerated since July 2006."<sup>379</sup> Paragraph 8 of Appendix C appears in a subsection of the Panel's analysis in step 1, titled "Datasets and related analyses".<sup>380</sup> This subsection appears equivalent to other subsections titled "Datasets and related studies", which are present in other sections of Appendix C. All such "datasets" subsections precede subsections titled "Analysis by the Panel". This structure is similar to the structure of the other Appendices, which also include distinct "Datasets and related analyses" subsections that precede "Analysis by the Panel" subsections.

6.113. From our review of the Appendices, it appears that all such "datasets" subsections describe the evidence and arguments provided by the parties to the Panel, and do not appear to contain any independent reasoning or findings by the Panel itself. This remains true for *all* three steps of the Panel's analysis in Appendix C.<sup>381</sup> We also note that the very same subsection in which the Panel allegedly found a break in the trend line *also* contains a "finding" that "the last eight [National Drug Strategy Household Survey (NDSHS)] reports indicate ... that smoking prevalence ... has decreased along a roughly linear trend since 1993", and the subsequent sentence states that "[t]he most recent NDSHS survey reveals that smoking rates ... have evolved according to this trend without 'break', 'shift' or 'kink' in the trend line that could be attributable to the TPP measures."<sup>382</sup>

6.114. We see no reason to presume that the Panel made directly contradictory factual findings within five paragraphs of one another, when a plain reading of the Panel Report indicates that these so-called findings merely contain descriptions of what the evidence purported to show, and do not amount to affirmative findings of fact by the Panel itself. In our view, the "Datasets and related analyses" subsection in which the Panel stated that "the RMSS data reveal a downward trend in smoking prevalence that has accelerated since July 2006" is, on its face, a summary of the evidence provided by the parties. Consequently, this so-called "finding" by the Panel is not an affirmative finding of fact based on its assessment of the evidence, but simply a description of what the evidence purports to represent.

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<sup>378</sup> Panel Report, Appendix C, paras. 41-42. The issue of what smoking prevalence had looked like prior to the implementation of the TPP measures only arose at the second step of the Panel's analysis. This is because, at the second step of the analysis, the Panel assessed whether the decline in smoking prevalence had accelerated after the implementation of the TPP measures. In other words, step 1 assessed in absolute terms whether smoking prevalence had declined *at all*, following implementation of the TPP measures, while step 2 assessed whether in relative terms smoking prevalence had declined more after implementation of the TPP measures than it had been decreasing prior to TPP implementation.

<sup>379</sup> Panel Report, Appendix C, para. 8.

<sup>380</sup> Panel Report, Appendix C, section 1.1.

<sup>381</sup> Indeed, in all sections of Appendix C, the Panel clearly describes the evidence provided by the parties in the "Datasets and related studies" subsection, and then proceeds to consider and form conclusions regarding the probative value of that evidence in the subsequent "Analysis by the Panel" subsection. For example, in the "Datasets and related studies" subsection of section 3, the Panel states that, "[o]verall, IPE concludes that the TPP measures had no statistically significant effect on general smoking prevalence and on cigar smoking prevalence." (Panel Report, Appendix C, para. 64) (fn omitted) Pursuant to the Dominican Republic's logic, this would appear to be an affirmative finding by the Panel that "the TPP measures had no statistically significant effect on ... smoking prevalence." (Ibid.) However, in its subsequent "Analysis by the Panel" subsection, the Panel stated that it was "not persuaded that these econometric results can be taken at face value". (Ibid., para. 103) This would appear to confirm that the so-called "findings" appearing in the "Datasets and related analyses/studies" subsections are not affirmative findings by the Panel, but descriptions of the parties' arguments and evidence.

<sup>382</sup> Panel Report, Appendix C, para. 13.

6.115. In our view, the Panel's assessment of the evidence and its factual findings based on that evidence, pertinent to step 1 of its analysis, are contained entirely in the subsequent subsection, titled "Analysis by the Panel".<sup>383</sup> In that "Analysis by the Panel" subsection, the Panel assessed the evidence it had *described* in the previous subsection and concluded that "despite different estimates and fluctuations of smoking prevalence, most of the datasets ..., including the RMSS data, OECD Dataset on Non-Medical Determinants, and NHS, show continuing declines in smoking prevalence at the national level in the period following the introduction of the TPP measures."<sup>384</sup> The Panel's reliance on all of these datasets confirms that the Panel did *not* make an affirmative finding of fact that the "downward trend in smoking prevalence ... has accelerated since July 2006."<sup>385</sup>

6.116. We therefore do not see any inconsistency between the Panel's actual findings in step 1 and the remainder of its analysis in Appendix C.<sup>386</sup>

### ***Step 2 of the Panel's cigarette consumption analysis***

6.117. As indicated above, in Appendix D to the Panel Report, the Panel assessed the parties' evidence regarding the contribution of the TPP measures to reducing tobacco product consumption.<sup>387</sup> The Panel distinguished between evidence concerning cigarettes and evidence concerning cigars.<sup>388</sup> The Panel assessed the evidence concerning *cigarette consumption* in three steps, assessing in turn: (1) whether consumption had declined following the implementation of the TPP measures; (2) whether the decline in consumption had accelerated following the implementation of the TPP measures; and (3) whether the TPP measures contributed to the decline in consumption. In step 2 of its analysis of cigarette consumption, the Panel questioned the validity of the econometric results provided by the complainants' expert, Professor List, for several reasons.<sup>389</sup> The Panel noted that Australia's expert, Dr Chipty, re-estimated Professor List's dynamic model, using the In-Market-Sales/Exchange of Sales (IMS/EOS) data, and replacing the price variable with a dummy variable, which "reverse[d] Professor List's conclusion", showing a "statistically significant shift in the post-implementation downward trend".<sup>390</sup> The Panel observed, however, that this shift was "no longer statistically significant when the excise tax changes and strategic inventory management associated with such changes [we]re taken into account".<sup>391</sup> The Panel considered that although Dr Chipty's model was "slightly more accurate[]" in predicting per capita sales in the pre-implementation period, it continued to perform poorly, and the Panel "continue[d] to have doubts about" its reliability in predicting the per capita sales that would have occurred in the absence of the TPP measures.<sup>392</sup> The Panel nevertheless noted that average cigarette sales volumes in the post-implementation period were "statistically significantly lower than in the pre-implementation period", and highlighted that "the cigarette sales trend in the post-implementation period has become steeper compared to the pre-implementation trend,

<sup>383</sup> The equivalent subsections in the other sections of Appendix C are also titled "Analysis by the Panel".

<sup>384</sup> Panel Report, Appendix C, para. 40.

<sup>385</sup> Panel Report, Appendix C, para. 8.

<sup>386</sup> We note that aspects of the Dominican Republic's appellant's submission might be read as indicating that the Panel's findings are incoherent as between steps 2 and 3 of its analysis of smoking prevalence. For example, the Dominican Republic states that, "for each step, the Panel applied a rate of decline that differed from the rate of decline found in the previous step" refers to an apparent inconsistency between the Panel's findings in steps 2 and 3 of its analysis of smoking prevalence. (Dominican Republic's appellant's submission, para. 188. See also *ibid.*, paras. 189-193) The Dominican Republic's claim that the Panel erred, however, focuses exclusively on the apparent inconsistency between the Panel's findings in step 1 and its subsequent findings in steps 2 and 3, and most particularly focuses on the Panel's findings in step 2 as compared to step 1. (See *ibid.*, paras. 185-212) We therefore do not consider that the Dominican Republic has asserted that the Panel acted inconsistently with Article 11 of the DSU with respect to any alleged incoherence as between the Panel's findings in steps 2 and 3. In any event, to the extent that such an assertion could be read as implied, it is unsubstantiated by any supporting argumentation.

<sup>387</sup> Panel Report, Appendix D, para. 1.

<sup>388</sup> The Panel noted that three of the complainants had initially argued that the TPP measures "'backfired' by increasing tobacco sales"; however, this argument was "not developed later in the proceedings". (Panel Report, Appendix D, para. 4) (fn omitted) The Panel also noted that the data pertaining to cigarette consumption primarily looked at cigarette sales volumes, although some studies looked at reported cigarette consumption. (*Ibid.*, para. 2)

<sup>389</sup> Panel Report, Appendix D, paras. 40-44.

<sup>390</sup> Panel Report, Appendix D, para. 45.

<sup>391</sup> Panel Report, Appendix D, para. 45.

<sup>392</sup> Panel Report, Appendix D, para. 45.



implying that the fall in cigarette sales has accelerated in the post-implementation period."<sup>393</sup> The Panel observed that the same conclusion could be drawn from the Aztec scanner data.<sup>394</sup> On this basis, the Panel concluded that "[t]he downward trend in cigarette sales in Australia appears to have accelerated in the post-TPP period."<sup>395</sup>

6.118. Honduras considers that, "without any analysis or explanation, and apparently on the basis of its own re-working of the back-up data provided by IPE, the Panel in one short paragraph reaches an affirmative conclusion based on its own 'standard mean comparison test' that is simply not supported by the facts on the record."<sup>396</sup> Honduras further highlights that the Panel itself indicated that its conclusion was contradicted by the Nielsen data, as well as the IMS/EOS data if a shorter time period were used.<sup>397</sup> Honduras considers that the Panel's "strong affirmative conclusion" is not supported by any explanation or calculation details that would allow the parties to understand its finding, and highlights that "even the evidence of Australia is not affirmative on this point" and the Panel's "own re-calculation only holds true for certain datasets under certain conditions".<sup>398</sup> Honduras highlights that Figure D.14 was prepared by the Panel based on backup material provided by IPE, and there is no explanation as to how it was developed, nor is there any way of testing its accuracy.<sup>399</sup> In Honduras' view, the fact that it is impossible to review the Panel's findings is a "fundamental problem of due process".<sup>400</sup> Honduras argues that the Panel "violated the essence of its task under Article 11 of the DSU" by failing to engage with the parties "in earnest" on any of the technical debates that took place before it, simply "dump[ing] its final analysis on the parties in its findings", depriving the parties of a meaningful opportunity to comment during the Panel proceedings, and failing to include the technical details necessary to review the Panel's findings.<sup>401</sup>

6.119. We note that, in assessing Dr Chipty's evidence concerning whether the decline in cigarette consumption accelerated after the implementation of the TPP measures, the Panel made two distinct sets of findings:

- a. The Panel first noted that Dr Chipty's re-specification of Professor List's dynamic model, relying on excise tax dummies instead of a price variable, showed a statistically significant negative effect of the TPP measures on cigarette sales. The Panel acknowledged that this effect was *no longer statistically significant* when excise tax changes, and strategic inventory management associated with those tax changes, were taken into account "in the post-implementation estimation".<sup>402</sup> The Panel recalled that it had doubts about the reliability of the dynamic model, given that it was not very accurate in predicting actual sales, and considered that this was only "slightly" improved in Dr Chipty's specification than it had been in Professor List's model.<sup>403</sup> The Panel stated that it "continue[d] to have doubts" about the accuracy of the model.<sup>404</sup>
- b. Second, the Panel observed that, under a standard mean-comparison test, "the average cigarette sales volumes based on the IMS/EOS data in the post-implementation period are statistically significantly lower than in the pre-implementation period."<sup>405</sup> The Panel, referring to Figure D.14, considered that this observation was confirmed based on the fact that "the cigarette sales trend in the post-implementation period has become steeper compared to the pre-implementation trend, implying that the fall in cigarette sales has accelerated in the post-implementation period."<sup>406</sup> The Panel stated that the same

<sup>393</sup> Panel Report, Appendix D, para. 46. (fn omitted)

<sup>394</sup> Panel Report, Appendix D, para. 46.

<sup>395</sup> Panel Report, Appendix D, para. 137.b.

<sup>396</sup> Honduras' appellant's submission, para. 893.

<sup>397</sup> Honduras' appellant's submission, para. 894.

<sup>398</sup> Honduras' appellant's submission, para. 894. Specifically, Honduras notes the Panel's finding that a "minor change to Dr Chipty's analysis ... leads to the conclusion that ... [t]here has not been any statistically significant shift in consumption". (Honduras' appellant's submission, para. 892 (referring to Panel Report, Appendix D, para. 45))

<sup>399</sup> Honduras' appellant's submission, para. 895.

<sup>400</sup> Honduras' appellant's submission, para. 895.

<sup>401</sup> Honduras' appellant's submission, para. 896.

<sup>402</sup> Panel Report, Appendix D, para. 45.

<sup>403</sup> Panel Report, Appendix D, para. 45.

<sup>404</sup> Panel Report, Appendix D, para. 45.

<sup>405</sup> Panel Report, Appendix D, para. 46.

<sup>406</sup> Panel Report, Appendix D, para. 46.



conclusion could be drawn based on the Aztec data. The Panel acknowledged that applying this test to the Nielsen data showed no difference between the pre- and post-implementation period trends. The Panel emphasized that the Nielsen data was available only for the period of February 2011 to December 2013, and when the test was applied to the IMS/EOS data for that same period it also showed no shift, even though that conclusion was reversed when the data was extended to September 2015. The Panel therefore did not consider the result using Nielsen data to be relevant.<sup>407</sup>

6.120. We understand that, with respect to the first part of the Panel's analysis, Honduras considers not only that the Panel "uncritically accept[ed] the conclusions and approaches of Dr Chipty", but that the Panel's findings indicate that a "minor change to Dr Chipty's analysis ... leads to the conclusion that [t]here has not been any statistically significant shift in consumption".<sup>408</sup> In our view, the first of these assertions is a significant distortion of the Panel's findings, in part because we agree with the second assertion. Indeed, the Panel appears to consider Dr Chipty's evidence in this respect to be of questionable probative value, much like Professor List's own expert evidence. Specifically, the Panel's findings indicate that it considered Dr Chipty's and Professor List's models to be *equally* unreliable.

6.121. We note, however, that the Panel did not end its analysis there. The Panel proceeded with its analysis, and ultimately concluded that the downward trend in cigarette sales accelerated in the post-implementation period, on the basis of two observations: (i) on the basis of a "standard mean-comparison" test, the Panel concluded that "average cigarette sales volumes ... in the post-implementation period are statistically significantly lower than in the pre-implementation period"; and (ii) the Panel found that this was confirmed based on the fact that "the cigarette sales trend in the post-implementation period has become steeper compared to the pre-implementation trend."<sup>409</sup>

6.122. Regarding the Panel's reliance on a standard mean-comparison test, which Honduras challenges on the basis that the Panel provided no explanation or details of its calculation, we understand that a mean-comparison test is a simple statistical test that the Panel could have conducted when verifying that the parties' methodologies did indeed reveal the results asserted by the parties. Indeed, the application of statistical testing to verify statistical results seems to us be very much in accordance with the duty of a panel to review the evidence adduced by the parties. We therefore do not consider that the Panel's application of a mean-comparison test indicates that the Panel failed to act objectively. To the contrary, it seems perfectly plausible that the Panel's mean-comparison test could have revealed that the complainants were *correct* in asserting that the decline in cigarette consumption had not accelerated after the implementation of the TPP measures.

6.123. Regarding the Panel's confirmation of its mean-comparison test by assessing the steepness of the tobacco consumption trend pre- and post-TPP implementation, we address this issue in greater detail below.<sup>410</sup> It suffices to note here that we do not consider that a panel acts inconsistently with Article 11 of the DSU simply by depicting the parties' evidence in graphical form. Furthermore, we do not see how a graphical representation of evidence that was in the parties' possession to begin with could imply that the Panel compromised the parties' due process rights. Since the evidence was in their possession, the parties were free to prepare such graphs on their own initiative. Their reluctance to do so should not preclude a panel from graphically representing data for the purpose of elucidating factual findings.

6.124. Finally, we do not consider that the Panel lacked any reasoning or explanation for its conclusions in step 2 of its analysis of cigarette consumption, including why it considered the Nielsen data to be less relevant to its consideration of this issue.<sup>411</sup> While the appellants may disagree with the Panel's review of the factual evidence, as well as its conclusion, the Panel's explanation for how it reviewed the evidence and its reasons for its ultimate conclusion are quite clearly expressed. There

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<sup>407</sup> Panel Report, Appendix D, fn 50 to para. 46.

<sup>408</sup> Honduras' appellant's submission, para. 892.

<sup>409</sup> Panel Report, Appendix D, para. 46.

<sup>410</sup> See paras. 6.326. 6.328. below.

<sup>411</sup> See para. 6.119. above.

is no doubt, in our view, about how and why the Panel concluded that "[t]he downward trend in cigarette sales in Australia appears to have accelerated in the post-TPP period."<sup>412</sup>

6.125. For these reasons, we consider that Honduras has not demonstrated that the Panel failed to make an objective assessment of the matter before it in assessing whether the decline in cigarette consumption accelerated after the implementation of the TPP measures.

### ***Step 3 of the Panel's smoking prevalence and cigarette consumption analyses***

6.126. In step 3 of its analyses of smoking prevalence and cigarette consumption, the Panel assessed whether the TPP measures had contributed to the acceleration in the decline in, respectively, smoking prevalence and cigarette consumption. The evidence presented by the parties consisted primarily of econometric models that sought to distinguish and assess the impact of the TPP measures and other determining factors on, respectively, smoking prevalence and consumption.<sup>413</sup> In this respect, as elsewhere, the Panel noted that its task was not to conduct its own econometric assessment, but rather "to review the robustness of the econometric evidence submitted by the parties".<sup>414</sup>

6.127. In step 3 of its *smoking prevalence* analysis, the Panel first explained that, of the different datasets provided by the parties, it considered the RMSS data to be "most suited ... to analyse the impact of the TPP measures on smoking prevalence".<sup>415</sup> The Panel then turned to assess the robustness of the complainants' experts' econometric models. The Panel identified a large number of different concerns that it had regarding these models.<sup>416</sup> Turning to the econometric models provided by Australia's expert, Dr Chipty, the Panel "note[d] that a number of concerns that [it] raised while reviewing the complainants' approaches and results [were] addressed by Dr Chipty".<sup>417</sup> The Panel considered that the "most recent" econometric evidence submitted by Australia suggested that the TPP measures and enlarged GHWs contributed to the reduction in overall smoking prevalence in Australia, including cigar smoking prevalence.<sup>418</sup> On that basis, the Panel ultimately concluded 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 as well as in cigar smoking prevalence observed after their entry into force."<sup>419</sup>

6.128. In step 3 of its *cigarette consumption* analysis, the Panel first addressed the different datasets provided by the parties. The Panel found that, "while ... no data are perfect, ... the IMS/EOS data [are] the most suitable available market data."<sup>420</sup> Similarly to its analysis of the smoking prevalence evidence, the Panel proceeded to examine the econometric models provided by the complainants' experts, and identified different concerns with respect to the robustness of these models.<sup>421</sup> Regarding the models provided by Australia's expert, Dr Chipty, the Panel considered that "some" of the concerns that it had raised regarding the complainants' experts' approaches were

<sup>412</sup> Panel Report, Appendix D, para. 137.b.

<sup>413</sup> Panel Report, Appendix C, para. 97; *ibid.*, Appendix D, para. 48.

<sup>414</sup> Panel Report, Appendix C, para. 98; *ibid.*, Appendix D, para. 105.

<sup>415</sup> Panel Report, Appendix C, para. 99.

<sup>416</sup> Panel Report, Appendix C, paras. 103-119.

<sup>417</sup> Panel Report, Appendix C, para. 120. The Panel highlighted that Dr Chipty addressed the issue of overfitting and relied on dummy variables to avoid the problems of multicollinearity and endogeneity (associated with the use of a price variable) as well as non-stationarity (associated with the use of either price or tax level variables). (*Ibid.*) The Panel also considered that Dr Chipty's econometric results were "robust to alternative specifications, including different TPP starting date[s] ..., the use of an excise tax level variable ... and sample reweighting dummies", and consistently showed a negative and statistically significant impact of the TPP measures on overall smoking prevalence. (*Ibid.*, para. 121) (fn omitted) The Panel further observed that "in most specifications", Dr Chipty's analysis continued to show a negative and statistically significant impact of the TPP measures on smoking prevalence even when using Professor List's procedure to compute standard errors. (*Ibid.*)

<sup>418</sup> Panel Report, Appendix C, para. 122.

<sup>419</sup> Panel Report, Appendix C, para. 123.c. The Panel noted that no post-implementation empirical evidence was provided regarding the impact of the TPP measures regarding smoking prevalence with respect to cigarillos. (*Ibid.*, para. 124)

<sup>420</sup> Panel Report, Appendix D, para. 102.

<sup>421</sup> Panel Report, Appendix D, paras. 101-114.

"to some extent" addressed by Dr Chipty.<sup>422</sup> The Panel considered that, "[o]verall, based on the most recent econometric evidence submitted by Australia, there is some econometric evidence suggesting that TPP and enlarged GHWs contributed to the reduction in wholesale cigarette sales in Australia."<sup>423</sup> On that basis, the Panel concluded ultimately that "[a]lthough it is impossible to distinguish between the impact of TPP and enlarged GHWs, 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>424</sup>

6.129. We proceed to address below a number of the appellants' arguments that the Panel acted inconsistently with Article 11 of the DSU in its analyses of whether the TPP measures contributed to the decline in smoking prevalence and cigarette consumption.<sup>425</sup>

### **Impact of tobacco costliness on smoking behaviour**

6.130. In step 3 of its *smoking prevalence* analysis in Appendix C, the Panel observed that the Dominican Republic's econometric results 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", even though "all parties consider tobacco excise tax to be one of the most effective tobacco control policies."<sup>426</sup> In its *cigarette consumption* analysis in Appendix D, the Panel did not indicate whether any of the parties' models were able to detect the impact of tobacco costliness.<sup>427</sup>

6.131. In the Dominican Republic's view, the Panel acted inconsistently with Article 11 of the DSU by: (i) treating the parties' evidence inconsistently; and (ii) failing to engage with the Dominican Republic's evidence and arguments.<sup>428</sup> Regarding the Panel's allegedly inconsistent treatment of the parties' evidence, the Dominican Republic argues that: (i) the Panel did not address the Dominican Republic's models that were able to detect the impact of tobacco costliness, although it accepted Australia's models that were able to detect the impact of tobacco costliness; and (ii) the Panel rejected the Dominican Republic's models because they were not able to detect the impact of tobacco costliness, but did not reject any of Australia's models even when such a model detected the wrong impact of tobacco costliness.<sup>429</sup> As to the Panel's alleged failure to engage with the

<sup>422</sup> Panel Report, Appendix D, para. 115. In particular, the Panel noted that Dr Chipty used dummy variables to capture the excise tax increases, thus avoiding the endogeneity problems (associated with the use of a price variable) and the unit root problem (associated with the use of the price or tax level variables). The Panel also observed that Dr Chipty's model, while based on IPE's first specification, was modified to account for strategic inventory management as well as the 2006 GHW regulation. (Ibid.) The Panel considered that Dr Chipty's results were "robust to alternative specifications, including different TPP starting date[s] ..., and to Professor List's procedure to compute standard errors". (Ibid., para. 116) The Panel observed that replacing the excise tax hike dummy variables with a tax level variable resulted in the TPP measures' effects no longer being statistically significant, but emphasized its earlier explanation that "specification testing suggests tax levels are not appropriate", and also observed that "the tax levels variable is likely to be non-stationary." (Ibid.)

<sup>423</sup> Panel Report, Appendix D, para. 117.c.

<sup>424</sup> Panel Report, Appendix D, para. 137.

<sup>425</sup> For the reasons explained above, our discussion of these issues does not capture every argument raised by the appellants concerning these aspects of the Panel's findings.

<sup>426</sup> Panel Report, Appendix C, para. 103.

<sup>427</sup> See, generally, Panel Report, Appendix D.

<sup>428</sup> The Dominican Republic notes the Appellate Body's statement that "a panel's choice not to discuss a piece of evidence that on its face appears to be favourable to the arguments of one of the parties might suggest bias or lack of even-handedness in the treatment of the evidence by the panel, even if in fact the panel is making an objective assessment of the facts." (Dominican Republic's appellant's submission, para. 505 (quoting Appellate Body Report, *Australia – Apples*, para. 270))

<sup>429</sup> Dominican Republic's appellant's submission, paras. 490-497. The Dominican Republic argues that, with respect to *cigarette smoking prevalence*, "the Panel accepted Dr Chipty's ... model ..., despite the fact that the specification was unable to detect the impact of two excise tax increases." (Dominican Republic's appellant's submission, para. 498 (referring to Panel Report, Appendix C, para. 121)) The Dominican Republic argues that, with respect to *cigar smoking prevalence*, "the Panel accepted Dr Chipty's model ... despite the fact that the cigar smoking models were, again, unable to detect the impact of the 2013 tax increases on cigar smoking prevalence." (Dominican Republic's appellant's submission, para. 500 (referring to Third Rebuttal Report of Dr Tasneem Chipty (1 February 2016) (Chipty Third Rebuttal Report) (Panel Exhibit AUS-605), para. 29 and Table 3, Rows [A] and [C])) With respect to *cigarette smoking consumption*, "the Panel accepted

Dominican Republic's arguments, the Dominican Republic refers to a supplemental submission which the Panel agreed to take into consideration, in which the Dominican Republic identified that Dr Chifty's consumption model provided to the Panel in her final reports showed that an increase in excise tax in 2013 led to an increase in cigarette consumption.<sup>430</sup> The Dominican Republic submits that this result was nonsensical, based on Dr Chifty's own views, and that it explained as much to the Panel.<sup>431</sup> The Dominican Republic argues, however, that "[w]ithout engaging with this evidence, the Panel relied on Dr Chifty's updated consumption model as a basis for its finding that the TPP measures have reduced cigarette consumption."<sup>432</sup>

6.132. Regarding the Dominican Republic's arguments that the Panel treated the same class of evidence inconsistently, Australia submits that the Dominican Republic mischaracterizes the "purpose" for which Australia submitted its evidence.<sup>433</sup> According to Australia, "[t]he Panel did not need to find – nor did it find – that Dr Chifty's revisions to the complainants' econometric models *fully* resolved the complainants' problems with tobacco costliness in order to draw these conclusions from Dr Chifty's submissions."<sup>434</sup> In any event, Australia submits that the Panel *did* address all relevant models, and critiqued the parties' models on grounds other than just whether they detected the impact of tobacco costliness.<sup>435</sup> As to the Dominican Republic's arguments regarding the alleged failure of the Panel to address the parties' evidence and arguments, Australia notes that this argument relates to a letter to the Panel of 17 February 2016 that was styled as a request for the Panel to take steps to protect the due process rights of the parties, but included in and of itself "substantive comments" on Dr Chifty's Third Rebuttal Report.<sup>436</sup> According to Australia, the Panel accepted these comments and provided Australia with an opportunity to respond.<sup>437</sup> On 16 March 2016, Australia commented on the Dominican Republic's comments.<sup>438</sup> Australia argues that the Panel summarized these events but, "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."<sup>439</sup> Australia considers that "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

Dr Chifty's updated consumption model ... even though it reached the 'nonsensical' finding that an increase in excise tax led to an increase in smoking consumption." (Ibid., para. 499 (referring to Dominican Republic's Communication to the Panel (17 February 2016); Response by the Dominican Republic to the Panel's Communication of 2 March 2016 (4 March 2016)) (emphasis omitted))

<sup>430</sup> Dominican Republic's appellant's submission, para. 506 (referring to Dominican Republic's Communication to the Panel (17 February 2016)).

<sup>431</sup> Dominican Republic's appellant's submission, paras. 63-64 (referring to Rebuttal Report of Dr Tasneem Chifty (14 September 2015) (Chifty Rebuttal Report) (Panel Exhibit AUS-535 (SCI)), para. 39).

<sup>432</sup> Dominican Republic's appellant's submission, para. 510. In the Dominican Republic's view, "[n]othing in the Panel's reasoning 'reveals that it has nevertheless assessed the significance of [the Dominican Republic's] evidence' that Dr Chifty's model produced 'nonsensical' tax results." (Ibid., para. 511 (quoting Appellate Body Reports, *Philippines – Distilled Spirits*, para. 135)).

<sup>433</sup> Australia's appellee's submission, para. 809. Australia submits that the Dominican Republic's arguments treat Dr Chifty's rebuttal evidence "as if she set out – and was required – to fix *all* of the flaws in the complainants' econometric models". (Ibid., para. 810 (emphasis original))

<sup>434</sup> Australia's appellee's submission, para. 810. (emphasis original; fn omitted) In Australia's view, 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". (Ibid., para. 811)

<sup>435</sup> Regarding the Dominican Republic's first alleged inconsistency, Australia submits that the Dominican Republic's reference to the Panel not mentioning the model specifications that *were* able to detect the impact of tobacco costliness is misleading given that accepting Professor List and IPE's models required "acceptance of one or more methodological choices that the Panel specifically faulted". (Australia's appellee's submission, para. 800 (emphasis omitted)) Australia considers that the Panel did indeed address the Dominican Republic's models that were able to detect the impact of tobacco costliness. Australia highlights in particular the Panel's rejection of the position that the sample period should begin in July 2006, as well as the Panel's observation that the Dominican Republic's model suffered from overfitting. (Ibid., para. 800) As to the second alleged inconsistency in the Panel's treatment of the evidence, Australia similarly explains that "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." (Ibid., para. 808 (emphasis original))

<sup>436</sup> Australia's appellee's submission, para. 814.

<sup>437</sup> Australia's appellee's submission, para. 816.

<sup>438</sup> Australia's appellee's submission, para. 817.

<sup>439</sup> Australia's appellee's submission, para. 818. (emphasis omitted)

post-proceeding submissions had *not added anything* to the extensive evidence that the parties had already submitted on this topic."<sup>440</sup>

6.133. We note at the outset that the Dominican Republic's position that the Panel "rejected" certain models is misleading. The Panel did not "reject" or "accept" any model *per se* on the basis of any individual criterion of robustness. The different criteria applied by the Panel to test robustness were not "silver bullets" used to accept/reject models such that there could be only one (or even none) left standing at the end of the day. Rather, the Panel assessed the parties' evidence, starting with the complainants' evidence, and noted multiple reasons to doubt the reliability of that evidence.<sup>441</sup> When comparing the complainants' evidence to Australia's evidence, which showed an entirely different outcome, the Panel considered that Australia's evidence was, in relative terms, more credible and reliable than the complainants' evidence, all the while recognizing that *no* model submitted by *any* expert was perfect.<sup>442</sup> Based on its examination of the different evidence, the Panel ultimately considered that Dr Chipty's models were sufficiently reliable to conclude 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 and cigarette consumption."<sup>443</sup> The appellants have not argued, much less demonstrated, that this approach by the Panel was in error.

6.134. We further note that, in assessing the parties' smoking prevalence evidence, although the Panel had doubts about certain of the complainants' models on the ground that they were unable to detect the impact of tobacco costliness, the Panel did not explicitly indicate that Australia's models were able to detect this impact. In other words, the Panel did not rely on this as a reason for finding that Australia's models were more reliable than the complainants' models. This was despite Australia's expert explicitly arguing that her smoking prevalence models revealed that "both tax policies and Plain Packaging have significantly reduced smoking prevalence."<sup>444</sup> Since the Panel did not rely on this as a reason to find Australia's models more credible than the complainants' models, we see no inconsistency in the Panel's treatment of the parties' smoking prevalence evidence with respect to this "criterion" of robustness.<sup>445</sup> Consequently, we do not consider that the Panel treated the parties' evidence inconsistently with respect to its assessment that Australia's smoking prevalence evidence was more credible than the complainants' evidence and its overall conclusion that there was some evidence suggesting that the TPP measures contributed to the reduction in smoking prevalence.

6.135. Turning to the Panel's analysis of the consumption evidence, we note that the Panel did not identify whether any of the models submitted by any party was able to detect the impact of tobacco costliness on consumption. Since this was not relevant to the Panel's determination that Dr Chipty's

<sup>440</sup> Australia's appellee's submission, para. 820. (emphasis original) Australia also argues that 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". (Ibid., para. 819)

<sup>441</sup> See also para. 6.272. below.

<sup>442</sup> This is evidenced by the Panel's statements in comparing Dr Chipty's models to those of the complainants that Dr Chipty only resolved "a number" and "some" of its concerns with the complainants' models. (Panel Report, Appendix C, para. 120; *ibid.*, Appendix D, para. 115)

<sup>443</sup> Panel Report, Appendix C, para. 123; *ibid.*, Appendix D, para. 7.979.

<sup>444</sup> Chipty Third Rebuttal Report (Panel Exhibit AUS-605), para. 3(d).

<sup>445</sup> We note that certain of the Panel's findings might be understood as implicitly suggesting that Australia's models were able to detect an impact of tobacco costliness. The Panel appeared to attribute the complainants' models' failure to detect an impact of tobacco costliness on smoking prevalence to various concerns the Panel noted in those models, including "overfitting" of the smoking prevalence trend, the manner in which the tobacco price control policy is specified, issues of multicollinearity and non-stationarity, the manner in which the population sampling corrections in the RMSS data were controlled for, and the manner in which the complainants' experts calculated standard error (for purposes of assessing the statistical significance of the independent variables). (See Panel Report, Appendix C, paras. 104-110) When assessing Australia's evidence, the Panel noted that Dr Chipty addressed a number of these concerns. (*Ibid.*, para. 120) In our view, however, there is a clear distinction in the Panel's findings between these different concerns, and the Panel's overarching observation that the complainants' models were unable to detect the impact of tobacco costliness. We therefore do not consider that the Panel's findings that Dr Chipty addressed these specific concerns are sufficient for us to conclude that the Panel *also* considered Dr Chipty's models' ability to detect the impact of tobacco costliness as a reason to consider Australia's models to be more robust than the complainants' models.

models were more credible than the complainants', we see no reason to conclude that the Panel's treatment of the parties' evidence, on its face, was inconsistent.

6.136. Having said that, we note that, on appeal, the Dominican Republic has identified a communication that it sent to the Panel in which it alleged that Dr Chipty's consumption models showed that excise tax increases led to an *increase* in consumption.<sup>446</sup> Specifically, on 17 February 2016, the Dominican Republic wrote a communication to the Panel in which it stated that "[w]ith the submission of the parties' respective Comments on 3 February 2016, the briefing phase of these Panel proceedings has now come to an end."<sup>447</sup> The Dominican Republic further noted that, in those comments, "the complainants and Australia ... provided the Panel with considerable further material, including several expert reports and other exhibits."<sup>448</sup> The Dominican Republic stated that "there are many comments that could now be made in respect of Australia's new argument and evidence", and noted "[a]s an example", a "material inconsistency" in Dr Chipty's analysis.<sup>449</sup> According to the Dominican Republic, Dr Chipty – who had previously stated that a result in which excise tax increases are shown to cause an increase in prevalence or consumption is "nonsensical" – had nonetheless made such a finding in her final report.<sup>450</sup> The Dominican Republic further claimed that Dr Chipty's finding that the September 2013 tax increase had led to an increase in consumption also explained her conclusion that the TPP measures had led to a statistically significant reduction in consumption.<sup>451</sup> The Dominican Republic requested that the Panel take appropriate steps "to ensure that the parties' due process interests are respected".<sup>452</sup>

6.137. The Panel, after having invited and received comments from Australia on the Dominican Republic's request<sup>453</sup>, sent a communication on 2 March 2016 to the parties in which it noted several considerations to be taken into account.<sup>454</sup> The Panel considered that "an appropriate balance" could be struck, by which it would "accept the Dominican Republic's comments of 17 February 2016 with respect to the specific criticisms of [Dr Chipty's Third Rebuttal Report] expressly identified in that communication regarding the use of tax dummies to control for the costliness of tobacco products in Dr Chipty's event study on tobacco consumption using IMS data as being on the record".<sup>455</sup> On this basis, the Panel requested the Dominican Republic to provide the Panel with the econometric results in support of its observations.<sup>456</sup> The Panel also gave Australia the opportunity to respond to the Dominican Republic's comments and noted that such comments "shall be strictly limited to addressing the specific criticisms ... identified in the Dominican Republic's communication of 17 February 2016".<sup>457</sup> The Panel "stress[ed] the very limited scope" of the opportunity to "provide further comments".<sup>458</sup>

6.138. On 4 March 2016, the Dominican Republic sent a communication to the Panel containing the statistical results in support of its arguments regarding Dr Chipty's model.<sup>459</sup> In that submission, the Dominican Republic explained that "as the effect of the 2013 tax increase becomes *more* positive

<sup>446</sup> Dominican Republic's Communication to the Panel, 17 February 2016, p. 2.

<sup>447</sup> Dominican Republic's Communication to the Panel, 17 February 2016, p. 1.

<sup>448</sup> Dominican Republic's Communication to the Panel, 17 February 2016, p. 1.

<sup>449</sup> Dominican Republic's Communication to the Panel, 17 February 2016, p. 1.

<sup>450</sup> Dominican Republic's Communication to the Panel, 17 February 2016, p. 2.

<sup>451</sup> Dominican Republic's Communication to the Panel, 17 February 2016, p. 2.

<sup>452</sup> Dominican Republic's Communication to the Panel, 17 February 2016, p. 3.

<sup>453</sup> Australia objected to the Dominican Republic's request. (See Communication from Australia to the Panel, 19 February 2016)

<sup>454</sup> Specifically, the Panel highlighted: (i) the fact that "the Panel's timetable [was] already protracted far beyond that which is envisaged by the DSU"; (ii) the "considerable amount of argumentation and evidence [that had] already been exchanged"; (iii) the observation 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 by the parties'"; and (iv) the fact that the Dominican Republic had not specifically requested an opportunity to comment on Dr Chipty's report but had "nonetheless identified certain criticisms" of the report in its letter of 17 February 2016. (Communication from the Panel to the Parties, 2 March 2016, pp. 2-3)

<sup>455</sup> Communication from the Panel to the Parties, 2 March 2016, p. 3.

<sup>456</sup> Communication from the Panel to the Parties, 2 March 2016, p. 3.

<sup>457</sup> Communication from the Panel to the Parties, 2 March 2016, p. 3.

<sup>458</sup> Communication from the Panel to the Parties, 2 March 2016, p. 3.

<sup>459</sup> Dominican Republic's Communication to the Panel, 4 March 2016.

and *more* significant, the [T]PP effect for the same start date becomes *more* negative and *more* significant."<sup>460</sup>

6.139. On 16 March 2016, Australia responded to the Dominican Republic's criticism of Dr Chipty's model. Australia explained that IPE had previously made similar criticisms, which Dr Chipty had previously addressed by explaining that "the inability to estimate precisely an effect from the 2013 excise increase was not due to any issue with her model, but rather was a result of insufficient data following the 2013 excise [tax] increase."<sup>461</sup> According to Australia, Dr Chipty only had "five months of data ... available to estimate the 2013 tax effect", and the imprecision identified by IPE did not affect the estimated effect of the TPP measures.<sup>462</sup> Australia also stated that "the results that the Dominican Republic present[ed] in Table 1 of its 4 March 2016 submission [we]re based on the backup production for Dr Chipty's December 2015 report – not her latest report"<sup>463</sup> and that, given that the modified analysis in Dr Chipty's final report was identical to the result presented in her December 2015 report, the Dominican Republic had had an adequate opportunity to review that finding and respond previously, but chose not to do so.<sup>464</sup> Australia also provided considerable additional arguments specifically addressing the claims that the positive 2013 tax effect was a nonsensical result and that the negative effects of the TPP measure were "driven" by the positive 2013 tax effect.<sup>465</sup>

6.140. It is uncontested that the Panel did not explicitly address the parties' arguments relating to the factual allegation that Australia's consumption model showed a positive effect of the 2013 tax increase on consumption. The Panel's decision not to address these arguments was notwithstanding the considerable debate between the parties over this issue and the fact that the Panel had explicitly indicated that such arguments and evidence were "on the record".<sup>466</sup> We note Australia's argument, on appeal, that the Panel implicitly addressed this issue by refraining from addressing it, because the Dominican Republic's letter and supplementary submission "had not added anything to the extensive evidence that the parties had already submitted on this topic".<sup>467</sup> In our view, however, the Panel's decision not to explicitly address the Dominican Republic's arguments and evidence regarding Australia's consumption evidence is brought into question by virtue of the fact that the Panel relied on almost identical reasoning to critique the complainants' smoking prevalence models.

6.141. In other words, even though the Panel did not rely on the impact of tobacco costliness as a reason to consider Australia's smoking prevalence models more credible than the complainants' models, such that the Panel did not act *inconsistently* in assessing the parties' smoking prevalence models, the Panel *did* indicate that the inability of a model to detect the impact of tobacco costliness is a reason to doubt its results.<sup>468</sup> The Panel came to this conclusion on the basis that "all parties consider tobacco excise tax to be one of the most effective tobacco control policies."<sup>469</sup> Yet, when the Dominican Republic presented evidence in support of its argument that Australia's consumption model showed that tobacco excise tax led to an *increase* in consumption, the Panel did not address this argument and proceeded to find that Australia's consumption model was more credible than the complainants' consumption models, sufficient for the Panel to conclude that there was some econometric evidence that the TPP measures contributed to reducing cigarette consumption.

6.142. We note Australia's argument that the Panel was not required to find that Australia had resolved all flaws that were present in the complainants' own models. We agree. If the Panel had found that the complainants' consumption models were doubtful on the ground that those models failed to show a statistically significant effect of tobacco costliness on consumption, and then

<sup>460</sup> Dominican Republic's Communication to the Panel, 4 March 2016, para. 5. (emphasis original)

<sup>461</sup> Australia's Communication to the Panel, 16 March 2016, para. 10.

<sup>462</sup> Australia's Communication to the Panel, 16 March 2016, para. 10 (referring to Surrebuttal Report of Dr Tasneem Chipty (26 October 2015) (Panel Exhibit AUS-586), para. 62(c)).

<sup>463</sup> Australia's Communication to the Panel, 16 March 2016, para. 12. (emphasis omitted)

<sup>464</sup> Australia's Communication to the Panel, 16 March 2016, para. 12.

<sup>465</sup> Australia's Communication to the Panel, 16 March 2016, paras. 14-27.

<sup>466</sup> Communication from the Panel to the Parties, 2 March 2016, p. 3. We emphasize that Australia acknowledges that, other than summarizing the procedural events as they occurred, the Panel did not "refer to these events further". (Australia's appellee's submission, para. 820)

<sup>467</sup> Australia's appellee's submission, para. 820. (emphasis omitted)

<sup>468</sup> Panel Report, Appendix C, para. 103.

<sup>469</sup> Panel Report, Appendix C, para. 103 (referring to Australia's first written submission to the Panel, para. 719; Honduras' first written submission to the Panel, para. 589; Dominican Republic's first written submission to the Panel, paras. 758 and 1027; Cuba's first written submission to the Panel, para. 276; Indonesia's first written submission to the Panel, para. 63).

refrained from referring to this shortcoming as a reason to consider Australia's models to be more credible (just as the Panel treated the parties' smoking prevalence evidence), there would be no inconsistency or issue with the Panel's treatment of the parties' evidence. This is because the Panel openly acknowledged that Dr Chipty's models did not resolve all issues present in the complainants' models, implying that her models indeed retained some of the shortcomings of the complainants' models. However, in the absence of any factual finding indicating whether the complainants' consumption models failed to show a statistically significant effect of tobacco costliness, one can only speculate. Indeed, bearing in mind that Australia's models were deliberately specified *differently* to those of the complainants' models, this issue identified by the Dominican Republic may have been specific to Australia's models and may *not* have been present in the complainants' models, which, by virtue of the Panel's own reasoning, would seem to be a reason to doubt the merits of Australia's consumption models as compared to the complainants' consumption models.

6.143. We therefore consider that the Panel's failure to address the Dominican Republic's argument and supporting evidence alleging that Dr Chipty's consumption models showed that excise tax increases led to an increase in cigarette consumption constituted an error in the Panel's appreciation of the evidence. However, not every error constitutes a violation of Article 11 of the DSU. We assess the consequences and materiality of the Panel's error below.<sup>470</sup>

6.144. We emphasize, however, that the Panel's error in this respect is limited to the Panel's assessment of whether the TPP measures contributed to the decline in cigarette consumption. In our view, the Dominican Republic's arguments do not suggest that the Panel acted unobjectively in relying on this as a measure of robustness, or credibility, in the context of assessing the relative merits of the parties' smoking prevalence evidence. Furthermore, since the Dominican Republic did not raise any concerns about Dr Chipty's smoking prevalence models in its letter of 17 February 2016, the Panel could not have failed to address any such arguments. Thus, the Panel's error only implicates the Panel's conclusion in step 3 of its cigarette consumption analysis.

### Proportionality assumption

6.145. In step 3 of its *smoking prevalence* analysis, the Panel observed that two of the complainants' experts, namely IPE and Professor List, had used different types of variables to account for tobacco excise tax increases (i.e. tobacco costliness) in different smoking prevalence models. Specifically, they had used, at various times, dummy variables, tax level variables, and price variables. Regarding the use of tax level variables, the Panel observed that such variables rely on the "assumption that the effect of the tax increase on prevalence is proportional to the size of the tax increase".<sup>471</sup> Subsequently, in step 3 of its *cigarette consumption* analysis, the Panel observed that one of the reasons to doubt certain of IPE's results was that IPE "ignore[d] the fact that the proportionality assumption underlying the use of the tax level in the analysis of the IMS/EOS data is rejected".<sup>472</sup> In assessing Australia's evidence, in the form of Dr Chipty's models, the Panel noted that Dr Chipty "specifie[d] excise tax increases dummy variables".<sup>473</sup> The Panel observed that replacing her dummy variables with a tax level variable resulted in the TPP measures' effects no longer being statistically significant.<sup>474</sup> The Panel recalled, however, that "specification testing suggests tax levels are not appropriate in the model specification."<sup>475</sup>

6.146. The Dominican Republic considers that the Panel failed to provide a reasoned and adequate explanation for its findings regarding the proportionality assumption.<sup>476</sup> According to the Dominican Republic, the Panel criticized IPE for ignoring the fact that the proportionality assumption was rejected, notwithstanding that IPE could not have addressed this issue because "it was asserted, for the first time, in Dr Chipty's final submission, at the closing of the written exchange between the

<sup>470</sup> See paras. 6.258. 6.267. below.

<sup>471</sup> Panel Report, Appendix C, para. 106.

<sup>472</sup> Panel Report, Appendix D, para. 106. The Panel also observed that when IPE's model used 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 wholesales cigarette sales". (Ibid.)

<sup>473</sup> Panel Report, Appendix D, para. 115.

<sup>474</sup> Panel Report, Appendix D, para. 116.

<sup>475</sup> Panel Report, Appendix D, para. 116. (fn omitted)

<sup>476</sup> Dominican Republic's appellant's submission, para. 572.



parties."<sup>477</sup> Furthermore, according to the Dominican Republic, Dr Chipty's conclusion that the proportionality assumption was rejected was based on her updated consumption model, which the Dominican Republic had shown included a finding that the 2013 excise tax hike had increased consumption of tobacco products. The Dominican Republic submits that Dr Chipty's model was mis-specified and consequently her "testing of whether there was proportionality between the size of a tax increase and its effect on consumption was inevitably distorted by her model's finding that an increase in excise tax led to an increase in consumption."<sup>478</sup> The Dominican Republic argues that "the Panel accepted the results of Dr Chipty's testing for the proportionality assumption ... without engaging with the Dominican Republic's evidence and argument that Dr Chipty's model estimated that Australia's 2013 tax increase ... *increased* consumption", and "failed to ... reconcile its acceptance of Dr Chipty's proportionality testing ... with evidence demonstrating that Dr Chipty's model was mis-specified precisely because it failed correctly to estimate the impact of one of those three tax increases".<sup>479</sup>

6.147. Australia submits that the Dominican Republic "misapprehends the purpose for which each side submitted expert evidence ... as well as the role of the Panel in evaluating that evidence".<sup>480</sup> Australia notes that it is uncontested that the proportionality assumption was required in order for the Dominican Republic's models to be valid. According to Australia, the Dominican Republic's arguments imply that "its experts were allowed to lack an understanding of their own model's assumptions ... unless and until *Australia's* experts pointed out the problem" and that "the Panel had *no choice* but to accept the validity of these models unless and until Australia submitted rebuttal evidence highlighting the problem."<sup>481</sup> Australia submits that such propositions are "fundamentally untenable ... in light of the Panel's duty to scrutinise the evidence" and assess its probative value.<sup>482</sup> As to the Dominican Republic's argument that Dr Chipty's model did not correctly estimate the impact of tax increases on tobacco consumption, such that her test of the proportionality assumption was distorted, Australia submits that this argument is "merely a reversion back to the arguments that [the Dominican Republic] made when it submitted comments on Dr Chipty's third rebuttal report after the period for substantive submissions had ended".<sup>483</sup> Australia submits that it addressed this "issue" in responding to the Dominican Republic's arguments regarding tobacco costliness.<sup>484</sup>

6.148. Regarding the Dominican Republic's argument that IPE could not have addressed the proportionality assumption because Dr Chipty identified this issue too late in the proceedings, we note that the Dominican Republic itself fully acknowledges the importance of satisfying the proportionality assumption in order for a model's results to be meaningful (to the extent that the model uses tax level variables).<sup>485</sup> It follows that the reliability of a model's results is called into question when the proportionality assumption is not respected, regardless of whether or when this issue is identified by a party engaged in WTO dispute settlement proceedings. Furthermore, regardless of whether and when anybody identified this issue, the complainants' experts had the responsibility to check the robustness of their results and, if necessary, modify or change their

<sup>477</sup> Dominican Republic's appellant's submission, para. 575. (fn omitted)

<sup>478</sup> Dominican Republic's appellant's submission, para. 576. According to the Dominican Republic, "[w]hen using a model to test whether the proportionality assumption holds, a key assumption is that the model is *capable of accurately estimating* the impact of the different tax increases." (Ibid., para. 578 (emphasis original)) The Dominican Republic elaborates that, "[t]o be proportionate, relative to the size of each tax increase, the three tax increases [included in IPE and Dr Chipty's models] must have a similar (i.e. proportionate) impact on consumption", and "[i]f the estimate for one tax increase goes in the *wrong* direction, ... the three tax increases will never have a similar ... impact on consumption in the *right* direction." (Ibid., para. 580 (italics and underlining original))

<sup>479</sup> Dominican Republic's appellant's submission, para. 581. (emphasis original)

<sup>480</sup> Australia's appellee's submission, para. 840. Australia also notes that "Dr Chipty 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*." (Ibid., fn 1085 to para. 840 (emphasis original))

<sup>481</sup> Australia's appellee's submission, para. 840. (emphasis original)

<sup>482</sup> Australia's appellee's submission, para. 840.

<sup>483</sup> Australia's appellee's submission, para. 841.

<sup>484</sup> Australia's appellee's submission, para. 841. See para. 6.132. above.

<sup>485</sup> The Dominican Republic accepts that "[t]he use of tax levels as a control for tobacco costliness implicitly assumes that the proportionality assumption holds" and that "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." (Dominican Republic's appellant's submission, para. 561)

models in order to make their evidence as credible as possible.<sup>486</sup> We see no error in the Panel relying on Dr Chipty's observations (observations which the Dominican Republic itself considers to be relevant) to question the credibility of the complainants' models.

6.149. Turning to the Dominican Republic's argument that "the Panel failed to explain how it could reconcile its acceptance of Dr Chipty's proportionality testing ... with evidence demonstrating that Dr Chipty's model was mis-specified"<sup>487</sup>, we note that, with the exception of the interim review process, the Dominican Republic should not have been given the opportunity to raise such arguments in the panel process, given that Dr Chipty's Third Rebuttal Report was Australia's final filing in the dispute. It cannot be ignored, however, that the Dominican Republic *did* notify the Panel of at least one concern that it had relating to Dr Chipty's Third Rebuttal Report, a concern which the Panel proceeded to accept and considered to be "on the record".<sup>488</sup> In that letter the Dominican Republic did *not* identify Dr Chipty's treatment of IPE's evidence in the Third Rebuttal Report as a concern.<sup>489</sup> Rather, the Dominican Republic's 17 February 2016 communication alleged only that Dr Chipty's consumption model showed that the 2013 excise tax hike led to an increase in consumption. In our view, the Dominican Republic had the opportunity to raise its argument regarding the proportionality assumption to the Panel and failed to do so. Its failure to do so means that the factual arguments that the Dominican Republic now makes on appeal essentially constitute the Dominican Republic's rebuttal of Dr Chipty's evidence. This amounts to relitigating a factual issue, and would require us to second-guess the Panel's appreciation of the evidence. We decline to do so.

6.150. For these reasons, we consider that the Dominican Republic has not demonstrated that the Panel erred in referring to the proportionality assumption in its assessment of the credibility of the evidence.

#### **The use of a linear trend versus a quadratic trend**

6.151. In step 3 of its *smoking prevalence* analysis, after highlighting that most of the models provided by the Dominican Republic and Indonesia's experts – IPE and Professor List – were unable to detect the impact of tobacco costliness, the Panel elaborated that, "[t]he manner in which the smoking prevalence trend is modelled with respect to the sample period considered ... has an important consequence on whether the econometric analysis is able to identify the impact of other variables."<sup>490</sup> The Panel noted that the relevant variables can contribute to creating the smoking prevalence trend, a problem the Panel referred to as "overfitting".<sup>491</sup> Turning to assess the models provided by Honduras' expert, Professor Klick, the Panel questioned his results on the basis that, *inter alia*, "as demonstrated by Dr Chipty, the use of a quadratic trend to capture the downward trend in smoking prevalence leads the predicted tobacco price variable to be not significant."<sup>492</sup> The Panel elaborated that, "[a]s explained above, specifying an excessively flexible smoking prevalence trend (i.e. quadratic trend) is likely to overfit the data on smoking prevalence and make redundant any other variables, such as individual tobacco control policies, that can potentially have also an impact on smoking prevalence."<sup>493</sup> Subsequently, in comparing Dr Chipty's models to those of the complainants, the Panel highlighted that "Dr Chipty acknowledges and addresses the issue of overfitting associated with a too flexible trend" and, by using dummy variables instead of a price variable to capture the impact of excise tax increases, Dr Chipty "avoids the problems of

<sup>486</sup> We note that, unlike the Panel's concerns regarding multicollinearity and non-stationarity (which the Panel developed of its own accord), the problem of the proportionality assumption was identified by one of the parties' experts in the course of the Panel proceedings. In our view, the mere fact that the Panel proceedings entails a back-and-forth of views from the parties should not preclude a Panel from relying on the concerns and views expressed by whomever has the last word. In our view, a distinct concern is raised when a Panel identifies concerns with the parties' evidence of its own accord. We address the parties' due process arguments in paras. 6.226. 6.257. below.

<sup>487</sup> Dominican Republic's appellant's submission, para. 581.

<sup>488</sup> Communication from the Panel to the Parties, 2 March 2016, p. 3.

<sup>489</sup> Nor did the Dominican Republic raise this issue in its subsequent elaboration of those arguments on 4 March 2016, in response to the Panel's request for the Dominican Republic to provide the statistical basis for its argument.

<sup>490</sup> Panel Report, Appendix C, para. 104.

<sup>491</sup> Panel Report, Appendix C, para. 104.

<sup>492</sup> Panel Report, Appendix C, para. 112.

<sup>493</sup> Panel Report, Appendix C, para. 112.

multicollinearity and endogeneity associated with the inclusion of the price variable (in combination with a quadratic trend variable)".<sup>494</sup>

6.152. Honduras claims that the Panel disregarded expert rebuttal evidence offered by Professor Klick against criticism by Dr Chipty as to the use of a quadratic trend to analyse the RMSS data.<sup>495</sup> Honduras points to Professor Klick's argument that the use of a linear trend is incorrect because the data rejected the hypothesis that the background trend in smoking prevalence was linear.<sup>496</sup> Honduras notes that the Panel Report failed to address this argument and instead rejected the robustness of Honduras' model, based on Dr Chipty's arguments.<sup>497</sup>

6.153. Australia argues that "Professor Klick failed to persuade the Panel that the use of a quadratic trend variable instead of a linear trend variable ... was appropriate."<sup>498</sup> Australia submits that Honduras disregards "the Panel's carefully documented reasons for rejecting Professor Klick's evidence".<sup>499</sup> Australia also argues that this aspect of Honduras' arguments relates to the Panel's authority to weigh the evidence, and 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>500</sup>

6.154. We note that, before the Panel, Honduras provided expert evidence in which its expert, Professor Klick, stated that "the RMSS data pretty clearly reject the hypothesis that the background trend in smoking prevalence is linear", on the basis of "a locally weighted regression of the average (weighted) prevalence by month in the RMSS data on a time indicator", which revealed a "quadratic curvature with respect to the time variable".<sup>501</sup> Professor Klick backed up this analysis with graphs visually depicting how the RMSS data followed a curved trend rather than a linear trend. Professor Klick also provided the results of his regression analysis, which showed that (although the linear trend was also statistically significant), "the quadratic trend is statistically significant ... [and] generates a higher adjusted  $R^2$  than the competing models, suggesting that it explains more of the variation in the data, and it generates a lower Root Mean Squared Error (RMSE) than the other models, which implies that it does a better job predicting the observed data."<sup>502</sup>

6.155. The Panel did not explicitly address this argument. We note, however, that the Panel questioned Professor Klick's model on the basis that the price variable was not statistically significant, and that this might be attributable to overfitting (for example, by using a quadratic trend).<sup>503</sup> Specifically, the Panel stated that "specifying an excessively flexible smoking prevalence trend (i.e. quadratic trend) is likely to overfit the data on smoking prevalence and make redundant any other variables, such as individual tobacco control policies, that can potentially have also an impact on smoking prevalence."<sup>504</sup> Thus, we understand that the Panel considered that the very thing that, in Professor Klick's view, made his quadratic trend superior to a linear trend was, in fact, problematic because it might have resulted in a lack of statistical significance with respect to the price variable. In other words, the Panel did explain why it considered a linear trend to be more useful. While Honduras may disagree with the Panel's conclusion in that respect, we do not consider that Honduras has demonstrated that the Panel erred in appreciating the relative merits of a quadratic trend versus a linear trend.

<sup>494</sup> Panel Report, Appendix C, para. 120.

<sup>495</sup> Honduras' appellant's submission, para. 1085 (referring to J. Klick, Third Supplemental Rebuttal Report – A Reply to Dr Chipty and Professor Chaloupka (8 December 2015) (Klick Third Supplemental Rebuttal Report) (Panel Exhibit HND-166), paras. 16-19, 29-32, and 46-48).

<sup>496</sup> Honduras' appellant's submission, para. 1085 (referring to Klick Third Supplemental Rebuttal Report (Panel Exhibit HND-166), para. 16).

<sup>497</sup> Honduras' appellant's submission, para. 1085 (referring to Panel Report, Appendix C, para. 112).

<sup>498</sup> Australia's appellee's submission, para. 941 (referring to Panel Report, Appendix C, para. 112). (fns omitted)

<sup>499</sup> Australia's appellee's submission, para. 942. (fn omitted)

<sup>500</sup> Australia's appellee's submission, para. 943 (referring to Appellate Body Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), para. 7.219).

<sup>501</sup> Klick Third Supplemental Rebuttal Report (Panel Exhibit HND-166), paras. 16-17.

<sup>502</sup> Klick Third Supplemental Rebuttal Report (Panel Exhibit HND-166), para. 19.

<sup>503</sup> Panel Report, Appendix C, para. 112.

<sup>504</sup> Panel Report, Appendix C, para. 112.

## Endogeneity

6.156. In step 3 of its *smoking prevalence* analysis, concerning whether the TPP measures contributed to reducing smoking prevalence, the Panel observed that IPE and Professor List's specifications of one of the independent variables, specifically the "tobacco price control policy" (i.e. excise taxes), had at various times included the use of dummy variables, tax level variables, and price variables.<sup>505</sup> In assessing the merits of these different types of variables, the Panel highlighted that a price variable (unlike a dummy variable or a tax level variable) accounts for *all* factors that influence price, including, but not limited to, excise tax increases.<sup>506</sup> The Panel referred to this as a problem of "endogeneity".<sup>507</sup> The Panel observed that, unlike another of the complainants' experts (Professor Klick), neither IPE nor Professor List "address[ed] the fact that the TPP measures might affect the price variable", and consequently their models were "unable to distinguish between the impact specific to the price variable and the TPP measures", leading the Panel to "question the econometric results based on the price variable".<sup>508</sup> The Panel contrasted this problem, which in this context appears specific to the use of a price variable, with the "exogenous" nature of a dummy variable or a tax level variable.<sup>509</sup> The Panel noted that Dr Chipty's model specification used dummy variables to capture excise tax increases, and thus avoided the problem of endogeneity.<sup>510</sup>

6.157. Subsequently, in step 3 of its *cigarette consumption* analysis, in assessing whether the TPP measures contributed to a decline in consumption of tobacco products, the Panel similarly observed that IPE's analysis of the IMS/EOS data, which also included a price variable to take account of excise tax increases, "fail[ed] to take into account the potential impact of the TPP measures on tobacco prices".<sup>511</sup> The Panel also "question[ed] the validity of IPE's results based on the Nielsen data for ... the use of the price variable".<sup>512</sup> Again, the Panel noted that Dr Chipty's model was specified with dummy variables to capture excise tax increases, thus avoiding the problem of endogeneity in the use of a price variable.<sup>513</sup>

6.158. The Dominican Republic argues that the Panel's treatment of the evidence was inconsistent, because: (i) while the Panel found that Australia's model using tax-based (tax dummies and tax levels) control variables avoided the problem of endogeneity, it did not extend that finding to the models provided by the Dominican Republic that used tax-based variables<sup>514</sup>; and (ii) while the Panel rejected the models provided by the Dominican Republic that used a price-based variable, the Panel did not reject the Australian models using a price-based control variable.<sup>515</sup>

6.159. Regarding the Panel's alleged failure to address the Dominican Republic's models that used tax dummies or tax levels, Australia argues that the Panel did address IPE's "'later' [smoking] prevalence models and identified multiple reasons for questioning the validity and probative value

<sup>505</sup> Panel Report, Appendix C, paras. 106-107.

<sup>506</sup> Panel Report, Appendix C, para. 107.

<sup>507</sup> See, for example, Panel Report, Appendix C, paras. 117 and 120; *ibid.*, Appendix D, paras. 57, 76, and 115, and fn 134 to para. 104.

<sup>508</sup> Panel Report, Appendix C, para. 107.

<sup>509</sup> Panel Report, Appendix C, para. 106.

<sup>510</sup> Panel Report, Appendix C, para. 120.

<sup>511</sup> Panel Report, Appendix D, para. 106.

<sup>512</sup> Panel Report, Appendix D, para. 107.

<sup>513</sup> Panel Report, Appendix D, para. 115.

<sup>514</sup> Dominican Republic's appellant's submission, para. 550. The Dominican Republic refers, specifically, to its aggregate prevalence and one-stage prevalence models for cigarettes, as well as its aggregate prevalence model for cigars. (*Ibid.* (referring to D. Afshartous, M. Hagedorn, A. Kaul, and M. Wolf, Empirical Assessment of Australia's Plain Packaging Regime, Institute for Policy Evaluation (8 December 2015) (IPE Third Updated Report) (Panel Exhibit DOM-375), paras. 30, 64-66, 84, and 109-112))

<sup>515</sup> Dominican Republic's appellant's submission, para. 553. The Dominican Republic refers specifically to the two-stage prevalence models submitted by the Dominican Republic and Australia. (*Ibid.* (referring to Second Rebuttal Report of Dr Tasneem Chipty (8 December 2015) (Chipty Second Rebuttal Report) (Panel Exhibit AUS-591), Table 5, Row [B]; J. List, A Further Synthesis of the Newly-Available Evidence on Australia's Plain Packaging Policy (8 December 2015) (List Third Supplemental Report) (Panel Exhibit DOM/IDN-7)), Table 5). According to the Dominican Republic, "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." (*Ibid.*)

of the results that these models produced".<sup>516</sup> Australia similarly submits that the Dominican Republic's later consumption models were also critiqued on multiple grounds.<sup>517</sup> As to the argument that the Panel did not address Australia's two-stage prevalence model that relied on price levels, Australia submits that "Dr Chipty never endorsed the use of price as a control", and "consistently identified problems with the use of price as a control".<sup>518</sup> Furthermore, Australia argues that the so-called "model" identified by the Dominican Republic as Dr Chipty's two-stage model is in fact "a single row in a table where Dr Chipty conducted a sensitivity analysis of various model results" that was included in order to be "comprehensive".<sup>519</sup>

6.160. We recall that the Panel did not reject outright any individual model on the basis of perceived flaws. Rather, the Panel assessed the parties' evidence, starting with the complainants', and noted multiple reasons to doubt the reliability of that evidence. The Panel considered that Australia's evidence was, in relative terms, more credible and reliable than the complainants' evidence, all the while recognizing that *no* model submitted by *any* expert was perfect. Consequently, any inconsistency in the Panel's treatment of the parties' evidence can only relate to the reasons the Panel provided for concluding that Australia's evidence was, in relative terms, more credible than the complainants' evidence.

6.161. We recall, in this respect, that the Panel provided several reasons that it considered Australia's evidence to be more credible than those of the complainants.<sup>520</sup> The Panel's reasoning with respect to endogeneity related *specifically* to the complainants' price-specified models, and the fact that Dr Chipty's primary model was *not* specified with a price variable (thereby avoiding the problem of endogeneity). We understand that the Dominican Republic's concerns with the Panel's approach relate to: (i) the Panel's treatment of the Dominican Republic's models that were *not* specified with price variables; and (ii) the Panel's treatment of Australia's models that *were* specified with a price variable.

6.162. With respect to the Panel's treatment of the Dominican Republic's models that were not specified with a price variable, we note that the Panel's reasons for preferring Dr Chipty's specification included the fact that Dr Chipty: (i) addressed the issue of overfitting; and (ii) avoided the issue of non-stationarity of the tax level variables.<sup>521</sup> These reasons alone would appear to indicate that the Panel *did* indicate its reasons for preferring Dr Chipty's non-price specified model to the Dominican Republic's non-price specified models. In any event, the Panel proceeded to also note that Dr Chipty's results were robust to alternative specifications, including different TPP starting dates, the use of a tax level variable, the use of sample reweighting dummies, and the fact that when Dr Chipty used Professor List's procedure to calculate standard error (a procedure about which the Panel had previously expressed its doubts<sup>522</sup>), the impact of the TPP measures on smoking prevalence remained negative and statistically significant in most specifications.<sup>523</sup> We therefore do not consider that the Panel disregarded the Dominican Republic's models specified with tax level variables and tax dummy variables, and the Panel clearly explained its reasons for concluding that Dr Chipty's models were more credible than the Dominican Republic's models.

6.163. Turning to the Dominican Republic's argument that the Panel rejected the models provided by the Dominican Republic that used a price-based variable<sup>524</sup>, but did not reject the Australian

<sup>516</sup> Australia's appellee's submission, para. 830. Australia refers specifically to those models' use of "inappropriate sample periods [and] ... trend variables that overfit the data". (Ibid.) Australia also considers that, in its assessment of smoking prevalence, IPE relied on tax dummy variables in its later models, but "made multiple *other* changes ... that the Panel expressly identified as additional reasons for questioning the results". (Ibid. (emphasis original))

<sup>517</sup> Australia's appellee's submission, para. 830. Australia refers to those models' reliance on the proportionality assumption. (Ibid.)

<sup>518</sup> Australia's appellee's submission, para. 833.

<sup>519</sup> Australia's appellee's submission, para. 833 (referring to Dominican Republic's appellant's submission, fn 476, in turn referring to Chipty Second Rebuttal Report (Panel Exhibit AUS-591), Table 5, Row [B]).

<sup>520</sup> See Panel Report, Appendix C, paras. 120-121.

<sup>521</sup> Panel Report, Appendix C, para. 120.

<sup>522</sup> Panel Report, Appendix C, paras. 109-110, and fns 131-132 to para. 110.

<sup>523</sup> Panel Report, Appendix C, para. 121.

<sup>524</sup> We recall that the Panel questioned the results of price-based models on the basis of endogeneity, multicollinearity, and non-stationarity.

models using a price-based variable<sup>525</sup>, we again note that the Panel did not "reject" any models on the basis of any individual criterion, but rather weighed the credibility of the evidence provided by the different parties. In any event, we understand that this aspect of the Dominican Republic's arguments is based on the assertion that the Panel gave probative value to Dr Chipty's so-called "two-stage model".

6.164. We note that the Panel's analysis of Dr Chipty's evidence consists of three paragraphs. In the first paragraph, the Panel considers that Dr Chipty addressed several of its concerns with the complainants' approaches, and emphasizes that "Dr Chipty's model specification ... includes *the excise tax increases dummy variables* and thus *avoids* the problems of multicollinearity and endogeneity ... [as well as] the issue of non-stationarity of the price or tax level variables."<sup>526</sup> In the second paragraph, the Panel notes that Dr Chipty's evidence showed that "alternative specifications" *also* showed a "negative and statistically significant impact of the TPP measures on overall smoking prevalence".<sup>527</sup> The Panel specifically explains that such alternative specifications included a "different TPP starting date", the use of "excise tax level variable[s]", and "sample reweighting dummies".<sup>528</sup> In support of these statements, the Panel refers to a page in Dr Chipty's Third Rebuttal Report containing "sensitivity analyses" of three models, which purport to show that "[w]hen the proportionality assumption is valid, both models with tax indicators and models with a tax level variable produce reliable model estimates."<sup>529</sup> None of the models referred to in the Third Rebuttal Report are based on price level variables. The Panel also refers to two pages in Dr Chipty's Second Rebuttal Report.<sup>530</sup> Both pages contain Dr Chipty's re-analysis of five models presented by the complainants, one of which is indeed Professor List's two-stage analysis that incorporated price level variables. We note that three of these five models are very similar (if not identical) to the models that Dr Chipty subsequently re-assessed in her sensitivity analysis in the Third Rebuttal Report. Finally, in the third paragraph of its analysis, the Panel concluded that "based on the most recent econometric evidence submitted by Australia, there is econometric evidence suggesting that TPP and enlarged GHWs contributed" to reducing smoking prevalence.<sup>531</sup>

6.165. We understand that the Dominican Republic considers that the Panel gave probative value or weight to Dr Chipty's alleged two-stage model, because this is one of the models referred to in those pages of the Chipty Second Rebuttal Report that is cited by the Panel in the second paragraph of its analysis. We note, however, that in the first paragraph of its analysis, the Panel clearly indicates that one of the advantages of "Dr Chipty's model specification" is that it does *not* rely on price level variables.<sup>532</sup> This paragraph therefore shows no indication that the Panel gave any weight to any model using a price level variable and, in fact, suggests that the Panel did *not* give any weight to any such model. Furthermore, in its second paragraph, when the Panel noted that Dr Chipty's econometric results were "robust to alternative specifications, including ... the use of an excise tax level variable"<sup>533</sup>, the Panel identified certain specifications that led it to this conclusion, and while it specifically mentioned a specification using tax level variables, the Panel did *not* mention any models using price level variables. Additionally, the Panel's conclusion on Dr Chipty's evidence states that "*the most recent econometric evidence* submitted by Australia" suggests that the TPP measures contributed to reducing smoking prevalence.<sup>534</sup> Dr Chipty's final econometric model was presented in her Third Rebuttal Report. The Dominican Republic has not identified anywhere in the Third Rebuttal Report that Dr Chipty relied on a model specified with a price variable. We note that the only reason to consider that the Panel did, in fact, give any probative weight to Dr Chipty's two-stage specification is that it is one of five models identified in the relevant pages of Dr Chipty's Second Rebuttal Report that are referred to by the Panel in its footnote indicating that Dr Chipty's

<sup>525</sup> Dominican Republic's appellant's submission, para. 553. The Dominican Republic refers specifically to the two-stage prevalence models submitted by the Dominican Republic and Australia. (Ibid. (referring to Chipty Second Rebuttal Report (Panel Exhibit AUS-591), Table 5, Row [B]; List Third Supplemental Report (Panel Exhibit DOM/IDN-7)), Table 5) According to the Dominican Republic, "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." (Ibid.)

<sup>526</sup> Panel Report, Appendix C, para. 120. (emphasis added)

<sup>527</sup> Panel Report, Appendix C, para. 121.

<sup>528</sup> Panel Report, Appendix C, para. 121.

<sup>529</sup> Chipty Third Rebuttal Report (Panel Exhibit AUS-605), para. 30, and Table 4 on p. 22.

<sup>530</sup> Chipty Second Rebuttal Report (Panel Exhibit AUS-591), pp. 33 and D.2.

<sup>531</sup> Panel Report, Appendix C, para. 122.

<sup>532</sup> Panel Report, Appendix C, para. 120.

<sup>533</sup> Panel Report, Appendix C, para. 121.

<sup>534</sup> Panel Report, Appendix C, para. 122. (emphasis added)

results were robust to alternative specifications. However, it is plausible that that footnote is intended to refer exclusively to the four other models identified on that page of Dr Chipty's Second Rebuttal Report (none of which included a price variable).

6.166. On balance, we do not consider that the Panel gave any weight to Dr Chipty's price-specified model, and consequently the Panel did not treat the parties' price-specified models inconsistently. We also note that, even if the Panel did give any weight to Dr Chipty's price-specified model, it was only by way of support for Dr Chipty's primary model, specified with dummy variables.<sup>535</sup> We see no inconsistency between the Panel giving most weight to Dr Chipty's tax dummy model, over and above price-specified models prepared by both the Dominican Republic and Dr Chipty. In other words, the fact that the Panel considered Dr Chipty's tax dummy model to be the most relevant and probative model is not called into question by the fact that there may have been an inferior, price-specified model that contradicted the Dominican Republic's similarly inferior price-specified model.

6.167. For these reasons, we do not consider that the Dominican Republic has demonstrated that the Panel erred in referring to endogeneity in its assessment of the parties' econometric evidence.<sup>536</sup>

### Multicollinearity

6.168. In step 3 of its *smoking prevalence* analysis, in addition to identifying the endogeneity of the price variable as a potential concern, the Panel also observed "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".<sup>537</sup> The Panel explained, without reference to any evidence on or off the Panel record, that multicollinearity arises when "two (or more) explanatory variables convey the same information", in which case "the predictive power of the model remains unchanged, but the confidence interval of the coefficient estimates may increase" and "the coefficient estimates may become very sensitive to minor changes in the model specification or data."<sup>538</sup> The Panel considered that one way to mitigate multicollinearity is to increase the sample period, but that "including a second linear trend specific to the July 2006-September 2015 period, as suggested by IPE, would not resolve th[e] issue."<sup>539</sup> The Panel also observed that "[e]vidence of multicollinearity is confirmed by the variance inflation factors [(VIF)] statistic."<sup>540</sup> Given that the complainants' experts did not address the issues of multicollinearity and endogeneity, the Panel called into question the econometric results based on the price variable.<sup>541</sup> In assessing Dr Chipty's analysis, the Panel observed that her use of dummy variables to capture excise tax increases avoided the problems of both multicollinearity and endogeneity associated with the price variable.<sup>542</sup>

6.169. In step 3 of its *cigarette consumption* analysis, the Panel highlighted that IPE's modified trend analysis and autoregressive integrated moving average with explanatory variable (ARIMAX) model included "both a price variable and a time trend variable, which happen to be highly collinear with each other".<sup>543</sup> The Panel similarly noted that in different stages of Professor Klick's difference-in-difference model, based on different datasets, there was multicollinearity between

<sup>535</sup> Panel Report, Appendix C, paras. 120-121. The Panel's findings show that the Panel gave the most weight to the latter model specification and only considered Dr Chipty's alternative specifications to be relevant to the extent that they confirmed the robustness of Dr Chipty's dummy variable model.

<sup>536</sup> We note the Dominican Republic's argument that the Panel's findings were insufficiently reasoned and adequate, because the Panel failed to address the fact that IPE demonstrated that "even when it used the tax dummies to control for tobacco costliness in ... aggregate and one-stage models, it did not find a TPP effect", and consequently IPE "concluded that there was no evidence of 'endogeneity'". (Dominican Republic's appellant's submission, para. 531 (emphasis original). See also *ibid.*, paras. 555-557; Australia's appellee's submission, para. 835) In our view, this aspect of the Dominican Republic's arguments constitutes relitigating the factual aspects of the case on appeal.

<sup>537</sup> Panel Report, Appendix C, para. 107.

<sup>538</sup> Panel Report, Appendix C, para. 107.

<sup>539</sup> Panel Report, Appendix C, para. 107.

<sup>540</sup> Panel Report, Appendix C, fn 119 to para. 107.

<sup>541</sup> Panel Report, Appendix C, para. 107.

<sup>542</sup> Panel Report, Appendix C, para. 120.

<sup>543</sup> Panel Report, Appendix D, para. 106. The Panel also observed that multicollinearity appeared to be "even more marked when the ... ARIMAX model include[d] five lags of the logarithm of per capita sales variables and of the price variable". (*Ibid.*)

different variables.<sup>544</sup> The Panel did not refer to multicollinearity when assessing Australia's models, prepared by Dr Chipty.<sup>545</sup>

6.170. The appellants argue that, in relying on the notion of multicollinearity to critique the parties' models, the Panel acted inconsistently with Article 11 of the DSU by compromising the complainants' due process rights, making the case for Australia, treating the parties' evidence inconsistently, and failing to provide reasoned and adequate explanations for its findings.<sup>546</sup>

6.171. We address the appellants' arguments regarding due process (including the Dominican Republic's arguments that the Panel made the case for Australia) in paragraphs 6.226. -6.257. below. As to the Dominican Republic's arguments that the Panel failed to provide a reasoned and adequate explanation for its findings<sup>547</sup>, we consider that the Panel adequately explained the basis for its concerns related to multicollinearity.<sup>548</sup> Having explained in paragraphs 116 of Appendix B and 107 of Appendix C why it considered the presence of multicollinearity in a model to be a reason to doubt the reliability of that model, the Panel identified throughout its analysis certain models that did or did not suffer from this shortcoming. We see no reason for the Panel not to apply well-known statistical tests of rigour to evidence that is statistical in nature, insofar as the Panel ensures that the due process rights of the parties are respected, and, in our view, the appellants have not demonstrated how the brevity of the Panel's explanation for why and how it tested for multicollinearity implies that it failed to make an objective assessment of the matter.

6.172. Turning to the appellants' arguments that the Panel treated the evidence inconsistently in its reliance on multicollinearity, both appellants argue that the Panel faulted the analyses of Honduras' and the Dominican Republic's experts for suffering from the problem of multicollinearity, but failed to assess Australia's models for that same problem.<sup>549</sup> Honduras notes the Panel's statement that Dr Chipty's smoking prevalence models "avoid[ed] the problems of multicollinearity and endogeneity"; however, Honduras submits that "there is no analysis of any kind" to show that the Panel actually examined Dr Chipty's models for multicollinearity.<sup>550</sup> Honduras also argues that the Panel contradicts itself by finding at one point that the issue of multicollinearity is "less severe" when using tax dummies yet noting later that Dr Chipty "avoids" the problem of multicollinearity by using those same dummies.<sup>551</sup> The Dominican Republic similarly argues that "the Panel stated that Australia's smoking prevalence models were not affected by multicollinearity" and "accepted the model specifications as robust evidence that the TPP measures had reduced smoking prevalence", without "stat[ing] whether it had applied a VIF test to these models and, if it did so, what the results of the test were" and addressing "whether Australia's *consumption* models were affected by multicollinearity".<sup>552</sup>

<sup>544</sup> Panel Report, Appendix D, paras. 109-110.

<sup>545</sup> Panel Report, Appendix D, paras. 115-117. We also note that, in step 2 of its cigarette consumption analysis, the Panel indicated that the only explanatory variable that was statistically significant in Professor List's dynamic models based on IMS/EOS data was the "time trend variable when the price variable [wa]s omitted or replaced by a tax level variable", which suggested that "the price variable and the time trend might be collinear", rendering "one of them ... redundant". (Panel Report, Appendix D, para. 43) Similarly to its analysis in step 3, the Panel did not refer to multicollinearity in comparing Australia's evidence to the complainants' evidence, and, in fact, the Panel indicated that it "continue[d] to have doubts" about Australia's evidence. (Panel Report, Appendix D, para. 45. See also *ibid.*, para. 46)

<sup>546</sup> Honduras' appellant's submission, paras. 1036-1045; Dominican Republic's appellant's submission, paras. 362-424.

<sup>547</sup> Dominican Republic's appellant's submission, paras. 413-418.

<sup>548</sup> See Panel Report, Appendix B, para. 116; Appendix C, paras. 107-108 and 120, fn 119 to para. 107, and fn 122 to para. 108; Appendix D, paras. 43, 106, and 109-110. See also Appendix E, paras. 29 and 51-54.

<sup>549</sup> Honduras' appellant's submission, para. 1038; Dominican Republic's appellant's submission, paras. 407-408 (referring to Panel Report, Appendix C, paras. 107 and 120) and 411.

<sup>550</sup> Honduras' appellant's submission, paras. 1043-1044 (quoting Panel Report, Appendix C, para. 120).

<sup>551</sup> Honduras' appellant's submission, para. 1044 (quoting Panel Report, Appendix C, fn 122 to para. 108).

<sup>552</sup> Dominican Republic's appellant's submission, paras. 407-408 (referring to Panel Report, Appendix C, paras. 107 and 120) and para. 411. (emphasis omitted (para. 408); emphasis original (para. 411)) The Dominican Republic further argues that, by applying the VIF test statistic with the same VIF threshold of 14 to Australia's models, "each of Australia's one-stage models and each of the prevalence models that controlled for reweighting, on which the Panel relied to find an actual impact of the TPP measures on smoking prevalence, have a VIF of 14 or above", which means that they are also "affected by the type of multicollinearity problem



6.173. Australia argues that the Panel's treatment of the econometric evidence submitted by the appellants was entirely consistent with the allocation of the burden of proof.<sup>553</sup> Australia argues that, since the appellants did not meet their initial burden of proof, there was no need for the Panel to assess the Australian models with the rigour reserved for rebuttal evidence, as would be appropriate if the burden of proof had shifted to Australia.<sup>554</sup> Australia therefore considers that the Panel appropriately assessed the evidence for the purpose of determining whether the burden of proof was met. Consequently, in Australia's view, there is no violation of Article 11 of the DSU for lack of even-handedness in its inquiry.<sup>555</sup>

6.174. We recall that the Panel did not "reject" any models or evidence on the basis of multicollinearity. Rather, the Panel considered that models suffering from multicollinearity may be less reliable than models not suffering from multicollinearity. Importantly, the Panel assessed the reliability of different models on the basis of a number of different considerations, one of which was the presence of multicollinearity. In comparing Dr Chipty's smoking prevalence and consumption models to the complainants' smoking prevalence and consumption models, the Panel did not find that Dr Chipty's models were flawless or cured all of the problems present in the complainants' models. Rather, the Panel stated that Dr Chipty's models addressed some of the concerns that it had raised with respect to the complainants' evidence.<sup>556</sup> Consequently, it does not follow that the Panel considered that Dr Chipty's models were superior on the basis that they did not suffer from multicollinearity, except to the extent that the Panel explicitly indicated this.

6.175. With this in mind, we note that, in the context of comparing the participants' *smoking prevalence* models, the Panel's only reference to multicollinearity as a reason to prefer Dr Chipty's models was very specific to the fact that Dr Chipty's model specified with dummy variables avoided the problem of multicollinearity present in a price-specified model.<sup>557</sup> We see no way to doubt the veracity of this finding without second-guessing the Panel's appreciation of the evidence. In any event, this finding does not suggest that Dr Chipty's alternative specifications (i.e. those models specified with tax levels) did not suffer from precisely the same issue of multicollinearity as the complainants' models.

6.176. As to Honduras' consideration that the Panel's findings are contradictory because the Panel found that "the issue of multicollinearity is less severe when excise tax increase dummies ... are used", we note that Honduras is seeking to generalize an observation that the Panel made in the specific context of assessing the level of multicollinearity present in Professor List's models when seeking to control for reweighting corrections in the RMSS data.<sup>558</sup> Thus, the Panel did not find that every single model submitted by every party suffered from multicollinearity, and, in any event, even if the Panel had made such a generic finding we would see no contradiction between that finding and the Panel's ultimate conclusion that Dr Chipty's dummy variable model avoided the problem of multicollinearity present in a price-specified model.<sup>559</sup> In short, the Panel's reliance on

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identified by the Panel". (Dominican Republic's appellant's submission, para. 410 (emphasis original)) We note that the Dominican Republic's arguments related to its own testing of the VIF statistic are inappropriate on appeal and essentially require the Appellate Body to second-guess the Panel's appreciation of the evidence. We therefore decline to take such arguments into account. (See paras. 6.329. -6.331. below)

<sup>553</sup> Australia's appellee's submission, paras. 737-738.

<sup>554</sup> Australia's appellee's submission, paras. 741-742.

<sup>555</sup> Australia's appellee's submission, paras. 744-745.

<sup>556</sup> In comparing the participants' smoking prevalence models, the Panel stated that "a number of concerns that [it] raised while reviewing the complainants' approaches and results [were] addressed by Dr Chipty." (Panel Report, Appendix C, para. 120) In comparing the participants' consumption models, the Panel stated that "some concerns that [it] raised regarding the experts of the Dominican Republic's, Honduras's and Indonesia's approaches and results of the market data [were] to some extent addressed by Dr Chipty." (Ibid., Appendix D, para. 115)

<sup>557</sup> Panel Report, Appendix C, para. 120.

<sup>558</sup> Panel Report, Appendix C, fn 122 to para. 108.

<sup>559</sup> To the extent that the Panel's statement that "the issue of multicollinearity is less severe when excise tax increase dummies ... are used" is a universally applicable statement, this would actually appear to support the Panel's conclusion that a model specified with tax dummies is more robust than a model specified with price variables. (Panel Report, Appendix C, fn 122 to para. 108) This is because the Panel did not appear to consider multicollinearity to be a binary issue whereby a model must be "accepted" or "rejected" depending whether or not it suffered from *any* multicollinearity. Rather, the Panel considered that a model might suffer "more" or "less" such that a model specified with dummy variables "avoids" the specific multicollinearity problem present in a model specified with a price-variable. (Panel Report, Appendix C, para. 120) This follows

multicollinearity as a reason to favour Dr Chipty's models was extremely limited and shows no lack of even-handedness.

6.177. As to the Panel's comparison of the participants' *consumption* models, the Panel did not, in any way, suggest that Dr Chipty's models were more credible than the complainants' on the basis that Dr Chipty's models did not suffer from multicollinearity.<sup>560</sup> Since the Panel's reasons for considering Dr Chipty's consumption models to be more reliable than the complainants' consumption models were unrelated to multicollinearity, it follows that the Panel did not apply a different standard of robustness in assessing Dr Chipty's models than it applied to the complainants' models.

6.178. We therefore consider that the Panel did not treat the participants' evidence inconsistently in assessing the relative merits of the complainants' econometric evidence and Australia's econometric evidence with respect to multicollinearity.

### Non-stationarity

6.179. As stated above, in step 3 of its *smoking prevalence* analysis, the Panel "call[ed] into question the econometric results based on the price variable" because the Dominican Republic's experts had not addressed the issue of multicollinearity or the potential impact of the TPP measures on prices.<sup>561</sup> The Panel "also note[d] 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".<sup>562</sup> The Panel explained that "[a] variable is said to be stationary, when its statistical properties, such as mean and variance are all constant over time."<sup>563</sup> The Panel stated that "econometric theory recommends not estimating a model when the dependent variable (i.e. smoking prevalence) is stationary and one of the explanatory variables (i.e. tax level or price) is not stationary in order to avoid spurious and biased results."<sup>564</sup> The Panel's findings suggest that a "standard unit root test" can reveal whether a variable is stationary.<sup>565</sup> In assessing Australia's evidence, the Panel observed that Dr Chipty's use of tax dummy variables "avoid[ed] the issue of non-stationarity of the price or tax level variables".<sup>566</sup> The Panel noted that, in any event, Dr Chipty's results were robust to alternative specifications, including the use of a tax level variable.<sup>567</sup>

6.180. In step 3 of its *cigarette consumption* analysis, the Panel highlighted that, in its analysis of the IMS/EOS data, IPE did "not address the fact that the price variable and the tax level variable appear to be non-stationary".<sup>568</sup> With respect to Professor Klick's analysis, the Panel questioned one of his models on the ground that "none of the explanatory variables, except the constant, are statistically significant."<sup>569</sup> The Panel observed, in this respect, that the "variable reporting the number of stores covered by the Aztec data is not stationary".<sup>570</sup> In its analysis of Australia's evidence, the Panel observed that Dr Chipty's model specified with excise tax dummy variables "avoids ... the unit root problem of the price or tax level variables".<sup>571</sup> The Panel noted that Dr Chipty's results were robust to *some* alternative specifications, but highlighted that the TPP measures' effects were no longer statistically significant when the tax dummy variables were replaced with a tax level variable.<sup>572</sup> The Panel further noted, however, that "specification testing

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from the very fact that the Panel considered it relevant to note that the problem of multicollinearity was "less severe" in Professor List's models when tax dummies were used.

<sup>560</sup> Panel Report, Appendix D, paras. 115-116.

<sup>561</sup> Panel Report, Appendix C, para. 107.

<sup>562</sup> Panel Report, Appendix C, para. 107.

<sup>563</sup> Panel Report, Appendix C, fn 120 to para. 107.

<sup>564</sup> Panel Report, Appendix C, para. 107.

<sup>565</sup> See, for example, Panel Report, Appendix C, para. 107; *ibid.*, Appendix D, fn 46 to para. 43.

<sup>566</sup> Panel Report, Appendix C, para. 120.

<sup>567</sup> Panel Report, Appendix C, para. 121.

<sup>568</sup> Panel Report, Appendix D, para. 106.

<sup>569</sup> Panel Report, Appendix D, para. 109. (fn omitted)

<sup>570</sup> Panel Report, Appendix D, fn 146 to para. 109.

<sup>571</sup> Panel Report, Appendix D, para. 115.

<sup>572</sup> Panel Report, Appendix D, para. 116.

suggests tax levels are not appropriate" and, "[f]urthermore, the tax levels variable is likely to be non-stationary."<sup>573</sup>

6.181. The appellants assert that the Panel's reliance on non-stationarity to critique the parties' models was inconsistent with Article 11 of the DSU because it: (i) compromised the complainants' due process rights; (ii) made the case for Australia; (iii) treated the parties' evidence inconsistently; and (iv) failed to provide reasoned and adequate explanations for its findings.<sup>574</sup>

6.182. We address the appellants' arguments regarding due process (including the argument that the Panel made the case for Australia) below.<sup>575</sup> As to the Dominican Republic's arguments that the Panel failed to provide a reasoned and adequate explanation for its findings<sup>576</sup>, we consider that the Panel adequately explained the basis for its concerns related to non-stationarity.<sup>577</sup> We see no reason for the Panel not to apply well-known statistical tests of rigour to evidence that is statistical in nature insofar as the Panel ensures that the due process rights of the parties are respected, and, in our view, the appellants have not demonstrated how the brevity of the Panel's explanation for why and how it tested for non-stationarity implies that it failed to make an objective assessment of the matter before it.

6.183. Turning to the appellants' arguments regarding the Panel's allegedly inconsistent reliance on non-stationarity in assessing the parties' evidence, the appellants argue that the Panel faulted several of the complainants' models on the basis that they suffered from non-stationarity, but failed to assess whether Australia's models suffer from the same problem.<sup>578</sup> In Honduras' view, the Panel did not indicate whether it had "examined whether Australia's evidence suffered from a similar problem of stationarity".<sup>579</sup> The Dominican Republic, for its part, submits that the Panel's treatment of the evidence was inconsistent for three reasons. First, the Dominican Republic asserts that the Panel relied on non-stationarity to reject the robustness of the Dominican Republic's models that used price or tax level variables, but relied on Australia's econometric models even when those models used price variables.<sup>580</sup> Second, the Dominican Republic submits that the standard unit root tests applied to Dr Chifty's models using tax dummy variables show that the tax dummy variables were non-stationary.<sup>581</sup> Third, the Dominican Republic submits that the Panel was inconsistent in accepting Dr Chifty's models using tax dummies but disregarding the Dominican Republic's models that relied on tax dummies.<sup>582</sup>

<sup>573</sup> Panel Report, Appendix D, para. 116.

<sup>574</sup> Honduras' appellant's submission, paras. 1046-1052; Dominican Republic's appellant's submission, paras. 267-361.

<sup>575</sup> See paras. 6.226. -6.257. below.

<sup>576</sup> Dominican Republic's appellant's submission, paras. 347-353.

<sup>577</sup> Having explained, in paragraph 107 of Appendix C, why it considered the presence of non-stationarity in a model to be a reason to doubt the reliability of that model, the Panel identified throughout its analysis certain models that did or did not suffer from this shortcoming. (See Panel Report, Appendix C, paras. 107 and 120, and fn 120 to para. 107; *ibid.*, Appendix D, paras. 44, 106, and 116, fn 46 to para. 43, and fn 146 to para. 109)

<sup>578</sup> Honduras' appellant's submission, paras. 1046-1051; Dominican Republic's appellant's submission, paras. 330-346. Honduras refers to the Panel's finding that standard unit root tests suggested that the tax level and price variables were non-stationary. (Honduras' appellant's submission, para. 1047 (referring to Panel Report, Appendix C, para. 107)) Honduras also refers to several consumption models that the Panel allegedly rejected on the basis of non-stationarity. (*Ibid.*, paras. 1048-1050 (referring to Panel Report, Appendix D, paras. 44 and 106))

<sup>579</sup> Honduras' appellant's submission, para. 1051.

<sup>580</sup> Dominican Republic's appellant's submission, para. 336 (referring to Panel Report, Appendix C, para. 120). The Dominican Republic specifically refers to the Panel's finding that Professor List's two-stage model was affected by non-stationarity and might produce biased results since it used price as a control for tobacco costliness, and its finding that "Dr Chifty's two-stage model, which ... used *price* as a control for tobacco costliness, was not affected by non-stationarity ..., and produced *reliable* results." (*Ibid.*, paras. 337-338 (referring to Panel Report, Appendix C, paras. 107 and 120) (*italics and underlining original*))

<sup>581</sup> Dominican Republic's appellant's submission, para. 342. The Dominican Republic submits that the Panel "should have reached the same conclusion for Australia's models as it did for the Dominican Republic's models". (*Ibid.*, para. 343) The Dominican Republic also notes that, "[i]n any event, the Panel ... failed to provide any explanation for its assertion that the use of tax dummies 'avoids the issue of non-stationarity of the price or tax level variables'." (*Ibid.*, para. 342) (fn omitted)

<sup>582</sup> Dominican Republic's appellant's submission, para. 345 (referring to IPE Third Updated Report (Panel Exhibit DOM-375), Tables 2.1-1, 2.1-4, 2.1-7, 2.2-1 to 2.2-4, 2.2-6, and 2.3-1 to 2.3-4; D. Afshartous,

6.184. Australia argues that the Dominican Republic's argument "misapprehends the burden of proof in this dispute, as well as the purpose for which Australia submitted Dr Chipty's rebuttal evidence".<sup>583</sup> According to Australia, given that Dr Chipty was simply rebutting the Dominican Republic's expert evidence, the Panel "did not need to find that Dr Chipty's rebuttal evidence corrected all deficiencies in the complainants' econometric models ... 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".<sup>584</sup> Australia also submits that the Panel was not required to find that Dr Chipty cured all defects in the complainants' models in order to find that those models, "as revised by Dr Chipty 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>585</sup>

6.185. We recall that the Panel was not seeking to assess whether any model was flawless, but rather was assessing the credibility of the complainants' evidence and Australia's competing evidence. The Panel did not have to find that Australia's evidence cured *all* shortcomings in the Dominican Republic's evidence in order to find that Australia's evidence was more credible. We therefore proceed to examine whether it acted inconsistently in assessing the evidence, to the extent that it relied on non-stationarity as a specific reason to consider Australia's evidence more credible than the complainants' evidence.

6.186. In this respect, we note that the Panel relied on the notion of non-stationarity, amongst other things, in both its smoking prevalence and consumption analyses to find that Australia's evidence was more credible than the complainants' evidence. With this in mind, we turn to the different allegations of inconsistency alleged by the appellants.

6.187. First, regarding the argument that the Panel relied on Dr Chipty's model specified with a price variable while rejecting the complainants' price-specified models on the basis of, *inter alia*, non-stationarity, we have addressed a similar argument above and concluded that the Panel gave no weight to Dr Chipty's two-stage (price-specified) model in its smoking prevalence analysis.<sup>586</sup> To the extent that the Panel gave any weight in its smoking prevalence analysis to Dr Chipty's model specified with price variables, it was merely to note that this alternative (and inferior) model supported the conclusion in Dr Chipty's main, superior model (specified with tax dummy variables).<sup>587</sup> We see no indication in the Panel's cigarette consumption analysis that it relied on any price-specified model at all.<sup>588</sup> We therefore see no inconsistency in the Panel's treatment of the parties' price-specified models.

6.188. As to the argument that the Panel should have found that Australia's models specified with tax dummy variables suffered from non-stationarity, we note that the Panel's findings, read on their face, indicate that the Panel did assess all models for non-stationarity.<sup>589</sup> On appeal, the Dominican Republic has argued that, as a factual matter, the Panel was incorrect, and Australia's models specified with dummy variables do suffer from non-stationarity.<sup>590</sup> In our view, this argument

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M. Hagedorn, A. Kaul, and M. Wolf, Summary of Findings: Empirical Assessment of Australia's Plain Packaging Regime, Institute for Policy Evaluation (1 February 2016) (IPE Summary Report) (Panel Exhibit DOM-379), Tables 3.1-2, Row [A], 3.1-3, 3.2-2 to 3.2-4, and 3.3-2, Row [A]).

<sup>583</sup> Australia's appellee's submission, para. 771.

<sup>584</sup> Australia's appellee's submission, para. 771. (emphasis original)

<sup>585</sup> Australia's appellee's submission, para. 771.

<sup>586</sup> See paras. 6.163. 6.166. above.

<sup>587</sup> See para. 6.166. above.

<sup>588</sup> Panel Report, Appendix D, paras. 115-116. We note, in particular, that the Panel specifically addressed the fact that Dr Chipty's models specified with a tax level variable did not give the same result as her model specified with a tax dummy variable. The Panel explained why it considered that this was not a critical flaw. (Panel Report, Appendix D, para. 116) The fact that the Panel did not refer to any price-specified model reinforces our understanding that the Panel did not give any probative weight to any model specified with prices, including any such model adduced by Australia.

<sup>589</sup> This follows from the Panel's statements in both Appendices C and D that the use of the tax dummy variables avoids the issue of non-stationarity of the price or tax level variables. (Panel Report, Appendix C, para. 120; *ibid.*, Appendix D, para. 115)

<sup>590</sup> The Dominican Republic states that when it applied standard unit root tests to Dr Chipty's models using tax dummies, "the results consistently show that the tax dummies were non-stationary." (Dominican Republic's appellant's submission, para. 342) See also paras. 6.329. 6.331. below.

merely constitutes relitigating the facts and expects the Appellate Body to second-guess the Panel's factual findings. We decline to do so.

6.189. Finally, regarding the argument that the Panel accepted Australia's models specified with tax dummy variables but disregarded the complainants' models specified with tax dummy variables, we recall that non-stationarity was merely one concern relied on by the Panel to weigh the credibility of the parties' evidence. In the Panel's smoking prevalence analysis, the Panel highlighted that Dr Chipty's tax dummy variables model avoided the problem of overfitting and was robust to alternative specifications.<sup>591</sup> Similarly, in its consumption analysis, the Panel highlighted that "part of Dr Chipty's model specification is based on the first specification proposed by the IPE but modified to account for strategic inventory management and the 2006 GHWs regulation."<sup>592</sup> The Panel also noted that Dr Chipty's results were robust to certain alternative specifications.<sup>593</sup> In our view, this explanation by the Panel shows why it accorded greater weight to Dr Chipty's consumption model specified with tax dummy variables than it did to the complainants' models specified with tax dummy variables.

6.190. We therefore consider that the appellants have not demonstrated that the Panel treated the parties' evidence inconsistently with respect to the Panel's reliance on the notion of non-stationarity to test the complainants' models.<sup>594</sup>

### Reweighting events in the data

6.191. In step 3 of its *smoking prevalence* analysis, the Panel noted the importance of "attempting to control for sample re-weighting events in the RMSS data", and stated that, in their initial reports, neither IPE nor Professor List controlled for this issue.<sup>595</sup> Furthermore, the Panel highlighted that IPE's and Professor List's proposed solutions to this issue "increase[d] the issue of multicollinearity, in particular when the price (or tax level) and trend variables are included in the specification".<sup>596</sup> The Panel emphasized how few of the explanatory variables were statistically significant (at 5%) when accounting for this sample reweighting issue and explained that "[s]ome results of IPE's modified trend analysis even suggest that the TPP measures have led to a statistically significant *increase* in cigar smoking prevalence", without being able to explain why this would be the case.<sup>597</sup> For these reasons, the Panel considered that "[o]verall, and based on the above, [it had] doubts about the reliability of the results obtained when the price variable, time trend and sample reweighting dummies [we]re included in the model specifications."<sup>598</sup>

6.192. The Dominican Republic argues that the Panel violated Article 11 of the DSU by: (i) treating the parties' evidence inconsistently with no explanation; and (ii) reasoning in an internally incoherent manner.<sup>599</sup> We address each set of arguments in turn.

<sup>591</sup> Panel Report, Appendix C, paras. 120-121.

<sup>592</sup> Panel Report, Appendix D, para. 115.

<sup>593</sup> Panel Report, Appendix D, para. 116.

<sup>594</sup> We note that, in step 2 of its cigarette consumption analysis in Appendix D to its Report, the Panel observed that, *inter alia*, Professor List's dynamic model based on Aztec data was affected by non-stationarity. (See Panel Report, Appendix D, para. 44) The Panel did *not*, however, rely on non-stationarity to find in favour of Australia in step 2 of its analysis. (See Panel Report, Appendix C, paras. 45-46)

<sup>595</sup> Panel Report, Appendix C, para. 108. We understand that this issue related to the fact that the RMSS data underwent periodic "reweighting" in order to ensure that it was representative of the Australian population, and in order to conduct a meaningful econometric analysis of that data, it is necessary to control for such reweighting events when analysing the data. The Dominican Republic elaborates that "[a]s demographic changes to the underlying population occur, data providers periodically *reweight* the surveyed sample, to ensure that it remains representative of the population it purports to represent." (Dominican Republic's appellant's submission, para. 431 (emphasis original)) We understand that this is uncontested by Australia. (See Australia's appellee's submission, para. 782)

<sup>596</sup> Panel Report, Appendix C, para. 108.

<sup>597</sup> Panel Report, Appendix C, para. 108. (fn omitted; emphasis added)

<sup>598</sup> Panel Report, Appendix C, para. 108.

<sup>599</sup> Dominican Republic's appellant's submission, paras. 446, 453, 457, and 461. In terms of inconsistent treatment, the Dominican Republic asserted that the Panel "treated 'the same class of quantitative evidence' inconsistently". (Dominican Republic's appellant's submission, para. 461 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 294)) We note that the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)*, in relevant part, found that "[t]he Panel's internally incoherent treatment of the same

6.193. The Dominican Republic raises several arguments in support of its view that the Panel treated the parties' evidence inconsistently. The Dominican Republic first submits that the Panel accepted Dr Chifty's two-stage model that controlled for reweighting, but rejected the robustness of the same model when presented by Professor List.<sup>600</sup> Second, the Dominican Republic asserts that the Panel relied on Dr Chifty's use of the two-stage model in a specification that did not even control for the declining trend in smoking<sup>601</sup>, even though the Panel elsewhere took the position that "an econometric model (when presented by the complainants) must not only *control* for the declining trend ..., but ... must also be able to *detect* that this trend has a statistically significant downward effect on smoking prevalence."<sup>602</sup> Third, the Dominican Republic submits that the Panel rejected the robustness of the Dominican Republic's models on the grounds that their approach to control for reweighting increased multicollinearity, even though the Panel accepted Australia's econometric models that controlled for reweighting despite the presence of multicollinearity.<sup>603</sup>

6.194. Australia submits that the Dominican Republic's claims "depend heavily upon the proposition that *Australia* was required to prove" that the decline in smoking prevalence and consumption was attributable to the TPP measures.<sup>604</sup> Australia submits that the Panel's role was to assess 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".<sup>605</sup> Australia therefore submits that the Panel was not required to find that Australia's experts had fixed the reweighting problem in the complainants' models, in order to question the validity of those models.<sup>606</sup> Australia further argues that the Dominican Republic's assertion that Dr Chifty relied on Professor List's results is incorrect. Rather, Australia explains, Dr Chifty merely demonstrated that "Professor List's *own results* showed a negative and statistically significant effect of the TPP measures when reported under the normal convention" for reporting statistically significant events.<sup>607</sup> Australia elaborates that the footnote to the Panel's statement that "Dr Chifty'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" reveals that the Panel was referring to "tables in which Dr Chifty summarised the results of the *complainants'* experts' models, *accepting* one or more of the methodological choices that Dr Chifty considered erroneous".<sup>608</sup> In Australia's view, the Panel did not endorse these methodological choices that it criticized elsewhere, but rather observed that, even accepting the results of those models, such models showed a negative and statistically significant effect of the TPP measures.<sup>609</sup>

6.195. We note that the first and second alleged inconsistencies identified by the Dominican Republic<sup>610</sup> relate specifically to the Panel's purported reliance on Dr Chifty's specification of Professor List's two-stage model, in the context of its smoking prevalence analysis. As stated above, the Panel did not give any weight to Dr Chifty's results based on her examination of the two-stage model.<sup>611</sup> Moreover, even if the Panel did give weight to Australia's price-specified model, it plainly considered such model to be of substantially inferior value to Australia's model specified with tax dummy variables.<sup>612</sup> We therefore do not consider that the Panel treated the parties' evidence inconsistently in assessing the price-specified models of the complainants and Australia.

6.196. As to the third inconsistency alleged by the Dominican Republic – that the Panel rejected the Dominican Republic's models on the basis that controlling for reweighting increased multicollinearity, but accepted Australia's models that suffered from exactly the same problem – we recall that the

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class of quantitative evidence thus vitiates the conclusion it drew based on the financial data submitted by the parties." (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 294)

<sup>600</sup> Dominican Republic's appellant's submission, paras. 441-445 and 449-453 (referring to Panel Report, Appendix C, paras. 108 and 121, and fn 143 to para. 121; Chifty Second Rebuttal Report (Panel Exhibit AUS-591), p. D.2).

<sup>601</sup> Dominican Republic's appellant's submission, para. 454.

<sup>602</sup> Dominican Republic's appellant's submission, para. 455. (emphasis original)

<sup>603</sup> Dominican Republic's appellant's submission, para. 461.

<sup>604</sup> Australia's appellee's submission, para. 789. (emphasis original)

<sup>605</sup> Australia's appellee's submission, para. 789.

<sup>606</sup> Australia's appellee's submission, para. 790.

<sup>607</sup> Australia's appellee's submission, para. 792. (emphasis original)

<sup>608</sup> Australia's appellee's submission, para. 793 (quoting Panel Report, Appendix C, para. 121). (emphasis original)

<sup>609</sup> Australia's appellee's submission, para. 794.

<sup>610</sup> See para. 6.193. above.

<sup>611</sup> See paras. 6.163. 6.166. above.

<sup>612</sup> See para. 6.166. above.

Panel did not "accept" or "reject" the various models that were put to it on the basis of any one factor. Rather, the Panel assessed the relative merits and credibility of the parties' competing evidence. We therefore do not consider that the Panel rejected the complainants' models on this basis; rather, the Panel indicated a number of reasons to consider that Australia's evidence was more credible than the complainants' evidence. The fact that Dr Chipty's primary model, specified with tax dummy variables, was robust to alternative specifications, notwithstanding that those other specifications may have suffered from many of the same issues that affected the complainants' models, appears to be secondary to the fact that her primary model was more credible and convincing than the complainants' models. We also note that there is a difference between a specification that increases the issue of multicollinearity in a particular model, and the presence of multicollinearity in a particularly specified model. We therefore do not consider that the Dominican Republic has demonstrated that the Panel treated the parties' evidence inconsistently with respect to sample reweighting.

6.197. We next address the Dominican Republic's arguments that the Panel's findings were internally incoherent. In this respect, the Dominican Republic argues that "the data provider identified four instances of reweighting in the RMSS sample ..., each of which could affect the model's estimate of the impact of the TPP measures on smoking prevalence."<sup>613</sup> The Dominican Republic submits that, unlike Dr Chipty, who controlled only for three of the four reweighting events, the Dominican Republic's experts controlled for all four reweighting events.<sup>614</sup> On the Panel's finding that "Australia's evidence was 'robust' to controlling for reweighting events,"<sup>615</sup> the Dominican Republic asserts that the Panel "ignored that Dr Chipty's models did not 'attempt[...]' to control' for all four reweighting events".<sup>616</sup> The Dominican Republic submits that this is in conflict with the Panel's recognition of "the importance of attempting to control for sample re-weighting events in the RMSS data".<sup>617</sup> The Dominican Republic further submits that "the Panel's error seems to be consequential in particular for the Panel's cigar prevalence finding" because "if the control for the fourth reweighting event ... is added to Dr Chipty's cigar prevalence model, the model no longer finds any impact of the TPP measures on cigar prevalence."<sup>618</sup>

6.198. Australia submits that, for the same reasons that the Panel did not treat the parties' evidence inconsistently, the Panel's reasoning was not internally incoherent. Australia submits, in this respect, that the Panel was simply not required to find that Dr Chipty had controlled for all RMSS reweighting events in order to take into account her sensitivity analysis, which was based on Professor List's models. Australia also states that Dr Chipty's sensitivity analysis "controlled for only three reweighting events due to the sample period [Professor List] chose".<sup>619</sup>

6.199. In our view, the Dominican Republic's arguments are based on a misunderstanding regarding the Panel's findings with respect to the importance of accounting for reweighting events in the RMSS data. We recall that the Panel did indeed "recognize the importance of attempting to control for sample re-weighting events in the RMSS data".<sup>620</sup> This, however, is different to a finding by the Panel that the absence of any attempt to control for such re-weighting events would render a model completely useless or unreliable. Furthermore, when examining how the complainants' experts sought to control for such reweighting events, the Panel highlighted that the inclusion of dummy variables increased the issue of multicollinearity, "in particular when the price (or tax level) and trend variables are included in the specification", and further noted that the problem was "accentuated when a fully flexible reweighting correction [was] adopted".<sup>621</sup> The Panel highlighted other concerns regarding the complainants' experts' attempts to control for reweighting, including the lack of statistical significance of explanatory variables, and the fact that at least one model showed a statistically significant *increase* in cigar smoking prevalence caused by the

<sup>613</sup> Dominican Republic's appellant's submission, para. 463.

<sup>614</sup> Dominican Republic's appellant's submission, paras. 463-464.

<sup>615</sup> Dominican Republic's appellant's submission, para. 465.

<sup>616</sup> Dominican Republic's appellant's submission, para. 465 (quoting Panel Report, Appendix C, para. 108).

<sup>617</sup> Dominican Republic's appellant's submission, para. 464 (referring to Panel Report, Appendix C, para. 108).

<sup>618</sup> Dominican Republic's appellant's submission, para. 467.

<sup>619</sup> Australia's appellee's submission, para. 795.

<sup>620</sup> Panel Report, Appendix C, para. 108.

<sup>621</sup> Panel Report, Appendix C, para. 108.

TPP measures.<sup>622</sup> The Panel ultimately concluded that, overall, it had "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>623</sup> We therefore understand that, although the Panel recognized the importance of attempting to control for sample reweighting events, IPE and Professor List were unable to account for such reweighting events without raising other concerns about the reliability of their results. This was one of the reasons that the Panel had doubts regarding their models.

6.200. Turning to Australia's evidence, the Panel did not mention sample reweighting at all in the context of noting that Dr Chipty had addressed "a number of [its] concerns" with the complainants' evidence.<sup>624</sup> In other words, the Panel did not consider that Dr Chipty had resolved the problems related to either accounting for the reweighting events or not accounting for those reweighting events.<sup>625</sup> The Panel did note, however, that Dr Chipty's model was "robust to *alternative specifications*", including "sample reweighting dummies".<sup>626</sup> This analysis by Dr Chipty appears to have been directly based on Professor List's own models in which he controlled for three sample reweighting corrections (in 2009, 2010, and 2014) by adding dummy variables.<sup>627</sup> It was on the basis of these specifications that Dr Chipty ran her own analysis, albeit with a longer sample period, stretching back to 2001 (instead of 2006). We note, in this respect, that it was Professor List who identified that the RMSS data had been subject to such population corrections in the first place, and that when he identified these corrections, he indeed referred to only three such corrections, in 2009, 2010, and 2014.<sup>628</sup> Subsequently, in IPE's final submission, after which time the parties in principle no longer had the opportunity to submit additional evidence<sup>629</sup>, IPE indicated that RMSS had made a reweighting correction in 2004.<sup>630</sup> Thus, by the time that there was any evidence on the record indicating that there had been a reweighting correction in 2004, the opportunity for Dr Chipty to re-specify Professor List's models in order to account for the 2004 correction had already passed.

6.201. The question, therefore, is whether the Panel erred by taking into account Dr Chipty's alternative specification as support for its conclusion that Australia's models were more reliable than the complainants' models, notwithstanding that the Panel had recognized the importance of accounting for reweighting events and Dr Chipty's alternative specification only accounted for three of the four reweighting events for which there was evidence on the Panel record. We note that, although the evidence of the fourth reweighting event was only provided at the final hour, the Panel could have given Dr Chipty and Professor List the opportunity to resubmit their models in order to account for the fourth reweighting event. Notwithstanding the Panel's failure to do so, we do not consider that the Panel's decision to take into account Dr Chipty's alternative specification is *per se* incoherent. The Panel's findings indicate that the Panel had reservations about controlling for reweighting, regardless of the number of reweighting events taken into account. Thus, the Panel did not consider the parties' models, in which they accounted for reweighting events, to be dispositive of anything. Furthermore, the Panel did not fault Professor List's evidence on the grounds that it

<sup>622</sup> Panel Report, Appendix C, para. 108.

<sup>623</sup> Panel Report, Appendix C, para. 108.

<sup>624</sup> Panel Report, Appendix C, para. 120.

<sup>625</sup> We note that the Panel's silence on this issue stands in contrast to Dr Chipty's own arguments that her one-stage microeconomic model controlled for demographics, meaning that there was "no concern about the reweighting of RMSS data because the model adequately control[ed] for changes in the population composition". (Chipty Third Rebuttal Report (Panel Exhibit AUS-605), fn 155 to para. 70(c)(ii)) Dr Chipty had previously stated that, "[w]ith the right microeconomic model that controls for demographics (like the one-stage microeconomic model I have presented), there is no need to worry about the reweighting because the model adequately controls for changes in the population composition." (Chipty Second Rebuttal Report (Panel Exhibit AUS-591), para. 37) Dr Chipty elaborated that all of her models in her final submission to the Panel controlled for a "set of sociodemographic characteristics". (Chipty Third Rebuttal Report (Panel Exhibit AUS-605), para. 71)

<sup>626</sup> Panel Report, Appendix C, para. 121 (referring to Chipty Third Rebuttal Report (Panel Exhibit AUS-605), p. 22; Chipty Second Rebuttal Report (Panel Exhibit AUS-591), p. D2). (emphasis added)

<sup>627</sup> Chipty Second Rebuttal Report (Panel Exhibit AUS-591), para. 34. See also J. List, A Synthesis of the Evidence on Australia's Plain Packaging Policy (28 October 2015) (List Second Supplemental Report) (Panel Exhibit DOM/IDN-5), para. 141; Panel Report, Appendix C, para. 108 (referring to List Second Supplemental Report (Panel Exhibit DOM/IDN-5), Table 8 on p. 43; List Third Supplemental Report (Panel Exhibit DOM/IDN-7), Table 13 on p. 32).

<sup>628</sup> List Second Supplemental Report (Panel Exhibit DOM/IDN-5), Appendix B.

<sup>629</sup> Notwithstanding that the Panel made a special exception regarding the Dominican Republic's communication to the Panel of 17 February 2016. (See paras. 6.136. -6.139. above)

<sup>630</sup> See IPE Summary Report (Panel Exhibit DOM-379), fn 53 to para. 53.



failed to account for all reweighting events. The Panel therefore showed no indication that a failure to account for one reweighting event was a fatal error in assessing the merits of a given model. Finally, the Panel merely relied on Dr Chipty's alternative specification as a supporting reason to take into account her results. Since the failure to account for a reweighting event was not fatal, we see no error or incoherence in the Panel considering that Dr Chipty's alternative specification supported her results.

6.202. For these reasons, we consider that the appellants have not demonstrated that the Panel erred in assessing the parties' efforts to account for reweighting events in the RMSS data.

### **The procedure for calculating standard error**

6.203. In step 3 of its *smoking prevalence* analysis, the Panel addressed the issue of how the parties' experts calculated standard error for purposes of assessing the statistical significance of the different variables in their models. The Panel explained that "a standard error is required to determine the estimated coefficient's level of statistical significance", and that "statistical significance is essential because, as well as being the variable's estimated coefficient, it is also important to determine whether the coefficient's variable is statistically different from zero."<sup>631</sup> The Panel highlighted "the importance of computing standard errors that are robust to heteroscedasticity and autocorrelation".<sup>632</sup> The Panel elaborated that, the parties' "treatment of standard errors evolved over the course of the proceedings."<sup>633</sup> According to the Panel:

Initially, Professor List and IPE chose to apply the STATA software command `ivreg2` to calculate standard errors that are robust to heteroscedasticity and serial correlation using the automatic bandwidth selection procedure by Newey and West (1994). Subsequently, Professor List, and later on IPE, applied an alternative way of calculating standard errors, that, according to Professor List, is adjusted to reflect more accurately the original suggestion by Newey and West (1994). Technically speaking, the disagreement between Professor List (as well as IPE and Professor Klick) and Dr Chipty concern[ed] the procedure to correct for autocorrelation, in particular the choice of the maximum amount of time, defined as the maximum lag, that the data can be correlated over time. Professor List propose[d] to set a smaller parameter value, resulting also in a smaller maximum lag than the one specified in the `ivreg2` command. A careful review of the evidence and discussions shows that the choice of the maximum lag is not well established in the statistics and econometric literature, as pointed out ... in an email exchange with STATA developers. As a result, it is unclear whether the results associated with Professor List's procedure would have changed for a range of parameter values, taking into consideration the fact that the maximum lag should be able to take into account all lags until the serial correlation in the data vanishes.<sup>634</sup>

6.204. The Panel also observed that, in the email exchange between the parties and the STATA software developers, the developers explained that "the automatic choice of the maximum

<sup>631</sup> Panel Report, Appendix C, para. 109.

<sup>632</sup> Panel Report, Appendix C, para. 109.

<sup>633</sup> Panel Report, Appendix C, para. 110.

<sup>634</sup> Panel Report, Appendix C, para. 110 (referring to D. Afshartous, M. Hagedorn, A. Kaul, and M. Wolf, Empirical Assessment of Australia's Plain Packaging Regime, Institute for Policy Evaluation (7 October 2014) (IPE Report) (Panel Exhibit DOM-100); D. Afshartous, M. Hagedorn, A. Kaul, and M. Wolf, Updated Empirical Assessment of Australia's Plain Packaging Regime, Institute for Policy Evaluation (14 September 2015) (IPE Updated Report) (Panel Exhibit DOM-303); J. List, A Consideration of the Empirical Evidence on the Effects of Australia's Tobacco Plain Packaging Legislation (1 June 2015) (List Report) (Panel Exhibit DOM/IDN-1); J. List, A Further Consideration of the Empirical Evidence on the Effects of Australia's Tobacco Plain Packaging Legislation (16 September 2015) (List Rebuttal Report) (Panel Exhibit DOM/IDN-3); D. Afshartous, M. Hagedorn, A. Kaul, and M. Wolf, Updated Empirical Assessment of Australia's Plain Packaging Regime, Institute for Policy Evaluation (27 October 2015) (IPE Second Updated Report) (Panel Exhibit DOM-361); IPE Third Updated Report (Panel Exhibit DOM-375); IPE Summary Report (Panel Exhibit DOM-379); List Second Supplemental Report (Panel Exhibit DOM/IDN-5); List Third Supplemental Report (Panel Exhibit DOM/IDN-7); J. List, Concluding Summary on Australia's Plain Packaging Policy (2 February 2016) (List Summary Report) (Panel Exhibit DOM/IDN-9); IPE Summary Report (Panel Exhibit DOM-379), p. 70; Chipty Second Rebuttal Report (Panel Exhibit AUS-591), pp. B1-B2). (fns omitted)

lag in the command ivreg2 is in line with the criteria necessary for asymptotic optimality."<sup>635</sup> The Panel further noted that Professor List had "present[ed] the results of simulations to compare the frequency of so-called false positives using [his] procedure and the ivreg2's automatic selection procedure".<sup>636</sup> The Panel considered that, although "Professor List conclude[d] that the STATA ivreg2's automatic selection procedure leads to a wrong finding of a statistically significant result 16% of the time, instead of 5%", his results were based on a sample size of 111 observations (from July 2006 to September 2015), while Dr Chipty considered a larger sample period of 177 observations (from January 2001 to September 2015).<sup>637</sup> The Panel considered that it was "unclear to what extent Professor List's results would change if the sample size increases, taking into account the fact that according to the STATA developers the formulae used in ivreg2 meet the criteria necessary for asymptotic optimality".<sup>638</sup>

6.205. In assessing Australia's smoking prevalence and consumption evidence, the Panel did not refer to Dr Chipty's use of the STATA ivreg2 formula as a reason to consider her results more reliable than those of the complainants' experts.<sup>639</sup> The Panel did, however, note that, in Dr Chipty's smoking prevalence models, "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."<sup>640</sup> Similarly, the Panel noted that, in Dr Chipty's cigarette consumption models, "the negative and statistically significant impact of the TPP measures on wholesale cigarette sales is robust to alternative specifications, including ... Professor List's procedure to compute standard errors."<sup>641</sup>

6.206. Honduras contends that "the complainants' experts expressed concern over the ... use of the erroneous IVREG formula", and that the Panel did not "explain how it deal[t] with these concerns".<sup>642</sup> Honduras argues that the Panel completely ignored Professor Klick's argument that "there is no support for the approach used by Dr Chipty and that the very literature she relies on makes clear that her use of an outlier approach was inappropriate."<sup>643</sup> Honduras notes that "[t]he Panel does not even mention this exhibit in this context."<sup>644</sup> Honduras also argues that the Panel misrepresented the evidence. According to Honduras, "Professor List responded to a criticism [by] Dr Chipty about an alleged error in the STATA program used and when Professor List started to examine this allegation, he found that it was Dr Chipty that had simply taken something off the internet that was wrong and that he stood by the results in his September and June reports."<sup>645</sup> According to Honduras, "[t]he Panel misrepresents this entire discussion as one of technical experts not being able to agree about a technical issue that the community in general is not in agreement about."<sup>646</sup> Honduras submits that, in reality, Dr Chipty "made a mistake in taking a command off the internet" and "Professor List exposed this error and double-checked his original results by going back to the authors of the method followed by all experts which confirmed his analysis."<sup>647</sup> Honduras considers that the Panel's findings were insufficiently reasoned and adequate; that the Panel mischaracterized

<sup>635</sup> Panel Report, Appendix C, fn 131 to para. 110 (referring to IPE Summary Report (Panel Exhibit DOM-379), p. 70; Chipty Second Rebuttal Report (Panel Exhibit AUS-591), pp. B1-B2).

<sup>636</sup> Panel Report, Appendix C, fn 132 to para. 110 (referring to List Summary Report (Panel Exhibit DOM/IDN-9), paras. 95-98).

<sup>637</sup> Panel Report, Appendix C, fn 132 to para. 110.

<sup>638</sup> Panel Report, Appendix C, fn 132 to para. 110.

<sup>639</sup> Specifically, we note that the Panel considered that Dr Chipty resolved a number of the concerns that it had identified with the complainants' models. The Panel proceeded to identify those particular concerns. The Panel did not mention the manner in which Dr Chipty calculated standard error as resolving any concerns. (See Panel Report, Appendix C, para. 120; *ibid.*, Appendix D, para. 115)

<sup>640</sup> Panel Report, Appendix C, para. 121.

<sup>641</sup> Panel Report, Appendix D, para. 116.

<sup>642</sup> Honduras' appellant's submission, para. 884.

<sup>643</sup> Honduras' appellant's submission, para. 944 (referring to J. Klick, Fourth Supplemental Rebuttal Report – Comments on Additional Arguments Raised by Dr Chipty (3 February 2016) (Klick Fourth Supplemental Report) (Panel Exhibit HND-169), para. 18).

<sup>644</sup> Honduras' appellant's submission, para. 945.

<sup>645</sup> Honduras' appellant's submission, para. 943 (referring to List Second Supplemental Report (Panel Exhibit DOM/IDN-5, paras. 98-102)).

<sup>646</sup> Honduras' appellant's submission, para. 943.

<sup>647</sup> Honduras' appellant's submission, para. 943.

and misstated the facts on the record and made findings that lacked a basis in the Panel Record; and that the Panel disregarded, distorted, and misrepresented certain evidence.<sup>648</sup>

6.207. Australia submits that the Panel's description of the events surrounding how the parties' experts calculated standard error is accurate.<sup>649</sup> Australia argues that, based on its review of the evidence, 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'".<sup>650</sup> Australia further submits that the Panel made similar findings with respect to the complainants' consumption evidence.<sup>651</sup> In Australia's view, "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."<sup>652</sup>

6.208. In addressing these issues, we note at the outset that the Panel Report does not express any firm opinion on the correct procedure for calculating standard error. Rather, the Panel expressed its doubts regarding both Professor List's procedure for calculating standard error<sup>653</sup> and his argument that Dr Chipty's procedure (using the STATA *ivreg2* command) was flawed.<sup>654</sup> Nevertheless, our review of the Panel's findings shows that the Panel appears to have given both Professor List's procedure and the *ivreg2* procedure roughly equivalent weight when comparing the credibility of the complainants' evidence to Australia's evidence. This follows because the Panel did not identify Dr Chipty's procedure for calculating standard error as a reason to consider Australia's evidence more credible than the complainants' evidence.<sup>655</sup> To the contrary, the Panel took into account the fact that Dr Chipty's models continued to show a negative statistically significant impact of the TPP measures on smoking prevalence and consumption, even when using Professor List's procedure to compute standard error.<sup>656</sup> We therefore understand that Honduras' arguments on

<sup>648</sup> Honduras' appellant's submission, paras. 942-946.

<sup>649</sup> According to Australia, IPE had originally indicated the importance of accounting for heteroscedasticity and autocorrelation in calculating standard error, and IPE had relied on a command in the STATA computer programme known as "*ivreg2*", which "automatically accounts for autocorrelation but requires an additional command to account for heteroscedasticity". (Australia's appellee's submission, para. 663) Australia submits that both IPE and Professor List failed to account for heteroscedasticity, with the consequence that their standard errors "were significantly overstated". (Ibid. (referring to Chipty Second Rebuttal Report (Panel Exhibit AUS-591), fn 24)) Australia argues that, after Professor List accounted for the problem of heteroscedasticity in calculating standard error, he claimed to have discovered an error in the *ivreg2* command that affected how it accounted for autocorrelation. (Ibid., para. 664) Australia considers that "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." (Ibid., para. 665 (emphasis original)) According to Australia, Dr Chipty showed that all of IPE and Professor List's models showed statistically significant declines in prevalence and consumption when relying on the *ivreg2* command, and further showed 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." (Ibid.)

<sup>650</sup> Australia's appellee's submission, para. 667 (quoting Panel Report, Appendix C, para. 111)

<sup>651</sup> Australia's appellee's submission, para. 668 (referring to Panel Report, Appendix D, para. 107 and fn 141 to para. 108).

<sup>652</sup> Australia's appellee's submission, para. 669.

<sup>653</sup> The Panel explained that a "careful review of the evidence and discussions shows that the choice of the maximum lag is not well established in the statistics and econometric literature, as pointed out ... in an email exchange with STATA developers", and considered that, as a result, it was "unclear whether the results associated with Professor List's procedure would have changed for a range of parameter values, taking into consideration the fact that the maximum lag should be able to take into account all lags until the serial correlation in the data vanishes." (Panel Report, Appendix C, para. 110 (fns omitted))

<sup>654</sup> The Panel noted that, although "Professor List conclude[d] that the STATA *ivreg2*'s automatic selection procedure leads to a wrong finding of a statistically significant result 16% of the time, instead of 5%", his results were based on sample size of 111 observations (from July 2006 to September 2015), while Dr Chipty considered a larger sample period of 177 observations (from January 2001 to September 2015). (Panel Report, Appendix C, fn 132 to para. 110) The Panel considered that it was "unclear to what extent Professor List's results would change if the sample size increases, taking into account the fact that according to the STATA developers the formulae used in *ivreg2* meet the criteria necessary for asymptotic optimality". (Ibid.)

<sup>655</sup> Panel Report, Appendix C, paras. 120-121; *ibid.*, Appendix D, paras. 115-116.

<sup>656</sup> Panel Report, Appendix C, para. 121; *ibid.*, Appendix D, para. 116. We note that, with respect to Dr Chipty's *smoking prevalence* models, the impact of the TPP measures on overall smoking prevalence

appeal are essentially challenging the merits of the Panel's conclusion that Dr Chipty's procedure for calculating standard error was not inferior to Professor List's methodology.

6.209. We first address Honduras' argument that the Panel lacked a reasoned and adequate explanation for its findings.<sup>657</sup> In our view, the Panel fully explained its reasons for both questioning Professor List's procedure and for considering the ivreg2 procedure to be relatively reliable.<sup>658</sup> We do not see how Honduras' disagreement with either the merits of the Panel's reasoning or the Panel's weighing and balancing of the evidence implies that the Panel failed to make an objective assessment of the matter before it. In our view, it is outside the scope of our mandate to second-guess the Panel's appreciation of the evidence.

6.210. Turning to Honduras' argument that the Panel disregarded certain evidence, we understand that Honduras has identified a sentence from an exhibit submitted to the Panel, where Professor Klick stated that, "[g]iven that the literature on this issue (including the very paper cited by Dr Chipty) indicates that the normal distribution is inappropriate, Dr Chipty's p values are incorrect and her claims of statistical significance are likewise wrong in any case."<sup>659</sup> We agree with Honduras that the Panel does not appear to have addressed this argument. We note, however, that a panel's summary of a party's evidence does not have to be comprehensive and, indeed, a panel could not be expected to reflect each and every aspect of every argument set forth in every exhibit submitted by every party in order to comply with the obligation to make an objective assessment of the matter before it. In any event, we do not consider that Honduras has demonstrated that the Panel's failure to explicitly address Professor Klick's argument in the Panel Report constitutes a material error. We highlight, in particular, that the Panel identified its own reasons for doubting Professor List's methodology, yet ultimately appears to have given equal weight to Professor List's methodology as it does to the ivreg2 methodology.

6.211. Regarding Honduras' argument that the Panel misrepresented the evidence of the parties, we understand that Honduras considers that "the treatment of standard errors did not just 'evolve over the course of the proceedings'" and that "[t]he Panel misrepresents this entire discussion as one of technical experts not being able to agree about a technical issue that the community in general is not in agreement about."<sup>660</sup> According to Honduras, "Dr Chipty was looking for a way to change the results of Professor List and she made a mistake in taking a command off the internet in order to do so. Professor List exposed this error and double-checked his original results by going back to the authors of the method followed by all experts which confirmed his analysis."<sup>661</sup>

6.212. We note that, according to the Panel:

Initially, Professor List and IPE chose to apply the STATA software command ivreg2 to calculate standard errors that are robust to heteroscedasticity and serial correlation using the automatic bandwidth selection procedure by Newey and West (1994). Subsequently, Professor List, and later on IPE, applied an alternative way of calculating

remained negative and statistically significant in most specifications when using Professor List's procedure for calculating standard error. (Ibid., Appendix C, para. 121)

<sup>657</sup> In this respect, Honduras argues that "Professor List showed that [Dr Chipty's] approach was incorrect as it led to many more false positives than did his approach." (Honduras' appellant's submission, para. 946) Honduras recognizes that the "the Panel rejects the evidence submitted by Professor List that shows the high number of false positive[s] associated with the method used by Dr Chipty based on a sample of 111 observations because '[i]t is... unclear to what extent Professor List's results would change if the sample size increases' noting that Dr Chipty relies on 177 observations." (Ibid., quoting Panel Report, Appendix C, fn 132 to para. 110) Honduras submits that that "is hardly a reasoned and adequate explanation for concluding this debate in favour of Australia's expert", and highlights that "Dr Chipty did not show that if you apply the same test to her 177 observations, the false positives would be less", which demonstrates, in Honduras' view, that the Panel applied a "double standard of proof". (Ibid.)

<sup>658</sup> See paras. 6.203. 6.204. above.

<sup>659</sup> Honduras' appellant's submission, para. 944 (quoting Klick Fourth Supplemental Report (Panel Exhibit HND-169), para. 18).

<sup>660</sup> Honduras' appellant's submission, para. 943 (quoting Panel Report, Appendix C, para. 110).

<sup>661</sup> Honduras' appellant's submission, para. 943.

standard errors, that, according to Professor List, is adjusted to reflect more accurately the original suggestion by Newey and West (1994).<sup>662</sup>

6.213. We proceed by reviewing whether this statement by the Panel misrepresents the evidence. We note that the Panel referred to both Professor List and IPE. With respect to IPE, we note that IPE's first report to the Panel states that it employed "heteroskedasticity- and autocorrelation-consistent (HAC) standard errors ... implemented in the STATA command 'ivreg2'".<sup>663</sup> IPE's second report similarly states that it used "autocorrelation-robust standard errors", and in the case of heteroskedasticity, "heteroskedasticity-robust standard errors", and that the procedure was "implemented in the STATA command 'ivreg2', version 04.1.08".<sup>664</sup> IPE therefore clearly relied on *ivreg2* in its first and second reports. It is uncontested that, subsequently, IPE changed from relying on *ivreg2* to Professor List's approach to calculating standard error. We therefore understand that the Panel's characterization of IPE's methodology for calculating standard error is correct.

6.214. Turning to Professor List's procedure for calculating standard error, we note that, in 2015, Professor List submitted four reports to the Panel, in June, September, October, and December. In his fourth report, Professor List addressed Dr Chipty's concerns regarding his calculations for standard error. In this respect, Professor List explained that, "in my June and September Reports, I mirrored the statistical procedures conducted by IPE, which sought to report standard errors that were robust to two sources of potential bias: heteroskedasticity and autocorrelation."<sup>665</sup> He further stated that, upon revisiting his previous calculations of standard error he "decided to move away from the open source add-on ('ivreg2') that Chipty uses to correct our standard errors in the Stata software package".<sup>666</sup> We further note that Dr Chipty asserted that Professor List initially used *ivreg2*.<sup>667</sup> Thus, there was ample evidence before the Panel indicating that Professor List initially used *ivreg2* before implementing a new procedure to calculate standard error. We therefore understand that the Panel correctly characterized the "evolution" of both the Dominican Republic's and Honduras' experts' evidence, and that it is Honduras who now, on appeal, appears to mischaracterize that evolution.

6.215. Before concluding, we briefly note Honduras' assertion that the Panel's statement that "there is uncertainty about the appropriate method to use and ... that 'according to the STATA developers the formulae used in *ivreg2* meet the criteria necessary for asymptotic optimality'" is a false reflection of the email exchange between Dr Chipty's team and the STATA developers.<sup>668</sup> Honduras asserts that "[t]he STATA developers simply responded to the specific question about lag times that Dr Chipty posed and replied that there is no golden rule but that one needs to adapt this where necessary. The STATA developers did not say that the 20 lag time that Dr Chipty used was accurate; they did not say that *Ivrge2* [*sic*] was appropriate and they in fact insisted on the need to check this issue on a case by case basis."<sup>669</sup>

6.216. We note that this argument concerns the Panel's finding that "according to the STATA developers the formulae used in *ivreg2* meet the criteria necessary for asymptotic optimality."<sup>670</sup> We observe that, subsequent to Dr Chipty's communications with the

<sup>662</sup> Panel Report, Appendix C, para. 110 (referring to IPE Report (Panel Exhibit DOM-100); IPE Updated Report (Panel Exhibit DOM-303); List Report (Panel Exhibit DOM/IDN-1); List Rebuttal Report (Panel Exhibit DOM/IDN-3); IPE Second Updated Report (Panel Exhibit DOM-361); IPE Third Updated Report (Panel Exhibit DOM-375); IPE Summary Report (Panel Exhibit DOM-379); List Second Supplemental Report (Panel Exhibit DOM/IDN-5); List Third Supplemental Report (Panel Exhibit DOM/IDN-7); List Summary Report (Panel Exhibit DOM/IDN-9)). (fns omitted)

<sup>663</sup> IPE Report (Panel Exhibit DOM-100), fn 83 on p. 70.

<sup>664</sup> IPE Updated Report (Panel Exhibit DOM-303), fn 52 to para. 65.

<sup>665</sup> List Third Supplemental Report (Panel Exhibit DOM/IDN-7), para. 44.

<sup>666</sup> List Third Supplemental Report (Panel Exhibit DOM/IDN-7), para. 46.

<sup>667</sup> According to Dr Chipty, "Professor List himself used the same Stata code, in both his June 2015 and September 2015 reports." (Chipty Second Rebuttal Report (Panel Exhibit AUS-591), para. 13) (emphasis omitted)

<sup>668</sup> Honduras' appellant's submission, para. 946 (quoting Panel Report, Appendix C, fn 132 to para. 110).

<sup>669</sup> Honduras' appellant's submission, para. 946.

<sup>670</sup> Panel Report, Appendix C, fn 132 to para. 110 (referring to List Summary Report (Panel Exhibit DOM/IDN-9), paras. 95-98).

STATA developers<sup>671</sup>, IPE communicated with the developers.<sup>672</sup> In their response to IPE's communication, the STATA developers stated that "the choice of this parameter is not well-established in the literature, and the formulae we use meet the criteria necessary for asymptotic optimality."<sup>673</sup> In our view, Honduras seems to have simply based its argument on appeal on Dr Chifty's correspondence with the STATA developers and completely ignored IPE's correspondence with the developers. The Panel plainly based its finding on the evidence before it.

6.217. We therefore consider that Honduras has not demonstrated that the Panel erred with respect to the Panel's assessment of the parties' disagreement regarding the procedure to calculate standard error.

#### **Scollo et al. 2015a**

6.218. In step 3 of its *cigarette consumption* analysis, in summarizing the "[d]atasets and related studies" provided by the parties, the Panel noted that "Scollo et al. 2015a used the NTPPTS data to assess changes in reported price paid and changes in reported numbers of cigarettes consumed following the introduction of TPP and enlarged GHWs in the period up to and after the large increase in excise duty on 1 December 2013."<sup>674</sup> The Panel explained that, "[o]verall, Scollo et al. 2015a conclude, among other[] things, that the introduction of TPP and enlarged GHWs [was] not associated with a change in consumption among daily, regular or current smokers or among smokers of brands in any market segment during the first year of implementation of the TPP measures."<sup>675</sup>

6.219. Honduras argues that, in step 3 of the Panel's cigarette consumption analysis, the Panel did not attempt "to square Dr Chifty's conclusion with all of the evidence that points in the opposite direction, including the peer-reviewed article by Dr Scollo which was published in *Tobacco Control*, despite its stated 'totality of evidence' approach".<sup>676</sup> Honduras argues that the Panel zeroed the contrary evidence and "fail[ed] to provide a reasoned and adequate conclusion of how its 'overall conclusions' fit with the rest of the facts on the record including but not limited to this important study by Dr Scollo".<sup>677</sup>

6.220. Australia submits that a panel 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>678</sup> Australia elaborates that "a panel does not 'zero' or 'disregard' or 'ignore' evidence merely because it ultimately determines that evidence should be weighed less heavily or rejected."<sup>679</sup>

6.221. We note that, in step 3 of its cigarette consumption analysis, the Panel did not make any specific observations regarding the independent merits of the Scollo et al. 2015 article. We further note, however, that the Scollo study was based on NTPPTS data, whereas Dr Chifty's results relied on IMS/EOS data.<sup>680</sup> In this respect, the Panel explicitly indicated that it "agree[d] with Australia that the IMS/EOS data is the most suitable available market data submitted by the parties".<sup>681</sup> The Panel stated that "the other market data sources ... suffer from a number of drawbacks in comparison with the IMS/EOS data", and elaborated on why the other market data sources were inferior to the

<sup>671</sup> See Chifty Second Rebuttal Report (Panel Exhibit AUS-591), figures B.1 and B.2 on pp. B.1 and B.2.

<sup>672</sup> IPE Summary Report (Panel Exhibit DOM-379), Figure 6.1-3 on p. 70.

<sup>673</sup> IPE Summary Report (Panel Exhibit DOM-379), Figure 6.1-3 on p. 70.

<sup>674</sup> Panel Report, Appendix D, para. 89 (referring to M. Scollo, M. Zacher, K. Coomber, M. Bayly, and M. Wakefield, "Changes in Use of Types of Tobacco Products by Pack Sizes and Price Segments, Prices Paid and Consumption Following the Introduction of Plain Packaging in Australia", *Tobacco Control*, Vol. 24 (2015) (Scollo et al. 2015a) (Panel Exhibits HND-133, DOM-237, DOM-311)).

<sup>675</sup> Panel Report, Appendix D, para. 90. The Panel also observed that "the authors find that reported consumption among regular smokers declined significantly following the December 2013 tax increase." (Ibid.)

<sup>676</sup> Honduras' appellant's submission, para. 903.

<sup>677</sup> Honduras' appellant's submission, para. 903.

<sup>678</sup> Australia's appellee's submission, para. 438 (referring to Appellate Body Reports, *China – Rare Earths*, para. 5.193; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 435).

<sup>679</sup> Australia's appellee's submission, para. 438 (quoting Honduras' appellant's submission, paras. 728, 775, 793, 813, 885, 903, and 1034; Dominican Republic's appellant's submission, paras. 746, 874, 906, and 934; referring to Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 202; *China – Rare Earths*, para. 5.197; *US – Clove Cigarettes*, para. 212).

<sup>680</sup> Panel Report, Appendix D, paras. 60 and 89.

<sup>681</sup> Panel Report, Appendix D, para. 102.

IMS/EOS data.<sup>682</sup> We therefore understand that the Panel's findings do address the relative merits of the Scollo article vis-à-vis Dr Chipty's econometric results, and consequently Honduras has not demonstrated that the Panel disregarded that evidence or failed to explain why it considered Dr Chipty's econometric results to be more credible than those of Scollo et al. 2015a.

### **Brevity of the Panel's explanation for its reliance on Australia's evidence**

6.222. Honduras submits that "[t]wo conclusory and short paragraphs to 'explain' a determination that closes a debate that continued over more than a year and involved about 15 expert reports and rebuttal reports [are] not adequate under any standard."<sup>683</sup>

6.223. Australia does not specifically address this argument.

6.224. We understand that this argument refers to the Panel's description of Dr Chipty's econometric models in both its smoking prevalence and its cigarette consumption analyses, each of which is only two paragraphs long (excluding a brief concluding paragraph for each analysis).<sup>684</sup> In our view, there may be any number of reasons for a panel to be concise in its treatment of the evidence (for example, a panel may consider an entire swathe of evidence to be inapposite to the question at hand). In the present dispute, a review of the Panel's findings indicates that the Panel's overall conclusion was formed on the basis of its assessment of the merits of all the evidence, including both Australia's and the complainants' evidence. Indeed, it was only on the basis of comparing the robustness of Australia's models to the complainants' models that the Panel was able to consider Australia's models to be more credible. We see nothing unobjective *per se* about the fact that the Panel was able to summarize, in two paragraphs, its reasons for considering that Australia's evidence was more credible than the complainants' evidence.

6.225. We therefore do not consider that Honduras has demonstrated how the brevity of the Panel's explanation for its reliance on Australia's evidence demonstrates any lack of objectivity in the Panel's assessment of the matter before it.

### **Due process concerns**

6.226. The appellants claim that the Panel failed to make an objective assessment of the facts of the case, as required under Article 11 of the DSU, when assessing certain post-implementation econometric evidence submitted by the parties.<sup>685</sup>

6.227. Honduras submits that, in exercise of its powers under Article 13 of the DSU and Article 14.2 of the TBT Agreement, the Panel should have appointed an expert to assist it in addressing the

<sup>682</sup> Panel Report, Appendix D, paras. 103-104. We also note, in this respect, the Panel's distinction between *market data* and *survey datasets*, and highlight that the NTPPTS dataset consisted of survey data rather than market data. (Panel Report, Appendix D, paras. 23 and 87-88) The Panel stated that the survey datasets on cigarette consumption that were used by some of the complainants' experts to analyse the impact of the TPP measures would be "reviewed in detail when discussing the econometric analysis". (Ibid., Appendix D, para. 23) While the Panel did not further critique the NTPPTS data in Appendix D, the Panel *did* state, in the context of assessing the merits of the CITTS data, that "survey data, such as the CITTS data, may... be more suited to analysing the impact of the TPP measures on proximal outcomes ... than more distal outcomes, such as smoking behaviours." (Ibid., Appendix D, para. 112) In Appendix B, which referred to CITTS data, as well as NTPPTS data, the Panel observed, without distinction, that "survey data ... may ... be more suited to analysing the impact of the TPP measures and enlarged GHWs on proximal outcomes ... than more distal outcomes." (Ibid., Appendix B, para. 118) That statement by the Panel followed very closely an argument by Australia that "the structure of the NTPPTS is likely to be more suited to detecting changes in proximal outcomes than in more distal variables, such as quitting-related behaviours." (Ibid., Appendix B, para. 73 (emphasis added)) Furthermore, in Appendix C, in the context of criticizing the data sources considered by Professor Klick, the Panel stated that the NTPPTS dataset "do[es] not actually measure smoking prevalence, because the sample is based only on smokers and recent quitters". (Ibid., Appendix C, para. 100) In our view, there is no reason to consider that the foregoing criticisms by the Panel of survey datasets, including the NTPPTS dataset, are not equally applicable to the Panel's assessment of the Scollo et al. 2015a study.

<sup>683</sup> Honduras' appellant's submission, para. 885.

<sup>684</sup> Panel Report, Appendix C, paras. 120-121; *ibid.*, Appendix D, paras. 115-116.

<sup>685</sup> Honduras' appellant's submission, paras. 696, 709, 719, and 1055-1071; Dominican Republic's appellant's submission, paras. 51-52, 304, 390-391, and 395.

post-implementation evidence in Appendices A-E to the Panel Report.<sup>686</sup> Instead, the Panel relied "on a 'ghost' expert of some kind to assist it".<sup>687</sup> As a result, "the parties were not in a position to respond to a number of the (misguided) criticisms that the Panel independently developed through this 'ghost expert'".<sup>688</sup> Honduras claims that, by taking upon itself the task of assessing the probative nature of the econometric evidence without seeking the advice of an expert, the Panel acted inconsistently with Article 11 of the DSU.<sup>689</sup>

6.228. The Dominican Republic claims that the Panel's assessment of non-stationarity and multicollinearity was conducted without respecting the Dominican Republic's due process rights.<sup>690</sup> The Dominican Republic points out that the concepts of non-stationarity and multicollinearity were never discussed with the parties during the briefing phase of the Panel proceedings.<sup>691</sup> Yet, according to the Dominican Republic, the Panel rejected the complainants' econometric evidence because of non-stationarity and multicollinearity concerns that the Panel identified by itself, using an econometric test that the Panel had developed and executed on its own initiative, without giving the parties any opportunity to comment.<sup>692</sup> In the Dominican Republic's view, this resulted in "a fundamental denial of due process rights, which lie at the heart of any fair and independent dispute resolution system".<sup>693</sup> The Dominican Republic also submits that, by coming up with these concerns on its own initiative, the Panel "made the case" for Australia, inconsistently with Article 11 of the DSU.<sup>694</sup>

6.229. Australia responds that 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 to examine the econometric evidence submitted to the Panel.<sup>695</sup> Australia submits that a panel's discretionary authority under Article 13 of the DSU and Article 14.2 of the TBT Agreement extends to deciding whether and when to seek additional information.<sup>696</sup> Moreover, Australia asserts that an important part of a panel's discretionary authority relates to the reasoning that it adopts in addressing the parties' claims and that the panel has the authority to develop its own reasoning and is not limited to the arguments advanced by the parties.<sup>697</sup> For Australia, 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>698</sup> Australia refers to the Appellate Body's explanation 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>699</sup> Finally, Australia points out that Honduras and the Dominican Republic could have used the interim review procedures under Article 15 of the DSU to request the Panel to review the relevant parts of the Panel Report, but did not do so.<sup>700</sup>

6.230. As a preliminary issue, we take note of a difference in the scope of the appellants' claims. In response to questioning at the second hearing, Honduras clarified that its claim concerns both: (i) who undertook the analysis on behalf of the Panel (with Honduras alleging that it was a "ghost

<sup>686</sup> Honduras' appellant's submission, paras. 1055 and 1068-1069. For Honduras, the arguments of the parties were of such a technical and fundamental nature that the Panel was "under an obligation to have sought the assistance of an expert, or group of experts, to support the assessment of the probative nature of the evidence submitted". (Ibid., para. 1068)

<sup>687</sup> Honduras' appellant's submission, para. 1070.

<sup>688</sup> Honduras' appellant's submission, para. 1070.

<sup>689</sup> Honduras' appellant's submission, para. 1071.

<sup>690</sup> Dominican Republic's appellant's submission, para. 57.

<sup>691</sup> Dominican Republic's appellant's submission, paras. 41, 296, and 382-383.

<sup>692</sup> Dominican Republic's appellant's submission, paras. 42, 298-299, and 390.

<sup>693</sup> Dominican Republic's appellant's submission, para. 49.

<sup>694</sup> Dominican Republic's appellant's submission, paras. 354-361 and 419-424.

<sup>695</sup> Australia's appellee's submission, para. 429.

<sup>696</sup> Australia's appellee's submission, paras. 469-470.

<sup>697</sup> Australia's appellee's submission, para. 439 (referring to Appellate Body Report, *EC – Hormones*, para. 156).

<sup>698</sup> Australia's appellee's submission, para. 440 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 566).

<sup>699</sup> Australia's appellee's submission, para. 441 (quoting Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.177).

<sup>700</sup> Australia's appellee's submission, paras. 458-466.



expert" instead of an expert or a group of experts appointed under Article 13 of the DSU or Article 14.2 of the TBT Agreement); and (ii) the alleged failure by the Panel to provide the parties with a meaningful opportunity to comment on the Panel's analysis.<sup>701</sup> In its appellant's submission, Honduras indicated that its claims pertain to the entirety of the Panel's analysis in Appendices A-E to the Panel Report.<sup>702</sup>

6.231. By contrast, in its submissions, and as it confirmed in response to questioning at the second hearing, the Dominican Republic indicates that its claim is narrower in scope. According to the Dominican Republic, its claim is limited to the second of the concerns raised by Honduras, i.e. the alleged failure by the Panel to provide the parties with a meaningful opportunity to comment on the Panel's analysis. Specifically, the Dominican Republic alleges that the Panel developed and executed certain econometric tests "on its own, without giving the parties any opportunity whatsoever to comment".<sup>703</sup> The focus of the Dominican Republic's claim is the Panel's employment of the econometric tools of "multicollinearity" and "non-stationarity".<sup>704</sup> Nonetheless, we recall the Dominican Republic's confirmation at the first hearing that it had incorporated by reference into its appeal, without exception, all of Honduras' claims and arguments on appeal.<sup>705</sup>

6.232. Turning to Honduras' assertion that its claims pertain to the Panel's analysis in the entirety of Appendices A-E to the Panel Report<sup>706</sup>, we observe that Appendices A-E comprise 150 pages of the Panel's analysis. In substantiating its claims on appeal, Honduras refers only to particular aspects of the Panel's analysis, specifically the Panel's reliance on "new" robustness criteria (i.e. multicollinearity and non-stationarity) "that were not even raised by Australia and that were never discussed during the two years that this proceeding was ongoing".<sup>707</sup> Hence, our analysis focuses on the Panel's reliance on these two criteria.

6.233. We start by addressing Honduras' argument that the Panel was obliged to appoint experts under Article 13 of the DSU and Article 14.2 of the TBT Agreement and that, by not doing so, it failed to conduct an objective assessment of the matter, as required under Article 11 of the DSU.<sup>708</sup> We note that Honduras did not raise a claim under Article 13 of the DSU or Article 14.2 of the TBT Agreement. Instead, Honduras considers that a panel's discretion to appoint experts under these provisions "is not boundless".<sup>709</sup> In Honduras' view, given the nature of the evidence at issue, the Panel was under an obligation to appoint experts to conduct an objective assessment of the matter under Article 11 of the DSU.<sup>710</sup>

6.234. We recall that Article 13.1 of the DSU<sup>711</sup> identifies the "right", not obligation, of a panel to seek information and technical advice from any individual or body which it deems appropriate.<sup>712</sup>

<sup>701</sup> See also Honduras' appellant's submission, paras. 696, 719, 938, and 980.

<sup>702</sup> Honduras' appellant's submission, para. 1068.

<sup>703</sup> Dominican Republic's appellant's submission, para. 42. (emphasis omitted)

<sup>704</sup> Dominican Republic's appellant's submission, paras. 42 and 377. In addition, in response to questioning at the second hearing, the Dominican Republic indicated that it also had concerns as to the Panel's development of a number of statistically significant variables and graphical analyses. We understand that the Dominican Republic is referring to its arguments regarding the Panel's reliance on Figure C.19 of Appendix C to the Panel Report. (See Dominican Republic's appellant's submission, paras. 202-212) We address this issue in paras. 6.344. 6.345. below.

<sup>705</sup> We recall that, in its Notice of Appeal, the Dominican Republic stated that it "incorporate[d] by reference into this appeal the claims on appeal made by Honduras". (Dominican Republic's Notice of Appeal, para. 16) Furthermore, in response to questioning at the first hearing of these appellate proceedings, the Dominican Republic confirmed that it incorporated all of Honduras' claims and arguments on appeal. Accordingly, we understand that any reference to Honduras' claims and arguments throughout these Reports also includes a reference to the claims and arguments of the Dominican Republic.

<sup>706</sup> Honduras' appellant's submission, para. 1068.

<sup>707</sup> Honduras' appellant's submission, para. 1075.

<sup>708</sup> Honduras' appellant's submission, paras. 1068-1069.

<sup>709</sup> Honduras' appellant's submission, para. 1057.

<sup>710</sup> Honduras' appellant's submission, paras. 938 and 1055-1063.

<sup>711</sup> Article 13.1 of the DSU provides, in relevant part, that "[e]ach panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate."

<sup>712</sup> Appellate Body Reports, *US – Carbon Steel*, para. 153; *EC – Sardines*, para. 302; *US – Continued Zeroing*, paras. 343-344.

Similarly, both Article 13.2 of the DSU<sup>713</sup> and Article 14.2 of the TBT Agreement<sup>714</sup> employ the auxiliary verb "may" to express the permissive intent of these provisions. Moreover, the panel's authority under Article 13 of the DSU is "comprehensive"<sup>715</sup>, and it "includes the authority to decide *not to seek* such information or advice at all".<sup>716</sup>

6.235. In light of the comprehensive authority to seek information vested into the panel under Article 13 of the DSU, we consider that it was within the Panel's discretion to decide whether to seek expert assistance.<sup>717</sup> We do not consider that the technical nature of the evidence addressed in Appendices A-E automatically implies that the Panel was "under an obligation" to seek external expert advice in order to assess this evidence. Moreover, with respect to the econometric evidence that the Panel assessed in Appendices A-E to its Report, we note that none of the complainants requested the Panel to engage experts, pursuant to Article 14.2 of the TBT Agreement, "to assist in questions of a technical nature". Absent a request by the complainants under Article 14.2 of the TBT Agreement, we cannot accept Honduras' argument on appeal that the Panel somehow compromised the parties' due process rights by failing to seek expert assistance on its own initiative. If the parties were of the view that it was, as Honduras puts it, "indispensably necessary"<sup>718</sup> for the Panel to seek expert assistance, they were free to request the Panel to do exactly that. The Panel did not act inconsistently with its duty to conduct an objective assessment of the matter under Article 11 of the DSU simply by seeking to assess the evidence put before it without engaging experts.

6.236. We now turn to address the appellants' claims regarding the Panel's alleged failure to grant due process to the complainants by not providing them with an opportunity to comment on the Panel's concerns over multicollinearity and non-stationarity.

6.237. We recall the Panel's explanation that multicollinearity arises when "two (or more) explanatory variables convey the same information", in which case "the predictive power of the model remains unchanged, but the confidence interval of the coefficient estimates may increase" and "the coefficient estimates may become very sensitive to minor changes in the model specification or data."<sup>719</sup> The Panel considered that one way to mitigate multicollinearity is to increase the sample period.<sup>720</sup> The Panel also observed that "[e]vidence of multicollinearity is confirmed by the variance inflation factors statistic."<sup>721</sup> With respect to non-stationarity, the Panel explained that "[a] variable is said to be stationary, when its statistical properties, such as mean and variance are all constant over time."<sup>722</sup> The Panel stated that "econometric theory recommends not estimating a model when the dependent variable (i.e. smoking prevalence) is stationary and one of the explanatory variables (i.e. tax level or price) is not stationary in order to avoid spurious and biased results."<sup>723</sup>

6.238. In the present dispute, the Panel relied on multicollinearity as a robustness criterion to test the weight and probative value of certain of the parties' econometric models addressed in Appendices B-E.<sup>724</sup> The Panel also relied on the concept of non-stationarity as a robustness criterion

<sup>713</sup> Article 13.2 of the DSU provides, in relevant part, that "[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter."

<sup>714</sup> Article 14.2 of the TBT Agreement states that, "[a]t 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."

<sup>715</sup> Appellate Body Report, *US – Shrimp*, para. 104.

<sup>716</sup> Appellate Body Report, *US – Shrimp*, para. 104. (emphasis original) See also Appellate Body Reports, *Canada – Continued Suspension*, para. 439; *US – Continued Suspension*, para. 439; *EC – Hormones*, para. 147.

<sup>717</sup> We further recall that the Panel made extensive use of the facility under Article 13 of the DSU. During the Panel proceedings, the parties requested the Panel to exercise its authority to seek information under Article 13 of the DSU on various occasions, regarding information relating to evidence submitted by another party. The Panel also exercised its authority under Article 13 to seek information from the WHO and the FCTC Secretariats, the International Bureau of WIPO, CCQ, and CCV. (Panel Report, paras. 1.56-1.57)

<sup>718</sup> Honduras' appellant's submission, para. 1060.

<sup>719</sup> Panel Report, Appendix C, para. 107.

<sup>720</sup> Panel Report, Appendix C, para. 107.

<sup>721</sup> Panel Report, Appendix C, fn 119 to para. 107; *ibid.*, Appendix D, fn 143 to para. 109.

<sup>722</sup> Panel Report, Appendix C, fn 120 to para. 107.

<sup>723</sup> Panel Report, Appendix C, para. 107.

<sup>724</sup> Panel Report, Appendix B, para. 116; *ibid.*, Appendix C, paras. 107-108 and 120; *ibid.*, Appendix D, paras. 106-110; *ibid.*, Appendix E, paras. 29, 51, and 54. We observe that, with respect to its assessment of

to test the weight and probative value of certain of the parties' econometric models addressed in Appendices C-D.<sup>725</sup>

6.239. Importantly, in its examination of the post-implementation evidence of smoking prevalence and consumption, the Panel did not reject any econometric models submitted by the parties on the basis of any individual robustness criteria.<sup>726</sup> Rather, the Panel identified a number of concerns with the complainants' econometric evidence, noted that Australia's evidence addressed a number of these concerns, and proceeded to reach conclusions on the basis of Australia's evidence. We further recall that multicollinearity and non-stationarity were two of the concerns identified by the Panel in the complainants' evidence.<sup>727</sup> The Panel considered that certain smoking prevalence and consumption models provided by Australia's expert, Dr Chipty, avoided the problems of multicollinearity and non-stationarity.<sup>728</sup> The Panel relied on this consideration, *inter alia*, to conclude that Dr Chipty's smoking prevalence and consumption evidence was more credible than the complainants' evidence, which was sufficient for the Panel to conclude that there was some econometric evidence that the TPP measures had contributed to the reduction in smoking prevalence and consumption.<sup>729</sup>

6.240. The review of empirical and econometric evidence has routinely been undertaken by WTO panels. In *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body commented on a panel's duty when reviewing econometric evidence and models submitted by parties, noting that "the relative complexity of a model and its parameters is not a reason for a panel to remain agnostic about them."<sup>730</sup> Rather, a panel should "reach conclusions with respect to the probative value it accords to economic simulations or models presented to it".<sup>731</sup>

6.241. However, in support of its claim, Honduras indicates that it "is deeply concerned about the Panel's novel and technical analysis of the evidence presented".<sup>732</sup> Likewise, the Dominican Republic states that it "does not take issue with the Panel's decision to use the robustness criterion [of multicollinearity] *per se*, but instead with the process that the Panel followed, which lacked objectivity".<sup>733</sup> These statements, as well as the appellants' responses to questions at the second hearing, suggest to us that neither Honduras nor the Dominican Republic considers that the Panel's use of the econometric tools of multicollinearity and non-stationarity was prohibited under Article 11 of the DSU, *per se*. Rather, the appellants contend that the Panel's appreciation and assessment of the facts before it, leading to its factual findings, and particularly its reliance on multicollinearity and non-stationarity, should have been tested with the parties.

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the post-implementation evidence on distal outcomes, in Appendix B to its Report, the Panel made a single reference to "multicollinearity". Specifically, the Panel questioned the Ajzen et al. estimation results, which had been obtained with the resampled data based on the multiple testing procedure. The Panel noted that the results "could suggest that the resample data are subject to multicollinearity". This singular reference to "multicollinearity" and the statement in which it is contained appears anecdotal, as the Panel does not rely on this statement or any consideration of "multicollinearity" in arriving at its conclusion on the association between proximal outcomes and distal outcomes based on the NTPPTS data. (Panel Report, Appendix B, paras. 111-116) Accordingly, we do not consider that the Panel's reference to "multicollinearity" in Appendix B warrants further scrutiny.

<sup>725</sup> Panel Report, Appendix C, para. 107; *ibid.*, Appendix D, paras. 44, 106, and 116.

<sup>726</sup> See para. 6.133. above.

<sup>727</sup> Regarding multicollinearity, see Panel Report, Appendix B, para. 116; *ibid.*, Appendix C, paras. 107-108 and 120, fn 119 to para. 107, and fn 122 to para. 108; *ibid.*, Appendix D, paras. 43, 106, and 109-110; *ibid.*, Appendix E, paras. 29 and 51-54. Regarding non-stationarity, see Panel Report, Appendix C, paras. 107 and 120, and fn 120 to para. 107; *ibid.*, Appendix D, paras. 44, 106, and 116, fn 46 to para. 43, and fn 146 to para. 109.

<sup>728</sup> Panel Report, Appendix C, para. 120; *ibid.*, Appendix D, para. 115.

<sup>729</sup> Panel Report, Appendix C, para. 123; *ibid.*, Appendix D, para. 137.

<sup>730</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 357.

<sup>731</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 357. In this regard, not only should the panel "examine[] the model, the parameters used by each party, and the arguments made by the parties, [noting] the different results generated by the simulations conducted by each party, the Panel [can go] further in its evaluation and comparative analysis of the economic simulations and the particular parameters used". (*Ibid.*, paras. 357-358) (fn omitted)

<sup>732</sup> Honduras' appellant's submission, para. 938.

<sup>733</sup> Dominican Republic's appellant's submission, para. 364.

6.242. For its part, Australia posits that a panel, in developing its reasoning, is free to examine certain evidence more intensively if doing so is warranted by the facts.<sup>734</sup> In the same vein, Australia submits that panels may conduct additional analyses of statistical evidence in order to resolve more fully certain factual issues<sup>735</sup>, and a panel does not exceed its discretion in attributing less probative value to or rejecting certain evidence in light of concerns regarding reliability.<sup>736</sup>

6.243. In performing its function under Article 11 of the DSU to "make ... an objective assessment of the facts of the case", a panel "has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof".<sup>737</sup> While a panel may not "make affirmative findings that lack a basis in the evidence contained in the panel record"<sup>738</sup>, in assessing the probative value of the evidence, it is not required to "accord to factual evidence ... the same meaning and weight as do the parties".<sup>739</sup> In addition, "[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."<sup>740</sup> We further recall that a complainant must satisfy its burden of proof by adducing evidence and arguments sufficient to make a *prima facie* case in relation to each of the elements of its claims. Where the complainant has made out a *prima facie* case, a panel may "in principle draw from arguments and evidence on the record, or develop its own reasoning in reaching its findings, provided that it does so consistently with the requirements of due process".<sup>741</sup>

6.244. The Appellate Body has addressed the importance of due process many times. Among the things said is that the protection of due process is "an essential feature of a rules-based system of adjudication, such as that established under the DSU", and that "due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings."<sup>742</sup> Moreover, due process is intrinsically connected to notions of fairness, impartiality, and "the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules".<sup>743</sup> While making an objective assessment of the matter before it, a panel should explore with the parties all pertinent issues arising in the dispute over the course of the proceedings.<sup>744</sup> At the same time, this does not oblige the panel to test its intended reasoning with the parties or engage with the parties on the findings and conclusions that it intends to adopt in resolving the dispute.<sup>745</sup> However, due process could be compromised in circumstances where the panel adopts 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>746</sup>

<sup>734</sup> Australia's appellee's submission, para. 440.

<sup>735</sup> Australia's appellee's submission, para. 439 and fn 569 thereto (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 357-358).

<sup>736</sup> Australia's appellee's submission, para. 438 (referring to Appellate Body Reports, *China – Rare Earths*, paras. 5.197 and 5.212).

<sup>737</sup> Appellate Body Report, *Korea – Dairy*, para. 137.

<sup>738</sup> Appellate Body Report, *US – Carbon Steel*, para. 142.

<sup>739</sup> Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.61.

<sup>740</sup> Appellate Body Report, *EC – Hormones*, para. 156.

<sup>741</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.176-7.177 (referring to Appellate Body Reports, *Canada – Aircraft*, para. 192; *EC – Hormones*, paras. 98 and 156; *Chile – Price Band System*, paras. 166 and 181; *US – Gambling*, para. 140, 270, 280, and 282; *Mexico – Anti-Dumping Measures on Rice*, para. 156; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.215; *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, p. 336; *Japan – Apples*, para. 159; *Japan – Agricultural Products II*, para. 129; *EC – Fasteners (China)*, para. 566; *Thailand – Cigarettes (Philippines)*, para. 150; *Australia – Salmon*, para. 278; *EC – Bananas III*, para. 141; *Korea – Various Measures on Beef*, para. 88; *Dominican Republic – Import and Sale of Cigarettes*, para. 121; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, fn 2323 to para. 1137; *US – Continued Zeroing*, paras. 343 and 347).

<sup>742</sup> Appellate Body Reports, *Canada – Continued Suspension*, para. 433; *US – Continued Suspension*, para. 433; *Thailand – H-Beams*, para. 88.

<sup>743</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147.

<sup>744</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1137.

<sup>745</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.177.

<sup>746</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.177. See also Appellate Body Reports, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, fn 2323 to para. 1137; *US – Continued Zeroing*, para. 347.

6.245. Turning back to the circumstances of this case, we recall that, in its examination of the post-implementation evidence of smoking prevalence and consumption<sup>747</sup>, multicollinearity and non-stationarity were two of the concerns identified by the Panel pertaining to certain evidence provided by the complainants.<sup>748</sup> Moreover, the Panel relied on, *inter alia*, the fact that certain pieces of Australia's evidence did *not* suffer from these concerns, in order to conclude that the TPP measures contributed to reducing smoking prevalence and consumption.<sup>749</sup> Our review of the Panel record suggests that these concerns were not identified by the parties, but were introduced by the Panel itself. Furthermore, the Panel did not pose questions to the parties or otherwise invite them to comment on the use of these robustness criteria in addressing the parties' evidence. It appears that the parties first became aware of possible concerns relating to multicollinearity and non-stationarity when the Panel issued its Interim Report to the parties on 2 May 2017.<sup>750</sup> At the interim review stage, the complainants did not raise concerns regarding the Panel's identification of these concerns.<sup>751</sup>

6.246. We note that, in order to identify the concerns regarding multicollinearity and non-stationarity in the parties' evidence, the Panel was obliged to conduct VIF and unit root tests.<sup>752</sup> The Panel's reliance on these technical tests was relevant to its assessment of the credibility of the evidence, and its ultimate determination that the TPP measures contributed to reducing smoking prevalence and consumption. These complex technical tests thus had an important role in the Panel's assessment of the evidence. We further note that the application of these tests involved a certain degree of discretion on the part of the Panel as to whether, and to what extent, concerns regarding multicollinearity and non-stationarity were legitimate reasons to question the reliability of the evidence.<sup>753</sup> Given that these concerns were not introduced by the parties, but emanated from the Panel itself, and in light of their highly technical nature and of the Panel's discretion in relying on these concerns, we consider that the Panel should have explored these issues with the parties.

6.247. We take note of Australia's argument that the complainants could have used the interim review stage to request the Panel to review the relevant parts of the Panel Report pursuant to Article 15 of the DSU, but chose not to do so.<sup>754</sup> Australia points out that the "conduct of the parties" is a relevant consideration in the evaluation of a party's due process claim and that such a claim should be rejected where the party failed to raise its objections notwithstanding an opportunity to do so.<sup>755</sup>

6.248. We recall that Article 15.2 of the DSU provides, in relevant part:

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.

6.249. Article 15.2 concerns the panel's Interim Report and the interim review stage of the panel proceedings. The second sentence of Article 15.2 permits parties, during the interim review stage of panel proceedings, "to submit comments on the draft report issued by the panel, and to make requests 'for the panel to review precise aspects of the interim report'".<sup>756</sup> In addition, the

<sup>747</sup> Panel Report, Appendices C and D.

<sup>748</sup> See fn 725 to para. 6.239. above.

<sup>749</sup> See para. 6.239. above.

<sup>750</sup> Panel Report, para. 1.32.

<sup>751</sup> Panel Report, paras. 6.1-6.103.

<sup>752</sup> Panel Report, Appendix C, para. 33; *ibid.*, Appendix D, para. 115, fn 46 to para. 43, and fn 146 to para. 109.

<sup>753</sup> By contrast, we understand that the Panel's application of, and reliance on, a mean-comparison test in step 2 of its cigarette consumption analysis did not entail such discretion in interpreting the results, but rather amounted to simply verifying whether the parties' competing assertions were borne out by the evidence. (See para. 6.122. above)

<sup>754</sup> Australia's appellee's submission, para. 464.

<sup>755</sup> Australia's appellee's submission, para. 466.

<sup>756</sup> Appellate Body Report, *EC – Sardines*, para. 301. (fn omitted)

third sentence grants parties the right to request a meeting "on the issues identified in the written comments".<sup>757</sup>

6.250. Panels have understood Article 15.2 to imply that the "purpose of the interim review stage is to consider specific and particular aspects of the interim report".<sup>758</sup> Along these lines, panels have declined requests for a "whole of report review"<sup>759</sup> or "whole sections of the report".<sup>760</sup> Likewise, panels have considered that interim review is "not the appropriate forum for relitigating arguments already put before a panel".<sup>761</sup> Furthermore, the Appellate Body has explained that "[t]he interim review stage is not an appropriate time to introduce new evidence."<sup>762</sup>

6.251. We recall that the parties appear to have first become aware of the Panel's reliance on multicollinearity and non-stationarity when the Panel issued its Interim Report to the parties on 2 May 2017.<sup>763</sup> In its letter to the parties forwarding the Interim Report, the Panel invited the parties to submit any comments on the Interim Report, or request an interim review meeting by 6 June 2017. Absent any request for an interim review meeting, the Panel invited the parties to submit further written comments on the other parties' requests for review on 4 July 2017.

6.252. On 6 June 2017, the Dominican Republic submitted its comments on the Interim Report to the Panel. The Dominican Republic did not request an interim review meeting. Instead, in its cover letter, the Dominican Republic "record[ed] its disappointment with the Panel's interim report".<sup>764</sup> The Dominican Republic also submitted, as interim comments, a table, which by the Dominican Republic's own description, "contain[ed] an indicative list of typographical, clerical and grammatical errors in the interim reports".<sup>765</sup> In the table, the Dominican Republic made one reference to "collinearity", pointing out that in paragraph 52 of Appendix E the Panel had omitted the article "the" before the word "collinearity". The Dominican Republic made no reference at all to the Panel's reliance on "non-stationarity".

6.253. On 6 June 2017, Honduras submitted its comments on the Interim Report to the Panel. As with the Dominican Republic, Honduras did not request an interim review meeting. In its comments on the Interim Report, Honduras made no mention of the Panel's reliance on "multicollinearity" or "non-stationarity".

6.254. Indeed, it appears that, as Australia argues, while the complainants became aware of the Panel's use of multicollinearity and non-stationarity when they received the Panel's Interim Report, they did not request a review of the relevant aspects of the Interim Report. In our view, if a party disagrees with certain aspects of the Interim Report, requesting the panel "to review precise aspects" of its Interim Report would be the normal course of action.<sup>766</sup> We consider it unfortunate that the parties did not raise their concerns regarding multicollinearity and non-stationarity at the interim review stage.

<sup>757</sup> We note that the panel in *Canada – Continued Suspension* explained that it is for a party, and not for a panel, to decide whether an additional interim review meeting would be useful. (Panel Report, *Canada – Continued Suspension*, para. 6.2. See also Panel Report, *US – Continued Suspension*, para. 6.2)

<sup>758</sup> Panel Report, *Japan – Alcoholic Beverages II*, para. 5.2, DSR 1996:I, p. 125.

<sup>759</sup> Panel Report, *Australia – Salmon*, para. 7.3.

<sup>760</sup> Panel Reports, *Canada – Continued Suspension*, paras. 6.16-6.17; *US – Continued Suspension*, paras. 6.17-6.18.

<sup>761</sup> Panel Report, *US – Poultry (China)*, para. 6.32 (referring to Panel Report, *Japan – DRAMs (Korea)*, para. 6.2).

<sup>762</sup> Appellate Body Report, *EC – Sardines*, para. 301.

<sup>763</sup> Panel Report, para. 1.32.

<sup>764</sup> Dominican Republic's letter to the Panel, forwarding the Dominican Republic's comments on the Panel's Interim Report, 6 June 2017.

<sup>765</sup> Dominican Republic's letter to the Panel, forwarding the Dominican Republic's comments on the Panel's Interim Report, 6 June 2017.

<sup>766</sup> We underscore that Article 15 of the DSU refers to "precise aspects of the interim report", which suggests that such aspects must be sufficiently specific. Previous panels and the Appellate Body understood that, at the interim review stage, the parties cannot introduce new evidence, ask for a review of a whole report, or enter into a debate about the merits of a panel's interpretation of relevant legal provisions. (See Appellate Body Report, *EC – Sardines*, para. 301; Panel Reports, *Australia – Salmon*, para. 7.3; *Indonesia – Iron or Steel Products*, Annex A-3, paras. 2.3-2.4)

6.255. We are mindful that the Appellate Body has previously indicated that, when a Member wishes to raise an objection in dispute settlement proceedings, "it is always incumbent on that Member to do so promptly."<sup>767</sup> We also recall that the Appellate Body in *Thailand – Cigarettes (Philippines)* considered that the conduct of the parties is among the considerations that are germane to a party's claim under Article 11 of the DSU.<sup>768</sup> Importantly, in *Thailand – Cigarettes (Philippines)*, the Appellate Body explained that it rejected Thailand's claim of due process violation, in particular, because the evidence at issue "did not raise or relate to a new issue, previously unknown to Thailand or unexplored by the Panel, and it was not the only evidence supporting the Panel's conclusion".<sup>769</sup> The Appellate Body noted that the exhibit in question "related to a key and highly disputed issue" and that the parties would have been aware of the importance of this piece of evidence when it was submitted.<sup>770</sup> By contrast, in the present case, the parties only became aware of the Panel's use of multicollinearity and non-stationarity to reject some of the complainants' evidence at the interim review stage.

6.256. Moreover, we emphasize that the Panel's reliance on the concerns over multicollinearity and non-stationarity entailed a degree of discretion on the part of the Panel in applying and interpreting the results of the technical tests regarding the relative robustness of different econometric models. In our view, although Honduras and the Dominican Republic could have raised their concerns regarding the Panel's reliance on these econometric tools during the interim review stage, in the circumstances of the present dispute, their failure to do so does not detract from the Panel's due process violation in its treatment of certain evidence submitted by the complainants. While the interim review affords parties an opportunity to raise and address numerous aspects of a Panel's findings, in our view, the interim review process contemplated under Article 15 would not have been sufficient to enable the parties to adequately explore these issues, given the review's limited nature and late stage.<sup>771</sup>

6.257. In light of the above, we consider that, by introducing in its Interim Report novel econometric criteria that it had not tested with the parties, in its examination of the post-implementation evidence of smoking prevalence and consumption, the Panel denied the parties their due process rights and thus acted inconsistently with its duty to conduct an objective assessment of the facts under Article 11 of the DSU.<sup>772</sup> We thus find that the Panel erred in the instances where it relied on multicollinearity and non-stationarity in its assessment of the parties' post-implementation evidence of smoking prevalence and consumption.

### ***Consequences of the Panel's errors in Appendices C and D***

6.258. We have found certain errors in the Panel's analysis of the impact of the TPP measures on smoking prevalence and cigarette consumption. Specifically, we have found that the Panel erred with respect to its assessment of multicollinearity, non-stationarity, and the impact of tobacco costliness, in finding that Australia's econometric evidence was more credible than the complainants' econometric evidence. In the view of the appellants, these errors implicate: (i) the Panel's intermediate conclusion regarding the evidence of actual effects; and (ii) the Panel's overall conclusion regarding the degree of contribution of the TPP measures. Specifically, the

<sup>767</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50.

<sup>768</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 155. In that dispute, Thailand argued that the Panel violated Thailand's due process rights and acted inconsistently with Article 11 of the DSU by accepting and relying on an exhibit without affording Thailand the right to comment on that piece of evidence. The Appellate Body rejected Thailand's claim, *inter alia*, because "Thailand could have requested an opportunity to respond when the Philippines submitted the exhibit in question, but it did not." (*Ibid.*, para. 160 (fn omitted))

<sup>769</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 160.

<sup>770</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 158.

<sup>771</sup> The Appellate Body in *EC – Sardines* underscored the limited nature of the interim review by pointing out that the interim review "cannot properly include an assessment of new and unanswered evidence". (Appellate Body Report, *EC – Sardines*, para. 301)

<sup>772</sup> In light of this finding, we do not consider it necessary to address the Dominican Republic's argument that the Panel "made the case" for Australia. (Dominican Republic's appellant's submission, paras. 354-361 and 419-424) Having said that, we wish to emphasize that we would see no due process issues arising if the Panel had, in fact, explored the issues of non-stationarity and multicollinearity with the parties prior to the issuance of the Interim Report and in a manner sufficient to substantiate the complainants' due process rights of notice and an opportunity to respond to the case against them.

Dominican Republic requests to reverse the Panel's finding that the TPP measures have reduced smoking prevalence and consumption of tobacco products.<sup>773</sup>

6.259. Australia argues that, even assuming that the Panel made any errors, the appellants are required to demonstrate that such errors materially undermine the Panel's findings.<sup>774</sup> In Australia's view, materiality "turns on whether 'other elements of the Panel's analysis' support its conclusion".<sup>775</sup> In Australia's view, the appellants failed to demonstrate that any errors by the Panel were material to its intermediate findings.<sup>776</sup> Australia further submits that, in any event, the appellants also failed to demonstrate how any errors, even to the extent that they were material to the Panel's intermediate findings, were also material to the Panel's overall finding on contribution.<sup>777</sup> Australia emphasizes the Panel's findings that the post-implementation evidence was "consistent with a finding that the TPP measures contribute to a reduction in the use of tobacco products" and that the complainants had failed to demonstrate the TPP measures are not apt to make a contribution to the objective.<sup>778</sup> In Australia's view, the pre-implementation evidence and the undisputed aspects of the Panel's findings on the post-implementation evidence are sufficient to support the Panel's overall finding on the contribution of the measures, notwithstanding any errors by the Panel.<sup>779</sup>

6.260. We note that the Panel's errors in assessing the evidence relate to two very specific aspects of its analysis of the impact of the TPP measures on smoking prevalence and cigarette consumption, specifically: (i) the Panel failed to examine the Dominican Republic's arguments and evidence indicating that Australia's consumption models showed a positive impact of tobacco costliness on cigarette consumption; and (ii) the Panel compromised the parties' due process rights by failing to explore the issues of multicollinearity and non-stationarity with the parties prior to the issuance of the interim report. In our view, it is important to examine the implications of the Panel's errors for its findings that there was some econometric evidence indicating that the TPP measures contributed to reducing smoking prevalence and cigarette consumption.

6.261. With respect to the Panel's reliance on the impact of tobacco costliness to critique the parties' evidence, we recall our finding that the Panel's error in this respect is limited to step 3 of the Panel's cigarette consumption analysis (i.e. whether the TPP measures reduced cigarette consumption), and does not implicate the Panel's smoking prevalence findings. This is because, as explained above, the appellants have failed to identify any errors in this respect regarding the Panel's appreciation of the parties' smoking prevalence evidence.<sup>780</sup> Having said that, we note that the Panel's smoking prevalence findings reveal the importance that the Panel attached to the question of whether a given model indicated an impact of tobacco costliness. The Panel stated that it was "not persuaded that [the parties' smoking prevalence] econometric results can be taken at face value, mainly because most of their model specifications are unable to detect the impact of tobacco costliness ... on smoking prevalence".<sup>781</sup> Thus, the Panel's findings indicate that the impact of tobacco costliness was a primary consideration in assessing the probative value of the parties' evidence.

6.262. It follows, by virtue of the Panel's own reasoning, that if Australia's consumption models had indicated an incorrect impact of tobacco costliness on consumption (as asserted by the Dominican Republic), while the complainants' models did not, this would have been a significant reason for the Panel to conclude that Australia's models were less credible than the complainants' models. We therefore consider that the Panel's failure to address the Dominican Republic's arguments in this respect fatally undermines the Panel's determination that Australia's evidence was more credible than the complainants' evidence, on which it based its conclusion that "there is some econometric evidence suggesting that the TPP measures ...

<sup>773</sup> Dominican Republic's appellant's submission, paras. 584-586.

<sup>774</sup> Australia's appellee's submission, para. 884. (emphasis omitted)

<sup>775</sup> Australia's appellee's submission, para. 884 (quoting Appellate Body Report, *US – Large Civil Aircraft* (2<sup>nd</sup> complaint), para. 722).

<sup>776</sup> Australia's appellee's submission, paras. 866 and 874.

<sup>777</sup> Australia's appellee's submission, para. 893.

<sup>778</sup> Australia's appellee's submission, paras. 901-903 (referring to Panel Report, paras. 7.1025 and 7.1037).

<sup>779</sup> Australia's appellee's submission, paras. 905-914.

<sup>780</sup> See paras. 6.134. 6.144. above.

<sup>781</sup> Panel Report, Appendix C, para. 103.



contributed to the reduction in wholesale cigarette sales, and therefore cigarette consumption."<sup>782</sup> We therefore conclude that the Panel's error vitiates this factual finding.

6.263. Regarding multicollinearity and non-stationarity, we note that the Panel partially relied on concerns related to non-stationarity and multicollinearity in step 3 of both its smoking prevalence and cigarette consumption analyses, in order to conclude that Australia's evidence was more reliable than the complainants' evidence.<sup>783</sup> We have already concluded above that the Panel's factual finding in step 3 of its cigarette consumption analysis is vitiated by the Panel's failure to address the Dominican Republic's assertion that Australia's consumption evidence indicated an incorrect impact of tobacco costliness. We therefore do not consider it necessary to further assess the implications for the Panel's consumption analysis of the Panel's errors with respect to non-stationarity and multicollinearity.

6.264. Turning to the Panel's *smoking prevalence* analysis, we recall that the Panel's reasons for favouring Australia's evidence were that: (i) Australia's expert, Dr Chipty, addressed "a number of concerns" that the Panel had raised while assessing the complainants' evidence; and (ii) Dr Chipty's results were robust in a number of alternative specifications.<sup>784</sup> We note that the Panel's only references to multicollinearity and non-stationarity were in concluding that dummy variables were preferable to price or tax level variables, to account for tobacco costliness. Specifically, the Panel noted that "Dr Chipty's model specification ... includes the excise tax increases dummy variables and thus avoids the problems of multicollinearity and endogeneity associated with the inclusion of the price variable (in combination with a quadratic trend variable)".<sup>785</sup> The Panel also highlighted that, "[i]n addition, the use of the tax dummies avoids the issue of non-stationarity of the price or tax level variables."<sup>786</sup>

6.265. We recall that we have found no errors in the Panel's references to endogeneity in concluding that dummy variables were preferable to a price variable.<sup>787</sup> Since the Panel relied on multicollinearity (at least in its smoking prevalence analysis) only in comparing dummy variables to price variables, and since the Panel's preference for dummy variables over price variables stands on the basis of endogeneity alone, it follows that vitiating the Panel's reliance on multicollinearity has no impact on the Panel's conclusion that Australia's smoking prevalence evidence was more reliable than the complainants' evidence.

6.266. By contrast, we note that the Panel's only reason (in its smoking prevalence analysis) to prefer dummy variables to tax level variables was on the basis of non-stationarity.<sup>788</sup> Consequently, vitiating the Panel's reliance on non-stationarity does indeed suggest that an aspect of the Panel's reasoning falls away, in that there is no basis for the Panel's preference for dummy variables over tax levels. In our view, however, this is not sufficient to call into question the Panel's determination that Australia's evidence was more credible than the complainants' evidence. We highlight that the Panel also considered it relevant that Dr Chipty addressed "the issue of overfitting associated with a too flexible trend" and, moreover, the Panel highlighted that Dr Chipty's results were robust to alternative specifications, *including the use of an excise tax level variable*.<sup>789</sup> It thus follows, in our view, that vitiating the Panel's reliance on non-stationarity and multicollinearity has no impact on the Panel's conclusion that "there is econometric evidence suggesting that [the TPP measures] contributed to the reduction in overall smoking prevalence in Australia."<sup>790</sup>

6.267. We have concluded above that the Panel's errors vitiate its factual finding in step 3 of its cigarette consumption analysis in Appendix D that "there is some econometric evidence suggesting that the TPP measures ... contributed to the reduction in wholesale cigarette sales, and therefore cigarette consumption."<sup>791</sup> We assess in section 6.1.2.3.4 below the question of whether this

<sup>782</sup> Panel Report, Appendix D, para. 137.c.

<sup>783</sup> Panel Report, Appendix C, para. 120; *ibid.*, Appendix D, para. 115.

<sup>784</sup> Panel Report, Appendix C, paras. 120-121.

<sup>785</sup> Panel Report, Appendix C, para. 120.

<sup>786</sup> Panel Report, Appendix C, para. 120.

<sup>787</sup> See paras. 6.156. 6.167. above.

<sup>788</sup> Panel Report, Appendix C, para. 120.

<sup>789</sup> Panel Report, Appendix C, paras. 120-121.

<sup>790</sup> Panel Report, Appendix C, para. 122. (fn omitted)

<sup>791</sup> Panel Report, Appendix D, para. 137.c.

implicates the Panel's overall conclusion on the degree of contribution of the TPP measures, and the Panel's overall conclusion in its application of Article 2.2 of the TBT Agreement.

#### 6.1.2.3.3.2 Groups of claims based on cross-cutting themes

6.268. As mentioned in paragraph 6.51. above, following a review of the participants' submissions, we do not consider it necessary to address, separately, each discrete claim raised by the appellants under Article 11 of the DSU. Rather, we address, jointly, clusters of claims based on the cross-cutting themes that underpin these claims. In addressing these claims, we recognize that there may be some overlap in certain of these themes. Likewise, certain of these themes have also been highlighted in sections 6.1.2.3.2 and 6.1.2.3.3.1 above.

#### *Representation of the Panel findings*

6.269. We observe that a number of the appellants' allegations are based on an apparent misapprehension of the Panel's findings.<sup>792</sup> For example, Honduras argues that the Panel materially misrepresented and distorted Honduras' evidence by implying that "the econometric evidence submitted by ... Honduras ... suggests that the TPP measures have increased pack concealment among adult cigarette smokers"<sup>793</sup>, without including a footnote indicating which econometric evidence by Honduras this assertion could refer to.<sup>794</sup> By providing an incomplete quotation, Honduras mischaracterizes the Panel's statement and implies that the Panel attributed the quoted "suggestion" to Honduras' evidence.<sup>795</sup> We note, instead, that the Panel statement in question followed the Panel's extensive engagement with the evidence submitted by the parties. At the beginning of its analysis section, the Panel offered the following summary of its finding before identifying, in subsequent paragraphs<sup>796</sup>, the bases in the parties' evidence for its finding:

A careful assessment of Durkin et al. 2015, Yong et al. 2015 and Zacher et al. 2014, 2015 and the econometric evidence submitted by the Dominican Republic, Honduras and Indonesia suggests that the TPP measures have increased pack concealment among adult cigarette smokers. However, empirical evidence of the impact of the TPP measures on stubbing out cigarettes before finishing them due to thoughts about the harms caused by smoking and stopping smoking among adult cigarette smokers is much more limited and mixed.<sup>797</sup>

6.270. As a second example, we note the Dominican Republic's argument that "the Panel accepted the robustness of Australia's econometric models, without indicating whether, and if so, how it had tested for multicollinearity."<sup>798</sup> However, in Appendix C to its Report, the Panel stated, *inter alia*, that:

Dr Chipty's model specification also includes the excise tax increases dummy variables and thus avoids the problems of multicollinearity and endogeneity associated with the

<sup>792</sup> With respect to the Panel's analysis of proximal and distal outcomes, Honduras' appellant's submission, Annex, paras. 1082-1084; Dominican Republic's appellant's submission, paras. 887-888 and 923. With respect to the Panel's analysis of smoking behaviour, Honduras' appellant's submission, paras. 877-880, 883-885, 931, 933, 974, and 1083; Dominican Republic's appellant's submission, paras. 407-408. We note that Australia also takes issue with the appellants' representation of the Panel's findings. For example, with respect to the Dominican Republic's claims challenging the Panel's analysis of the evidence concerning Quitline calls in Appendix B to its Report, Australia's appellee's submission, paras. 588-596 (referring to Dominican Republic's appellant's submission, paras. 926-934). With respect to Honduras' claims concerning the Panel's treatment of Professor Klick's evidence, Australia's appellee's submission, paras. 858-859 and Annex 2 (referring to Honduras' appellant's submission, section VIII.2.2).

<sup>793</sup> Honduras' appellant's submission, Annex, p. 322, para. 1084 (quoting Panel Report, Appendix B, para. 72).

<sup>794</sup> Honduras' appellant's submission, Annex, p. 322, para. 1084 (referring to J. Klick, The Effect of Australia's Plain Packaging Law on Smoking: Evidence from Survey and Market Data (26 July 2014) (Panel Exhibit UKR-5), pp. 54-56).

<sup>795</sup> Honduras' appellant's submission, Annex, p. 322, para. 1084 (referring to Panel Report, Appendix B, para. 72).

<sup>796</sup> Panel Report, Appendix B, paras. 73-77.

<sup>797</sup> Panel Report, Appendix B, para. 72.

<sup>798</sup> Dominican Republic's appellant's submission, para. 408 (referring to Panel Report, Appendix C, para. 120).

inclusion of the price variable (in combination with a quadratic trend variable). In addition, the use of the tax dummies avoids the issue of non-stationarity of the price or tax level variables.<sup>799</sup>

6.271. Thus, it is incorrect for the Dominican Republic to suggest that the Panel simply accepted the robustness of Australia's econometric models. Nor is it correct for the Dominican Republic to assert that the Panel failed to indicate whether it had tested Dr Chifty's models for multicollinearity.

6.272. As a third example, we note that the appellants make several allegations challenging the Panel's assessment of the evidence on smoking behaviour, on the grounds that the Panel erroneously rejected the complainants' econometric models on the basis of an individual robustness criterion (endogeneity, multicollinearity, non-stationarity, or reweighting).<sup>800</sup> These allegations ignore the fact that the Panel did not accept or reject the models submitted by the parties. Rather, the Panel assessed the relative merits of each model, comparing the flaws in Dr Chifty's models to the flaws in the complainants' models, and finding the former to be more credible than the latter. The Panel did not apply an absolute standard of "robustness".<sup>801</sup>

6.273. In light of the foregoing, we reject the appellants' allegations that are based on a misapprehension of the Panel's findings, including the three examples cited above.<sup>802</sup>

6.274. Still under the broad rubric of allegations that incorrectly represent the Panel's findings, we take note of Honduras' contention that the Panel was not "even-handed" in its assessment of the facts of the case because, unlike in its evaluation of the TPP measures, the Panel did not combine the effect of the alternative measure with the effect of the unchallenged large GHWs when it examined the alternative measures proposed by the complainants.<sup>803</sup> In particular, we highlight Honduras' assertion that "the Panel clearly did not combine the effect of the alternative measure with the effect of the unchallenged large GHW."<sup>804</sup>

6.275. Honduras' assertion appears to suggest that the separate effect of the enlarged GHWs, which came into force in Australia at the same time as the TPP measures, was not only perceptible but was also identified on the Panel record. However, this suggestion is inaccurate. In response to questioning at the second hearing, the participants all agreed that there was no evidence on the Panel record showing the separate effects of the TPP measures and the enlarged GHWs. Indeed, the Panel Report expressly states that the post-implementation evidence submitted by the parties to the Panel, especially the empirical econometric evidence relating to smoking prevalence (Appendix C)<sup>805</sup>, consumption (Appendix D)<sup>806</sup>, and down-trading (Appendix E)<sup>807</sup>, did not distinguish between the impact of the TPP measures and the impact of the enlarged GHWs. Consequently, absent such evidence by the parties, the Panel could not have been expected to disentangle the impact of the TPP measures from that of the enlarged GHWs.

### ***The allocation of the burden of proof under Article 2.2 of the TBT Agreement***

6.276. We recall that "the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof."<sup>808</sup> Significantly, the burden of proving that a Member's

<sup>799</sup> Panel Report, Appendix C, para. 120.

<sup>800</sup> Honduras' appellant's submission, paras. 887, 939, 959, 970, and 975-976; Dominican Republic's appellant's submission, paras. 548-551 and 555-559.

<sup>801</sup> See, for example, Panel Report, Appendix C, paras. 104, 108, 110, and 120-122.

<sup>802</sup> With respect to the Panel's analysis of proximal and distal outcomes in Appendices A and B to its Report, Honduras' appellant's submission, para. 757, and Annex, paras. 1082-1084; Dominican Republic's appellant's submission, paras. 887-888 and 923. With respect to the Panel's analysis of smoking behaviour in Appendices C and D to its Report, Honduras' appellant's submission, paras. 877-880, 883-885, 931, 933, 974, 1026-1035, and 1083; Dominican Republic's appellant's submission, paras. 407-408 and 926-934.

<sup>803</sup> Honduras' appellant's submission, paras. 1021-1025.

<sup>804</sup> Honduras' appellant's submission, para. 1022.

<sup>805</sup> Panel Report, Appendix C, paras. 1-2.

<sup>806</sup> Panel Report, Appendix D, paras. 1-3.

<sup>807</sup> Panel Report, Appendix E, paras. 1-2.

<sup>808</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 335. See also Appellate Body Reports, *US – Carbon Steel (India)*, para. 446; *US – Gambling*, paras. 138-140; *US – Carbon*

measure is inconsistent with specific provisions of covered agreements rests on the complainant.<sup>809</sup> This is in line with the Appellate Body's explanation that "under the usual allocation of the burden of proof, a responding Member's measure will be treated as *WTO-consistent*, until sufficient evidence is presented to prove the contrary."<sup>810</sup>

6.277. Turning back to the case before us, we recall that the burden of demonstrating that the TPP measures are inconsistent with Article 2.2 of the TBT Agreement rested on the complainants.<sup>811</sup> Specifically, as regards the main set of the complainants' arguments vis-à-vis the contribution of the TPP measures to Australia's objective, Honduras argued before the Panel that the TPP measures make no contribution to Australia's objective, nor are they apt to do so.<sup>812</sup> The Dominican Republic contended that well-accepted axioms of social and medical science confirm that the TPP measures will not be effective in achieving Australia's stated goals.<sup>813</sup> The Dominican Republic also argued that, at this stage, evidence of actual operation is far more valuable than mere expectations of the effects of the TPP measures.<sup>814</sup> Australia argued that the TPP measures improve public health by impacting the three mechanisms identified in the TPP Act, namely: (i) reducing the attractiveness of tobacco packaging; (ii) reducing positive perceptions of taste; and (iii) reducing positive perceptions of smokers.<sup>815</sup> Australia argued further that, with regard to the nature of the objective of the TPP measures, their characteristics as revealed by their design and structure, and the nature, quantity, and quality of evidence available, the Panel should determine the measure's degree of contribution in qualitative terms.<sup>816</sup>

6.278. The fact that the complainants bore the burden of proving that the TPP measures are inconsistent with Article 2.2 of the TBT Agreement implies, *inter alia*, that, in order to prevail on their main contention of no contribution, the complainants were required to adduce sufficient evidence to persuade the Panel that the TPP measures are *not* apt to, and do *not*, make any contribution to Australia's legitimate objective. Given that the burden of proof rests on the complainant, where a panel finds that a complainant's proposition that the challenged measures makes no contribution is contradicted by evidence (e.g. because the respondent has presented credible evidence suggesting that the measure *does* make some contribution), then the panel is required to reject the complainant's proposition of no contribution. This was the determination of the Panel in these proceedings when it found that:

[T]he 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 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>817</sup>

*Steel*, para. 157; *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66; *Japan – Apples*, para. 159; *EC – Hormones*, para. 98; *Japan – Agricultural Products II*, para. 129.

<sup>809</sup> As the Appellate Body stated in *US – Gambling*:

The complaining party bears the burden of proving an inconsistency with specific provisions of the covered agreements. ...

Where the complaining party has established its *prima facie* case, it is then for the responding party to rebut it. ...

A *prima facie* case must be based on "evidence and legal argument" put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments.

(Appellate Body Report, *US – Gambling*, paras. 138-140. (emphasis original; fns omitted))

<sup>810</sup> Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66. (emphasis original)

<sup>811</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 323. (fn omitted) See also Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208.

<sup>812</sup> Panel Report, para. 7.426.

<sup>813</sup> Panel Report, para. 7.437.

<sup>814</sup> Panel Report, para. 7.438.

<sup>815</sup> Panel Report, para. 7.451.

<sup>816</sup> Panel Report, para. 7.455.

<sup>817</sup> Panel Report, para. 7.1025.

6.279. However, as Australia points out<sup>818</sup>, certain of the appellants' arguments challenging discrete aspects of the Panel's intermediate findings and its overall conclusion appear to be premised on the Appellate Body accepting a reversal of the burden of proof under Article 2.2 of the TBT Agreement.<sup>819</sup> Such a reversal would imply that the primary burden of proof was on Australia to establish that the TPP measures are apt to, and do, make a contribution to Australia's objective, rather than the onus of establishing the lack of contribution of the TPP measures to Australia's objective being on the complainants.

6.280. For example, Honduras submits that, even "taking them as a given", the Panel's "limited" findings on proximal and distal outcomes, addressed in Appendices A and B to the Panel Report, are insufficient to support the Panel's overall conclusion that the TPP measures contribute to Australia's objective.<sup>820</sup> According to Honduras, there is therefore no basis for the Panel to have concluded that the TPP measures "are apt to and actually do contribute to the 'ultimate target' of reducing use of tobacco products".<sup>821</sup> In a similar vein, the Dominican Republic notes the Panel's explanation that the TPP measures were expected to work through a "causal chain" (proximal outcomes → distal outcomes → smoking behaviours), and that it was insufficient to look exclusively at the impact of the TPP measures on proximal outcomes.<sup>822</sup> The Dominican Republic contends that the Panel failed to assess the post-implementation evidence on the impact of the TPP measures on proximal and distal outcomes in light of the expected "causal chain".<sup>823</sup>

6.281. We recall that the Panel's analysis was aimed primarily at establishing "'to what degree, or if at all' the TPP measures contribute to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products".<sup>824</sup> In this regard, the Panel acknowledged that the "fulfilment of this objective through the TPP measures is predicated on their ability to influence smoking behaviours, such as initiation, cessation, and relapse."<sup>825</sup> For this reason, the Panel considered that the impact of the measures on such behaviours is, "*a priori*, directly relevant to an assessment of the degree of contribution of the measures to this objective".<sup>826</sup> Moreover, the Panel made it clear that they did not "exclude" that "evidence relating to 'proximal' outcomes reflecting the three mechanism[s] of the TPP Act"<sup>827</sup>, in combination with other relevant evidence before the Panel, could inform the Panel's assessment of the degree of contribution of the measures to Australia's objective.<sup>828</sup> However, the Panel also made it clear that such evidence was only relevant "to the extent that it would inform the impact of the measures on the smoking behaviours that are the ultimate target of the measures".<sup>829</sup>

6.282. Thus, while the "causal chain" model was a useful prism through which the Panel examined the impact of the TPP measures insofar as post-implementation evidence of the various mechanisms in the chain was available to the Panel, we understand the focus of the Panel's analysis to have been on the impact of the TPP measures on smoking behaviours. As such, the possible absence of convincing evidence with respect to a certain step in the chain would not, by itself, diminish the probative value of the other evidence, including in particular the evidence of the impact of the TPP measures on smoking behaviours. Moreover, we view the Panel's evaluation of the evidence through the prism of the causal chain as an analytical tool that the Panel employed. We do not understand the Panel to have considered the "causal chain" to be a rigid model or the only way by which it could have assessed the contribution of the TPP measures to Australia's objective. We find support for this view in the Panel's explanation that, while it did not "exclude" that "evidence relating to 'proximal' outcomes reflecting the three mechanism[s] of the TPP Act"<sup>830</sup>, in combination with

<sup>818</sup> Australia's appellee's submission, paras. 478-492.

<sup>819</sup> For example, see Honduras' appellant's submission, section VIII.2.1.1.2; Dominican Republic's appellant's submission, paras. 777, 872-875, 882-885, and 894-895.

<sup>820</sup> Honduras' appellant's submission, paras. 746-747.

<sup>821</sup> Honduras' appellant's submission, para. 757.

<sup>822</sup> Dominican Republic's appellant's submission, para. 883 (referring to Panel Report, paras. 7.488, 7.491, 7.519, 7.580, 7.610, 7.648, 7.684, and 7.1030).

<sup>823</sup> Dominican Republic's appellant's submission, para. 885.

<sup>824</sup> Panel Report, para. 7.483.

<sup>825</sup> Panel Report, para. 7.495. (emphasis original)

<sup>826</sup> Panel Report, para. 7.495.

<sup>827</sup> Panel Report, para. 7.498.

<sup>828</sup> Panel Report, para. 7.498.

<sup>829</sup> Panel Report, para. 7.498.

<sup>830</sup> Panel Report, para. 7.498.

other relevant evidence before the Panel, could inform the Panel's assessment of the degree of contribution of the measures to Australia's objective<sup>831</sup>, such evidence was only relevant "to the extent that it would inform the impact of the measures on the smoking behaviours that are the ultimate target of the measures".<sup>832</sup>

6.283. As noted above, it was the complainants, not Australia or the Panel, that bore the burden of proving that the TPP measures are not apt to, and do not, make a contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products. This allocation of the burden of proof informs the question of whether the Panel's conclusion that "the complainants have not demonstrated that the TPP measures are not apt to make a contribution to Australia's objective"<sup>833</sup> is supported by the Panel's intermediate findings. As we see it, the Panel's function was to assess objectively whether the complainants' proposition of the absence of any contribution was supported or undermined by the evidence before it. Contrary to what the appellants' arguments suggest, in answering the question before it, the Panel was not itself supposed to demonstrate, throughout its intermediate findings, that the TPP measures made a precise or quantifiable degree of positive contribution to Australia's objective.

6.284. Thus, to the extent that these claims by the appellants are premised on the reversal of the allocation of the burden of proof, we reject this premise. Consequently, we find that these claims lack merit and warrant no further scrutiny.<sup>834</sup>

### *The Panel's discretion as the trier of facts*

6.285. Australia alleges 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."<sup>835</sup> Australia contends that, 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."<sup>836</sup> For Australia, the appellants' attacks on 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".<sup>837</sup> Australia underlines its concern with the following explanation:

[T]he 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.<sup>838</sup>

6.286. We recall that, in carrying out its duty to make an objective assessment of the facts of the case, a panel is required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that [the panel's] factual findings have a proper basis in that evidence".<sup>839</sup>

<sup>831</sup> Panel Report, para. 7.498.

<sup>832</sup> Panel Report, para. 7.498.

<sup>833</sup> Panel Report, para. 7.1025.

<sup>834</sup> Honduras' appellant's submission, section VIII.2.1.1.2; Dominican Republic's appellant's submission, paras. 777, 872-875, 882-885, and 894-895.

<sup>835</sup> Australia's appellee's submission, para. 20.

<sup>836</sup> Australia's appellee's submission, para. 20. (emphasis added)

<sup>837</sup> Australia's appellee's submission, para. 20.

<sup>838</sup> Australia's appellee's submission, para. 425.

<sup>839</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185; referring to Appellate Body Reports, *EC – Hormones*, paras. 132-133; *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170,

Within these parameters, "it is generally within the discretion of the [p]anel to decide which evidence it chooses to utilize in making findings."<sup>840</sup> Moreover, when assessing the probative value of the evidence, a panel is not required to "accord to factual evidence ... the same meaning and weight as do the parties".<sup>841</sup> As such, a challenge under Article 11 of the DSU "cannot be made out simply by asserting that a panel did not agree with arguments or evidence".<sup>842</sup> Crucially, the Appellate Body has cautioned that it: (i) will not "interfere lightly" with the panel's fact-finding authority<sup>843</sup>; (ii) will not "second-guess the [p]anel in appreciating either the evidentiary value of ... studies or the consequences, if any, of alleged defects in [the evidence]"<sup>844</sup>; and (iii) will not reach "a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding from the one the panel reached".<sup>845</sup> The Appellate Body has also considered it unacceptable for an appellant to simply recast factual arguments that it made before the panel in the guise of an Article 11 claim.<sup>846</sup> Instead, an appellant must identify specific errors regarding the objectivity of the panel's assessment<sup>847</sup>, and "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."<sup>848</sup>

6.287. Turning to the case before us, we take note of several instances with respect to which it appears that the appellants' arguments are not focused on the objectivity of the Panel's assessment of the facts of the case. Instead, the appellants' arguments seem to challenge the accuracy or merit of the Panel's factual findings following its weighing of the parties' evidence.<sup>849</sup>

6.288. For example, the appellants allege that the Panel merely accepted "Australia's argument that the dataset was ill suited to provide information on distal outcomes"<sup>850</sup>, and that the Panel "failed to engage with the Dominican Republic's evidence showing that the datasets are not less suited to measuring the impact on distal outcomes".<sup>851</sup> Contrary to the appellants' assertions, we note that in its evaluation of the post-implementation evidence on quitting-related and other distal outcomes in Appendix B to its Report, the Panel engaged repeatedly with the parties' respective views of the limitations or otherwise of the NTPPTS dataset. For instance, in its evaluation of the evidence concerning quitting-related cognitions, the Panel took account of the concerns about the "particular features of the NTPPTS data" raised by Australia's expert, Professor Chaloupka, as well as the rebuttal to Professor Chaloupka that was proffered by the complainants' (Dominican Republic and Indonesia) experts, Ajzen et al.<sup>852</sup> The Panel also took note of the contention of Ajzen et al. that Professor Chaloupka's assertion that the NTPPTS data underestimated changes in some measures

177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *EC – Selected Customs Matters*, para. 258).

<sup>840</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178; *EC – Hormones*, para. 135.

<sup>841</sup> Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.61.

<sup>842</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.227; (referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238).

<sup>843</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 881.

<sup>844</sup> Appellate Body Report, *Japan – Apples*, para. 222 (quoting Appellate Body Reports, *EC – Asbestos*, para. 177; *Korea – Alcoholic Beverages*, para. 161).

<sup>845</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 881. (fn omitted)

<sup>846</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178; *EC – Fasteners (China)*, para. 442; *US – Steel Safeguards*, para. 498; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238.

<sup>847</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178; *EC – Fasteners (China)*, para. 442 (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 498; *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238).

<sup>848</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 442). (emphasis original)

<sup>849</sup> With respect to proximal and distal outcomes, Honduras' appellant's submission, paras. 781-783; Dominican Republic's appellant's submission, paras. 1015-1016. With respect to smoking behaviours, Honduras' appellant's submission, paras. 908-910, 916-920, 931-933, and 1026-1035; Dominican Republic's appellant's submission, paras. 555-559. With respect to the Panel's overall conclusions, Honduras' appellant's submission, paras. 734, 753, and 759-769; Dominican Republic's appellant's submission, paras. 908-915. With respect to the Panel's discussion of GHWs, Honduras' appellant's submission, para. 1021. With respect to the Panel's assessment of the cigar-specific evidence, Honduras' appellant's submission, paras. 853 and 856-858; Dominican Republic's appellant's submission, paras. 213, 797, and 1073-1074.

<sup>850</sup> Honduras' appellant's submission, para. 783.

<sup>851</sup> Dominican Republic's appellant's submission, para. 1016. (emphasis original)

<sup>852</sup> Panel Report, Appendix B, paras. 15-18.

of intention because recent quitters who gave up smoking had not been asked was unfounded. According to Ajzen et al., the TPP measures did not increase quitting behaviours in the short term.<sup>853</sup> In its analysis, the Panel highlighted this point of contention about the NTPPTS data, and expressed the following view:

Ajzen et al. further report a small and statistically significant decrease in the proportion of adult smokers reporting their interest in quitting and intention to quit. We note that Ajzen et al. do not offer an explanation as to why the TPP measures would have *decreased* smokers' interest in quitting and intention to quit. We note that it is conceivable that these findings could partly result from the fact that, as observed by Australia, questions on quitting intention were not asked of recent quitters, contrary to Ajzen et al.'s claim that the question was asked to both smokers and recent quitters, although it is not clear, in the absence of specific evidence relating to the number of recent quitters, to what extent this circumstance may account for the results.<sup>854</sup>

6.289. The Panel also took account of the parties' concerns about reliance on the NTPPTS data in the context of the Panel's evaluation of the evidence relating to pack concealment and micro-indicators of concern.<sup>855</sup> Likewise, the Panel took account of the parties' concerns about reliance on the NTPPTS data in the context of the Panel's evaluation of the evidence relating to relating to quit attempts.<sup>856</sup>

6.290. These paragraphs in Appendix B to the Panel Report undermine the suggestion by the appellants that the Panel failed to engage with the complainants' evidence concerning the reliability of the NTPPTS data in the context of quitting-related and other distal outcomes. Rather, it appears that the Panel was not persuaded by the complainants' views in this respect.

6.291. As the Appellate Body has found, a challenge under Article 11 of the DSU "cannot be made out simply by asserting that a panel did not agree with arguments or evidence".<sup>857</sup> Thus, the mere fact that the Panel did not agree with the arguments put forward by the complainant regarding the reliability of the NTPPTS data with respect to quitting-related and other distal outcomes is not, by itself, sufficient to sustain a claim that the Panel failed to "objectively assess the facts of the case" in accordance with Article 11 of the DSU.

6.292. In a similar vein, Honduras challenges a number of aspects of the Panel's treatment of the complainants' expert reports in Appendix C. Honduras characterizes the Panel as having "wilfully ignored" the complainants' evidence and takes issue with the Panel's reasons for doing that.<sup>858</sup> However, we do not read the Panel as having "wilfully ignored" or "disregarded" the complainants' models. Rather, we understand that the Panel assessed the credibility of competing evidence, and selected one set of evidence (specifically, Australia's evidence) on the basis that it was more credible than the complainants' evidence.

6.293. For these reasons, we reject the attempts by the appellants to resubmit their factual arguments under the guise of challenging the objectivity of the Panel's assessment of the facts of the case. As noted in paragraph 6.50. above, if the Appellate Body were to entertain such factual arguments, this would undermine the Panel in its role as the trier of facts and the adjudicator of first instance in WTO dispute settlement.<sup>859</sup>

<sup>853</sup> Panel Report, Appendix B, para. 18.

<sup>854</sup> Panel Report, Appendix B, para. 39. (emphasis original; fn omitted)

<sup>855</sup> Panel Report, Appendix B, paras. 50-51 and 73.

<sup>856</sup> Panel Report, Appendix B, paras. 84-85 and 101.

<sup>857</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.227 (referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238).

<sup>858</sup> Honduras' appellant's submission, paras. 931-933 (referring to Panel Report, Appendix C, paras. 102 and 105).

<sup>859</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 881.



***Honduras' allegations that the Panel disregarded, significantly misrepresented, or distorted Honduras' evidence***

6.294. Honduras submits that "on many occasions" the Panel disregarded, significantly misrepresented, and distorted the evidence as presented by Honduras in the form of expert reports by Professor Klick related to the various aspects of the degree of contribution of the TPP measure to Australia's objective.<sup>860</sup> Australia does not address each "occasion" identified by Honduras. Instead, Australia contends that, first, as a factual matter, the Panel *did* in fact examine the arguments presented by Professor Klick that Honduras claims it "disregarded".<sup>861</sup> Second, Australia reiterates 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.<sup>862</sup> For Australia, the Panel's treatment of Professor Klick's evidence lies squarely within the bounds of its proper discretionary authority. Australia considers that Honduras' allegations that the Panel "materially misrepresented" and "distorted" Professor Klick's evidence, and did not "objectively assess" Professor Klick's critiques of Australia's evidence<sup>863</sup>, do nothing more than challenge the *weight* that the Panel accorded to his evidence.<sup>864</sup> Likewise, Australia contends that Honduras' numerous allegations that the Panel "disregarded" Professor Klick's rebuttals do nothing more than challenge the particular evidence that the Panel chose to rely on and cite in its final report.<sup>865</sup> For Australia, since such allegations fail to meet the requirements of a claim under Article 11, they must be rejected.<sup>866</sup>

6.295. In our view, a significant number of Honduras' allegations that the Panel disregarded, significantly misrepresented, or distorted Honduras' evidence<sup>867</sup> are yet another attempt by Honduras to relitigate, before us, its factual case before the Panel under the guise of a claim under Article 11 of the DSU. As discussed above, in making an objective assessment of the facts of the case, a panel is required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that [the panel's] factual findings have a proper basis in that evidence".<sup>868</sup> In this regard, a panel "has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof".<sup>869</sup> Within these parameters, "it is generally within the discretion of the [p]anel to decide which evidence it chooses to utilize in making findings."<sup>870</sup> Moreover, an allegation that a panel has failed to conduct the "objective assessment of the matter before it" required by Article 11 is "a very serious allegation".<sup>871</sup> In this vein, the Appellate Body has considered that allegations that there was "'disregard' and 'distortion' and 'misrepresentation' of the evidence" by a panel "imply 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>872</sup> Bearing these considerations in mind, we highlight two examples of allegations that the Panel disregarded, distorted, or misrepresented evidence.

<sup>860</sup> Honduras' appellant's submission, Annex, p. 315, para. 1082.

<sup>861</sup> Australia's appellee's submission, Annex 2, para. 941.

<sup>862</sup> Australia's appellee's submission, Annex 2, para. 943.

<sup>863</sup> Australia's appellee's submission, Annex 2, para. 944 and fn 1214 thereto (quoting Honduras' appellant's submission, Annex, pp. 318-319, 321, 324-325, 328, and 340).

<sup>864</sup> Australia's appellee's submission, Annex 2, para. 944 (referring to Honduras' appellant's submission, Annex, pp. 319-320 and 324).

<sup>865</sup> Australia's appellee's submission, Annex 2, para. 944 (referring to Honduras' appellant's submission, Annex, p. 318, 337, and 330).

<sup>866</sup> Australia's appellee's submission, Annex 2, para. 944.

<sup>867</sup> Honduras' appellant's submission, paras. 879-890; *ibid.*, Annex, paras. 1082-1084.

<sup>868</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185; referring to Appellate Body Reports, *EC – Hormones*, paras. 132-133; *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *EC – Selected Customs Matters*, para. 258).

<sup>869</sup> Appellate Body Report, *Korea – Dairy*, para. 137.

<sup>870</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *EC – Hormones*, para. 135).

<sup>871</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.227 (quoting Appellate Body Report, *EC – Poultry*, para. 133).

<sup>872</sup> Appellate Body Report, *EC – Hormones*, para. 133. (fn omitted)

6.296. First, we take note of Honduras' assertion that the Panel failed to reflect and address relevant expert evidence prepared by Professor Klick rebutting arguments by Australia's expert, Professor Chaloupka, in relation to the NTPPTS data.<sup>873</sup> In Honduras' view, Professor Klick addressed and rebutted the allegations by Professor Chaloupka that his analyses and reliance on the NTPPTS data were flawed, demonstrating that the survey data from the NTPPTS regarding smoker perceptions and intentions did not indicate a systematic improvement following the introduction of the TPP measures.<sup>874</sup> Honduras maintains that "nowhere in the Panel Report is there an indication that the Panel objectively assessed this material evidence."<sup>875</sup>

6.297. Before the Panel, Honduras relied on Professor Klick's Third Supplemental Rebuttal Report in support of its arguments relating to the post-implementation evidence on smoking behaviours, not proximal outcomes. This is why the Panel referred extensively to this exhibit in its evaluation of the post-implementation evidence on smoking behaviours<sup>876</sup>, and not in relation to proximal outcomes. We recall that the mere fact that a panel has not explicitly referred to each and every piece of evidence in its reasoning is insufficient to establish a claim under Article 11 of the DSU. Rather, an appellant "must explain why such evidence is so material to its case that the panel's failure to address it explicitly has a bearing on the objectivity of its factual assessment".<sup>877</sup> In this regard we note that, in connection with proximal outcomes, the Panel did in fact take account of Professor Klick's and Professor Chaloupka's divergent opinions regarding the NTPPTS data.<sup>878</sup> Following its review of the available evidence, the Panel "agree[d] with Professor Chaloupka that the impact of the TPP measures is likely to be smaller for the less proximal outcomes, when looking at the impact in an overall survey sample composed of smokers and recent quitters".<sup>879</sup> As the Appellate Body has stated, a challenge under Article 11 of the DSU "cannot be made out simply by asserting that a panel did not agree with arguments or evidence".<sup>880</sup>

6.298. Second, we highlight Honduras' challenge to the Panel's conclusion, in Appendix C to its Report, that "there is some econometric evidence suggesting that the TPP measures ... contributed to the reduction in overall smoking prevalence."<sup>881</sup> Honduras contends that the Panel's conclusion was "based exclusively on one dataset and one expert's re-assessment of the analysis presented by the complainants of that dataset".<sup>882</sup> Honduras elaborates that, even though the Panel considered the RMSS dataset to be the "most suitable", that does not explain why the Panel's conclusions were based *exclusively* on that dataset, and did not take into account the other datasets (such as the official prevalence data of New South Wales, the most populous state in Australia).<sup>883</sup> Australia argues that the Panel "provided a detailed explanation for its RMSS finding but nevertheless examined other models that were *not* based on the RMSS data".<sup>884</sup> Australia also considers more generally that the Panel examined all the evidence and found the complainants' evidence unpersuasive.<sup>885</sup>

<sup>873</sup> Honduras' appellant's submission, Annex, p. 316, para. 1083 and fn 676 thereto (referring to Panel Report, Appendix A, paras. 34-41).

<sup>874</sup> Honduras' appellant's submission, Annex, pp. 316-317, para. 1083 (referring to Klick Third Supplemental Rebuttal Report (Panel Exhibit HND-166), section III).

<sup>875</sup> Honduras' appellant's submission, Annex, p. 317, para. 1083.

<sup>876</sup> See, for example, Panel Report, Appendix C, paras. 69-70, 101, and 112; *ibid.*, Appendix D, paras. 20, 56-59, and 71.

<sup>877</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.147. (fn omitted) See also Appellate Body Reports, *Australia – Apples*, paras. 275-276; *US – COOL*, para. 322; *Philippines – Distilled Spirits*, para. 135.

<sup>878</sup> Panel Report, Appendix A, paras. 39-41.

<sup>879</sup> Panel Report, Appendix A, para. 68 (referring to F. Chaloupka, Rebuttal Report on Selected Issues Raised in Ongoing Challenges to Australia's Tobacco Plain Packaging Measure (26 October 2015) (Panel Exhibit AUS-582), para. 9).

<sup>880</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.227 (referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238).

<sup>881</sup> Panel Report, Appendix C, para. 123.c.

<sup>882</sup> Honduras' appellant's submission, para. 885.

<sup>883</sup> Honduras' appellant's submission, para. 879.

<sup>884</sup> Australia's appellee's submission, fn 1102 to para. 853 (referring to Panel Report, Appendix C, paras. 113-116).

<sup>885</sup> Australia's appellee's submission, para. 853.

6.299. We observe that the Panel examined the results of Professor Klick's models based on all the relevant datasets submitted to it.<sup>886</sup> The Panel did not ignore any models that were not based on the RMSS data. At the same time, one of the Panel's criticisms (among several others) of Professor Klick's models based on non-RMSS data was that they were based on non-RMSS data. This, among other things, led the Panel to question the credibility of those models. We recall that the Panel's analysis was aimed at assessing the contribution of the TPP measures to Australia's objective.

6.300. We further note that some of the evidence before the Panel indicated that the TPP measures did indeed contribute to reducing smoking prevalence, while other evidence before the Panel indicated that the measures made no contribution. Honduras seems to consider that, even though the Panel considered one set of evidence to be more credible than the other, unless there was a reason to completely disregard the other evidence, the less credible evidence should have also been taken into account.<sup>887</sup>

6.301. We disagree. Given that the two sets of evidence were directly contradictory (one indicating that the TPP measures resulted in a reduction in smoking prevalence and the other showing no contribution), it would appear to be internally incoherent and contradictory for the Panel to have based its conclusions on both sets of contradictory evidence, notwithstanding that it had determined that one set of evidence was more credible than the other. Moreover, the fact that a panel considers one set of evidence to be more credible than a contradictory set of evidence does not imply that it failed to take account of the less credible evidence. Rather, in emphasizing one set of evidence over another, the Panel simply exercised its discretion as the trier of fact "to decide which evidence it chooses to utilize in making findings".<sup>888</sup> Indeed, to the extent that Honduras' arguments suggest that the Panel erred in attributing little to no relevance to one set of evidence adduced by the parties, such argument seems to us to be a disguised attempt to challenge the Panel's assessment of the probative value of the evidence before it.

6.302. As the two examples above illustrate, a significant number of Honduras' allegations that the Panel disregarded, significantly misrepresented, or distorted Honduras' evidence<sup>889</sup> are yet another attempt by Honduras to relitigate its factual arguments, which were rejected by the Panel, under the guise of a claim under Article 11.

### ***Connection between Honduras' evidence and arguments before the Panel***

6.303. Honduras makes several allegations that the Panel failed to take account of certain evidence submitted in support of its arguments during the Panel proceedings. However, we observe that with respect to a number of these allegations, the evidence that Honduras refers to was not plainly connected, during the Panel proceedings, to the arguments that Honduras refers to on appeal.<sup>890</sup>

6.304. For example, in relation to the Panel's findings on proximal and distal outcomes, Honduras claims that the Panel disregarded important findings by Professor Klick concerning the Cancer Institute New South Wales Tracking Survey (CITTS), and particularly Professor Klick's statements that the claims relied on by Australia were the result of "cherry-picking" CITTS results.<sup>891</sup> Honduras considers this to be evidence that was "material" to demonstrating the lack of robustness and probative value of Dunlop et al. 2014. Honduras argues that Dunlop et al. 2014 formed the basis for the Panel's finding that "there is some empirical evidence suggesting that the TPP measures have reduced the appeal of tobacco products among adult cigarette smokers, in terms of pack dislike,

<sup>886</sup> See Panel Report, Appendix C, paras. 112-118.

<sup>887</sup> Honduras' appellant's submission, paras. 877-880.

<sup>888</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *EC – Hormones*, para. 135).

<sup>889</sup> Honduras' appellant's submission, paras. 879-890; *ibid.*, Annex, paras. 1082-1084.

<sup>890</sup> With respect to proximal and distal outcomes, Honduras' appellant's submission, Annex, para. 1083. With respect to smoking behaviours, Honduras' appellant's submission, paras. 949 and 1072. See also *ibid.*, Annex, paras. 1085-1086.

<sup>891</sup> Honduras' appellant's submission, Annex, para. 1083 (referring to Panel Report, Appendix A, paras. 17-19; J. Klick, Second Supplemental Rebuttal Report – A Review of Australian Survey Data From New South Wales (28 October 2015) (Klick Second Supplemental Rebuttal Report) (Panel Exhibit HND-165), paras. 35-61).

product dislike, perceived lower quality, satisfaction and value, lower brands' prestige, and connection and identification."<sup>892</sup>

6.305. We note the Panel's explanation that the CITTS is a weekly tracking telephone survey of smokers and recent quitters (who quit in the past 12 months), involving approximately 50 interviews conducted per week throughout the year. The CITTS monitors smoking-related thoughts and behaviours among adult smokers and recent quitters in New South Wales.<sup>893</sup> The Panel observed that Dunlop et al. 2014 used the CITTS data to investigate the impact of Australia's TPP measures on two of the specific mechanisms: (i) decreasing the promotional appeal of packaging; and (ii) increasing the impact of health warnings.<sup>894</sup> The Panel noted that, overall, Dunlop et al. 2014 had concluded that the TPP measures had an "early statistically significant effect" in reducing the promotional appeal of the packaging among adult smokers.<sup>895</sup> Following its review of the evidence relating to the appeal of tobacco products, the Panel stated that:

A careful review of Wakefield et al. 2015 and Dunlop et al. 2014 and the econometric evidence submitted by the Dominican Republic, Honduras and Indonesia leads us to conclude that there is some empirical evidence suggesting that the TPP 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>896</sup>

6.306. The Panel observed, in a footnote to the above conclusion, that "in his review of Dunlop et al.'s 2014 analysis, Professor Klick did not discuss and re-analyse the questions of the CITTS related to appeal."<sup>897</sup> The Panel noted further that "Professor Klick did not mention in his reports whether the commissioned Roy Morgan Research Survey also asked questions related to the appeal of tobacco products."<sup>898</sup> Thus, the Panel's engagement with Professor Klick's evidence was limited to noting that it did not relate to the inquiry in question, i.e. the appeal of tobacco products.

6.307. On appeal, Honduras submits that Professor Klick's conclusions concerning the "cherry-picking" of specific CITTS results apply to Dunlop et al. 2014 as a whole and should therefore have been objectively assessed by the Panel.<sup>899</sup> Rather tellingly, in its appellant's submission, Honduras does not cite any of its arguments before the Panel. Instead, in support of its allegation, Honduras identifies the last 26 paragraphs of Professor Klick's Second Supplemental Rebuttal Report.<sup>900</sup> This exhibit accompanied Honduras' opening statement at the Panel's second substantive meeting with the parties. Honduras relied on this exhibit to address the post-implementation evidence of "actual smoking behaviours" and "quitting behaviours".<sup>901</sup> It does not appear that Honduras relied on this exhibit when making its submissions regarding the post-implementation evidence relating to the appeal of tobacco products. In response to questioning at the second hearing, Honduras confirmed that during the Panel proceedings, it did not link its arguments on the appeal of tobacco products to Professor Klick's Second Supplemental Rebuttal Report.

6.308. The Appellate Body has said that "[a] complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party

<sup>892</sup> Honduras' appellant's submission, Annex, para. 1083 (quoting Panel Report, Appendix A, para. 29).

<sup>893</sup> Panel Report, Appendix A, para. 17.

<sup>894</sup> Panel Report, Appendix A, para. 18 (referring to S. Dunlop, T. Dobbins, J. Young, D. Perez, and D. Currow, "Impact of Australia's Introduction of Tobacco Plain Packs on Adult Smokers' Pack-Related Perceptions and Responses: Results from a Continuous Tracking Survey", *BMJ Open*, Vol. 4 (2014), doi:10.1136/bmjopen.2014.005836 (Dunlop et al. 2014) (Panel Exhibits AUS-207, HND-132, DOM-199)).

<sup>895</sup> Panel Report, Appendix A, para. 19 (referring to Department of Health, Post-Implementation Review: Tobacco Plain Packaging 2016, Australian Government (2016) (Tobacco Plain Packaging PIR) (Panel Exhibit AUS-624), paras. 77-80).

<sup>896</sup> Panel Report, Appendix A, para. 29 (referring to Wakefield et al. 2015 (Panel Exhibits AUS-206, DOM-306); Dunlop et al. 2014 (Panel Exhibits AUS-207, HND-132, DOM-199); Ajzen et al. Data Report (Panel Exhibit DOM/IDN-2), paras. 89-97 and 148-150, and Appendix A, pp. 78-80).

<sup>897</sup> Panel Report, Appendix A, fn 36 to para. 29.

<sup>898</sup> Panel Report, Appendix A, fn 36 to para. 29.

<sup>899</sup> Honduras' appellant's submission, Annex, p. 316, para. 1083.

<sup>900</sup> Honduras' appellant's submission, Annex, p. 315, para. 1083 (referring to Panel Report, Appendix A, paras. 17-19; Klick Second Supplemental Rebuttal Report (Panel Exhibit HND-165), paras. 35-61).

<sup>901</sup> Honduras' opening statement at the second Panel meeting, as delivered, paras. 41-42.

simply allege facts without relating them to its legal arguments."<sup>902</sup> Given the sheer volume of evidence and submissions submitted to the Panel in these proceedings, it would be unreasonable to have required the Panel to have engaged with every argument in every piece of evidence presented to it, in the absence of a party asserting, to the Panel, the relevance of that particular aspect of the evidence.

6.309. In any event, a review of Professor Klick's Second Supplemental Rebuttal Report<sup>903</sup> shows that Professor Klick indicated that he would "examine the CITTS data on the non-behavioral metrics that led Dunlop et al. to come to [their] conclusion about the increased effectiveness of health warnings resulting from plain packaging and the reduction of the promotional appeal of tobacco products that allegedly moved consumers 'closer to cessation'".<sup>904</sup> However, Professor Klick's Second Supplemental Rebuttal Report includes no discussion specific to the appeal of tobacco products. This observation is supported by Honduras' own assertion that Professor Klick's conclusions concerning the "cherry-picking" of specific CITTS results apply to Dunlop et al. 2014 *as a whole* and should therefore have been objectively assessed by the Panel.<sup>905</sup> These arguments seem to imply that even if Honduras did not make a specific connection between Professor Klick's Second Supplemental Rebuttal Report and its arguments concerning the appeal of tobacco products, the Panel failed to carry out its function under Article 11 of the DSU by not making this connection and addressing the concerns in Professor Klick's report.

6.310. We recall that "[a] *prima facie* case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to *each* of the elements of the claim."<sup>906</sup> Thus, the onus was on Honduras to connect its arguments to its evidence, and not "expect the panel to divine", from the totality of Honduras' evidence and arguments, "a claim of WTO-inconsistency".<sup>907</sup>

***Panels need not address every argument raised by the parties***

6.311. We recall that "a panel is not obligated to consider each and every argument put forward by the parties in support of their respective claims, as long as it completes an objective assessment of the matter before it, in accordance with Article 11 of the DSU."<sup>908</sup> Thus, where an appellant challenges a panel's failure to address a particular argument, the appellant must explain why such argument or evidence "is so material to its case that the panel's failure to address it explicitly has a bearing on the objectivity of its factual assessment".<sup>909</sup>

6.312. In this regard, we note that Honduras makes several claims alleging that the Panel disregarded certain of Professor Klick's rebuttals to Dr Chipty's evidence.<sup>910</sup> For example, Honduras claims that the Panel disregarded Professor Klick's rebuttals to Dr Chipty's argument that the RMSS data showed that Australians cited health concerns as the primary reason for quitting while New Zealanders cited costs as the primary reason for quitting.<sup>911</sup> We note that, although Dr Chipty made such an argument, the Panel did not appear to rely on this argument anywhere in its analysis. Honduras has not identified any such instance, although Honduras does point to the fact that the Panel at least acknowledged Dr Chipty's arguments in summarizing the experts' opinions, whereas the Panel did not acknowledge Professor Klick's rebuttal.<sup>912</sup> Given that the Panel did not actually rely on Dr Chipty's argument in its own analysis of Professor Klick's evidence, we are not persuaded that

<sup>902</sup> Appellate Body Report, *US – Gambling*, para. 140. (fn omitted)

<sup>903</sup> Honduras' appellant's submission, Annex, p. 315, para. 1083 (referring to Panel Report, Appendix A, paras. 17-19; Klick Second Supplemental Rebuttal Report (Panel Exhibit HND-165), paras. 35-61).

<sup>904</sup> Klick Second Supplemental Rebuttal Report (Panel Exhibit HND-165), para. 35.

<sup>905</sup> Honduras' appellant's submission, Annex, p. 316, para. 1083.

<sup>906</sup> Appellate Body Report, *US – Gambling*, para. 140. (emphasis original, fn omitted)

<sup>907</sup> Appellate Body Report, *US – Gambling*, paras. 140. (fn omitted)

<sup>908</sup> Appellate Body Report, *Colombia – Textiles*, fn 71 to para. 5.18.

<sup>909</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.147. (fn omitted) See also Appellate Body Reports, *Australia – Apples*, paras. 275-276; *US – COOL*, para. 322; *Philippines – Distilled Spirits*, para. 135.

<sup>910</sup> Honduras appellant's submission, Annex, paras. 1085-1086.

<sup>911</sup> Honduras' appellant's submission, Annex, pp. 328-329, para. 1085 (referring to J. Klick, Rebuttal Report – A Reply to Dr Chipty (8 July 2015) (Panel Exhibit HND-118), paras. 71-75).

<sup>912</sup> Honduras' appellant's submission, Annex, p. 328, para. 1085 (referring to Panel Report, Appendix C, para. 23).

the Panel's failure to explicitly acknowledge Professor Klick's rebuttal undermines the objectivity of the Panel's assessment.

6.313. As a second example, we take note of Honduras' claim that the Panel disregarded Professor Klick's rebuttal of Dr Chifty's criticisms of his smoking prevalence analysis using data from the New South Wales Population Health Survey (NSWPHS).<sup>913</sup> According to Honduras, Professor Klick "comprehensively" responded to Dr Chifty's criticisms: "(i) [that] the RMSS dataset is more suitable than the NSW data; (ii) that the timeframe of the NSW data is inadequate to properly study the effects of plain packaging and, relatedly, that the tax increases in Australia make the data unsuitable for a pre/post-implementation analysis; and (iii) that the change in survey methodology of how the NSW data was collected limits the usability of the data".<sup>914</sup> We recall that the Panel's only criticism of Professor Klick's analysis of the NSWPHS data was that "the nature of the data (i.e. yearly observations) limits the number of observations to two post-packaging observations (2013 and 2014), which prevents distinguishing between the TPP measures and tobacco excise tax increases in 2013 and 2014."<sup>915</sup> The Panel also considered that only two observations are "extremely short in comparison with the RMSS data encompassing up to 34 post-TPP observations (December 2012-September 2015)".<sup>916</sup> We therefore understand the Panel as not having relied on the other aspects of Dr Chifty's criticism of Professor Klick's analysis of the NSWPHS data (such as the change in survey methodology). Thus, similar to the first example cited above, given that the Panel did not rely on Dr Chifty's argument in its own analysis of Professor Klick's evidence, we are not persuaded that the Panel's failure to explicitly acknowledge Professor Klick's rebuttal undermines the objectivity of the Panel's assessment.

6.314. In sum, and in line with the examples discussed above, in instances where the Panel did not rely on Dr Chifty's argument in its own analysis of Professor Klick's evidence, we are not persuaded that the Panel's failure to address a counter-argument raised by Professor Klick in response to Dr Chifty's argument amounts to a failure by the Panel to make an objective assessment of the facts of the case. In this vein, we find that Honduras has not demonstrated that Professor Klick's arguments that were not reflected in the Panel Report were "so material to its case that the [P]anel's failure to address [them] explicitly has a bearing on the objectivity of its factual assessment".<sup>917</sup>

***Allegations that the Panel's findings are based on "incoherent reasoning" or lacked a "reasoned and adequate explanation"***

6.315. With respect to several of their claims under Article 11 of the DSU, the appellants allege that the Panel failed to provide "reasoned and adequate explanations" or "coherent reasoning" for its findings.<sup>918</sup> For example, Honduras claims that the Panel erred under Article 11 of the DSU by failing to provide a reasoned and adequate explanation<sup>919</sup>, because the Panel's limited findings on the actual impact of the TPP measures on proximal and distal outcomes were inconsistent with the Panel's proposition that the TPP measures are "working as intended".<sup>920</sup> Similarly, the Dominican Republic claims that the Panel erred under Article 11 because the Panel's findings on the actual impact of the TPP measures on proximal and distal outcomes were incoherent with its finding that the

<sup>913</sup> Honduras' appellant's submission, Annex, pp. 331-332, para. 1085 (referring to J. Klick, Supplemental Rebuttal Report – A Review of New and Updated Australian Survey and Market Data (16 September 2015) (Panel Exhibit HND-122), para. 42; Klick Third Supplemental Rebuttal Report (Panel Exhibit HND-166), paras. 9-28).

<sup>914</sup> Honduras' appellant's submission, Annex, pp. 331-332, para. 1085 (referring to Klick Third Supplemental Rebuttal Report (Panel Exhibit HND-166), paras. 9-28).

<sup>915</sup> Panel Report, Appendix C, para. 115.

<sup>916</sup> Panel Report, Appendix C, para. 100.

<sup>917</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.147. (fn omitted) See also Appellate Body Reports, *Australia – Apples*, paras. 275-276; *US – COOL*, para. 322; *Philippines – Distilled Spirits*, para. 135.

<sup>918</sup> Honduras' appellant's submission, paras. 696, 753, 880, 889-890, 916-917, 940-941, 949-951, 958-959, 962-963, 968, 971-972, 976, 979, and 987-989; Dominican Republic's appellant's submission, paras. 34, 555-559, and 893.

<sup>919</sup> See Honduras' appellant's submission, para. 734.

<sup>920</sup> Honduras' appellant's submission, section VIII.2.1.1.2. See *ibid.*, para. 753.

TPP measures are expected to contribute to Australia's objective through the operation of the hypothesized "causal chain".<sup>921</sup>

6.316. Australia challenges the appellants' claims that the Panel failed to provide "reasoned and adequate explanations" for its findings, arguing that, in raising such claims, "the appellants dispense with even the pretence of a legitimate grievance."<sup>922</sup> Australia highlights that the appellants indicate that they are "not request[ing] the Appellate Body to reach any conclusions as to whether the Panel was correct" in its factual analysis, while at the same time the appellants "devote so much space to a panel's alleged failure to provide 'reasoned and adequate' explanations".<sup>923</sup> For Australia, 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 relitigate the issues they lost before the Panel.<sup>924</sup>

6.317. We recall that, in making an objective assessment of the facts of the case, a panel is required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that [the panel's] factual findings have a proper basis in that evidence".<sup>925</sup> The Appellate Body has also highlighted that an "essential part of a panel's task under Article 11 is to explain its objective assessment of the matter before it".<sup>926</sup> Hence, demonstrating that a panel's reasoning is internally inconsistent may, in some instances be sufficient to implicate the objectivity of a panel's assessment under Article 11.<sup>927</sup>

6.318. In the present proceedings, we observe that, with respect to a large number of their claims, when Honduras or the Dominican Republic refers to the Panel's failure to provide a reasoned and adequate explanation, they are contending either that: (i) the Panel's reasoning was internally inconsistent or lacked coherence<sup>928</sup>; (ii) the Panel disregarded, distorted, or misrepresented evidence<sup>929</sup>; (iii) the Panel's findings lacked a sufficient evidentiary basis on the Panel record<sup>930</sup>; or (iv) the Panel was not even-handed in its treatment of the parties' evidence.<sup>931</sup> It is noted that when an appeal is brought under Article 11 of the DSU, the Appellate Body examines a panel's explanations, not to verify the *correctness* of these explanations, but as a means of checking whether the panel was *objective* in its assessment of the facts. To this end, the Appellate Body may consider that a panel's objectivity is implicated if the appellant successfully demonstrates that (i) the panel's reasoning was internally inconsistent or lacked coherence<sup>932</sup>; (ii) the panel disregarded, distorted, or misrepresented evidence<sup>933</sup>; (iii) the panel's findings lacked a sufficient evidentiary basis on the

<sup>921</sup> Dominican Republic's appellant's submission, paras. 893 (referring to Panel Report, para. 7.1030) and 895.

<sup>922</sup> Australia's appellee's submission, para. 431.

<sup>923</sup> Australia's appellee's submission, para. 431 (quoting Dominican Republic's appellant's submission, para. 325).

<sup>924</sup> Australia's appellee's submission, para. 431.

<sup>925</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185; referring to Appellate Body Reports, *EC – Hormones*, paras. 132-133; *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *EC – Selected Customs Matters*, para. 258).

<sup>926</sup> Appellate Body Report, *US – Continued Zeroing*, para. 338 (quoting Panel Report, *US – Continued Zeroing*, para. 7.180). (emphasis original)

<sup>927</sup> Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 894; *Russia – Commercial Vehicles*, paras. 5.81-5.82; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 295.

<sup>928</sup> See, for example, Honduras' appellant's submission, paras. 734, 753, and 797; Dominican Republic's appellant's submission, paras. 177 and 888.

<sup>929</sup> See, for example, Honduras' appellant's submission, para. 717 and Annex; Dominican Republic's appellant's submission, paras. 559 and 574-577.

<sup>930</sup> See, for example, Honduras' appellant's submission, paras. 13, 696, 721, and 772; Dominican Republic's appellant's submission, paras. 194-197, 293, and 416-417.

<sup>931</sup> See, for example, Honduras' appellant's submission, paras. 729-730; Dominican Republic's appellant's submission, paras. 257 and 797.

<sup>932</sup> Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 894; *Russia – Commercial Vehicles*, paras. 5.81-5.82; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 295.

<sup>933</sup> Appellate Body Report, *EC – Hormones*, para. 133.



panel record<sup>934</sup>; or (iv) the panel was not even-handed in its treatment of the parties' evidence.<sup>935</sup> Accordingly, the appellants' references to "reasoned and adequate explanation" insofar as they relate to the means of testing the Panel's objectivity could be viewed as a purely semantic issue, given that the substance of these allegations falls squarely within the scope of appellate review with respect to claims under Article 11 of the DSU.

6.319. Having said that, we take note of Honduras' assertion that, where a panel reviews the determinations of domestic investigating authorities, the Appellate Body has held that a panel must assess whether the explanations provided by the authority are "reasoned and adequate", and that the panel must also assess "the coherence of its reasoning".<sup>936</sup> According to Honduras, the Appellate Body has clarified that essentially the same standard that is imposed on domestic authorities applies "in cases where a panel operates as the initial trier of facts, such as this one".<sup>937</sup> Honduras requests that the Appellate Body "be equally critical and searching of the Panel's alleged 'careful review' and fault the Panel for failing to provide a reasoned and adequate explanation of how the facts supported the determination made."<sup>938</sup>

6.320. As we see it, this line of argumentation invites us to engage in a factual assessment of the evidence that was before the Panel in order to determine whether the Panel provided a "reasoned and adequate explanation" of its findings. Such a proposition fails to recognize the differences between: (i) the role of the Appellate Body and its scope of appellate review, as governed by Article 17.6 of the DSU, on the one hand<sup>939</sup>; and (ii) the role of a panel, as trier of fact, when reviewing an investigating authority's determinations under the SCM Agreement and the Anti-Dumping Agreement, on the other hand.<sup>940</sup> Given these differences, we reject Honduras' assertion that the standard of review that applies to a panel's factual assessment, when a panel is reviewing the determinations of domestic authorities, applies equally to the scope of appellate review "in cases where a panel operates as the initial trier of facts, such as this one".<sup>941</sup>

### ***Allegations challenging the Panel's graphical representation of the parties' evidence***

6.321. These allegations concern Figure B.1 in Appendix B and Figure D.14 in Appendix D to the Panel Report.

6.322. With respect to Appendix B, the Dominican Republic contests the Panel's findings that "the empirical evidence on the impact of the TPP measures on calls to Quitline is unambiguous", and that "the TPP measures and enlarged GHWs have statistically significantly increased calls to Quitline."<sup>942</sup> In support of its claims, the Dominican Republic challenges the Panel's reliance on Figure B.1. The

<sup>934</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178; *Brazil – Retreaded Tyres*, para. 185; *EC – Hormones*, paras. 132-133; *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *EC – Selected Customs Matters*, para. 258.

<sup>935</sup> Appellate Body Report, *Korea – Alcoholic Beverages*, para. 163.

<sup>936</sup> Honduras' appellant's submission, para. 703 (quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97).

<sup>937</sup> Honduras' appellant's submission, para. 703 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, fn 618 to para. 293).

<sup>938</sup> Honduras' appellant's submission, para. 707 (referring to Appellate Body Report, *US – Wheat Gluten*, paras. 160-161).

<sup>939</sup> Specifically, Article 17.6 of the DSU provides no fact-finding role for the Appellate Body. Hence, the scope of appellate review, as it pertains to claims under Article 11 of the DSU, is limited to evaluating the objectivity of a panel's assessment and does not extend to a usurping of the role of the panel as trier of fact.

<sup>940</sup> Appellate Body Reports, *Korea – Pneumatic Valves (Japan)*, para. 5.221; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.255; *Russia – Commercial Vehicles*, para. 5.102; *US – Washing Machines*, para. 5.258; *US – Steel Safeguards*, para. 299; *Argentina – Footwear (EC)*, para. 121; *US – Anti-Dumping and Countervailing Duties (China)*, para. 379; *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>941</sup> Honduras' appellant's submission, para. 703 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, fn 618 to para. 293).

<sup>942</sup> Dominican Republic's appellant's submission, para. 959 (quoting Panel Report, para. 7.963.c; *ibid.*, Appendix B, para. 103).



Dominican Republic avers that "[a]lthough the Panel attributes Figure B.1 to Ajzen et al., the figure does not appear in Ajzen et al. Therefore, the Panel itself must have produced Figure B.1 on its own initiative, without testing it with the parties during the proceedings."<sup>943</sup>

6.323. In this regard, we highlight the Panel's statement that "Ajzen et al. find that, as reported in Figure B.1, there was a statistically significant increase in the number of calls to the Quitline after the introduction of the TPP measures, which occurred approximately three weeks before the sale of plain packs with enlarged GHWs became mandatory."<sup>944</sup> The Dominican Republic's assertion is correct insofar as it reads this statement by the Panel as suggesting that Figure B.1 in Appendix B is copied from the Ajzen et al. Data Report. There are clear visual differences between the Panel's graph and that of Ajzen et al. First, the time period covered in Ajzen et al. is from 6 March 2005 to 4 March 2013, while the Panel's graph is limited to the period between January 2011 and April 2013. Second, the Panel's graph, as the Panel itself notes<sup>945</sup>, moves the position of the TPP line (the red line in Ajzen et al.) to December 2012, in order to reflect accurately when the TPP measures came into effect with respect to imported tobacco products. That said, the visible differences between the two graphs do not necessarily mean that the data depicted in both graphs covering the period from January 2011 to March 2013 are different.

6.324. We understand the Panel to have used the graph merely as a visual aid to illustrate its observation that, as Ajzen et al. had found, "there was a statistically significant increase in the number of calls to the Quitline after the introduction of the TPP measures."<sup>946</sup> In fact, beyond stating that the Panel produced the graph "on its own initiative"<sup>947</sup>, the Dominican Republic does not appear to contest the accuracy of what is depicted in the graph. Moreover, in response to questioning at the second hearing, the Dominican Republic clarified that it does not question the accuracy of the information depicted in the graph, and that it understands this information to have been extracted from the parties' evidence. Indeed, the Dominican Republic appears to presume the accuracy of the Panel's graph in Figure B.1 when it states that, "[a]s both Young et al. 2014 and Ajzen et al. found, the blue spike shows that Quitline calls peaked several weeks *after* the sale of plain packs was permitted (October 2012) but *before* the sale of plain packs became mandatory (December 2012)."<sup>948</sup>

6.325. We recall that in making an objective assessment of the facts of the case, a panel is required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that [the panel's] factual findings have a proper basis in that evidence".<sup>949</sup> Within these parameters, "it is generally within the discretion of the panel to decide which evidence it chooses to utilize in making findings."<sup>950</sup> In the same vein, as long as the panel's reasoning is based on the parties' evidence on the panel record, we consider it to be within the discretion of the panel to decide how it represents its analysis and reasoning. Thus, nothing prohibits panels from using visual aids in representing their understanding and analysis of the evidence submitted by the parties.

6.326. With respect to Appendix D, Honduras challenges several aspects of the Panel's analysis of Dr Chipty's evidence with respect to step 2 of its cigarette consumption analysis in Appendix D to the Panel Report. This step concerned whether the decline in cigarette sales accelerated after the implementation of the TPP measures. Among its arguments, Honduras highlights that Figure D.14 was prepared by the Panel based on backup material provided by IPE, and there is no explanation

<sup>943</sup> Dominican Republic's appellant's submission, para. 969. (fn omitted)

<sup>944</sup> Panel Report, Appendix B, para. 93.

<sup>945</sup> Panel Report, Appendix B, para. 93, note to Figure B.1.

<sup>946</sup> Panel Report, Appendix B, para. 93. See also *ibid.*, para. 103; Ajzen et al. Data Report (Panel Exhibit DOM/IDN-2), para. 250.

<sup>947</sup> Dominican Republic's appellant's submission, para. 969.

<sup>948</sup> Dominican Republic's appellant's submission, para. 969. (emphasis original)

<sup>949</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185; referring to Appellate Body Reports, *EC – Hormones*, paras. 132-133; *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *EC – Selected Customs Matters*, para. 258).

<sup>950</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *EC – Hormones*, para. 135).

as to how it was developed, nor is there any way of testing its accuracy.<sup>951</sup> In Honduras' view, the fact that it is impossible to review the Panel's findings is a "fundamental problem of due process".<sup>952</sup> Honduras argues that the Panel "violated the essence of its task under Article 11 of the DSU" by failing to engage with the parties "in earnest" on any of the technical debates that took place before it, "simply dump[ing] its final analysis on the parties in its findings", depriving the parties of a meaningful opportunity to comment during the Panel proceedings, and failing to include the technical details necessary to review the Panel's finding.<sup>953</sup>

6.327. Figure D.14 is a graphical representation of the trends in cigarette sales volumes pre- and post-implementation of the TPP measures. In the Panel Report, the stated source for Figure D.14 is the backup material to the IPE Summary Report, which included the entire contents of the RMSS, IMS/EOS, and Aztec data. As we understand it, the Panel constructed Figure D.14 on its own, relying on the data submitted by the parties. We therefore understand that the Panel developed this line of reasoning of its own accord, constructed the graph itself, based on the data, and concluded that the trend lines were different. As discussed above, we see nothing wrong with this approach. As long as the Panel's reasoning is based on the parties' evidence on the Panel record, we consider it to be within the discretion of the Panel to decide how it represents its analysis and reasoning. Honduras has failed to demonstrate that Figure D.14 is not based on the evidence on the Panel record. Honduras has also not demonstrated that Figure D.14 serves any purpose beyond serving as a visual aid for the Panel to represent its understanding and analysis of the evidence submitted by the parties.

6.328. Accordingly, with respect to the Panel's inclusion of Figures B.1 and D.14 in its Report, we find that Honduras has not demonstrated that the Panel failed to make an objective assessment of the facts of the case.

#### ***Submitting facts that are not on the Panel record***

6.329. It is well settled that the Appellate Body's review of any issues raised on appeal must be based on the factual findings of the panel or uncontested facts on the panel record.<sup>954</sup> This limitation is especially relevant in the context of our evaluation of whether a panel failed to make an objective assessment of the facts of the case as required under Article 11 of the DSU. We recall that, in carrying out its duty under Article 11 of the DSU, a panel is required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that [the panel's] factual findings have a proper basis in that evidence".<sup>955</sup> Hence, an assessment of whether a panel failed to make an objective assessment of the facts of the case is limited to those facts that were presented to the panel. Consequently, any facts not on the panel record are beyond the remit of appellate review.

6.330. In this regard, we observe that, in connection with smoking prevalence, Honduras' appellant's submission contains factual information pertaining to the "most recent official prevalence data of Australia", drawn from "[t]he latest Australian government data (National Drug Strategy

<sup>951</sup> Honduras' appellant's submission, para. 895.

<sup>952</sup> Honduras' appellant's submission, para. 895.

<sup>953</sup> Honduras' appellant's submission, para. 896.

<sup>954</sup> Appellate Body Report, *US – Hot-Rolled Steel*, paras. 174 and 180. As the Appellate Body said in *US – Offset Act (Byrd Amendment)*:

Article 17.6 is clear in limiting our jurisdiction to issues of law covered in panel reports and legal interpretations developed by panels. We have no authority to consider new facts on appeal. The fact that the documents are "available on the public record" does not excuse us from the limitations imposed by Article 17.6. We note that the other participants have not had an opportunity to comment on those documents and, in order to do so, may feel required to adduce yet more evidence. We would also be precluded from considering such evidence.

(Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 222)

<sup>955</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (quoting Appellate Body Report, *Brazil – Retreated Tyres*, para. 185). (emphasis added) See also Appellate Body Reports, *EC – Hormones*, paras. 132-133; *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *EC – Selected Customs Matters*, para. 258.

Household Survey) from 2016".<sup>956</sup> Likewise, in connection with the Panel's reliance on multicollinearity, the Dominican Republic indicates that, "[s]ince obtaining the Panel Report, the Dominican Republic has applied the VIF test statistic to Australia's models using the techniques described in the literature."<sup>957</sup> Similarly, in support of its claim challenging the Panel's findings in Appendix B<sup>958</sup>, the Dominican Republic refers to factual information contained in the *amicus curiae* submission of Professor Sinclair Davidson, received by the Appellate Body on 7 August 2018. The Dominican Republic states that "[i]n his submission to the Appellate Body, Professor Sinclair Davidson has explained, pursuant to information obtained under Australia's Freedom of Information Act, that, in the contract commissioning the NTPPTS, the Australian Government required that the NTPPTS address distal outcomes, such as 'quit intentions' and 'quit attempts'."<sup>959</sup>

6.331. This information, submitted by the appellants, did not form part of the Panel record. Consequently, in accordance with Article 17.6 of the DSU, in deciding this appeal, we are precluded from taking into account any factual information submitted by the participants that was not on the Panel record.

#### **6.1.2.3.3.3 Claims concerning the Panel's statements on the future impact of the TPP measures**

6.332. Honduras alleges that the Panel failed to make an objective assessment of the facts of the case by accepting "the speculative assertion of a 'future generation' effect" of the TPP measures, "without a reasoned and adequate explanation of how this conclusion was supported by the facts on the record".<sup>960</sup> The Dominican Republic, for its part, indicates that in the event that the Division does not reverse the Panel's overall conclusion on contribution for other reasons, the Dominican Republic raises the conditional appeal that the Panel erred in the application of Article 2.2 of the TBT Agreement and failed to conduct an objective assessment of the matter under Article 11 of the DSU in reviewing the potential future impact of the TPP measures.<sup>961</sup> Specifically, the Dominican Republic contends that "the Panel simply accepted Australia's 'suggestion' that the TPP measures would, in future, contribute to Australia's objective, on the basis that it found this suggestion 'reasonable'."<sup>962</sup> In the Dominican Republic's view, "[t]he Panel did not address any evidence to establish that Australia's hypotheses were properly 'tested and supported by sufficient evidence', as required by the Appellate Body."<sup>963</sup> The Dominican Republic requests that the Appellate Body declares the Panel findings regarding the future impact moot and of no legal effect if it finds unnecessary to address this ground of appeal.<sup>964</sup> In response to questioning at the second hearing, the Dominican Republic indicated that it did not consider the Panel's statements on the future impact of the TPP measures to be findings or conclusions, but rather more akin to mere "remarks". The Dominican Republic also stated that it did not consider the Panel's remarks to be an integral part of the Panel's assessment of the contribution of the TPP measures to Australia's objective.

6.333. We recall that, in its analysis of the contribution of the TPP measures to Australia's objective under Article 2.2 of the TBT Agreement, the Panel examined the relevant evidence relating to the design, structure, and intended operation of the TPP measures and the evidence relating to the application of the TPP measures since their entry into force in December 2012.<sup>965</sup> On the basis of such evidence, the Panel reached its overall conclusion that "the TPP measures are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to,

<sup>956</sup> Honduras' appellant's submission, para. 920.

<sup>957</sup> Dominican Republic's appellant's submission, paras. 410-412.

<sup>958</sup> Dominican Republic's appellant's submission, para. 1015 (quoting Panel Report, Appendix B, paras. 39 and 118).

<sup>959</sup> Dominican Republic's appellant's submission, para. 1028. (emphasis omitted)

<sup>960</sup> Honduras' appellant's submission, para. 847.

<sup>961</sup> Dominican Republic's appellant's submission, para. 1182.

<sup>962</sup> Dominican Republic's appellant's submission, para. 1220 (quoting Panel Report, paras. 7.940 and 7.1044).

<sup>963</sup> Dominican Republic's appellant's submission, para. 1220 (quoting Panel Report, para. 7.982, in turn quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151).

<sup>964</sup> Dominican Republic's appellant's submission, para. 1183.

<sup>965</sup> Panel Report, para. 7.1024.

tobacco products."<sup>966</sup> Having reached this conclusion, in the penultimate paragraph of the section on its overall conclusions, the Panel made the following observation:

In making this determination, we are also mindful that the impact of the TPP measures may evolve over time. Our determination is based on the evidence available to us at the time of our assessment and is not intended to prejudge the future evolution of the contribution of the TPP measures to the reduction of the use of, and exposure to, tobacco products. We note, however, that we find reasonable Australia's suggestion that the 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 impacts on smoking cessation for existing smokers will also take some time to produce their full effects.<sup>967</sup>

6.334. To our minds, given that the TPP measures had been in force for a very brief period by the time the Panel proceedings got under way, the Panel's observation that "the impact of the TPP measures may evolve over time" seems reasonable. Moreover, we note that the Panel made the observation that the impact of the TPP measures *may* evolve over time only *after* it had concluded that "the TPP measures are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products."<sup>968</sup> Moreover, in making this observation, the Panel stated that its conclusion was "based on the evidence available to [the Panel] at the time of [the Panel's] assessment and is not intended to prejudge the future evolution of the contribution of the TPP measures to the reduction of the use of, and exposure to, tobacco products".<sup>969</sup>

6.335. Furthermore, to the extent that the Panel made intermediate observations regarding the future effects of the TPP measures, in section 7.2.5.3.6 of its Report, we read these statements in the context of the Panel's weighing of the probative value of the post-implementation evidence, as compared to the pre-implementation evidence. We note that, after finding persuasive Australia's suggestion that, in the early period of application, the data and evidence relating to actual smoking behaviours "may not provide a complete picture of the extent to which the measures contribute"<sup>970</sup>, the Panel stated that:

We also consider that, in this context, and in light of the nature of the design of the measures, as discussed in preceding sections, available empirical evidence relating to the impact of the measures on "proximal" outcomes, as well as evidence relating to "distal outcomes" that may be precursors of actual smoking behaviours, may usefully inform our assessment of the actual contribution of the TPP measures to their objective, together with evidence before us relating to actual smoking behaviours since the entry into force of the measures.<sup>971</sup>

6.336. Likewise, later in its analysis, the Panel stated that it would "consider the evidence before [it] in relation to the application of the TPP measures with awareness that the time-period for which evidence of application of the measures is available may have an impact on the nature and extent of the conclusions that may be drawn from this evidence".<sup>972</sup>

6.337. We understand the Panel's statements as suggesting that, because it was too early to evaluate conclusively the contribution of the TPP measures to Australia's objective, the Panel would rely on the evidence pertaining to the design and structure of the TPP measures to inform its understanding of the limited evidence available to it of the actual impact of the TPP measures, following their entry into force. Thus, in making these statements, the Panel addressed and rejected the complainants' arguments that evidence regarding the TPP measures' actual effects should be given more weight than the pre-implementation evidence in the Panel's assessment.

6.338. In sum, given the limited period following the entry into force of the TPP measures and the possibility of the evolution of the impact of the TPP measures over time, the Panel did not consider

<sup>966</sup> Panel Report, para. 7.1043.

<sup>967</sup> Panel Report, para. 7.1044.

<sup>968</sup> Panel Report, para. 7.1043.

<sup>969</sup> Panel Report, para. 7.1044.

<sup>970</sup> Panel Report, para. 7.940.

<sup>971</sup> Panel Report, para. 7.940.

<sup>972</sup> Panel Report, para. 7.943.

the evidence regarding the actual effects of the TPP measures to be dispositive. Moreover, the Panel did not take account of "evidence" of the future impact of TPP measures. Nor were its general remarks regarding possible evolution over time decisive for its overall conclusion regarding contribution of the TPP measures to Australia's objective. For these reasons, we are not persuaded that the appellants' claims challenging the Panel's statements on the possible future impact of the TPP measures warrant further scrutiny.

#### **6.1.2.3.3.4 Claims that we need not address for purposes of resolving these disputes**

6.339. The following treaty provisions are relevant to our consideration of whether, in order to resolve these disputes, it is necessary for us to address certain allegations of error put forward by the appellants. Article 17.12 of the DSU provides that "[t]he Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding."<sup>973</sup> Article 3.4 of the DSU indicates that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter", while Article 3.7 of the DSU states that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute." These overarching aims of the WTO dispute settlement mechanism suggest to us that, while we are required to address each issue on appeal, we have the discretion not to rule on certain claims when doing so is not necessary to resolve the dispute.<sup>974</sup>

#### ***The Dominican Republic's claims concerning the Panel's assessment of the evidence relating to the NTPPTS and ITC datasets in proximal and distal outcomes***

6.340. The Dominican Republic notes that the parties presented, to the Panel, evidence and arguments based on the NTPPTS and ITC datasets, which measured the impact of the TPP measures on a number of proximal and distal outcomes. Australia's evidence was based on published papers that analysed these datasets (Wakefield et al. 2015, Durkin et al. 2015, and Yong et al. 2015<sup>975</sup>), while the Dominican Republic's evidence was based on a re-analysis of these datasets by Ajzen et al., which was presented in several expert reports.<sup>976</sup> According to the Dominican Republic, "the Panel criticized Ajzen et al.'s analysis in a manner that failed to respect the Dominican Republic's due process rights and that lacked even-handedness."<sup>977</sup> Despite these allegations, the Dominican Republic expressly states that it "has decided not to challenge the Panel's failure to conduct an objective assessment of Ajzen et al, because these errors are not consequential for the Panel's findings on proximal and distal outcomes".<sup>978</sup>

6.341. In order to reverse a panel's finding on the basis of Article 11, we must "be satisfied that the Panel's errors, taken together or singly, undermine the objectivity of the Panel's assessment", such that the panel's factual finding "no longer ha[s] a sufficient evidentiary and objective basis".<sup>979</sup> Given the Dominican Republic's own admission that any potential errors made by the Panel in its criticisms of Ajzen et al. are "not consequential for the Panel's findings on proximal and distal outcomes"<sup>980</sup>, we consider it unnecessary to address the Dominican Republic's allegations in this regard.

<sup>973</sup> Article 17.6 limits an appeal to "issues of law covered in the panel report and legal interpretations developed by the panel".

<sup>974</sup> Appellate Body Reports, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, para. 6.318; *US – Upland Cotton*, paras. 510-511.

<sup>975</sup> Wakefield et al. 2015 (Panel Exhibits AUS-206, DOM-306); H. Yong, R. Borland, D. Hammond, J. Thrasher, K. Cummings, and G. Fong, "Smokers' Reactions to the New Larger Health Warning Labels on Plain Cigarette Packs in Australia: Findings from the ITC Australia Project", *Tobacco Control* (19 February 2015), doi:10.1136/tobaccocontrol-2014-05197 (Yong et al. 2015) (Panel Exhibit DOM-382); S. Durkin, E. Brennan, M. Coomber, M. Zacher, M. Wakefield, and M. Scollo, "Short-Term Changes in Quitting-Related Cognitions and Behaviours After the Implementation of Plain Packaging with Larger Health Warnings: Findings from a National Cohort Study with Australian Adult Smokers", *Tobacco Control*, Vol. 24 (2015), ii26-ii32 (Durkin et al. 2015) (Panel Exhibits AUS-215 (revised), DOM-305).

<sup>976</sup> Dominican Republic's appellant's submission, para. 948. See also *ibid.*, fn 861 to para. 949.

<sup>977</sup> Dominican Republic's appellant's submission, para. 949.

<sup>978</sup> Dominican Republic's appellant's submission, para. 949 (referring to Panel Report, Appendix A, para. 101 and fn 39 thereto).

<sup>979</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1318.

<sup>980</sup> Dominican Republic's appellant's submission, para. 949.

**GHWs**

6.342. Honduras contends that the Panel was not "even-handed" in its assessment of the facts of the case because, unlike in its evaluation of the TPP measures, the Panel did not combine the effect of the alternative measure with the effect of the unchallenged increase in the mandatory size of the GHWs on tobacco packaging when it examined the alternative measures proposed by the complainants.<sup>981</sup> Honduras contends that "if the Panel had, in the required even-handed manner, examined the alternative measures in combination with the enlarged GHWs which were never challenged by the complainants, it would not have made the findings it made on 'equivalent contribution' and should not have rejected these alternatives."<sup>982</sup>

6.343. As discussed in paragraph 6.313. above, in response to questioning at the second hearing, the participants all agreed that there was no evidence on the Panel record that showed the separate effects of the TPP measures and the enlarged GHWs.<sup>983</sup> In any event, we observe that this contention by Honduras, brought as a claim under Article 11 of the DSU, challenges the objectivity of the Panel's assessment of the facts in relation to the Panel's analysis of the contribution of the TPP measures to Australia's objective. This claim mirrors another of Honduras' claims, in which Honduras alleges that "the Panel's failure to compare the degree of contribution of the alternative measure in light of the other tobacco control measures that were not challenged constitutes an additional error of law" under Article 2.2 of the TBT Agreement.<sup>984</sup> This claim by Honduras challenges the Panel's analysis of the contribution of the proposed alternative measures, and is discussed in section 6.1.4.3 below. In response to questioning at the second hearing, Honduras clarified that it was not challenging the Panel's failure to separate the effects of the TPP measures from the effects of the GHWs. Rather, its appeal was about the lack of even-handedness in the context of the Panel's examination of alternative measures, where, according to Honduras, the Panel did not even consider the possibility that GHWs may have some effect. Given this clarification by Honduras, we do not consider it necessary or appropriate, for purpose of resolving these disputes to address its claim under Article 11 of the DSU in the context of the Panel's analysis of the contribution of the TPP measures.

**Step 2 of the Panel's smoking prevalence analysis**

6.344. The Dominican Republic argues that "[t]he Panel's finding in step 2 [of its smoking prevalence analysis] that the rate of decline accelerated in the post-TPP period appears to be based on the Panel's own original analysis of the RMSS data, which is depicted in Figure C.19 of its Report."<sup>985</sup> According to the Dominican Republic, "the Panel did not present Figure C.19 ... to the parties during the proceedings" nor did the Panel explain in its Report "how it produced Figure C.19".<sup>986</sup> The Dominican Republic considers that the Panel's conclusion in step 2 was not based on reasoned or adequate findings, lacked a basis in the evidence contained on the Panel record, failed to respect the Dominican Republic's due process rights, and inappropriately made the case for Australia, which demonstrates that the Panel failed to make an objective assessment of the matter before it.<sup>987</sup>

6.345. The Panel's conclusion in step 2 of its smoking prevalence analysis states that, based on the most recent available RMSS data, smoking prevalence in Australia "has not only continued to

<sup>981</sup> Honduras' appellant's submission, paras. 1021-1025.

<sup>982</sup> Honduras' appellant's submission, para. 1024. (emphasis omitted)

<sup>983</sup> We emphasize that, even if the isolated effect of the unchallenged large GHWs were to be established, as Australia points out, Honduras bore the burden of establishing, before the Panel, that the combined effects of its proposed alternative measures and the enlarged GHWs would make an equivalent contribution to Australia's objective, to the contribution resulting from the combined effects of the TPP measures and the enlarged GHWs. As the Appellate Body has stated, "the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof." (Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 335. See also Appellate Body Reports, *US – Carbon Steel (India)*, para. 446; *US – Gambling*, paras. 138-140; *US – Carbon Steel*, para. 157; *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66; *Japan – Apples*, para. 159; *EC – Hormones*, para. 98; *Japan – Agricultural Products II*, para. 129)

<sup>984</sup> Honduras' appellant's submission, paras. 645-657.

<sup>985</sup> Dominican Republic's appellant's submission, para. 159.

<sup>986</sup> Dominican Republic's appellant's submission, para. 162 (referring to Panel Report, Appendix C, para. 51).

<sup>987</sup> Dominican Republic's appellant's submission, para. 194.



decrease following the introduction of the TPP measures, but ... has accelerated with a steeper slope of the smoking prevalence trend between December 2012 and September 2015 ... compared to the pre-TPP periods".<sup>988</sup> The Panel did not explicitly refer to Figure C.19 when forming this conclusion. We note that, in summarizing Dr Chipty's arguments in the relevant "[d]atasets and related studies" subsection<sup>989</sup>, the Panel not only purported to visually depict the RMSS data in Figure C.19, but also referred to two graphs submitted to the Panel by Australia, namely, Figure 2 of the Chipty Second Rebuttal Report and a "similar graphic for the period January 2001-September 2015" that was included in the Tobacco Plain Packaging Post-Implementation Review (PIR).<sup>990</sup> We further note that Figure C.19 of the Panel Report, Figure 2 of the Chipty Second Rebuttal Report, and Figure 3 of the Tobacco Plain Packaging PIR all indicate a steepening trend after the implementation of the TPP measures. Since all three graphs substantiate the Panel's finding that "the downward trend in smoking prevalence has accelerated with a steeper slope of the smoking prevalence trend between December 2012 and September 2015", and there is no reason to question two of those three graphs, we do not consider it necessary to examine whether the Panel erred in relying on Figure C.19.<sup>991</sup>

#### **6.1.2.3.4 Whether the Panel erred in its overall conclusion on the contribution of the TPP measures to Australia's objective**

6.346. Honduras asserts that, in reaching its overall conclusion on the contribution of the TPP measures to Australia's objective, the Panel failed to provide a reasoned and adequate explanation of the quality and probative value of the pre-implementation evidence in light of the post-implementation evidence.<sup>992</sup> In addition, Honduras claims that the Panel erred under Article 11 of the DSU by failing to provide a reasoned and adequate explanation of how the facts supported the determination made<sup>993</sup> because the Panel's findings relating to the TPP measures' actual effects on smoking behaviour do not support its overall conclusion that the measures actually "do" make a meaningful contribution to Australia's objective.<sup>994</sup>

6.347. The Dominican Republic claims that the Panel erred under Article 11 of the DSU by offering internally incoherent reasoning in relation to whether the actual effects of the TPP measures confirmed its findings on the measures' anticipated effects reached on the basis of the pre-implementation evidence.<sup>995</sup> The Dominican Republic submits that the Panel did not address these "discrepancies" between the predicted effects and the actual affects resulting from the operation of the TPP measures, or offer any justification for adopting a different approach to assessing those outcomes for which the predicted effects were discredited, rather than confirmed, by the evidence on the actual impact of the TPP measures.<sup>996</sup> The Dominican Republic adds that, if the Appellate Body were to reverse the Panel's findings on the actual effects of the TPP measures on smoking prevalence and consumption, none of the remaining intermediate Panel findings – i.e. neither the Panel's findings on the *anticipated* impact of the TPP measures nor its findings on the *actual* impact of the measures on "proximal" and "distal" outcomes – would be sufficient to sustain its overall conclusion on the contribution of the TPP measures.<sup>997</sup>

6.348. Australia considers that, contrary to what the appellants assert, the Panel did assess the pre-implementation evidence against the post-implementation evidence.<sup>998</sup> Australia also maintains that Honduras' allegation, that the Panel's findings concerning smoking prevalence and consumption

<sup>988</sup> Panel Report, Appendix C, para. 56.

<sup>989</sup> Panel Report, Appendix C, section 2.1, paras. 43-52.

<sup>990</sup> Panel Report, Appendix C, para. 51 and fn 48 thereto (referring to Australia's comments on the complainants' responses to Panel question No. 146, para. 15; Chipty Second Rebuttal Report (Panel Exhibit AUS-591), paras. 8-12; Tobacco Plain Packaging PIR (Panel Exhibit AUS-624), p. 35).

<sup>991</sup> Panel Report, Appendix C, para. 56.

<sup>992</sup> Honduras' appellant's submission, para. 797.

<sup>993</sup> Honduras' appellant's submission, para. 721.

<sup>994</sup> Honduras' appellant's submission, paras. 735-737. See also *ibid.*, paras. 724 and 726.

<sup>995</sup> Dominican Republic's appellant's submission, para. 763.

<sup>996</sup> Dominican Republic's appellant's submission, paras. 777.

<sup>997</sup> See Dominican Republic's appellant's submission, para. 593.

<sup>998</sup> Australia's appellee's submission, para. 540.

do not support the Panel's overall conclusion, is based on a "mischaracterization" of the Panel's actual findings and conclusions.<sup>999</sup>

6.349. We recall that, before the Panel, Honduras' main contention<sup>1000</sup> was that the TPP measures make no contribution to Australia's objective, nor are they apt to do so.<sup>1001</sup> The Dominican Republic contended that well-accepted axioms of social and medical science confirm that the TPP measures will not be effective in achieving Australia's stated goals.<sup>1002</sup> The Panel understood the parties' arguments as follows:

In essence, the complainants consider 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. Australia in essence responds that, contrary to the complainants' assertions, the measures are designed on the basis of a sound evidence base, and that available post-implementation evidence confirms that the measures are contributing to their objective of reducing smoking.<sup>1003</sup>

6.350. Hence, in addressing the parties' arguments, the Panel sought to determine the degree to which the TPP measures, "as written and applied, contribute, if at all, to Australia's legitimate objective of improving public health by reducing the use of, and exposure to, tobacco products".<sup>1004</sup> In this regard, the Panel acknowledged that the "fulfilment of this objective through the TPP measures is predicated on their ability to influence smoking *behaviours*, such as initiation, cessation, and relapse."<sup>1005</sup> For this reason, the Panel considered that the impact of the measures on such behaviours, is "*a priori*, directly relevant to an assessment of the degree of contribution of the measures to this objective".<sup>1006</sup> Moreover, the Panel made it clear that it did not "exclude" that "evidence relating to 'proximal' outcomes reflecting the three mechanism[s] of the TPP Act"<sup>1007</sup>, in combination with other relevant evidence before the Panel, could inform the Panel's assessment of the degree of contribution of the measures to Australia's objective.<sup>1008</sup> However, the Panel also made it clear that such evidence was relevant only "to the extent that it would inform the impact of the measures on the smoking behaviours that are the ultimate target of the measures".<sup>1009</sup>

6.351. Bearing in mind the TPP Act's depiction of the intended operation of the TPP measures, the Panel first assessed the anticipated effect of the TPP measures, based on their design, structure, and expected operation.<sup>1010</sup> Thereafter, the Panel assessed the evidence relating to the actual effects of the TPP measures following their entry into force. Specifically, the Panel assessed the impact of the TPP measures on: (i) "non-behavioural" or "proximal" outcomes (i.e. the appeal of packaging, the effectiveness of the GHWs, and the ability of packaging to mislead consumers)<sup>1011</sup>; (ii) "distal" outcomes (i.e. intention and behavioural outcomes, such as increased intentions to quit and increased quit attempts)<sup>1012</sup>; and (iii) smoking behaviour (i.e. prevalence and consumption).<sup>1013</sup> The Panel also examined the impact of the TPP measures on illicit trade.<sup>1014</sup> In carrying out this task, the Panel considered that it had a duty to examine and consider all the evidence before it and to "evaluate the relevance and probative force of each piece thereof".<sup>1015</sup>

<sup>999</sup> Australia's appellee's submission, para. 843.

<sup>1000</sup> We recall that the complainants made two sets of arguments in the alternative in support of their claim under Article 2.2. See para. 6.5. above.

<sup>1001</sup> Panel Report, para. 7.426.

<sup>1002</sup> Panel Report, para. 7.437.

<sup>1003</sup> Panel Report, para. 7.485. We note that the Panel's characterization of the parties' arguments is not challenged on appeal.

<sup>1004</sup> Panel Report, para. 7.424. See also *ibid.*, para. 7.483.

<sup>1005</sup> Panel Report, para. 7.495. (emphasis original)

<sup>1006</sup> Panel Report, para. 7.495.

<sup>1007</sup> Panel Report, para. 7.498.

<sup>1008</sup> Panel Report, para. 7.498.

<sup>1009</sup> Panel Report, para. 7.498.

<sup>1010</sup> Panel Report, section 7.2.5.3.5.

<sup>1011</sup> Panel Report, para. 7.491.

<sup>1012</sup> Panel Report, para. 7.491.

<sup>1013</sup> Panel Report, section 7.2.5.3.6.

<sup>1014</sup> Panel Report, section 7.2.5.3.7. The Panel's findings on illicit trade are not appealed.

<sup>1015</sup> Panel Report, para. 7.517 (quoting Appellate Body Report, *Korea – Dairy*, para. 137).



6.352. Throughout its analysis, the Panel emphasized that the operation of the TPP measures, including their contribution to Australia's objective, must be viewed in the broader context of other tobacco control measures maintained by Australia. The Panel explained that, while this broader context does not remove or reduce the need "to identify the contribution that the challenged measures themselves make to Australia's objective", it was a relevant consideration in the Panel's assessment, to the extent that "it informs and affects the manner in which the measures are applied and operate, as a component of a broader suite of complementary tobacco control measures."<sup>1016</sup>

6.353. Following its examination of the pre- and post-implementation evidence before it<sup>1017</sup>, the Panel concluded as follows:

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. 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 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.

...

7.1043. Taken as a whole, therefore, we consider that the evidence before us supports the view that, as applied in combination with the comprehensive range of other tobacco control measures maintained by Australia and not challenged in these proceedings, including a prohibition on the use of other means through which branding could otherwise contribute to the appeal of tobacco products and to misleading consumers about the harmful effects of smoking, the TPP measures are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products.<sup>1018</sup>

6.354. We observe that, in its summary of the bases for its overall conclusion, the Panel emphasized the significance of the pre-implementation evidence pertaining to the anticipated effects of the TPP measures<sup>1019</sup>, while highlighting the limitations of the post-implementation evidence pertaining to the actual impact of the TPP measures.<sup>1020</sup> For instance, in connection with the evidence of the anticipated effects of the TPP measures, the Panel provided the following explanation:

7.1027. [W]e are not persuaded that the complainants have established that the largely convergent conclusions reflected in the body of studies at issue, and the overall conclusions drawn from them, should be considered to be so fundamentally flawed as to provide no support for the proposition that the TPP measures are capable of contributing to their objective through these mechanisms.

7.1028. We are comforted in this conclusion by the fact that this body of literature has been subject to various reviews conducted outside the context of these proceedings, which have concluded that the body of studies at issue supports the proposition that tobacco plain packaging would be apt to reduce the appeal of tobacco products, enhance the effectiveness of GHWs and reduce the ability of tobacco packaging to mislead consumers about the risks of smoking. We note in particular the conclusions of the independent review conducted on behalf of the UK Government[\*], which considered both the quality of a previous systematic review of the evidence base relating to tobacco plain packaging and the quality of the underlying evidence itself, and concluded that the quantitative studies reviewed were "conducted to a high standard", that "the conclusions that were drawn are a reasonable reflection of the evidence available" and that the review of the qualitative studies at issue was "a high quality systematic review",

<sup>1016</sup> Panel Report, para. 7.506 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 154).

<sup>1017</sup> Panel Report, para. 7.1024.

<sup>1018</sup> Panel Report, paras. 7.1025 and 7.1043.

<sup>1019</sup> Panel Report, paras. 7.1026-7.1034.

<sup>1020</sup> Panel Report, paras. 7.1035-7.1039.

which was "clearly documented and follows recognised best practice for such reviews".<sup>1021</sup>

**[\*fn original]** <sup>2648</sup> We attach particular weight to this assessment conducted by independent reviewers who are not among the frequently cited "plain packaging" authors and were commissioned for the purposes of making an independent assessment of the relevant literature.

6.355. While, as quoted above, the Panel expressed confidence in the strength of its conclusions based on the evidence of the anticipated effects of the measures, we observe that the Panel was rather more circumspect concerning the evidence of the actual effects of the TPP measures following their entry into force. For example, as regards the post-implementation evidence of smoking prevalence and consumption, the Panel was careful to note 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. The data before us in these proceedings relate[] to a period of up to three years following the entry into force of the TPP measures."<sup>1022</sup> In addition to the limitation of time affecting the availability of the post-implementation evidence, the Panel observed further that:

The overall impact of the TPP measures is difficult to quantify in terms of the magnitude of changes in smoking behaviours attributable to the measures, on the basis of the evidence available to us. In particular, this impact ... is difficult to isolate empirically, on the basis of the evidence before us, from other factors that also affect the evolution of smoking behaviours, including other tobacco control measures applied simultaneously with the TPP measures.<sup>1023</sup>

6.356. Based on the foregoing, we understand the Panel to have identified the limited time following the entry into force of the TPP measures, as well as the difficulty of isolating the effects of the TPP measures, as factors undermining the quality of the available post-implementation evidence on the actual effects of the TPP measures. By contrast, the Panel's explanations suggest that the Panel accorded greater probative weight to the pre-implementation evidence pertaining to the anticipated effects of the TPP measures.

6.357. Furthermore, we recall the Panel's observation that the impact of the TPP measures *may* evolve over time. The Panel made this observation only after it had concluded that "the TPP measures are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products."<sup>1024</sup> As stated above, given that the TPP measures had been in force for a very brief period by the time the Panel proceedings got under way, the Panel's observation that "the impact of the TPP measures may evolve over time"<sup>1025</sup> seems reasonable.

6.358. In our view, having examined properly all the relevant evidence before it, the Panel was well within the bounds of its discretion, as the trier of fact, to accord greater probative weight to the evidence of the anticipated effects of the TPP measures than to the evidence of the actual effects of the TPP measures. For these reasons, we reject Honduras' assertion that, in reaching its overall conclusion on the contribution of the TPP measures to Australia's objective, the Panel failed to provide a reasoned and adequate explanation of the quality and probative value of the pre-implementation evidence in light of the post-implementation evidence.<sup>1026</sup>

6.359. Moreover, as discussed in sections 6.1.2.3.2 6.1.2.3.3 above, we are not persuaded that the appellants have demonstrated that the Panel, in arriving at its intermediate findings, failed to make an objective assessment of the facts of the case. We also do not agree with the Dominican Republic's assertion that, if the Panel's findings on the actual effects of the TPP measures

<sup>1021</sup> Panel Report, paras. 7.1027-7.1028 (referring to Chantler Report (Panel Exhibits AUS-81, CUB-61)); *ibid.*, Annex D, p. 49 (referring to Stirling Review (Panel Exhibits AUS-140, HND-130, CUB-59)); *ibid.*, Annex E, p. 56 (referring to Stirling Review (Panel Exhibits AUS-140, HND-130, CUB-59)).

<sup>1022</sup> Panel Report, para. 7.1037.

<sup>1023</sup> Panel Report, para. 7.1040.

<sup>1024</sup> Panel Report, para. 7.1043.

<sup>1025</sup> Panel Report, para. 7.1044.

<sup>1026</sup> Honduras' appellant's submission, para. 797.

on smoking prevalence and consumption are reversed, none of the Panel's remaining intermediate findings – i.e. neither the Panel's findings on the anticipated impact of the TPP measures nor its findings on the actual impact of the measures on "proximal" and "distal" outcomes – would be sufficient to sustain its overall conclusion on the contribution of the TPP measures.<sup>1027</sup>

6.360. In this regard, we recall our finding in section 6.1.2.3.2 above that the complainants have not demonstrated that the Panel failed to make an objective assessment of the case with respect to its assessment of the evidence of the anticipated effects of the TPP measures. Accordingly, the complainants have not demonstrated that the Panel erred in finding as follows:

7.929. 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.

7.930. Rather, our review of the relevant evidence suggests that it is recognized that various branding features are capable of being used on tobacco packaging in order to convey certain positive associations with the products, and that a body of research exists, that sought to investigate the impact of *removing* this type of feature[] through plain packaging of tobacco products, on the types of "proximal outcomes" now reflected in the TPP Act. ...

7.931. We also take note of the body of research devoted to the study of the relationship between product perceptions, intentions and behaviours discussed by the parties ...[.] Overall, this evidence, while it makes clear the complexity and multiplicity of factors driving smoking behaviours, is consistent, in our view, with the proposition underlying the design and structure of TPP measures that relevant behaviours may be influenced by a reduction in the appeal of tobacco products or an improved awareness and understanding of health risks of smoking, or both.<sup>1028</sup>

6.361. Likewise, as reflected in section 6.1.2.3.3.2 above, we are not persuaded by any of the appellants' challenges to the Panel's analysis of the post-implementation evidence relating to proximal and distal outcomes. Accordingly, the Panel's findings in Appendices A and B to its Report, summarized in paragraphs 7.958 and 7.963 of the Panel Report, stand. As discussed above, we consider that the Panel, having examined properly all the relevant evidence before it, was well within the bounds of its discretion as trier of fact to accord greater probative weight to the evidence of the anticipated effects of the TPP measures than to the evidence of the actual effects of the TPP measures. Accordingly, in our view, the Panel's findings on the anticipated effects, together with its findings on the actual impact of the TPP measures on proximal and distal outcomes support the Panel's overall conclusion 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>1029</sup>

6.362. Moreover, in section 6.1.2.3.3.1 above, we have rejected the vast majority of the appellants' challenges to the Panel's analysis of smoking behaviour. That said, we have found two errors in the Panel's assessment of the post-implementation evidence on smoking prevalence and consumption. First, we have found that the Panel erred in its reliance on non-stationarity and multicollinearity.<sup>1030</sup> However, as discussed above, we consider that this error by the Panel has no impact on the Panel's ultimate conclusion that "there is econometric evidence suggesting that [the TPP measures] contributed to the reduction in overall smoking prevalence in Australia."<sup>1031</sup> Second, with respect to the Panel's reliance on the impact of tobacco costliness to critique the parties' evidence, we find that the Panel erred by failing to address the Dominican Republic's arguments

<sup>1027</sup> See Dominican Republic's appellant's submission, para. 593.

<sup>1028</sup> Panel Report, paras. 7.929-7.931. (emphasis original)

<sup>1029</sup> Panel Report, para. 7.1025.

<sup>1030</sup> See para. 6.257. above.

<sup>1031</sup> Panel Report, Appendix C, para. 122. (fn omitted)

regarding Australia's consumption model. We consider that this error fatally undermines the Panel's determination that Australia's evidence was more credible than the complainants' evidence, on which the Panel based its conclusion that "there is some econometric evidence suggesting that the TPP measures ... contributed to the reduction in wholesale cigarette sales, and therefore cigarette consumption."<sup>1032</sup> In our view, the Panel's error vitiates this factual finding.

6.363. Having found these errors in the Panel's analysis, we take note of Australia's contention that even if the appellants could establish that the Panel exceeded the bounds of its discretion as the trier of facts, they would still need to demonstrate that the Panel's errors undermined the objectivity of the Panel's assessment.<sup>1033</sup> For Australia, in order for the appellants to prevail on their claims of error under Article 11, they must show that the Panel exceeded the bounds of its discretion and that the consequences for the Panel's findings are material. In Australia's view, "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."<sup>1034</sup>

6.364. The Appellate Body has said that not every error in the appreciation of evidence, or error of law, constitutes a failure on the part of the panel to make an objective assessment of the matter before it.<sup>1035</sup> Rather, "[t]o succeed in its challenge under Article 11, an appellant must show that the statement was *material* to the panel's legal conclusion."<sup>1036</sup> Hence, in order to reverse a panel's finding on the basis of Article 11, the Appellate Body has said that it must "be satisfied that the [p]anel's errors, taken together or singly, undermine the objectivity of the [p]anel's assessment", such that the panel's factual finding "no longer ha[s] a sufficient evidentiary and objective basis".<sup>1037</sup>

6.365. Turning back to the facts of this case, we recall our finding that the Panel's errors vitiate only the Panel's factual findings with respect to step 3 of its cigarette consumption analysis in Appendix D to its Report. However, the question remains whether vitiating this factual finding undermines the Panel's overall conclusion that the TPP measures are apt to, and do, contribute to Australia's objective. In this respect, we recall that the Panel's ultimate conclusion on the degree of contribution took into account the evidence of the anticipated effects of the TPP measures (i.e. the pre-implementation evidence regarding the design, structure, and intended operation of the measures).<sup>1038</sup> The Panel considered that, on the basis of this evidence, the appellants had failed to demonstrate that the TPP measures are incapable of contributing to Australia's objective. Moreover, the Panel considered it reasonable to hypothesize that the TPP measures will contribute to Australia's objective by reducing the appeal of tobacco products.<sup>1039</sup> The Panel also took into account the

<sup>1032</sup> Panel Report, Appendix D, para. 137.c.

<sup>1033</sup> Australia's appellee's submission, para. 448 (referring to Appellate Body Reports, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 5.157; *China – Rare Earths*, para. 5.178; *EC – Fasteners (China)*, para. 442).

<sup>1034</sup> Australia's appellee's submission, para. 449.

<sup>1035</sup> Appellate Body Reports, *US – Steel Safeguards*, para. 497; *Japan – Apples*, para. 222. In *EC – Hormones*, the Appellate Body stated that, "not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts." (Appellate Body Report, *EC – Hormones*, para. 133)

<sup>1036</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 722. (emphasis added)

<sup>1037</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1318. Likewise, in *EC – Fasteners (China)*, the Appellate Body stated that:

An attempt to make every error of a panel a violation of Article 11 of the DSU is an approach that is inconsistent with the scope of this provision. In particular, when alleging that a panel ignored a piece of evidence, the mere fact that a panel did not explicitly refer to that evidence in its reasoning is insufficient to support a claim of violation under Article 11. Rather, a participant must explain why such evidence is so material to its case that the panel's failure explicitly to address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment.

(Appellate Body Report, *EC – Fasteners (China)*, para. 442)

<sup>1038</sup> Panel Report, paras. 7.1026-7.1034.

<sup>1039</sup> The Panel stated that:

[I]n 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

post-implementation evidence of the actual effects of the TPP measures. The Panel considered it relevant that the TPP measures have reduced the appeal of tobacco products and contributed to reducing smoking prevalence and consumption of tobacco products.<sup>1040</sup> Specifically, the Panel considered such evidence to be "consistent with" the view that the TPP measures contributed to Australia's objective.<sup>1041</sup>

6.366. We note that, in forming its conclusion that the evidence of smoking prevalence and consumption was consistent with the hypothesized impact of the TPP measures, the Panel highlighted "[t]he 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".<sup>1042</sup> The Panel's reasoning with respect to smoking prevalence and consumption was therefore formed on the basis of the Panel's conclusions in steps 2 and 3 of its smoking prevalence analysis (in Appendix C) and steps 2 and 3 of its cigarette consumption analysis (in Appendix D). As indicated, the Panel also considered it relevant that the evidence indicated that the TPP measures had reduced the appeal of tobacco products.<sup>1043</sup> Of these five different aspects of its analysis that the Panel relied on in forming its conclusion that the post-implementation evidence was consistent with the hypothesized impact of the TPP measures, the appellants have demonstrated that the Panel erred with respect to one aspect only, namely, step 3 of the Panel's cigarette consumption analysis.

6.367. Furthermore, we recall that smoking prevalence and consumption were merely two metrics through which the Panel assessed whether the TPP measures had had an actual effect on smoking behaviours (initiation, cessation, and relapse). In our view, the appellants have not demonstrated how any errors by the Panel in its assessment of consumption would also demonstrate that the Panel erred in its assessment of smoking prevalence. We also highlight, in this respect, that although the Panel considered that the evidence on cigar consumption was mixed, the Panel relied exclusively on the cigar smoking prevalence evidence in concluding that the "econometric evidence ... suggesting that the TPP measures ... contributed to a reduction in cigar smoking prevalence is also consistent with a conclusion that the measures have an impact on relevant smoking behaviours with respect to cigars."<sup>1044</sup> To our minds, it follows that the Panel did not require evidence of an affirmative impact of the TPP measures on tobacco product consumption in order to conclude that the post-implementation evidence was "consistent with" the hypothesized contribution of the TPP measures to Australia's objective.

6.368. Finally, we take note of Honduras' claim that "the Panel's own limited findings"<sup>1045</sup> relating to the TPP measures' actual effects on smoking behaviour do not support its overall conclusion that the measures actually "do" make a meaningful contribution to Australia's objective.<sup>1046</sup> Honduras pointed out, that in its approach to the evidence on contribution, the Panel highlighted the need to examine "actual behaviour" and "emphasise[d] the importance of empirical evidence on the use of tobacco products in order to reach a conclusion on the actual contribution of the measures to their objective".<sup>1047</sup> However, Honduras asserts that the Panel's findings in the Appendices to its Report are "cautiously worded and suggest uncertainty about the general conclusions to draw from the evidence".<sup>1048</sup> For Honduras, even taking the Panel's findings as a given, these "limited" findings do not support the Panel's overall conclusion on the "actual contribution" of the TPP measures to Australia's objective.<sup>1049</sup>

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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.

(Panel Report, para. 7.1034 (emphasis original))

<sup>1040</sup> Panel Report, paras. 7.1036-7.1037

<sup>1041</sup> Panel Report, paras. 7.1036-7.7037.

<sup>1042</sup> Panel Report, para. 7.986.

<sup>1043</sup> Panel Report, para. 7.1036.

<sup>1044</sup> Panel Report, para. 7.1039. (fn omitted)

<sup>1045</sup> Honduras' appellant's submission, para. 726.

<sup>1046</sup> Honduras' appellant's submission, paras. 735-737. See also *ibid.*, paras. 724 and 726.

<sup>1047</sup> Honduras' appellant's submission, para. 735.

<sup>1048</sup> Honduras' appellant's submission, para. 738.

<sup>1049</sup> Honduras' appellant's submission, paras. 739-745.

6.369. We recall that, before the Panel, "the complainants consider[ed] 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>1050</sup> The Panel sought to determine the degree to which the TPP measures, "as written and applied, contribute, if at all, to Australia's legitimate objective of improving public health by reducing the use of, and exposure to, tobacco products".<sup>1051</sup> In its overall conclusion, the Panel answered this question as follows:

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. 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 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.

...

7.1043. Taken as a whole, therefore, we consider that the evidence before us supports the view that, as applied in combination with the comprehensive range of other tobacco control measures maintained by Australia and not challenged in these proceedings, including a prohibition on the use of other means through which branding could otherwise contribute to the appeal of tobacco products and to misleading consumers about the harmful effects of smoking, the TPP measures are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products.<sup>1052</sup>

6.370. We observe that paragraph 7.1025 contains two sentences. In the first sentence, the Panel concluded 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>1053</sup> In the second sentence, the Panel continued to state that the evidence before it 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>1054</sup> None of the appellants' submissions expressly referred to the first sentence of paragraph 7.1025. However, in response to questioning at the second hearing, the appellants as well as Australia all seemed to share the view that the two sentences of paragraph 7.1025 were not to be read in isolation from each other. Rather, in their view, both sentences, read together, reflected the Panel's rejection of the complainants' proposition that the TPP measures are not apt to, nor do they, make a contribution to Australia's objective of reducing the use of, and exposure to, tobacco products. Honduras went on to add that paragraph 7.1043 confirmed the Panel's main finding, as reflected in the second sentence of paragraph 7.1025.

6.371. We agree with the participants that both sentences of paragraph 7.1025, read together, are a rejection of the complainants' proposition that the TPP measures are not apt to, nor do they make a contribution to Australia's objective of reducing the use of, and exposure to, tobacco products. However, we do not share Honduras' view that the content of paragraph 7.1043 is the same as that of the second sentence of paragraph 7.1025. As we read it, there is an additional nuance to the Panel's finding in paragraph 7.1043. Between paragraphs 7.1025 and 7.1043, the Panel summarized the key points<sup>1055</sup> that justify its conclusion that "the TPP measures are apt to, and do, make a *meaningful* contribution to Australia's objective of reducing the use of, and exposure to, tobacco

<sup>1050</sup> Panel Report, para. 7.485. We note that the Panel's characterization of the parties' arguments is not challenged on appeal.

<sup>1051</sup> Panel Report, para. 7.424. See also *ibid.*, para. 7.483.

<sup>1052</sup> Panel Report, paras. 7.1025 and 7.1043.

<sup>1053</sup> Panel Report, para. 7.1025. (emphasis added)

<sup>1054</sup> Panel Report, para. 7.1025.

<sup>1055</sup> We observe that, in these paragraphs, the Panel emphasized the robust nature of the pre-implementation evidence before it, while highlighting the limitations of the evidence relating to the actual impact of the TPP measures following their entry into force.

products."<sup>1056</sup> We do not consider the Panel's addition of the word "meaningful" to be happenstance. While paragraph 7.1025 addressed and rejected the proposition by the complainants that "the TPP measures are not apt to make a contribution to Australia's objective"<sup>1057</sup>, the Panel's conclusion in paragraph 7.1043 goes further by speaking to the question of the "degree" of the contribution that the TPP measures, in concert with Australia's other tobacco-control measures, make to Australia's objective. In this regard, and as discussed in paragraph 6.40. above, we understand the Panel to have concluded that "the TPP measures are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products"<sup>1058</sup> as a gateway to addressing the complainants' alternative proposition. We recall that the complainants argued, in the alternative, that even if the Panel were to conclude that the TPP measures make a contribution to Australia's objective, the TPP measures would still be "more trade-restrictive than necessary" because various alternative measures would be available to Australia that are less trade-restrictive and could achieve an *equivalent* degree of contribution<sup>1059</sup> to Australia's objective. Indeed, the Panel highlighted this conclusion about the measures' "meaningful contribution to Australia's objective" in its assessment of the complainants' proposed alternative measures.<sup>1060</sup>

6.372. Hence, given the specific circumstances of this case and the manner in which the complainants put forward their claims before the Panel, it is our view that the *degree* of the contribution of the TPP measures (i.e. whether the contribution is "meaningful") is pertinent only to the Panel's comparison of the trade restrictiveness of, and the degree of achievement of Australia's objective by, the TPP measures, with that of the proposed possible alternative measures that may be reasonably available and that are less trade-restrictive than the TPP measures – taking account of the risks non-fulfilment would create.<sup>1061</sup> Accordingly, in the specific circumstances of this case, the Panel's overall conclusion on the contribution of the TPP measures to Australia's objective is not affected by the qualification of "meaningful".

6.373. In light of the foregoing, we find that the appellants have not demonstrated that the Panel erred in finding, in paragraphs 7.1025 and 7.1043 of the Panel Report, that:

7.1025. Overall ... 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 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.

...

7.1043. Taken as a whole, therefore, we consider that the evidence before us supports the view that, as applied in combination with the comprehensive range of other tobacco control measures maintained by Australia and not challenged in these proceedings, including a prohibition on the use of other means through which branding could otherwise contribute to the appeal of tobacco products and to misleading consumers about the harmful effects of smoking, the TPP measures are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products.<sup>1062</sup>

<sup>1056</sup> Panel Report, paras. 7.1024-7.1025 and 7.1043. (emphasis added)

<sup>1057</sup> Panel Report, para. 7.1025.

<sup>1058</sup> Panel Report, para. 7.1043.

<sup>1059</sup> Honduras' first written submission to the Panel, para. 911; Dominican Republic's first written submission to the Panel, paras. 1019 and 1021 (referring to para. 736 *et seq.*, in particular para. 737).

<sup>1060</sup> Panel Report, para. 7.1386.

<sup>1061</sup> Appellate Body Reports, *US – COOL*, para. 376 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, paras. 320-322).

<sup>1062</sup> Panel Report, paras. 7.1025 and 7.1043.

### 6.1.3 The trade restrictiveness of the TPP measures

6.374. We address, in turn, whether the Panel: (i) erred in its interpretation of Article 2.2 as it pertains to the element of "trade restrictiveness"; (ii) erred in applying Article 2.2 in its determination of the trade restrictiveness of the TPP measures; and (iii) acted inconsistently with Article 11 of the DSU.

#### 6.1.3.1 Whether the Panel erred in its interpretation of Article 2.2 of the TBT Agreement

6.375. Before assessing the degree of trade restrictiveness of the TPP measures, the Panel defined the standard by which to assess trade restrictiveness, within the meaning of Article 2.2. The Panel emphasized that "a technical regulation is 'trade-restrictive' within the meaning of Article 2.2 when it has a limiting effect on international trade".<sup>1063</sup> The Panel further observed that "past panels, and the Appellate Body, have assessed the trade-restrictiveness of specific technical regulations with reference to their limiting effect on the 'competitive opportunities' available to imported products" in disputes where "a separate assessment [was made] of whether the technical regulation accorded less favourable treatment to imported products under Article 2.1 of the TBT Agreement."<sup>1064</sup> However, the Panel considered that "[t]he manner in which an assertion of trade-restrictiveness is substantiated may vary from case to case" and "an assertion that a technical regulation is trade-restrictive might be substantiated on the basis of whether the technical regulation has a limiting effect on competitive opportunities 'in qualitative terms ... in the particular circumstances of a given case'".<sup>1065</sup>

6.376. The Panel further noted that, "in certain cases, 'a detrimental modification of competitive opportunities may be self-evident with respect to certain *de jure* discriminatory measures, whereas supporting evidence and argumentation of actual trade effects might be required to demonstrate the existence and extent of trade-restrictiveness in respect of non-discriminatory internal measures that address a legitimate objective'".<sup>1066</sup> Consequently, "[w]hile 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>1067</sup> The Panel considered, therefore, that "[h]ow the existence and extent of trade-restrictiveness is to be demonstrated in respect of technical regulations that are not alleged to be discriminatory will depend ... on the circumstances of a given case" and "in the absence of any allegation of *de jure* restriction on the opportunity for imports to compete on the market or of any alleged discrimination in this respect (between imports or between imported and domestic products), a sufficient demonstration will be required to establish the existence and extent of any 'limiting effect' on international trade."<sup>1068</sup> The Panel added that a demonstration of trade restrictiveness "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>1069</sup>

6.377. Honduras argues that the Panel erred in its interpretation of Article 2.2 of the TBT Agreement by failing to rely on a legal standard based on the conditions of competition and competitive opportunities.<sup>1070</sup> According to Honduras, the Panel "bas[ed] its analysis ... on whether the [TPP] measures are discriminatory" and "favoured a 'trade effects' test based on the extent to which the measures actually reduced the volume of sales and thus of imports".<sup>1071</sup> In Honduras' view, the

<sup>1063</sup> Panel Report, para. 7.1072. (fn omitted)

<sup>1064</sup> Panel Report, para. 7.1073 (referring to Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.367-7.370; *US – COOL*, para. 7.572; Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208 and fn 643 thereto; *US – COOL*, para. 477; *EC – Seal Products*, para. 5.205 and fn 1269 thereto).

<sup>1065</sup> Panel Report, para. 7.1074 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208).

<sup>1066</sup> Panel Report, para. 7.1074 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, fn 643 to para. 5.208).

<sup>1067</sup> Panel Report, para. 7.1074.

<sup>1068</sup> Panel Report, para. 7.1075 (referring to Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208).

<sup>1069</sup> Panel Report, para. 7.1076.

<sup>1070</sup> Honduras' appellant's submission, paras. 465-529.

<sup>1071</sup> Honduras' appellant's submission, para. 466. See also *ibid.*, paras. 465, 484, and 506-529.



Panel's "'trade effects' test is inconsistent with established WTO jurisprudence and constitutes an error of law".<sup>1072</sup> For Honduras, "by holding non-discriminatory technical regulations to a different and higher standard, effectively requiring a demonstration of actual trade effects in the period following the implementation of the TPP measures, the Panel erred in its interpretation of Article 2.2 of the TBT Agreement."<sup>1073</sup>

6.378. The Dominican Republic, for its part, argues that the Panel correctly "articulated the proper interpretation of 'trade-restrictive' at the outset of its analysis of Article 2.2".<sup>1074</sup> The Dominican Republic considers that "the Panel explained that prior assessments [of trade restrictiveness] were focused on whether a technical regulation had a 'limiting effect on the "competitive opportunities" available to imported products'".<sup>1075</sup> The Dominican Republic highlights the Panel's findings that "the TPP measures limit the opportunity for producers to differentiate their product", that such "differentiation engenders consumer loyalty and increases consumers' willingness to pay", and that "the TPP measures limit the opportunity for tobacco manufacturers to compete on the basis of such brand differentiation."<sup>1076</sup> In the Dominican Republic's view, by concluding that it was unpersuaded that "this modification of the competitive environment for all tobacco products on the entire market (which may in principle increase competition on the market) constitutes, in itself, a restriction on 'competitive opportunities' for imported tobacco products that must be assumed to have a 'limiting effect' on international trade", the Panel effectively concluded that the "evidence that the TPP measures, by their very design, limit competitive opportunities for imported tobacco products was not sufficient to demonstrate trade-restrictiveness."<sup>1077</sup> According to the Dominican Republic, "had the Panel properly applied the legal standard of trade restrictiveness, it would have found that the loss of competitive opportunities for tobacco products arising from the design, structure and intended operation of the TPP measures constitutes trade restrictiveness, within the meaning of Article 2.2 of the TBT Agreement."<sup>1078</sup>

6.379. Australia argues that the Panel correctly interpreted Article 2.2 as reflecting a legal standard of a limiting effect on international trade and not a standard related to conditions of competition. Australia considers that the Panel's interpretation is consistent with the ordinary meaning and context of Article 2.2, the object and purpose of the TBT Agreement, and the Appellate Body's prior statements on the legal standard under Article 2.2.<sup>1079</sup> In Australia's view, the appellants' focus on a "competitive opportunities" standard of trade restrictiveness "would read the terms 'trade-restrictive' and 'obstacles to international trade' out of the text of Article 2.2".<sup>1080</sup> In Australia's view, "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>1081</sup> Australia also argues that, in interpreting Article 2.2, the Panel did not find that only discriminatory measures can be inconsistent with Article 2.2, nor did the Panel find that evidence of actual trade effects is required in order to demonstrate that a non-discriminatory technical regulation has a limiting effect on international trade.<sup>1082</sup>

6.380. We understand from the appellants' responses to questioning at the first hearing that the Panel's basic articulation of the legal standard, as set forth above<sup>1083</sup>, is not contested by either Honduras or the Dominican Republic.<sup>1084</sup> In particular, neither Honduras nor the Dominican Republic

<sup>1072</sup> Honduras' appellant's submission, para. 467.

<sup>1073</sup> Honduras' appellant's submission, para. 467.

<sup>1074</sup> Dominican Republic's appellant's submission, para. 1245.

<sup>1075</sup> Dominican Republic's appellant's submission, para. 1267 (quoting Panel Report, para. 7.1073, in turn quoting Appellate Body Reports, *US – COOL*, para. 477).

<sup>1076</sup> Dominican Republic's appellant's submission, para. 1270 (quoting Panel Report, para. 7.1167). (emphasis omitted)

<sup>1077</sup> Dominican Republic's appellant's submission, para. 1272 (quoting Panel Report, para. 7.1167). (emphasis omitted)

<sup>1078</sup> Dominican Republic's appellant's submission, para. 1246.

<sup>1079</sup> Australia's appellee's submission, paras. 289-296.

<sup>1080</sup> Australia's appellee's submission, para. 303.

<sup>1081</sup> Australia's appellee's submission, para. 304 (quoting Panel Report, para. 7.1168). (emphasis original)

<sup>1082</sup> Australia's appellee's submission, paras. 308-309 and 319-320.

<sup>1083</sup> See para. 6.375. above.

<sup>1084</sup> See also Honduras' appellant's submission, para. 469; Dominican Republic's appellant's submission, para. 1281.

contests the Panel's explanation that the legal standard under Article 2.2 requires a demonstration of "a limiting effect on international trade".<sup>1085</sup> Having said that, we observe that, as explained below, several fundamental aspects of the Panel's interpretation of Article 2.2 are indeed contested by the appellants.

6.381. First, we note Honduras' statements that the Panel "agree[d] that 'a detrimental modification of competitive opportunities' is at the heart of the concept of trade restrictiveness", and that "[t]he Panel reiterate[d] the general rule that a limiting effect on competitive opportunities is what characterises a trade restriction."<sup>1086</sup> In Honduras' view, the Panel's determination that the TPP measures had modified the conditions of competition in the Australian market "should have been the end of matter".<sup>1087</sup> For its part, the Dominican Republic considers that the Panel erred by applying Article 2.2 "such that demonstrating limitations on competitive opportunities is not sufficient for demonstrating that a measure is 'trade-restrictive'".<sup>1088</sup> Like Honduras, the Dominican Republic's argument that the Panel erred in its application of Article 2.2 appears to be premised on its view that, under the legal standard of Article 2.2, any limitation on so-called "competitive opportunities" is sufficient to demonstrate trade restrictiveness.<sup>1089</sup>

6.382. We therefore understand that both appellants consider that a demonstration of a "modification of the conditions of competition" in a particular market (in Honduras' words)<sup>1090</sup> or of a "limitation on competitive opportunities" of products (in the Dominican Republic's words)<sup>1091</sup> suffices to demonstrate that a measure is trade-restrictive.<sup>1092</sup> While the Dominican Republic considers that this is reflected in the Panel's interpretation of Article 2.2, Honduras considers that the Panel erred in its interpretation of Article 2.2 in this respect.<sup>1093</sup>

6.383. In our view, the Panel plainly did not consider that a determination of the trade restrictiveness of a technical regulation is "focused on"<sup>1094</sup> assessing the conditions of competition or competitive opportunities of products. Rather, the Panel explained that prior claims of inconsistency with Article 2.2 of the TBT Agreement had been raised in circumstances where a claim had also been raised with respect to whether the measures accorded to imported products treatment less favourable than that accorded to like domestic products within the meaning of Article 2.1 of the TBT Agreement, and that, in those disputes, the determination of trade restrictiveness was focused on the limiting effect of the measures on the competitive opportunities of imported products.<sup>1095</sup> The Panel thereafter stated that, depending on the specific circumstances of the dispute, an assertion of trade restrictiveness "might be substantiated on the basis of whether the technical regulation has a

<sup>1085</sup> Panel Report, para. 7.1072 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 319); Honduras' and the Dominican Republic's responses to questioning at the first hearing. We also observe that this definition accords with the Dominican Republic's description of the term "trade restriction" as referring to a "limiting condition", as well as the dictionary definitions of *restriction* as "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation" and *restrict* as "limit, bound, confine". (Dominican Republic's appellant's submission, para. 1281; *Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble and A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2554) The first sentence of Article 2.2 also refers to "unnecessary obstacles to international trade", and the word "obstacle" is defined as a "thing that stands in the way and obstructs progression; a hindrance, an obstruction". (*Shorter Oxford English Dictionary* 5th edn, W.R. Trumble and A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 1970)

<sup>1086</sup> Honduras' appellant's submission, para. 472 (quoting Panel Report, para. 7.1074).

<sup>1087</sup> Honduras' appellant's submission, para. 520.

<sup>1088</sup> Dominican Republic's appellant's submission, para. 1286.

<sup>1089</sup> See, for example, Dominican Republic's appellant's submission, para. 1288 ("the Dominican Republic showed that the design and structure of the TPP measures, in and of themselves, impose a limitation on competitive opportunities, thereby demonstrating the trade-restrictiveness of those measures").

<sup>1090</sup> Honduras' appellant's submission, para. 526.

<sup>1091</sup> Dominican Republic's appellant's submission, para. 1288. (fn omitted)

<sup>1092</sup> To the extent that Honduras (or the Dominican Republic) considers that the legal standard under Article 2.2 does *not* require a demonstration of a limiting effect on international trade, such an interpretation would directly contradict the Appellate Body's prior interpretation that "the word 'restriction' refers generally to something that has a limiting effect" and "[a]s used in Article 2.2 in conjunction with the word 'trade', the term means something having a limiting effect on trade." (Appellate Body Report, *US – Tuna II (Mexico)*, para. 319 (fn omitted)) Neither Honduras nor the Dominican Republic has raised any arguments demonstrating that the Appellate Body's interpretation in that dispute was in error.

<sup>1093</sup> See paras. 6.377. 6.378. above.

<sup>1094</sup> Dominican Republic's appellant's submission, para. 1267.

<sup>1095</sup> Panel Report, para. 7.1073.

limiting effect on competitive opportunities".<sup>1096</sup> It is therefore incorrect to assert, as Honduras does, that the Panel "agree[d] that 'a detrimental modification of competitive opportunities' is at the heart of the concept of trade restrictiveness".<sup>1097</sup>

6.384. As to whether we agree with this aspect of the Panel's interpretation, we recall that the legal standard under Article 2.2 entails demonstrating that the technical regulation at issue imposes a limiting effect on international trade.<sup>1098</sup> The question therefore arises as to whether a demonstration of a modification in the conditions of competition (or a limitation on the competitive opportunities of certain products) suffices to demonstrate a limiting effect on international trade. We see a significant difference between, on the one hand, panels and the Appellate Body's reliance on the concept of conditions of competition in the context of Article 2.2 in prior disputes and, on the other hand, the appellants' reliance on that concept in these disputes.

6.385. We recall the Appellate Body's prior statement that in "assessing the trade-restrictiveness of a technical regulation under Article 2.2 ... [a] demonstration of a limiting effect on competitive opportunities in qualitative terms *might suffice in the particular circumstances of a given case*".<sup>1099</sup> The Appellate Body has generally relied on the term "competitive opportunities" to refer to the conditions of competition of imported products vis-à-vis domestic products (i.e. national treatment)<sup>1100</sup> or as between imported products from one Member and imported products from another Member (i.e. most-favoured-nation treatment).<sup>1101</sup> In the specific context of Article 2.2, the Appellate Body has indicated that a panel's determination that a measure modifies the conditions of competition for imported products as a group vis-à-vis domestic products as a group (for instance, in the context of assessing a claim under Article 2.1 of the TBT Agreement) would suffice to indicate that the technical regulation is trade-restrictive within the meaning of Article 2.2.<sup>1102</sup> However, "evidence of actual trade effects may also be probative" to a panel's determination of trade restrictiveness and, while "a detrimental modification of competitive opportunities may be self-evident in respect of certain *de jure* discriminatory measures, ... supporting evidence and argumentation of actual trade effects might be required to demonstrate the existence and extent of trade-restrictiveness in respect of *non-discriminatory* internal measures".<sup>1103</sup>

<sup>1096</sup> Panel Report, para. 7.1074. (emphasis added)

<sup>1097</sup> Honduras' appellant's submission, para. 472 (quoting Panel Report, para. 7.1074).

<sup>1098</sup> See para. 6.380. above.

<sup>1099</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208. (fn omitted; emphasis added) According to Honduras, "in *US – COOL*, the Appellate Body recalled that 'trade restrictiveness' focuses on the competitive opportunities available to imported products" and, "in *US – COOL (Article 21.5 – Canada and Mexico)*, the Appellate Body reiterated that the issue of trade restrictiveness requires a demonstration of a limiting effect on competitive opportunities." (Honduras' appellant's submission, para. 491 (referring to Appellate Body Reports, *US – COOL*, para. 477; *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208)) We disagree. The Appellate Body's statement in *US – COOL* that the panel's "findings suggest it considered the measure to have a considerable degree of trade-restrictiveness insofar as it has a limiting effect on the competitive opportunities for imported livestock as compared to the situation prior to the enactment of the COOL measure" does *not* imply, as asserted by Honduras, that "'trade restrictiveness' focuses on the competitive opportunities available to imported products." (Appellate Body Reports, *US – COOL*, para. 477; Honduras' appellant's submission, para. 491)

<sup>1100</sup> See, for example, Appellate Body Reports, *EC – Seal Products*, 5.101, 5.105, and 5.108; *Thailand – Cigarettes (Philippines)*, para. 134; *US – Clove Cigarettes*, para. 179 and fn 372 thereto; *US – COOL*, para. 270; *US – Tuna II (Mexico)*, para. 214 and fn 457 thereto; *Korea – Various Measures on Beef*, para. 137.

<sup>1101</sup> See, for example, Appellate Body Reports, *EC – Seal Products*, paras. 5.82, 5.84, 5.87-5.88, and 5.90.

<sup>1102</sup> For instance, in *US – COOL*, the Appellate Body referred to the panel's finding that "'by imposing higher segregation costs on imported livestock' the COOL measure negatively affects the conditions of competition of imported livestock vis-à-vis like domestic livestock in the US market." (Appellate Body Reports, *US – COOL*, para. 477 (quoting Panel Reports, *US – COOL*, para. 7.574)) The Appellate Body relied on this finding to conclude that the measure in that dispute had a "considerable degree of trade-restrictiveness". (Ibid., para. 479) Thus, the Appellate Body was concerned with the competitive opportunities of *imported products vis-à-vis like domestic products*. Subsequently, in *US – COOL (Article 21.5 – Canada and Mexico)*, the Appellate Body also referred to the competitive opportunities of *imported products vis-à-vis like domestic products*. (Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208 and fn 643 thereto (referring to the Appellate Body Reports, *US – COOL*, para. 477))

<sup>1103</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, fn 643 to para. 5.208 (referring to Appellate Body Report, *EC – Poultry*, paras. 126-127). (emphasis added)

6.386. Thus, a showing of a reduction in the competitive opportunities of imported products is only relevant to the assessment of trade restrictiveness to the extent that it reveals a limiting effect on international trade. For instance, where a measure is shown to reduce the competitive opportunities of *imported products* as a group, from a Member<sup>1104</sup>, vis-à-vis competing *domestic products*, that would suffice for a panel to conclude that the measure is indeed trade-restrictive.<sup>1105</sup> In our view, the Panel's articulation of the legal standard under Article 2.2 reflects this understanding.<sup>1106</sup>

6.387. We further understand that the appellants seek to import a new and different notion of "competitive opportunities" and "conditions of competition" into the test of a measure's trade restrictiveness. The appellants appear to consider that a showing of a reduction in the competitive opportunities of some imported products vis-à-vis all other products in the market, including *other imported products from the same Member*, suffices to demonstrate trade restrictiveness. Both appellants insist that the measure reduced competitive opportunities for imported products, that this sufficed to demonstrate trade restrictiveness, and that the fact that the TPP measures were not shown to discriminate against imported products is irrelevant.<sup>1107</sup> In their view, a reduction in the competitive opportunities of products associated with individual brands suffices to show trade restrictiveness.<sup>1108</sup> Thus, under the appellants' approach, it is not the competitive opportunities of imported products as a group that must be shown to suffer, but rather the competitive opportunities of any imported product vis-à-vis other products (including other imported products from the same Member), in order for a panel to find that a measure is trade-restrictive.

6.388. We note that the Panel did not explicitly address this aspect of the complainants' arguments as a question of interpretation. As we understand it, however, the Panel's finding in paragraph 7.1167 of its Report (which is appealed) reveals the Panel's interpretative view on this issue. Specifically, the Panel stated that "the TPP measures limit the opportunity for producers to differentiate their products" and that "by restricting the opportunity for brands to differentiate themselves, the TPP measures limit the opportunity for tobacco manufacturers to compete".<sup>1109</sup> The Panel concluded, however, that this merely amounted to a "modification of the competitive environment for all tobacco products on the entire market", which did not constitute, "in itself, a

<sup>1104</sup> We note the Panel's finding that trade-restrictiveness need not be assessed "only on the basis of the effect of the measure on trade of all WTO Members, in all products that are the subject of the technical regulation". (Panel Report, para. 7.1078. See also *ibid.*, para. 7.1088) This finding is not appealed.

<sup>1105</sup> Consistently with this understanding, the Appellate Body, in referring to Article 2.2 as context to interpret Article 2.1, implied that discriminatory measures could be considered an obstacle to trade within the meaning of Article 2.2. (Appellate Body Report, *US – Clove Cigarettes*, para. 171)

<sup>1106</sup> See paras. 6.375. 6.376. above.

<sup>1107</sup> Honduras' appellant's submission, paras. 508-511; Dominican Republic's appellant's submission, paras. 1310-1315.

<sup>1108</sup> Both appellants consider that the Panel erred by failing to find that a reduction in the opportunity for manufacturers to differentiate their products on the basis of brands was sufficient to demonstrate trade restrictiveness. (Honduras' appellant's submission, para. 476; Dominican Republic's appellant's submission, paras. 1286-1287) Honduras states that, "as the Panel had accepted ... that the TPP measures affected the conditions of competition on the Australian market (e.g. through *reduced opportunities to differentiate products*), that should have been the end of the matter." (Honduras' appellant's submission, para. 520 (emphasis added)) Honduras also states that "the TPP measures had an obvious limiting effect on competitive opportunities for, among others, imported tobacco products ... *The fact that this limiting effect on trade equally applied to all tobacco products on the Australian market is irrelevant to a determination of trade restrictiveness.*" (Honduras' appellant's submission, para. 511 (emphasis added)) Since Honduras does not consider that discrimination is relevant to the analysis, the reduced competitive opportunities to which Honduras is referring appear to be changes in the conditions of competition for (the products of) individual producers in the market. The Dominican Republic explains that the Panel erred in considering that an evaluation of competition in international trade "should be focused on the ability of producers to compete based on lower *prices*, rather than on other factors, such as quality, reputation, etc." (Dominican Republic's appellant's submission, para. 1294 (italics original; underlining added)) The Dominican Republic also states that "[m]easures like the TPP measures – which fundamentally erode *the opportunities for foreign producers to win loyal consumers* willing to pay for their preferred products – place a commercially significant limitation on the competitive opportunities that are the lifeblood of international trade." (Dominican Republic's appellant's submission, para. 1289 (emphasis added)) We also note that, before the Panel, the Dominican Republic was clear that the relevant competitive opportunities at issue are the "competitive opportunities for *producers* of tobacco products". (Dominican Republic's first written submission to the Panel, para. 1022 (emphasis added)) The Dominican Republic also stated that, "Australia's [TPP] measures are designed, structured, and implemented to eliminate the opportunity for *producers* to differentiate their products." (Dominican Republic's second written submission to the Panel, para. 933 (emphasis added))

<sup>1109</sup> Panel Report, para. 7.1167.

restriction on 'competitive opportunities' for imported tobacco products".<sup>1110</sup> The Panel considered that "it need[ed] to be shown *how* such effects on the conditions of competition on the market give rise to a limiting effect on international trade".<sup>1111</sup> We therefore understand that the Panel distinguished between a reduction in the competitive opportunities of brand-owners/producers and a reduction in the competitive opportunities of imported products vis-à-vis domestic products. The Panel considered that the latter would suffice to demonstrate trade restrictiveness, but that the former, by itself, would be insufficient.

6.389. We agree with the Panel that the mere fact of a modification of the conditions of competition in a market would not necessarily suffice for a panel to conclude on the degree of trade restrictiveness, if any, of a particular technical regulation. We recall that a determination of the degree of trade restrictiveness requires a panel to assess the degree to which the measure causes a *limiting effect on international trade*. We note the Panel's interpretative finding that, "when considering the effects of a technical regulation (including whether the technical regulation has a *limiting effect on trade*), consideration might be given to ... 'both import-enhancing and import-reducing effects on the trade of other Members'".<sup>1112</sup> None of the participants has appealed this finding, and, in response to questioning at the first hearing, all participants agreed with this finding.<sup>1113</sup> In our view, a non-discriminatory modification of conditions of competition in a market may have both trade-enhancing and trade-reducing effects on trade, such that it could plausibly have a net *positive* effect on trade between Members. In a situation where a measure merely modifies the conditions of competition of individual producers within a market, and a panel is unable to anticipate the impact of the measure on the conditions of competition for *imported products, as a group*, from a Member, we do not see how the panel could conclude that the measure will necessarily have a limiting effect on international trade, much less determine the overall degree of trade restrictiveness of the measure in question, which could in turn inform the panel's assessment of whether there is a possible alternative measure that is less trade-restrictive than that measure.<sup>1114</sup> We therefore consider that the Panel did not err in considering that a demonstration of a reduction in the competitive opportunities of certain imported products vis-à-vis all other products in the market (including other imported products) would not necessarily suffice to demonstrate the degree of trade restrictiveness of a measure.

6.390. The appellants' arguments regarding conditions of competition and competitive opportunities might also be understood as suggesting that, in a situation where all imported products suffer the same detrimental impact (for instance, as alleged in these disputes, a reduction in the opportunity to differentiate), such a "general limitation" that is equally applicable to *all* products in the market would suffice to demonstrate trade restrictiveness.<sup>1115</sup> Under this understanding of their arguments, the appellants' simultaneous arguments that the "conditions of competition" in the market have been altered and that *all* products have suffered the same detrimental impact are misleading, if not contradictory. Notions of conditions of competition necessarily concern *competition* between goods in the market rather than a *generic* detrimental impact applicable to an equal extent to all goods in

<sup>1110</sup> Panel Report, para. 7.1167.

<sup>1111</sup> Panel Report, para. 7.1168. (emphasis original)

<sup>1112</sup> Panel Report, para. 7.1088. (emphasis original)

<sup>1113</sup> We recognize that the Panel's use of the word "might" could be read as indicating that panels have discretion as to whether to take into account import-enhancing effects when determining the trade restrictiveness of a technical regulation. This would seem to imply that different panels could potentially apply different legal standards when applying Article 2.2. In our view, panels are not at liberty to arbitrarily apply distinct legal standards of the same provision. However, we note that the word "might" could also be read as indicating that a panel should take into account both trade-enhancing and trade-reducing aspects of a technical regulation *when both such effects are present*. This appears to be the meaning attributed by the participants to the Panel's finding on this issue, and we also consider this to be the appropriate standard under Article 2.2. We note that the Panel itself applied this standard when assessing the degree of trade restrictiveness of the TPP measures in these disputes. (See Panel Report, para. 7.1235)

<sup>1114</sup> The essential question is whether the panel is able to determine, or anticipate, the limiting effect of the measure on international trade.

<sup>1115</sup> We note, for example, Honduras' reference to a "general limitation on the opportunity to compete" and its statement that "[t]he fact that this limiting effect on trade equally applied to all tobacco products ... is irrelevant to a determination of trade restrictiveness", as well as the Dominican Republic's statement that it is "the high-end products that suffer from the greatest loss of competitive opportunity", thereby implying simultaneously that low-end products also suffer some detrimental impact but that such detrimental impact is less severe for low-end products than it is for high-end products. (Honduras' appellant's submission, paras. 507 and 511; Dominican Republic's appellant's submission, para. 1308)

the market. In any event, the burden of demonstrating the existence of such a general limitation as well as its limiting effect on international trade rests on the complainant. We return to this issue when addressing the appellants' claims that the Panel erred in its application of Article 2.2.<sup>1116</sup>

6.391. We recall that both appellants consider that the Panel erred by effectively requiring that, in situations where a non-discriminatory measure is challenged under Article 2.2, it is necessary for a complainant to provide evidence of actual trade effects in order to demonstrate the trade restrictiveness of the measure.<sup>1117</sup> The Panel found that, "[h]ow the existence and extent of trade-restrictiveness is to be demonstrated in respect of technical regulations that are not alleged to be discriminatory will depend, as is the case for other technical regulations, on the circumstances of a given case."<sup>1118</sup> The Panel elaborated that a demonstration of trade restrictiveness "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>1119</sup> In our view, these statements by the Panel are accurate in describing the legal standard under Article 2.2, as articulated by the Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)*.<sup>1120</sup> Indeed, there is little disagreement amongst the participants that how to demonstrate trade restrictiveness depends on the circumstances of each case.<sup>1121</sup> We therefore consider that the Panel did *not* interpret Article 2.2 such that evidence of "actual trade effects" is always required for a complainant to demonstrate the trade restrictiveness of a non-discriminatory measure.<sup>1122</sup> We also return to this issue in addressing whether the Panel erred in its application of Article 2.2 in the particular circumstances of these disputes.<sup>1123</sup>

6.392. We note further that certain statements by Honduras might be read as suggesting that there is *no* circumstance in which any evidence other than the design and structure of a measure is necessary for a complainant to demonstrate the trade restrictiveness of the measure within the meaning of Article 2.2.<sup>1124</sup> We disagree. In certain circumstances, a measure's design and structure

<sup>1116</sup> See para. 6.408. below.

<sup>1117</sup> Honduras' appellant's submission, paras. 514-527; Dominican Republic's appellant's submission, paras. 1247 and 1310-1316. Honduras also argues that, "according to the Panel, there is only a 'limiting effect' or 'restriction' on international trade when a restriction is imposed at the border (i.e. *de jure* limits competitive opportunities of imported products) or when it affects imported products more than domestic products, or certain imported products more than others (i.e. it limits competitive opportunities in a discriminatory manner)." (Honduras' appellant's submission, para. 507)

<sup>1118</sup> Panel Report, para. 7.1075.

<sup>1119</sup> Panel Report, para. 7.1076. The Panel also highlighted that "it will not always be possible to quantify a particular factor analysed under Article 2.2, or to do so with precision." (Panel Report, para. 7.1076 (referring to Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208))

<sup>1120</sup> Specifically, the Appellate Body explained that "the demonstration of a limiting effect on competitive opportunities in qualitative terms *might suffice in the particular circumstances of a given case*."

(Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208 (referring to Appellate Body Reports, *US – COOL*, para. 477) (emphasis added)) The Appellate Body also stated that:

At the same time, evidence of actual trade effects may also be probative in making this assessment. ... For instance, a detrimental modification of competitive opportunities may be self-evident in respect of certain *de jure* discriminatory measures, whereas *supporting evidence and argumentation of actual trade effects might be required to demonstrate the existence and extent of trade-restrictiveness in respect of non-discriminatory internal measures that address a legitimate objective*.

(Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, fn 643 to para. 5.208 (referring to Appellate Body Report, *EC – Poultry*, paras. 126-127)) (emphasis added)

<sup>1121</sup> See, for example, Honduras' appellant's submission, paras. 496-497; Dominican Republic's appellant's submission, para. 1288.

<sup>1122</sup> Honduras' appellant's submission, para. 507; Dominican Republic's appellant's submission, para. 1310. We also disagree with Honduras that the Panel considered that a limiting effect on international trade can only consist of a restriction imposed at the border or a discriminatory measure. (Honduras' appellant's submission, para. 507)

<sup>1123</sup> See para. 6.409. below.

<sup>1124</sup> According to Honduras, "there is nothing in the Appellate Body's report in *US – COOL (Article 21.5 – Canada and Mexico)* that suggests that a demonstration of actual trade effects would ever be required." (Honduras' appellant's submission, para. 523) Honduras states, also in reference to the Appellate Body's findings in *US – COOL (Article 21.5 – Canada and Mexico)* that "[n]owhere in footnote 643 ... did the Appellate Body state that actual trade effects are 'necessary', 'required' or 'dispositive' to ascertain a technical regulation's trade restrictiveness." (Ibid., para. 497) In Honduras' view, "established WTO jurisprudence underscores that a demonstration of a 'limiting effect' need not be based on quantitative evidence but can sufficiently be based on qualitative evidence such as the measure's design and architecture." (Ibid., para. 494)

may be insufficient for a panel to anticipate whether and to what extent the measure will have a limiting effect on international trade.<sup>1125</sup> If a panel is unable to anticipate whether and to what extent a measure is trade-restrictive based exclusively on its examination of the design and structure of the measure (for instance, because the measure's design and structure leads the panel to conclude that the measure could have both trade-enhancing and trade-reducing effects), then the panel *must* take into account the additional evidence and arguments adduced by the parties.<sup>1126</sup> Such additional evidence might include evidence of actual trade effects or evidence of a qualitative or quantitative nature that may inform the panel's determination of the anticipated effects of the measure.

6.393. In any event, there is no obligation on a panel to cease its analysis of the trade restrictiveness of a measure after examining only a subset of the evidence (such as the design and structure of the measure, or more generally the evidence related to the anticipated effects of the measure). Indeed, it is appropriate for panels to take into account all relevant evidence adduced by the parties before concluding on the degree of trade restrictiveness. For instance, in *US – COOL*, the Appellate Body considered the Panel's examination of the actual trade effects to be relevant to the determination of the degree of trade restrictiveness, notwithstanding that the design and structure of the measure revealed that it was trade-restrictive.<sup>1127</sup> In short, there is no obligation on a panel to exclude any evidence in assessing the trade restrictiveness of the measure and an examination of additional available evidence (such as evidence of actual trade effects) may be necessary in order for the panel to determine the trade restrictiveness of the measure.

6.394. On the basis of the foregoing, we conclude that the appellants have not demonstrated that the Panel erred in its interpretation of Article 2.2 of the TBT Agreement.

### 6.1.3.2 Whether the Panel erred in its application of Article 2.2

#### 6.1.3.2.1 Overview

6.395. In order to determine the degree of trade restrictiveness of the TPP measures, the Panel began by addressing the complainants' argument that the TPP measures were trade-restrictive on the basis that it was "evident from the design, structure, and expected operation of the measures that [they] severely limit[] competitive opportunities to differentiate tobacco products".<sup>1128</sup> The Panel agreed with the complainants that the TPP measures would limit the opportunity for producers to differentiate their products. However, the Panel considered that it was unclear how this modification of the conditions of competition in the entire tobacco product market amounted to a limiting effect on international trade. The Panel also observed that this alteration in the competitive environment might, in fact, increase competition in the market.<sup>1129</sup> In the Panel's view, it needed to be shown how such effects on the conditions of competition in the market amount to a limiting effect on international trade.<sup>1130</sup>

6.396. The Panel proceeded with its analysis by addressing separately the complainants' arguments relating to: (i) the effects of the TPP measures on barriers to entry into the Australian market<sup>1131</sup>; (ii) the effects of the TPP measures on the volume and value of trade in tobacco products<sup>1132</sup>;

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(referring to Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.50)) For its part, and notwithstanding its incorporation by reference of Honduras' claims and arguments, the Dominican Republic considers that "the Panel correctly pointed out that evidence of the actual trade effects *may* sometimes be necessary to show a limitation on competitive opportunities." (Dominican Republic's appellant's submission, para. 1288 (emphasis original; fn omitted))

<sup>1125</sup> This is exactly what the Appellate Body stated in *US – COOL (Article 21.5 – Canada and Mexico)*. (See fn 1120 to para. 6.391. above)

<sup>1126</sup> A failure by the panel to do so would not only prejudice a complainant, rather than a respondent, but would be inconsistent with the panel's duty under Article 11 of the DSU to make an objective assessment of the matter before it.

<sup>1127</sup> Appellate Body Reports, *US – COOL*, para. 477.

<sup>1128</sup> Panel Report, para. 7.1164 (quoting Dominican Republic's response to Panel question No. 117, para. 233).

<sup>1129</sup> Panel Report, para. 7.1167.

<sup>1130</sup> Panel Report, para. 7.1168.

<sup>1131</sup> Panel Report, paras. 7.1172-7.1187.

<sup>1132</sup> Panel Report, paras. 7.1188-7.1225.

(iii) compliance costs arising from the TPP measures<sup>1133</sup>; and (iv) penalties under the TPP measures.<sup>1134</sup>

6.397. Regarding the argument that the TPP measures *raise barriers to entry* into the Australian market, the complainants had argued that the "communication effect" of plain packaging (whereby "successful entry for potential entrants becomes significantly more difficult without the possibility to create brand awareness") and the "competitive effect" (whereby "producers need to reduce prices to address consumers' reduced willingness to pay") increase barriers to entry.<sup>1135</sup> The Panel rejected these arguments, noting that, in addition to the communication and competitive effects of the TPP measures, there is also a "contestability effect" that will have a positive effect on entry to the market.<sup>1136</sup> The Panel considered there to be "significant uncertainty about the strength and the relative weight of each of the three effects on entry", and was unpersuaded that "the TPP measures have raised or will significantly raise the barriers to entry into the Australian market."<sup>1137</sup> The Panel concluded that the complainants had not demonstrated 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".<sup>1138</sup>

6.398. The Panel proceeded to consider the impact of the TPP measures on *the volume and value* of trade in tobacco products. Regarding the *volume* of trade, the Panel found that the TPP measures resulted in a reduction in the volume of imports of premium tobacco products both in relative and absolute terms.<sup>1139</sup> The Panel did not consider that the decrease in the consumption and imports of premium tobacco products was exclusively the result of "downtrading".<sup>1140</sup> The Panel rejected the argument that decreased demand for imported tobacco products, in and of itself, amounts to a limiting effect on trade.<sup>1141</sup> The Panel considered that, "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 effects on *consumption* would be needed."<sup>1142</sup> The Panel found, however, that the TPP measures did indeed contribute to the reduction of cigarette consumption<sup>1143</sup>, noted that "the Australian market is in fact supplied entirely through imported tobacco products"<sup>1144</sup>, and concluded that, "by reducing the use of tobacco products, [the TPP measures] reduce the volume of imported tobacco products on the Australian market, and thereby have a 'limiting effect' on trade."<sup>1145</sup>

6.399. The Panel then addressed the parties' arguments regarding the *value* of trade in tobacco products, namely, that a "reduction in brand differentiation possibilities caused by the TPP measures will lead 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>1146</sup> The Panel found that the "evidence suggests that the measures have led to an increase in the price of cigarettes which has more than offset the decrease in the quantity of cigarettes consumed and has thereby contributed

<sup>1133</sup> Panel Report, paras. 7.1226-7.1246.

<sup>1134</sup> Panel Report, paras. 7.1247-7.1254.

<sup>1135</sup> Panel Report, para. 7.1173. Indonesia also argued that the TPP measures make it "more difficult for imported products to establish an identity with consumers who are already familiar with domestic brands". (Panel Report, para. 7.1175)

<sup>1136</sup> Panel Report, para. 7.1179.

<sup>1137</sup> Panel Report, para. 7.1183.

<sup>1138</sup> Panel Report, para. 7.1187.

<sup>1139</sup> Panel Report, para. 7.1196.

<sup>1140</sup> Panel Report, paras. 7.1197-7.1198. Regarding whether the TPP measures had caused "downtrading", whereby "consumers buy a cheaper brand than the brand that they bought before the TPP measures were introduced", the Panel concluded that the "reduction in the ratio of higher- to low-priced cigarette wholesale sales observed since the entry into force of the TPP measures results at least in part from the intended operation of the TPP measures and their effect on the consumption of tobacco products more generally." (Ibid., paras. 7.1109 and 7.1196) The Panel also defined downtrading as "consumers shift[ing] from the more expensive brands to the less expensive brands because they have a higher willingness to switch brands and a lower willingness to pay". (Ibid., para. 7.1123 (referring to Indonesia's response to Panel question No. 117))

<sup>1141</sup> Panel Report, paras. 7.1199-7.1201.

<sup>1142</sup> Panel Report, para. 7.1201. (emphasis added)

<sup>1143</sup> Panel Report, para. 7.1205.

<sup>1144</sup> Panel Report, para. 7.1207.

<sup>1145</sup> Panel Report, para. 7.1208. See also *ibid.*, para. 7.1219.

<sup>1146</sup> Panel Report, para. 7.1209.



to an increase in the value of the market."<sup>1147</sup> The Panel rejected the Dominican Republic's argument that the TPP measures had already resulted in switching from higher- to lower-priced cigarettes (and consequently a reduction in the value of trade), on the basis that "brands in the higher priced segments generally maintained or increased their pricing premiums over brands in the lower-priced segments in the first year following the implementation of plain packaging, and have not exhibited a marked drop."<sup>1148</sup> The Panel also considered whether prices will "ultimately decline" over time.<sup>1149</sup> The Panel noted the difficulties of predicting "the evolution of competitive interactions", but highlighted that cigarette prices have increased since the introduction of the TPP measures and brands in higher priced market segments have maintained or increased their pricing premiums over lower-priced brands, suggesting that price competition has not increased.<sup>1150</sup> The Panel nevertheless considered that the evidence did not allow it "to exclude the possibility that the TPP measures may have reinforced price competition, which does not seem unreasonable, nor ... that they may reinforce it in the future".<sup>1151</sup> The Panel therefore concluded 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>1152</sup>

6.400. Regarding the argument that the TPP measures are trade-restrictive because they entail compliance *costs*, the Panel considered that, while some compliance costs may be of such a magnitude or nature as to be trade-restrictive, technical regulations might also create a regulatory environment in which "operating costs are *reduced*, thereby *enhancing* competitive opportunities and *facilitating* trade."<sup>1153</sup> The Panel considered that the complainants had done little to substantiate their general assertions concerning the compliance costs of the TPP measures.<sup>1154</sup> Overall, the Panel considered that the complainants failed to identify how the costs of complying with the TPP measures are of such a nature or magnitude as to have a limiting effect on trade.<sup>1155</sup>

6.401. Finally, regarding the argument that "a penalty itself may operate as a restriction on international trade" and that, in this case, the penalties imposed under the TPP measures are trade-restrictive<sup>1156</sup>, the Panel did not exclude the possibility "that a technical regulation imposing costly penalties on importation may, in the circumstances of a given case, have a limiting effect on trade and, as a result, be 'trade-restrictive' within the meaning of Article 2.2".<sup>1157</sup> However, in the circumstances of this case, the Panel did not consider that "the imposition of penalties to ensure compliance with the requirements of the TPP measures results, in itself, in an 'additional' limiting effect on imports beyond what would be induced by full compliance with the TPP requirements themselves."<sup>1158</sup>

6.402. Overall, the Panel concluded that the TPP measures are trade-restrictive insofar as they reduce the volume of imported tobacco products on the Australian market, thereby having a "limiting effect" on trade.<sup>1159</sup> The Panel considered it plausible that the measures could, over time, affect the overall value of tobacco imports, but did not consider that the evidence demonstrated that to have occurred to date.<sup>1160</sup> The Panel further concluded that the complainants had not demonstrated that "the TPP measures impose conditions on the sale of tobacco products in Australia or compliance costs of such magnitude that they would amount to a limiting effect on trade."<sup>1161</sup>

<sup>1147</sup> Panel Report, para. 7.1218.

<sup>1148</sup> Panel Report, para. 7.1221.

<sup>1149</sup> Panel Report, para. 7.1222.

<sup>1150</sup> Panel Report, para. 7.1224.

<sup>1151</sup> Panel Report, para. 7.1224.

<sup>1152</sup> Panel Report, para. 7.1225.

<sup>1153</sup> Panel Report, para. 7.1235. (emphasis original; fn omitted)

<sup>1154</sup> Panel Report, paras. 7.1241-7.1246.

<sup>1155</sup> Panel Report, para. 7.1242.

<sup>1156</sup> Panel Report, paras. 7.1247-7.1254.

<sup>1157</sup> Panel Report, para. 7.1248.

<sup>1158</sup> Panel Report, para. 7.1254. The Panel was therefore not persuaded that "the existence of these penalties, or their level, lead[s] to a greater degree of trade-restrictiveness than that arising from compliance with the relevant requirements of the TPP measures." (Ibid.)

<sup>1159</sup> Panel Report, para. 7.1255.

<sup>1160</sup> Panel Report, para. 7.1255.

<sup>1161</sup> Panel Report, para. 7.1255.

6.403. On appeal, both appellants claim that the Panel erred in its application of Article 2.2 of the TBT Agreement by failing to find that a reduction in the opportunity for products to differentiate on the basis of brands sufficed to demonstrate the trade restrictiveness of the TPP measures.<sup>1162</sup> The appellants also claim that the Panel erred in its application of Article 2.2 in determining the effect of the TPP measures on the value of imported tobacco products.<sup>1163</sup> We proceed by addressing each set of arguments in turn.

#### 6.1.3.2.2 The reduced opportunity for products to differentiate on the basis of brands

6.404. The appellants argue that the Panel erred in its application of Article 2.2 of the TBT Agreement by finding that, although the TPP measures reduced the opportunity for products to differentiate on the basis of brands, this did not demonstrate the trade restrictiveness of the TPP measures.<sup>1164</sup> Both appellants consider that the Panel found that the reduction in the opportunity to differentiate products on the basis of brands did not demonstrate trade restrictiveness because the TPP measures were not shown to discriminate against imported products.<sup>1165</sup> In their view, this is an incorrect application of Article 2.2, and instead the Panel's finding that the TPP measures reduced the opportunity for products to compete on the basis of brands should have sufficed for the Panel to determine the trade restrictiveness of the TPP measures.<sup>1166</sup> Both appellants also consider that the Panel incorrectly required the complainants to adduce evidence of "actual trade effects" in order to find that the TPP measures are trade-restrictive.<sup>1167</sup> Additionally, the Dominican Republic argues that the Panel's reason for rejecting the complainants' argument based on the design and structure of the TPP measures (namely, that the reduced opportunity to differentiate "may in principle *increase* competition on the market"<sup>1168</sup>) "wrongly implies that an evaluation of 'competition' and 'competitive opportunity' in international trade should be focused on the ability of producers to compete based on lower *prices*, rather than on other factors, such as quality, reputation, etc."<sup>1169</sup>

6.405. Australia submits that, in its application of Article 2.2, the Panel "neither required that the TPP measures were discriminatory, nor applied a 'heightened' evidentiary standard of actual trade effects for non-discriminatory measures".<sup>1170</sup> Australia considers that if the Panel had 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'".<sup>1171</sup> However, in Australia's view, the Panel did not do that, but rather examined "the three distinct bases upon which the complainants argued that the TPP measures were trade-restrictive".<sup>1172</sup> Australia further argues that the Panel did not require evidence of "actual trade effects" and rather examined the qualitative evidence on its own terms, concluding that such evidence was insufficiently persuasive.<sup>1173</sup>

6.406. We recall that the legal standard under Article 2.2 requires a panel to determine the extent to which a technical regulation has a limiting effect on international trade. Where a measure modifies the conditions of competition in the market, a panel must be satisfied that such modification will have a limiting effect on trade in order to conclude that the measure is trade-restrictive. Such a

<sup>1162</sup> Honduras' appellant's submission, paras. 511 and 517-518; Dominican Republic's appellant's submission, paras. 1290 and 1308-1309.

<sup>1163</sup> Dominican Republic's appellant's submission, paras. 1317-1338; Honduras' and the Dominican Republic's responses to questioning at the first hearing. Neither appellant has challenged the Panel's findings regarding barriers to entry into the Australian tobacco market, compliance costs, or penalties.

<sup>1164</sup> Honduras' appellant's submission, paras. 511 and 517-518; Dominican Republic's appellant's submission, paras. 1290 and 1308-1309.

<sup>1165</sup> Honduras' appellant's submission, paras. 507-513; Dominican Republic's appellant's submission, paras. 1310-1316.

<sup>1166</sup> Honduras' appellant's submission, paras. 476 and 485-486; Dominican Republic's appellant's submission, paras. 1308 and 1315.

<sup>1167</sup> Honduras' appellant's submission, paras. 514-527; Dominican Republic's appellant's submission, paras. 1247 and 1312-1315.

<sup>1168</sup> Panel Report, para. 7.1167. (emphasis original)

<sup>1169</sup> Dominican Republic's appellant's submission, para. 1294. (emphasis original) See also *ibid.*, paras. 1290-1309.

<sup>1170</sup> Australia's appellee's submission, para. 305.

<sup>1171</sup> Australia's appellee's submission, para. 310.

<sup>1172</sup> Australia's appellee's submission, para. 310.

<sup>1173</sup> Australia's appellee's submission, paras. 321-330.

limiting effect on trade may be self-evident in cases of *de jure* discriminatory measures. However, a non-discriminatory modification of conditions of competition in a market may have both trade-enhancing and trade-reducing effects on trade, such that a panel could not necessarily anticipate whether the measure will have a limiting effect on trade based exclusively on its design and structure. If a panel's examination of a subset of the evidence (such as the design and structure of the measure) leaves it unable to determine whether the measure will have a limiting effect on trade, the panel must proceed to examine all additional arguments and evidence. In any event, even if a panel considers a subset of the evidence (such as the design and structure of the measure) sufficient to determine the trade restrictiveness of the measure, the panel is not precluded from examining additional arguments and evidence for purposes of defining the degree of trade restrictiveness.<sup>1174</sup>

6.407. In these disputes, the Panel considered that it was not able to determine, exclusively on the basis of its examination of the design and structure of the TPP measures, whether the TPP measures are trade-restrictive. The Panel agreed with the complainants that "the TPP measures limit the opportunity for producers to differentiate their products" and that, "by restricting the opportunity for brands to differentiate themselves, the TPP measures limit the opportunity for tobacco manufacturers to compete on the basis of such brand differentiation."<sup>1175</sup> The Panel stated, however, that it was not persuaded that "this modification of the competitive environment for all tobacco products on the entire market (which may in principle *increase* competition on the market) constitutes, in itself, a restriction on 'competitive opportunities' for imported tobacco products that must be assumed to have a 'limiting effect' on international trade."<sup>1176</sup>

6.408. We note that, in forming this conclusion, the Panel highlighted that brand differentiation is valuable in international trade because "differentiation engenders consumer loyalty and increases consumers' willingness to pay."<sup>1177</sup> This indicates that the impact of the reduction in the opportunity to differentiate will be different for different producers depending on the specific degree of customer loyalty associated with different producers' brands.<sup>1178</sup> Thus, while a reduction in the opportunity to differentiate might harm the competitive opportunities of some products, it would necessarily seem to improve the competitive opportunities of other competing products. These findings by the Panel indicate that, to the extent that the competitive opportunities of some imported products might be adversely affected by a reduction in the opportunity to brand-differentiate, the competitive opportunities of other imported products (including other imported products from the same Member) that compete with such products would simultaneously benefit.<sup>1179</sup> We therefore do not consider that, on appeal, the appellants have demonstrated that the Panel erred by failing to find that the reduction in the opportunity to differentiate between different products caused by the TPP measures necessarily amounts to a limiting effect on international trade.

6.409. Having upheld the Panel's determination that it was unable to conclude on the degree of trade restrictiveness on the basis of its examination of the design and structure of the TPP measures, we also disagree with the appellants that the Panel required evidence of "actual trade effects" or applied a "higher evidentiary burden" on the basis that the TPP measures were not shown to be

<sup>1174</sup> See para. 6.393. above.

<sup>1175</sup> Panel Report, para. 7.1167.

<sup>1176</sup> Panel Report, para. 7.1167. (fn omitted)

<sup>1177</sup> Panel Report, para. 7.1167.

<sup>1178</sup> We note that, although aspects of the appellants' arguments might be understood as focusing on the detrimental impact of the measure on *producers*, the Panel did indeed find that the TPP measures impact *producers' products*, when it stated that "the TPP measures limit the opportunity for producers to differentiate their *products*." (Panel Report, para. 7.1167 (emphasis added))

<sup>1179</sup> Indeed, this precise effect of the measure was asserted by the complainants in the context of their downtrading arguments. Honduras, for example, argued that the TPP measures "caused a downward substitution effect, whereby 'consumers purchase relatively fewer higher-quality and higher-priced products, and instead purchase relatively more lower-quality and lower-priced products'." (Panel Report, para. 7.1189 (quoting Honduras' first written submission to the Panel, paras. 372-379)) (See also Panel Report, paras. 7.1190-7.1192 (referring to Dominican Republic's first written submission to the Panel, para. 978; second written submission to the Panel, para. 938; response to Panel question Nos. 117, 125-126, and 151; comments on Australia's response to Panel question No. 151; Cuba's comments on Australia's response to Panel question No. 165, para. 26; Indonesia's first written submission to the Panel, paras. 397-399; second written submission to the Panel, para. 270; response to Panel question Nos. 117 and 165))

discriminatory.<sup>1180</sup> There is no indication that the Panel's conclusions with respect to brand differentiation were exclusively based on the fact that the TPP measures were non-discriminatory. To the contrary, the Panel's rejection of the argument that the reduction in the opportunity to brand-differentiate demonstrated trade restrictiveness was on the basis that this fact alone was insufficient for it to anticipate whether the net effect of the TPP measures would be trade-restrictive.<sup>1181</sup> For this reason, the Panel proceeded to examine the additional evidence and arguments adduced by the parties. Furthermore, the Panel did not require such additional evidence or argumentation to be in the form of "actual trade effects" (by which we understand the parties to refer to evidence of "actual" effects to date, as opposed to evidence of an "anticipated" effect in the future). To the contrary, having rejected the parties' arguments based exclusively on the design and structure of the measure, the Panel examined all evidence regarding both the actual effects to date as well as evidence informing the expected operation of the measure (i.e. the anticipated effects of the measure).<sup>1182</sup> This included both quantitative and qualitative evidence regarding the anticipated impact of the measures.<sup>1183</sup> The Panel therefore did not require evidence of actual trade effects or apply a different legal standard to non-discriminatory measures than that applicable to discriminatory measures. Rather, the Panel correctly sought to determine the extent to which the TPP measures have a limiting effect on international trade.

6.410. Finally, we note that the Dominican Republic considers that the Panel's reasoning "focused on the ability of producers to compete based on lower *prices*, rather than on other factors, such as quality, reputation, etc.". <sup>1184</sup> We understand that this aspect of the Dominican Republic's arguments focuses on the parenthetical in the Panel's rejection of the complainants' brand-differentiation argument, where it stated that it was not persuaded that the "modification of the competitive environment for all tobacco products on the entire market (which may in principle increase competition on the market) constitutes, in itself, a restriction on 'competitive opportunities' for imported tobacco products that must be assumed to have a 'limiting effect' on international trade."<sup>1185</sup> In our view, the Panel's parenthetical reference to the TPP measures potentially increasing competition in the market simply reflects the Panel's view that its examination of only the design and structure of the TPP measures was insufficient for it to anticipate the effect of the measure on international trade. Neither the Dominican Republic nor Honduras has explained, on appeal, how the fact of a reduction in brand differentiation was sufficient for the Panel to have anticipated the effect of the measure on trade. We therefore do not consider that the appellants have demonstrated that the Panel failed to apply Article 2.2 correctly in forming its conclusion that the reduction in the opportunity to differentiate was insufficient for it to determine the degree of trade restrictiveness of the TPP measures.

6.411. In sum, we can see no reason to question the Panel's conclusion that it was unable to anticipate, solely on the basis of the design and structure of the measures, whether the anticipated reduction in the opportunity to differentiate would have an overall negative impact on trade, as

<sup>1180</sup> See, for example, Honduras' appellant's submission, para. 490; Dominican Republic's appellant's submission, para. 1310.

<sup>1181</sup> Specifically, the Panel stated that, the limitation on "the opportunity for tobacco manufacturers to compete on the basis of such brand differentiation" amounted to a "modification of the competitive environment for all tobacco products on the entire market". (Panel Report, para. 7.1167 (fn omitted)) The Panel was not convinced that such a modification of the competitive environment in the market "constitutes, in itself, a restriction on 'competitive opportunities' for imported tobacco products that must be assumed to have a 'limiting effect' on international trade". (Ibid.)

<sup>1182</sup> Panel Report, paras. 7.1172-7.1254. See also paras. 6.397. 6.401. above.

<sup>1183</sup> In our view, the complainants' arguments regarding alleged barriers to entry, the expected effect of the TPP measures on the value of imported products, and the compliance costs and penalties associated with the TPP measures all relate to the anticipated effects of the TPP measures. We note Honduras' argument that the Panel dismissed some of the qualitative evidence on the basis that it was unsupported by "evidence showing the actual effects of the TPP measures". (Honduras' appellant's submission, para. 519 (referring to Panel Report, para. 7.1181)) A review of the Panel's findings reveals that Honduras' concern pertains to a single aspect of the complainants' qualitative evidence and concerns the Panel's conclusion that such qualitative evidence was simply not conclusive in light of contradictory empirical evidence. In short, Honduras appears to consider that, by concluding that the complainants' qualitative evidence was not persuasive, the Panel somehow misapplied the legal standard under Article 2.2. We cannot see how the Panel's determination of the persuasiveness of certain evidence in the face of contradictory evidence implies that the Panel somehow misapplied the legal standard under Article 2.2.

<sup>1184</sup> Dominican Republic's appellant's submission, para. 1294. (emphasis original)

<sup>1185</sup> Panel Report, para. 7.1167. (italics original; fn omitted; underlining added)

claimed by the complainants. We therefore reject the appellants' argument that the Panel erred in its application of Article 2.2 by concluding that it was unable to anticipate the impact of the TPP measures on trade based exclusively on the fact that the TPP measures reduce the opportunity for producers to differentiate their products on the basis of brands.

#### 6.1.3.2.3 The effect of the TPP measures on the value of imported tobacco products

6.412. The appellants argue that the Panel erred in applying Article 2.2, in its assessment of the impact of the TPP measures on the value of imported tobacco products. Many of the arguments raised by the appellants in this respect relate to the Panel's findings with respect to so-called "downtrading". The concept of "downtrading" refers to "[d]ownward substitution from higher- to low-priced brands"<sup>1186</sup>, and, in the context of the TPP measures, downtrading caused by the TPP measures refers to "consumers buy[ing] a cheaper brand than the brand that they bought before the TPP measures were introduced".<sup>1187</sup> We also note that, in its appellant's submission, the Dominican Republic refers to the extent to which the shift in the ratio of high-end to low-end cigarette sales was "caused" by downtrading.<sup>1188</sup> Since downtrading, per the Panel's definition, is the non-attributable shift in the ratio of high-end to low-end cigarette sales, we understand that the Dominican Republic's use of the term "downtrading" refers specifically to the shift that is attributable to the TPP measures. For the sake of simplicity, we use the term "downtrading" to refer generically to the phenomenon of consumers shifting from high-end to low-end cigarettes, without specifically attributing such downtrading effect to the TPP measures. Where we refer to this downtrading effect as being caused by the TPP measures, we do so explicitly.

6.413. We observe that the Panel's findings regarding the impact of the TPP measures on value appear in the subsection of its Report titled "Whether the TPP measures have a limiting effect on the volume and value of trade in tobacco products". At the first hearing, the participants extensively discussed the correct way to understand the structure and content of the Panel's findings in this subsection. We observe, in particular, the Dominican Republic's view that the Panel's analysis was in four parts, consisting of: (i) "downtrading" in paragraphs 7.1189-7.1198; (ii) "demand" in paragraphs 7.1199-7.1201; (iii) "volume" in paragraphs 7.1202-7.1208; and (iv) "price competition" in paragraphs 7.1209-7.1225. For the reasons explained below, we consider that the plain language of the Panel Report indicates that the Panel's analysis of the impact of the TPP measures on volume and value was, in fact, in three parts: (i) whether the TPP measures caused downtrading to occur; (ii) the impact of the TPP measures on the volume of imported tobacco products; and (iii) the impact of the TPP measures on the value of imported tobacco products.

6.414. Before the Panel, the complainants presented several different arguments regarding the impact of the TPP measures on the volume and value of imported tobacco products. Several of these arguments relied on the notion that the TPP measures had caused downtrading to occur. In order to address these arguments, the Panel first assessed the parties' econometric evidence regarding *whether the TPP measures had caused downtrading* in the Australian cigarette market. The Panel's findings in this respect are contained in Appendix E to the Panel Report. The Panel concluded that the TPP measures contributed to the shift in ratio of higher- to low-priced cigarette sales.<sup>1189</sup> The Panel further stated that it was "unclear to what extent this reduction in the quantity ratio attributable to the TPP measures represents only downward substitution" and "at least part of the reduction in the quantity ratio is due to the overall reduction in the total wholesale sales volume" attributable to the TPP measures.<sup>1190</sup> In other words, the Panel concluded that the TPP measures contributed to a shift in the ratio of high-end to low-end cigarette sales, and found that the

<sup>1186</sup> Panel Report, para. 7.1109.

<sup>1187</sup> Panel Report, para. 7.1109 (referring to Dominican Republic's response to Panel question Nos. 117, 125-126, and 151). Alternatively, "[a]s consumers shift from the more expensive brands to the less expensive brands because they have a higher willingness to switch brands and a lower willingness to pay, downtrading occurs." (Ibid., para. 7.1123 (referring to Indonesia's response to Panel question No. 117))

<sup>1188</sup> See, for example, Dominican Republic's appellant's submission, paras. 1323 and 1329.

<sup>1189</sup> This is reflected in the Panel's statements that "the TPP measures appear to have had a negative impact on the ratio of higher- to low-priced cigarette wholesale sales", and "there is some econometric evidence suggesting that the TPP measures contributed to the reduction in the ratio of higher- to low-priced cigarette wholesale sales." (Panel Report, para. 7.1196 (fn omitted); *ibid.*, Appendix E, para. 56.c)

<sup>1190</sup> Panel Report, Appendix E, para. 56.c. See also *ibid.*, Appendix E, para. 55.

mechanisms by which the TPP measures contributed to this shift were both downward substitution (i.e. downtrading) and a general decline in tobacco product sales.<sup>1191</sup>

6.415. In the main body of the Panel Report, the Panel addressed the complainants' arguments that the TPP measures are trade-restrictive by reducing the *volume* and *value* of imported tobacco products. The complainants' arguments included, *inter alia*, arguments that downtrading caused by the TPP measures: (i) led to a decline in the volume of premium tobacco product sales in Australia<sup>1192</sup>; and (ii) led to, or would lead to, a decline in the overall value of tobacco product sales in Australia.<sup>1193</sup> In our view, the Panel did not assess the "volume" and "value" aspects of the complainants' downtrading arguments together, but rather assessed them separately. Specifically, we understand that the Panel conducted its analysis by first considering all arguments regarding the impact of the TPP measures on the volume of imported tobacco products, and then turning to address the impact of the TPP measures on the value of imported tobacco products.<sup>1194</sup>

6.416. First, regarding the impact of the TPP measures on volume, the Panel stated that the complainants "demonstrated that the TPP measures have contributed to a reduction of the volume of imports of premium tobacco products both in relative and in absolute terms".<sup>1195</sup> The Panel elaborated that "there is some evidence, albeit limited, that together with the enlarged GHWs introduced on the same date, the TPP measures appear to have had a negative impact on the ratio of higher- to low-priced cigarette wholesale sales."<sup>1196</sup> The Panel considered it "reasonable to expect" that the reduction in ratio of higher- to low-priced cigarette sales observed since the entry into force of the TPP measures resulted "at least in part" from the TPP measures.<sup>1197</sup> The Panel also noted that "overall consumption of tobacco products" has diminished, that "this is at least partly attributable" to the TPP measures, and that, since the Australian market is "supplied entirely through imported products", there will be a reduction in imports of such premium products.<sup>1198</sup> The Panel highlighted, however, that this decrease in consumption and imports of premium tobacco products was not exclusively caused by downtrading, since (i) the overall consumption of tobacco products has decreased (meaning that "at least some part of the decrease in the consumption of premium tobacco products has not been substituted"), and (ii) "the higher- and lower-priced segments of the market

<sup>1191</sup> We address in section 6.1.3.3 below the Dominican Republic's claims that this factual finding by the Panel was inconsistent with Article 11 of the DSU.

<sup>1192</sup> Before the Panel, Cuba argued that downtrading caused by the TPP measures would impact the volume of Cuba's trade in cigars. (Panel Report, para. 7.1191) The Panel also appeared to consider that other arguments raised by the Dominican Republic, Honduras, and Indonesia also implicated the effects of downtrading on the volume of premium imported tobacco products. (Panel Report, paras. 7.1189-7.1195)

<sup>1193</sup> Panel Report, para. 7.1209.

<sup>1194</sup> We note that the entirety of the Panel's analysis in paragraphs 7.1196 to 7.1208 concerns the impact of the TPP measures on volume. Furthermore, paragraph 7.1208 contains a general conclusion on the trade restrictiveness of the TPP measures with respect to their impact on volume. Almost the entirety of the remainder of the Panel's analysis in that subsection, from paragraphs 7.1209 to 7.1225, relates to the Panel's analysis of the impact of the TPP measures on the value of imported tobacco products, and similarly culminates in a general conclusion regarding the trade restrictiveness of the TPP measures in terms of their impact on value. The only exception to this is paragraph 7.1219, which concerns "overall imports of cigars and cigarillos", "the impact of the TPP measures on cigar imports", and "the reduction in cigar smoking prevalence in Australia". Paragraph 7.1219 concludes that "the TPP measures are trade-restrictive also *vis-à-vis* cigars." While we acknowledge that this paragraph does not relate to the impact of the TPP measures on *value*, but rather on *volume*, we note that under the Dominican Republic's understanding of the structure of this section, paragraph 7.1219 would fall within the Panel's analysis of "price competition". Given that this paragraph plainly refers to the impact of the TPP measures on the volume of cigar imports, and does not refer to price competition at all, the location of paragraph 7.1219 is as anomalous under the Dominican Republic's understanding of the Panel's structure as it is under our own understanding. Essentially, no matter how one views the structure of the Panel's analysis, paragraph 7.1219 appears to be misplaced. We can see no other way to reconcile the Panel's conclusion in paragraph 7.1208 on the volume of *imported tobacco products* generally with its subsequent, yet apparently preliminary, discussion in paragraph 7.1219 of the impact of the TPP measures on the volume of *cigar products*.

<sup>1195</sup> Panel Report, para. 7.1196.

<sup>1196</sup> Panel Report, para. 7.1196. The Panel based this finding on its analysis in Appendix E to the Panel Report. Specifically, in Appendix E, the Panel examined whether the TPP measures had caused consumers to shift from high-end (i.e. more expensive, premium) cigarettes to low-end (i.e. less expensive, non-premium) cigarettes, and concluded that "there is some econometric evidence suggesting that the TPP measures contributed to the reduction in the ratio of higher- to low-priced cigarette wholesale sales." (Panel Report, Appendix E, para. 56.c)

<sup>1197</sup> Panel Report, para. 7.1196.

<sup>1198</sup> Panel Report, para. 7.1196.

have evolved on the basis of distinct trends ... even before the implementation of the TPP measures."<sup>1199</sup> The Panel also concluded that there was no evidence of cigar downtrading, or any causal link between cigar downtrading and the TPP measures.<sup>1200</sup>

6.417. The Panel proceeded to address the argument that, as consumers downtrade, demand for imported tobacco products will decline, and this decline in demand amounts to a limiting effect on trade (i.e. a "disincentive to export tobacco products to Australia").<sup>1201</sup> The Panel noted that the TPP measures can indeed contribute to reducing demand for tobacco products, but considered that, because the TPP measures will have supply-side implications, with consequences for overall consumption, a demonstration of effects on demand alone are not sufficient to demonstrate that the TPP measures are trade-restrictive.<sup>1202</sup> The Panel next recalled its finding that "the TPP measures are apt to, and do in fact, reduce the appeal of tobacco products to the consumer, and that this may in turn have an impact on smoking behaviours."<sup>1203</sup> The Panel noted that "it is undisputed that the Australian market is in fact supplied entirely through imported tobacco products"<sup>1204</sup>, and, on that basis, 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>1205</sup>

6.418. The Panel then assessed the impact of the TPP measures on the *value* of imports.<sup>1206</sup> The Panel agreed with the complainants that, "to the extent that they restrict the use of branding features on tobacco products and their retail packaging, the TPP measures reduce opportunities for producers to differentiate their products on the basis of these features."<sup>1207</sup> The Panel proceeded to consider whether "such 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>1208</sup> The Panel concluded that "the empirical evidence ... does not validate the complainants' argument that the TPP measures will lead 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>1209</sup> In that context, the Panel also concluded that the "evidence suggests that the 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>1210</sup>

6.419. Thereafter, the Panel addressed the Dominican Republic's argument that, "by reducing brand differentiation, the TPP measures have already led to switching from higher- to lower-priced cigarettes and, hence, to a reduction in the value of the trade, without reducing smoking prevalence or consumption."<sup>1211</sup> The Panel considered that the Dominican Republic's argument was "based on the assumption that the TPP measures would either keep the price of cigarettes constant or reduce it".<sup>1212</sup> The Panel noted that "evidence shows that brands in the higher priced segments generally maintained or increased their pricing premiums over brands in the lower-priced segments in the first year following the implementation of plain packaging, and have not exhibited a marked drop, in line with the observation that the average price of cigarettes had increased sufficiently to offset the decrease in consumption."<sup>1213</sup> The Panel concluded that the facts before it did not support the Dominican Republic's argument.<sup>1214</sup> Before concluding with respect to the impact on value, the Panel

<sup>1199</sup> Panel Report, para. 7.1197.

<sup>1200</sup> Panel Report, para. 7.1198.

<sup>1201</sup> Panel Report, paras. 7.1199-7.1201 (referring to Honduras' first written submission to the Panel, paras. 875-876; response to Panel question No. 117).

<sup>1202</sup> Panel Report, paras. 7.1199-7.1201.

<sup>1203</sup> Panel Report, para. 7.1206.

<sup>1204</sup> Panel Report, para. 7.1207. (fn omitted)

<sup>1205</sup> Panel Report, para. 7.1208.

<sup>1206</sup> Panel Report, paras. 7.1209-7.1218 and 7.1220-7.1225. Regarding paragraph 7.1219 of the Panel Report, see fn 1192 to para. 6.415. above.

<sup>1207</sup> Panel Report, para. 7.1214.

<sup>1208</sup> Panel Report, para. 7.1214.

<sup>1209</sup> Panel Report, para. 7.1218.

<sup>1210</sup> Panel Report, para. 7.1218.

<sup>1211</sup> Panel Report, para. 7.1221.

<sup>1212</sup> Panel Report, para. 7.1221.

<sup>1213</sup> Panel Report, para. 7.1221 (referring to M. Katz, An Economic Assessment of the Effects of Tobacco Plain Packaging (9 March 2015) (Katz Report) (Panel Exhibit AUS-18), para. 66).

<sup>1214</sup> Panel Report, para. 7.1221.

also addressed the argument that, over time, prices will ultimately decline as a consequence of the TPP measures.<sup>1215</sup> The Panel noted that, "at least in the period of observation covered, price competition has not increased."<sup>1216</sup> However at the same time, the evidence did not allow the Panel "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".<sup>1217</sup> The Panel ultimately concluded 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."<sup>1218</sup>

6.420. The appellants, and predominantly the Dominican Republic, make several sets of arguments asserting that the Panel erred in determining the trade restrictiveness of the TPP measures based on their impact on the value of imported tobacco products. Before turning to address these arguments, we observe that they all relate to the complainants' reliance on the notion of downtrading to demonstrate, before the Panel, that the value of imported tobacco products declined. Although the Panel also made findings regarding the impact of downtrading on *volume*, the appellants' arguments on appeal relate exclusively to the impact of downtrading on *value*.<sup>1219</sup>

6.421. We understand that the complainants' primary argument before the Panel was that the TPP measures were trade-restrictive on the basis that they reduced the opportunity for manufacturers to differentiate on the basis of brands. The Panel accepted that the TPP measures reduce the opportunity for brand differentiation but considered that this was insufficient to demonstrate a limiting effect on international trade. We understand that the complainants' arguments in relation to downtrading sought to demonstrate that the TPP measures' effects on brand differentiation would indeed have a limiting effect on international trade, including by reducing the value of imported tobacco products.

6.422. Value is a function of price and quantity. In order to demonstrate that the TPP measures reduced the value of imported tobacco products, it would have sufficed for the complainants to adduce quantitative evidence of the average *price* and aggregate *quantity* of their imported tobacco products before and after the implementation of the TPP measures, and explain causation. The complainants' reliance on the notion of downtrading, however, hypothesized that the TPP measures would necessarily lead to a decline in value, as a consequence of consumers shifting from premium to non-premium products in response to the TPP measures. We understand that the Panel based its ultimate assessment of the effect of the TPP measures on value on all the evidence provided to it, including both qualitative and quantitative evidence.

6.423. In this respect, we consider it useful to briefly address, at the outset, the appellants' argument that the Panel erred in its application of Article 2.2 by concluding that the TPP measures will not lead to a reduction in the value of imported products, even though (in the appellants' view) the qualitative evidence indicated that such an effect would occur in the future.<sup>1220</sup> We note that the Panel did indeed take into account the future impact of the TPP measures on value.<sup>1221</sup> The Panel did not consider, however, that the evidence was sufficient to conclude that the TPP measures *did*, or necessarily *would*, lead to a reduction in value. We recall that there is no obligation on a panel to base its assessment of the degree of trade restrictiveness on a subset of the relevant evidence.<sup>1222</sup> Bearing in mind that the weighing and balancing of the evidence is the province of the Panel in its

<sup>1215</sup> Panel Report, paras. 7.1222-7.1225

<sup>1216</sup> Panel Report, para. 7.1224.

<sup>1217</sup> Panel Report, para. 7.1224.

<sup>1218</sup> Panel Report, para. 7.1225.

<sup>1219</sup> See paras. 6.416. 6.417. above. In response to questioning at the first hearing, the Dominican Republic clarified that its arguments regarding the Panel's findings on downtrading relate exclusively to the impact of downtrading on the *value* of imported tobacco products.

<sup>1220</sup> Honduras' and the Dominican Republic's responses to questioning at the first hearing.

<sup>1221</sup> The Panel concluded 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." (Panel Report, para. 7.1225)

<sup>1222</sup> See para. 6.393. above. We similarly see no reason that a panel's determination of the anticipated effects of a measure (i.e. the "expected operation" of the measure) should not be based on all evidence before it, including empirical evidence of the effects of the measure to date.



role as factfinder<sup>1223</sup>, we do not consider that this aspect of the appellants' arguments demonstrates that the Panel erred in applying Article 2.2.<sup>1224</sup>

6.424. Having addressed this aspect of the appellants' arguments, we note that the Dominican Republic has raised three additional sets of arguments alleging that the Panel erred in its application of Article 2.2, with respect to its determination that the TPP measures have not reduced the value of imported tobacco products. The Dominican Republic argues, first, that the Panel erred in assessing the complainants' downtrading argument by rejecting that argument on the basis that the TPP measures were not the exclusive cause of downward substitution by consumers.<sup>1225</sup> Second, the Dominican Republic submits that any separate reasons that the Panel had for rejecting the complainants' downtrading argument were also in error.<sup>1226</sup> Third, the Dominican Republic posits that the Panel erred by taking into account the reaction of producers to the TPP measures.<sup>1227</sup> We address each set of arguments in turn.

#### 6.1.3.2.3.1 The causation standard applied by the Panel

6.425. The Dominican Republic argues that the Panel erred by requiring that downtrading (caused by the TPP measures) be the sole cause of the downward shift in the ratio of high-end to low-end cigarette sales.<sup>1228</sup> In the Dominican Republic's view, paragraphs 7.1196 and 7.1197 of the Panel Report indicate that the Panel rejected the complainants' argument that downtrading (caused by the TPP measures) led to a reduction in value on the basis that the shift in the ratio was not exclusively caused by downtrading (caused by the TPP measures).<sup>1229</sup> In the Dominican Republic's view, the fact that the Panel considered that the shift in ratio was at least partially attributable to downtrading caused by the TPP measures should have been sufficient, and the Panel applied an inappropriately rigid standard of causation.<sup>1230</sup>

6.426. Australia disagrees with the Dominican Republic's interpretation of the Panel Report. Australia considers that the Panel did not find that the TPP measures caused downtrading to occur.<sup>1231</sup> Australia also argues that, in any event, the Panel rejected the Dominican Republic's downtrading argument because the argument was based on the assumption that the TPP measures would keep the price of cigarettes constant or reduce it, and, "contrary to this assumption, the Panel found that average tobacco prices net of taxes increased in the period following the implementation of the TPP measures."<sup>1232</sup> Australia does not consider that the Panel applied a "rigid 'exclusive cause' standard in its analysis of trade-restrictiveness".<sup>1233</sup>

6.427. We recall that, with respect to the complainants' argument that downtrading would lead to a decline in the value of imported tobacco products, the Panel rejected the argument that such effect had occurred.<sup>1234</sup> However, the Panel did not preclude the possibility that such an effect could occur in the future.<sup>1235</sup>

6.428. In our view, the Dominican Republic's arguments are based on an incorrect understanding of the Panel's findings on downtrading. We understand that the Dominican Republic's argument on appeal is essentially premised on its view that the Panel, in paragraphs 7.1196 and 7.1197 of the

<sup>1223</sup> We also recall that, in the context of claiming that the Panel erred in determining the degree of contribution of the TPP measures to Australia's objective, the appellants argue the opposite (namely, that the Panel erred by according too much weight to the evidence of anticipated effects, and insufficient weight to the evidence of actual effects). (See paras. 6.346. 6.347. above).

<sup>1224</sup> Neither appellant has raised this argument in the context of challenging the Panel's findings under Article 11 of the DSU and, in any event, it is not the role of the Appellate Body to second-guess the Panel's appreciation of the evidence.

<sup>1225</sup> Dominican Republic's appellant's submission, paras. 1317-1330.

<sup>1226</sup> Dominican Republic's responses to questioning at the first hearing.

<sup>1227</sup> Dominican Republic's appellant's submission, paras. 1331-1338.

<sup>1228</sup> Dominican Republic's appellant's submission, paras. 1317-1330.

<sup>1229</sup> Dominican Republic's appellant's submission, paras. 1322, 1329 and fn 1256 thereto, and 1330.

<sup>1230</sup> Dominican Republic's appellant's submission, paras. 1323-1330.

<sup>1231</sup> Australia's responses to questioning at the first hearing.

<sup>1232</sup> Australia's opening statement at the first hearing, para. 49 (referring to Panel Report, paras. 7.1215 and 7.1221). (emphasis original)

<sup>1233</sup> Australia's appellee's submission, para. 332.

<sup>1234</sup> See paras 6.418. 6.419. above.

<sup>1235</sup> See para. 6.419. above.

Panel Report, rejected the complainants' argument that downtrading reduced the *value* of imported tobacco products. The Dominican Republic considers that the Panel rejected this argument on the basis that the reduction in the ratio of high-end to low-end cigarette sales was not exclusively caused by downward substitution by consumers in response to the TPP measures, but was at least in part caused by the overall reduction in consumption, also caused by the TPP measures.<sup>1236</sup> As described above, however, paragraphs 7.1196 and 7.1197 of the Panel Report refer to the impact of the TPP measures on the *volume* of imported tobacco products, and not the impact on *value*.<sup>1237</sup>

6.429. Part of the Dominican Republic's confusion may relate to the fact that paragraphs 7.1196 and 7.1197 of the Panel Report refer to the decline in the volume of imported premium tobacco products being partially attributable to downtrading and partially attributable to the overall decline in consumption caused by the TPP measures.<sup>1238</sup> These findings are very similar, yet different, to certain findings made by the Panel in its analysis of whether the TPP measures caused downtrading, in Appendix E to the Panel Report.<sup>1239</sup> We address below certain issues arising in relation to the Panel's findings in Appendix E.<sup>1240</sup> It suffices for the moment, however, to note that the Panel's findings in paragraphs 7.1196 and 7.1197 concern the impact of downtrading on *volume* and do not refer to the impact of downtrading on *value*.

6.430. Furthermore, paragraph 7.1221 of the Panel Report *does* address the "effects of downtrading on value" argument. The first sentence of paragraph 7.1221 specifically refers to this argument, stating that "[i]n the Dominican Republic's view, the complainants['] argument is that... the TPP measures have already led to switching from higher- to lower-priced cigarettes and, hence, to a reduction in the value of ... trade."<sup>1241</sup> The Panel reasoned that this argument was "based on the assumption that the TPP measures would either keep the price of cigarettes constant or reduce it".<sup>1242</sup> According to the Panel, "evidence shows that brands in the higher priced segments generally maintained or increased their pricing premiums over brands in the lower-priced segments in the first year following the implementation of plain packaging, and have not exhibited a marked drop, in line with the observation that the average price of cigarettes had increased sufficiently to offset the decrease in consumption."<sup>1243</sup> Consequently, in the Panel's view, "the facts ... do not support the Dominican Republic's argument."<sup>1244</sup>

6.431. In short, the relevant paragraph that directly addresses the argument that downtrading led to a reduction in the value of imported cigarette products, is neither paragraph 7.1196 nor 7.1197, but rather paragraph 7.1221. Critically, for the purposes of addressing the Dominican Republic's claim on appeal, paragraph 7.1221 does not reject the "downtrading led to a decrease in value"

<sup>1236</sup> Dominican Republic's appellant's submission, para. 1319.

<sup>1237</sup> See para. 6.416. above. We emphasize that paragraphs 7.1196 and 7.1197 refer to the decline in *consumption* and *imports* of premium tobacco products, and neither paragraph, at any point, refers to the impact of either downtrading or the TPP measures on *value*.

<sup>1238</sup> The last sentence of paragraph 7.1196 states that "consumption of premium tobacco products has ... *decreased in absolute terms*, which may be expected to lead, in turn, to a reduction in imports of premium products." (Panel Report, para. 7.1196 (emphasis added)) The following sentence, the first sentence of paragraph 7.1197, plainly refers to this decrease in consumption of premium tobacco products in absolute terms, when it states that the Panel is "not persuaded ... that *this decrease* in the *consumption and imports of premium tobacco products* is exclusively the result of 'downtrading' as the complainants describe it". (Panel Report, para. 7.1197 (emphasis added)) The second sentence of paragraph 7.1197 explains that "given that the overall consumption of tobacco products has decreased, at least some part of the *decrease in the consumption of premium tobacco products* has not been substituted with the consumption of non-premium products." (Panel Report, para. 7.1197 (emphasis added))

<sup>1239</sup> In paragraphs 55 and 56.c of Appendix E to the Panel Report, the Panel stated that the shift in ratio of high-end to low-end sales was partially attributable to the TPP measures, and, to the extent that shift is attributable to the TPP measures, it resulted from both downward substitution and an overall decline in wholesale sales. Thus, in Appendix E, the Panel was referring to the impact of the TPP measures on the *ratio of sales*. By contrast, in paragraphs 7.1196 and 7.1197 of its Report, the Panel found that, to the extent that the TPP measures reduced the *volume of imported premium tobacco products*, they did so through downward substitution caused by the TPP measures, as well as a more general decline in wholesale sales volume, also caused by the TPP measures. We note that a decline in the *ratio* of high-end to low-end sales is not the same thing as a decline in the absolute *volume* of high-end sales.

<sup>1240</sup> See section 6.1.3.3 below.

<sup>1241</sup> Panel Report, para. 7.1221.

<sup>1242</sup> Panel Report, para. 7.1221.

<sup>1243</sup> Panel Report, para. 7.1221 (referring to Katz Report (Panel Exhibit AUS-18), para. 66).

<sup>1244</sup> Panel Report, para. 7.1221.

argument on the basis of the extent to which downward substitution by the TPP measures caused the shift in ratio of cigarette sales. We also note that the Panel's ultimate conclusion in paragraph 7.1225 on the impact of the TPP measures on the value of imported tobacco products took into account the possible future impact of downtrading on value. Specifically, the Panel stated 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>1245</sup> In our view, these findings fully capture the Panel's conclusions on the impact of downtrading on the value of imported tobacco products.

6.432. We are aware of the Dominican Republic's argument, raised at the first hearing, that paragraphs 7.2572 and 7.2573 of the Panel Report demonstrate that the Panel addressed the "downtrading led to a decrease in value" argument in paragraphs 7.1196 and 7.1197. Paragraphs 7.2572 and 7.2573, appearing in the context of the Panel's analysis under Article 20 of the TRIPS Agreement, summarize the Panel's earlier findings on, respectively, "price competition" and "downward substitution", in its assessment of trade restrictiveness.<sup>1246</sup> In neither paragraph 7.2572 nor 7.2573 does the Panel refer to its findings in paragraph 7.1221. This is particularly significant given that paragraph 7.2573, which contains the Panel's own summary of its findings on "downward substitution", does describe almost word for word the Panel's findings in paragraphs 7.1196 and 7.1197 regarding the impact of downtrading on the volume of imported tobacco products, and also describes the Panel's statement in paragraph 7.1225 regarding the possible future impact of the TPP measures on value. In other words, paragraphs 7.1196 and 7.1197 contain the Panel's findings on the impact of downtrading on volume, paragraphs 7.1221 and 7.1225 contain the Panel's findings on the impact of downtrading on value, and paragraphs 7.2572 and 7.2573 claim to summarize the Panel's findings on downtrading, but omit any mention of its findings contained in paragraph 7.1221.

6.433. We agree with the Dominican Republic that it is concerning that the Panel's own summary of its findings on downtrading omits any mention of paragraph 7.1221. Indeed, the Dominican Republic has identified a tension between the plain text of the Panel's findings and its subsequent summary of those findings.<sup>1247</sup> In our view, however, the Panel's subsequent *summary* of its earlier findings is not a sufficient basis to simply disregard the plain text of those earlier findings.<sup>1248</sup> We note that not only does the Dominican Republic's interpretation of the Panel Report ignore the plain text of paragraphs 7.1196, 7.1197, and 7.1221, but it also would render paragraph 7.1221 entirely redundant. We disagree with this understanding of the Panel Report.

6.434. As indicated, the text of paragraphs 7.1221 and 7.1225 reveals that the Panel did not reject the Dominican Republic's downtrading argument on the basis that the TPP measures were not the sole cause of the downward substitution. Such reasoning is absent from paragraph 7.1221, and indeed paragraph 7.1225 allows for the possibility that the TPP measures may, in fact, lead to a

<sup>1245</sup> Panel Report, para. 7.1225.

<sup>1246</sup> We note that the Panel made this summary of its findings in the context of assessing the complainants' arguments that the TPP measures affect the ability of trademark owners to "extract economic value from those trademarks". (Panel Report, para. 7.2571)

<sup>1247</sup> On the one hand, under the Dominican Republic's interpretation of the Panel Report, paragraphs 7.1196 and 7.1197 contain the Panel's operative reasoning for rejecting the argument that downtrading led to a decline in value, which is plainly contradicted by the plain text of those paragraphs as well as the fact that paragraph 7.1221 on its face appears to be the operative paragraph addressing this argument. On the other hand, to the extent that paragraph 7.1221 is indeed the operative paragraph in which the Panel rejected the argument that downtrading led to a decline in value, then paragraph 7.2573 is a confusing summary by the Panel of its own findings, and is incomplete to the extent that it does not refer to paragraph 7.1221.

<sup>1248</sup> We find further support for our understanding of the Panel Report when we take into account the Panel's distinct findings on the impact of downtrading on cigars, rather than cigarettes. In paragraph 7.1198, the Panel concluded that there was no evidence that the TPP measures had caused downtrading to occur in the cigar market. That paragraph, like paragraphs 7.1196-7.1197, does not refer to any impact of downtrading on value, but only to the impact of downtrading on "imports" and "sales". Having indicated in paragraph 7.1198 that there is no evidence that downtrading of cigars is occurring, the Panel at no point returns to examine whether downtrading has had any impact on the value of imported cigars. This approach to the impact of downtrading on trade in cigars stands in stark contrast to the Panel's findings with respect to the impact of downtrading on trade in cigarettes. Indeed, in paragraph 7.1196, the Panel explicitly finds that the TPP measures have caused some downtrading in the cigarette market, and subsequently in paragraph 7.1221 the Panel concludes that downtrading has not led to a reduction in the value of the cigarette market.

reduction in value in the future. A close reading of the Panel Report shows that the Panel first concluded in Appendix E (and restated in paragraph 7.1196) that the TPP measures were at least partially responsible for downtrading in Australia. On that basis, the Panel proceeded to examine whether downtrading did, or would, lead to a reduction in either the volume or value of imported tobacco products. The Panel rejected the argument that downtrading caused by the TPP measures reduced the value of imported tobacco products for reasons unconnected from the extent to which downward substitution caused the decrease in ratio of cigarette sales. The Panel was also sufficiently persuaded by the downtrading argument to conclude that value might be reduced in the future.

6.435. We therefore understand that the Panel applied the exact standard of causation that the Dominican Republic considers appropriate under Article 2.2, simply requiring that the TPP measures be at least partially responsible for downtrading in order to assess whether that downtrading effect caused by the TPP measures led, or would lead in the future, to a reduction in value. Consequently, the Dominican Republic has not demonstrated that the Panel erred by relying on an inappropriate standard of causation in applying Article 2.2.

#### **6.1.3.2.3.2 The Panel's reasoning in paragraph 7.1221 of the Panel Report**

6.436. As explained above, paragraph 7.1221 of the Panel Report contains the Panel's operative findings regarding the impact of downtrading (caused by the TPP measures) to date on the value of imported tobacco products. That paragraph states the following:

In the Dominican Republic's view, the complainants['] argument is that, by reducing brand differentiation, the TPP measures have already led to switching from higher- to lower-priced cigarettes and, hence, to a reduction in the value of the trade, without reducing smoking prevalence or consumption. However, at the same time the Dominican Republic adds that "[t]his disagreement on the actual trade effects resulting from the [TPP] measures is not material to the Panel's finding of trade-restrictiveness under Article 2.2, because it is evident from the design, structure, and expected operation of the measures that it severely limits competitive opportunities to differentiate tobacco products". The Dominican Republic's argument is based on the assumption that the TPP measures would either keep the price of cigarettes constant or reduce it. However, evidence shows that brands in the higher priced segments generally maintained or increased their pricing premiums over brands in the lower-priced segments in the first year following the implementation of plain packaging, and have not exhibited a marked drop, in line with the observation that the average price of cigarettes had increased sufficiently to offset the decrease in consumption. In other words, the facts before us do not support the Dominican Republic's argument.<sup>1249</sup>

6.437. At the first hearing, the Dominican Republic argued that, in the event that the Appellate Body considered paragraph 7.1221 to contain the Panel's findings on the complainants' "downtrading has reduced value" argument, the Panel in any event erred in applying Article 2.2. The Dominican Republic argued, first, that its downtrading argument did not rely on the Panel's assumption that prices would remain constant or fall. According to the Dominican Republic, downtrading could still lead to a reduction in value even if prices increased. Second, the Dominican Republic argued that the Panel's references to high-end products maintaining or increasing their pricing premiums is insufficient to reject the downtrading argument, because an increasing price differential between high-end and low-end cigarettes only enhances the negative impact of the TPP measures on the value of imported products, since for every unit that shifts down there is a bigger loss of value on the sale. Third, according to the Dominican Republic, the Panel used an effect that was not attributable to the TPP measures (specifically the increase in the average price of cigarettes) to offset an effect that *is* attributable to the TPP measures (i.e. downtrading itself).<sup>1250</sup>

6.438. Australia considers that the Panel's findings in paragraph 7.1221 are not appealed, and therefore are not within the scope of this appeal. In any event, Australia submits that the Panel

<sup>1249</sup> Panel Report, para. 7.1221 (quoting Dominican Republic's response to Panel question No. 117, para. 233; referring to Katz Report (Panel Exhibit AUS-18), para. 66). (fns omitted)

<sup>1250</sup> Dominican Republic's responses to questioning at the first hearing.

correctly considered that it could not simply defer to the Dominican Republic's key price assumption, and the Panel correctly found that the empirical evidence indicated that the TPP measures led to an increase in the price of cigarettes.<sup>1251</sup>

6.439. Regarding the Dominican Republic's first argument on appeal, we note that the "assumption" that the Panel ascribed to the Dominican Republic's argument – that "the TPP measures would either keep the price of cigarettes constant or reduce it"<sup>1252</sup> – was not an assumption that the Dominican Republic necessarily acknowledged in making its downtrading argument. Rather, we understand that this assumption was a necessary implication of its arguments. Specifically, we understand the Dominican Republic's argument before the Panel to have been that, because the TPP measures cause consumers to shift from more expensive to less expensive cigarettes, the overall value of cigarette sales will necessarily go down. The Panel's reference to the "assumption" underlying this argument is based on the fact that the TPP measures could theoretically lead to an increase in prices such that any downward shift in consumption is offset by the price increase, resulting in no reduction in the total value of imported products. In other words, the only way in which downtrading in and of itself could suffice for the Panel to conclude that the TPP measures have reduced the value of imported tobacco products is if prices were to remain constant or decline.

6.440. We do not read the Panel's findings as disagreeing with the Dominican Republic that it is possible that an increase in prices, accompanied by downtrading, could result in a reduction of overall value. Rather, the Panel's point was that, if prices increase, then it is not necessarily the case that the predicted reduction in overall value will occur. In other words, as a matter of logic, the Panel was not stating that downtrading will not lead to a reduction in value – rather, by rejecting a necessary premise of the Dominican Republic's argument, the Panel was refuting the argument that downtrading must necessarily lead to a reduction in value. We see no error in the Panel's reasoning.

6.441. With respect to the Dominican Republic's second argument – that increases in the price differential between high-end and low-end products aggravate the loss in value – we consider that this argument ignores the fact that for each lost sale by a high-end producer, the loss in value of that particular sale may be offset by the increase in price paid by other consumers who continue to purchase the high-end product. In other words, while the total quantity of high-end sales may go down as a result of downtrading, the simultaneous increase in price means that total value (i.e. quantity multiplied by price) could plausibly remain constant, or even increase. It therefore does not follow that an increase in price necessarily reduces value.<sup>1253</sup>

6.442. As to the Dominican Republic's third argument, that the Panel relied on an effect that was *not* caused by the TPP measures (price increase) to offset an effect that *was* caused by the TPP measures (downtrading), we consider this argument to be contradicted by the Panel's explicit finding that the price increase was caused by the TPP measures themselves.<sup>1254</sup> To the extent that the Dominican Republic's arguments at the first hearing contest the correctness of the Panel's finding of causation, we note that the Dominican Republic did not appeal this factual finding under Article 11 of the DSU, and it therefore falls outside the scope of this appeal.<sup>1255</sup>

<sup>1251</sup> Australia's responses to questioning at the first hearing.

<sup>1252</sup> Panel Report, para. 7.1221.

<sup>1253</sup> Importantly, neither we nor the Panel considers that price increases will necessarily lead to an increase in value. Rather, the Panel's findings merely indicate that downtrading could plausibly lead to no change (or an increase) in value, if prices increased. The fact that prices increased was sufficient for the Panel to reject the argument that downtrading necessarily reduced the value of imported tobacco products.

<sup>1254</sup> Specifically, the Panel found that the "evidence suggests that the 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." (Panel Report, para. 7.1218) We therefore disagree with the Dominican Republic's assertion that the Panel simply found that there was an upward trend in the value of tobacco products following the implementation of the TPP measures, without assessing whether the TPP measures caused that upward trend.

<sup>1255</sup> At the first hearing, the Dominican Republic compared the Panel's analysis of causation in attributing the price increases to the TPP measures to the Panel's analysis of the extent to which downtrading occurred (i.e. the extent to which the shift in ratio of cigarette sales was caused by the TPP measures). The Dominican Republic pointed out that, in assessing the causes of the shift in ratio, the Panel assessed not only whether that downward shift occurred and increased following the implementation of the TPP measures, but whether the TPP measures had caused that increase. By contrast, in the context of assessing the impact of the TPP measures on prices, the Dominican Republic asserts that the Panel merely found that prices had increased,

6.443. For these reasons, we consider that, even if the Dominican Republic's first two arguments regarding paragraph 7.1221 of the Panel Report are properly within the scope of this appeal, the Dominican Republic has failed to demonstrate that the Panel's reasoning in that paragraph constituted a misapplication of the legal standard under Article 2.2.

#### 6.1.3.2.3.3 The reaction of private actors to the TPP measures

6.444. The Dominican Republic argues that, as a general matter (i.e. without reference to paragraph 7.1221 in particular), the Panel erred by taking into account price increases.<sup>1256</sup> The Dominican Republic submits that "[a] measure does not cease to be trade-restrictive just because private actors may be able to adapt their commercial strategy in the face of the measure."<sup>1257</sup> The Dominican Republic refers to certain Appellate Body and panel jurisprudence standing for the proposition that actions by private actors to mitigate the harmful effects of a measure will not preclude a finding of WTO-inconsistency.<sup>1258</sup> In the Dominican Republic's view, the Panel erred "by allowing for the conduct of private actors to be a means for undoing, or mitigating, the trade-restrictive effects of a measure".<sup>1259</sup>

6.445. Australia argues that the Panel did not consider that the trade restrictiveness of the TPP measures could be cured or mitigated, but rather "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".<sup>1260</sup> Australia sees "no reason why the Panel should have excluded consumption data from its analysis", given that the assessment of trade restrictiveness entails assessing whether there is a limiting effect on international trade.<sup>1261</sup> Australia considers that it was appropriate for the Panel "to ascertain the effects of the TPP measures in the marketplace, where the forces of supply and demand interact".<sup>1262</sup> Australia also notes that, previously, in the context of Article 2.1 of the TBT Agreement, the Appellate Body found it appropriate "to review both supply and demand side evidence in determining how a technical regulation affects the conditions of competition in the marketplace".<sup>1263</sup>

6.446. In our view, the jurisprudence cited by the Dominican Republic stands for the principle that a determination of a measure's consistency must be based on all relevant facts, such that the fact that private actors may adapt their behaviour in order to mitigate negative consequences does not alter a finding of inconsistency when the facts indicate that a measure is WTO-inconsistent.<sup>1264</sup> In

without verifying whether this price increase accelerated after the implementation of the TPP measures or whether the TPP measures caused that shift.

<sup>1256</sup> Dominican Republic's appellant's submission, paras. 1331-1338.

<sup>1257</sup> Dominican Republic's appellant's submission, para. 1333.

<sup>1258</sup> Dominican Republic's appellant's submission, paras. 1334-1336 (referring to Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, para. 117; *Korea – Various Measures on Beef*, para. 14; *US – FSC (Article 21.5 – EC)*, para. 220; Panel Reports, *Indonesia – Import Licensing Regimes*, para. 7.11; *India – Solar Cells*, para. 7.95; *US – FSC (Article 21.5 – EC)*, para. 8.157).

<sup>1259</sup> Dominican Republic's appellant's submission, para. 1333. According to the Dominican Republic, "the Panel found that the possibility of suppliers/producers counteracting the distortions on demand for high-end tobacco products (resulting from the TPP measures) by adjusting prices[] can immunize a measure against any finding of trade restrictiveness evident from the design, nature and anticipated operation of the measure." (Ibid., para. 1337)

<sup>1260</sup> Australia's appellee's submission, para. 339. (emphasis original)

<sup>1261</sup> Australia's appellee's submission, para. 340.

<sup>1262</sup> Australia's appellee's submission, para. 340.

<sup>1263</sup> Australia's appellee's submission, para. 340 (referring to Appellate Body Reports, *US – COOL*, para. 349).

<sup>1264</sup> In *Korea – Various Measures on Beef*, the Appellate Body stated that the "central consequence" of the dual retail system on imported products was a "drastic reduction of commercial opportunity to reach, and hence to generate sales to, the same consumers served by the traditional retail channels for domestic beef", and that, "[i]n these circumstances, the intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product." (Appellate Body Report, *Korea – Various Measures on Beef*, paras. 145-146) In *US – FSC (Article 21.5 – EC)*, the Appellate Body found that "the fair market value rule provide[d] a considerable impetus, and, in some circumstances, in effect, a requirement, for manufacturers to use domestic input products, rather than like imported ones. As such, the fair market value rule treats imported products less favourably than like domestic products." (Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 220) The Appellate Body elaborated that this conclusion was "not nullified by the fact that the fair market value rule will not give rise to less favourable treatment for like imported products in each

other words, the application of any provision of a covered agreement should be based on the facts of the case, and, where the application of the relevant legal standard reveals that its constituent elements have been satisfied, other factors (such as possible actions by private actors) do not trump, mitigate, or offset the ensuing finding of inconsistency.

6.447. In the present dispute, in light of the complainants' own arguments that the value of trade had decreased as a result of the measure, the Panel considered it relevant to examine the impact of the measure on prices. This followed from the fact that import value is a function of the quantity of imported products multiplied by the average price of those products. Thus, it is inescapable that price is a relevant consideration in assessing value. Price, for its part, is a function of market dynamics, including the maximum price that consumers are willing to pay and the minimum price that producers are willing to accept. It seems clear that a measure can have a causal impact on price by affecting various actors in the market. Consequently, in our view, by looking at the impact of the TPP measures on prices, the Panel was effectively examining the relevant facts in order to conclude on the degree of trade restrictiveness of the TPP measures, based on the complainants' own arguments that the TPP measures led to a decrease in value.

6.448. With this in mind, the jurisprudence cited by the Dominican Republic regarding the possible actions of private entities to mitigate a finding of WTO-inconsistency does not appear to be relevant. Rather, the Panel simply examined the facts of the case in order to determine whether and to what extent the TPP measures are trade-restrictive, for the purpose of assessing whether the TPP measures are inconsistent with Article 2.2. Indeed, the Dominican Republic's arguments imply that the Panel should have ignored the actual dynamics of the marketplace and formed a factual conclusion regarding either prices in the marketplace or value (which itself represents price multiplied by quantity) without examining the actual effect of the TPP measures on prices. We disagree. We also note that, if the Panel had found that prices had remained constant or declined, then it seems that the Panel would indeed have found that the measure reduced the value of trade and was trade-restrictive in this way. Thus, far from "immunizing" the measure from a finding of trade restrictiveness (or inconsistency with Article 2.2), the Panel, in examining the impact of the TPP measures on prices, simply examined whether the evidence and facts supported the assertions made by the complainants that the TPP measures had reduced the value of trade.<sup>1265</sup>

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and every case". (Ibid., para. 221) In *India – Solar Cells*, the panel noted that "[t]he fact that all [Solar Power Developers] participating in the National Solar Mission could use (and the fact that some in fact are using) *certain types* of foreign cells and modules (e.g. thin film solar modules under Phase I) does not negate the fact that the [domestic contest requirements] under the challenged measures accord less favourable treatment to the *other types of foreign cells* and modules whose use is prohibited by the requirements in question." (Panel Report, *India – Solar Cells*, para. 7.94 (emphasis original)) In *Thailand – Cigarettes (Philippines)*, in considering a claim under Article III:2 of the GATT 1994, the Appellate Body considered that, as a factual matter, "Thailand's measure provides for circumstances in which resellers of imported cigarettes will be subject to VAT liability, to which resellers of domestic cigarettes will never be subject." (Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 117) Thus, the possibility for private actors to "take action to avoid the imposition of VAT liability" did not alter the assessment of whether, as a factual matter, "imported cigarettes are subject to internal taxes or other internal charges in excess of those applied to domestic cigarettes." (Ibid.) In *Indonesia – Import Licensing Regimes*, the respondent argued that the "the challenged measures [were] the result of private actions and not measures instituted or maintained by a Member." (Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.4) The panel considered that "the fact that private actors are able to make decisions about their import needs does not immunize Indonesia's measures from challenge", and that "the intervention of some element of private choice does not necessarily relieve a Member of responsibility." (Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.11 (fn omitted)) The panel concluded that all challenged measures were measures "taken by" Indonesia. (Ibid., paras. 7.11-7.12, 7.16-7.17, 7.20-7.21, and 7.24-7.25)

<sup>1265</sup> As the European Union states in its third participant's submission, "the Panel appropriately considered both demand and supply effects, since the question here is not whether producers of some negatively affected products may avoid the impact of the measure, but rather how the impact on the competitive opportunities in the market in general will be, and how, as a consequence, this would impact trade volumes" and value. (European Union's third participant's submission, para. 42)



6.449. We therefore do not consider that the Panel erred by taking into account the impact of the TPP measures on prices, notwithstanding that such effect was a consequence of market dynamics involving consumers as well as producers/suppliers.<sup>1266</sup>

#### 6.1.3.2.4 Conclusion on the Panel's application of Article 2.2

6.450. On the basis of the foregoing, we conclude that the appellants have not demonstrated that the Panel erred in its application of Article 2.2 of the TBT Agreement in assessing the trade restrictiveness of the TPP measures.

#### 6.1.3.3 Claims under Article 11 of the DSU

6.451. The Dominican Republic argues that the Panel failed to make an objective assessment of the matter as required under Article 11 of the DSU in finding that "the complainants had not shown that the decrease in sales of high-end cigarettes relative to low-end cigarettes reveals 'only' or 'exclusively' consumer downtrading, as opposed to the results of other market phenomena."<sup>1267</sup> The Dominican Republic refers specifically to the Panel's finding that part of the reduction in the ratio of sales was due to "the overall reduction in the total wholesale sales volume following and due to the introduction of the TPP measures".<sup>1268</sup> According to the Dominican Republic, the Panel failed to make an objective assessment of the matter, by: (i) failing to provide a reasoned and adequate explanation for this finding; (ii) compromising the Dominican Republic's due process rights; and (iii) making the case for Australia.<sup>1269</sup>

6.452. Australia considers that the Panel acted within the bounds of its discretion, consistently with Article 11 of the DSU. In Australia's view, the Panel took the complainants' downtrading evidence into account, but attributed to it a different weight and significance than the complainants would have preferred.<sup>1270</sup>

6.453. All three of the Dominican Republic's claims under Article 11 concern alleged substantive and procedural errors underlying the Panel's factual finding, contained in paragraphs 55 and 56.c of Appendix E of the Panel Report, that the TPP measures contributed to the decrease in the ratio of high-end to low-end cigarette sales through both downtrading and the reduction in overall wholesale sales caused by the TPP measures.<sup>1271</sup> In the main body of the Panel Report, the Panel made a similar (but different) finding, stating that the decline in *volume of premium cigarette sales* was attributable to the TPP measures through both downtrading and the reduction in overall wholesale sales caused by the TPP measures.<sup>1272</sup> The similarity between these findings may be responsible for much of the confusion amongst the participants regarding the correct understanding of the Panel's findings.<sup>1273</sup> However, the *ratio* of high-end to low-end sales and the absolute *volume* of high-end sales are plainly two different things.

<sup>1266</sup> We note that this approach accords with the Appellate Body's finding in *US – COOL* that the trade restrictiveness of a particular measure may depend on whether producers incur the costs of the measure, or whether those costs are passed on to consumers. (Appellate Body Reports, *US – COOL*, para. 483)

<sup>1267</sup> Dominican Republic's appellant's submission, para. 1340.

<sup>1268</sup> Panel Report, Appendix E, para. 55. See also *ibid.*, Appendix E, para. 56.c.

<sup>1269</sup> Dominican Republic's appellant's submission, paras. 1356-1357. According to the Dominican Republic, the Panel relied on a graph, Figure E.6 in Appendix E to the Panel Report, in order to conclude that part of the shift in cigarette sales was attributable to a decline in overall wholesale sales caused by the TPP measures. (Dominican Republic's appellant's submission, paras. 1348-1354) The Dominican Republic does not appear to challenge the accuracy of this graph *per se*, but rather asserts that the Panel erred both procedurally and substantively by relying on this graph to conclude that at least part of the reduction in the ratio of higher to low-priced cigarette sales was due to the overall reduction in consumption resulting from the TPP measures. (Dominican Republic's appellant's submission, paras. 1366-1382; responses to questioning at the first hearing)

<sup>1270</sup> Australia's appellee's submission, para. 343.

<sup>1271</sup> Panel Report, Appendix E, paras. 55 and 56.c. We disagree with Australia's reading of Appendix E, and consider that the Panel did find that the TPP measures contributed to the shift in ratio of high-end to low-end sales and that the TPP measures caused this shift through both downtrading and a more general reduction in wholesale sales. (Australia's responses to questioning at the first hearing; Panel Report, Appendix E, paras. 55 and 56.c)

<sup>1272</sup> Panel Report, para. 7.1197.

<sup>1273</sup> See paras. 6.428. 6.429. above.



6.454. The Dominican Republic's challenge under Article 11 of the DSU relates to the Panel's finding that at least some part of the TPP measures' impact on the ratio is attributable to the overall reduction in cigarette wholesale sales caused by the TPP measures.<sup>1274</sup> We note that the Dominican Republic considers this to be a material error by the Panel because, in its view, the Panel rejected the value aspect of their downtrading argument on the ground that "the complainants had not shown that the decrease in sales of high-end cigarettes relative to low-end cigarettes reveals 'only' or 'exclusively' consumer downtrading, as opposed to the results of other market phenomena."<sup>1275</sup> As we have explained above, this is an incorrect understanding of the Panel Report.<sup>1276</sup> The only aspect of the Panel's findings in Appendix E that was relevant to the Panel's analysis of the impact of downtrading on the value of imported tobacco products was the finding that the TPP measures at least contributed to the shift in ratio of cigarette sales, including through downtrading.<sup>1277</sup> We therefore disagree with the Dominican Republic that the Panel's finding concerning the different mechanisms by which the TPP measures caused the shift in ratio was relevant to the Panel's analysis of trade restrictiveness. Indeed, the Panel's finding in Appendix E that the reduction in the ratio of higher- to low-priced cigarette wholesale sales represents both "downward substitution" caused by the TPP measures as well as "the overall reduction in the total wholesale sales volume following and due to the introduction of the TPP measures and enlarged GHWs"<sup>1278</sup> is essentially an unnecessary finding of fact by the Panel.<sup>1279</sup>

6.455. We have reservations regarding this unnecessary finding by the Panel. The Panel's finding that part of the shift in ratio is attributable to the decline in overall wholesale sales means that, if downtrading had not occurred, then there still would have been a decline in the ratio of high-end to low-end sales. In our view, the Panel failed to indicate any basis for this factual finding.

6.456. We note that the Panel's sole reason for stating that part of the ratio decline is attributable to a general decline in wholesale sales is that "the reduction in higher-priced segment wholesale sales has decreased at a much faster rate than the sales of low-priced cigarettes."<sup>1280</sup> Although this statement is not footnoted, it appears to be based on the Panel's findings in paragraph 14 of Appendix E, that: (i) "the share of smokers preferring higher-priced brands has decreased, while the share of smokers preferring low-priced brands has experienced a small but positive increase"; and (ii) "the share of smokers preferring higher-priced brands has, on average, decreased at a much faster rate than the share of smokers preferring low-priced brands has increased, confirming the decrease in smoking prevalence."<sup>1281</sup> The Panel elaborated in that paragraph that this explained why

<sup>1274</sup> See para. 6.451. above. We also take note of the Dominican Republic's argument that the Panel erred by relying on its analysis in Appendix E to conclude that the TPP measures led to a reduction in overall wholesale sales. (See, for example, Dominican Republic's appellant's submission, paras. 1372-1374 and 1379) We disagree. In our view, the Panel's factual finding that the TPP measures led to a reduction in wholesale cigarette sales is based entirely on its analysis in Appendix D, which concludes that: "the TPP measures ... contributed to the reduction in wholesale cigarette sales." (See Panel Report, Appendix D, para. 137.c)

<sup>1275</sup> Dominican Republic's appellant's submission, para. 1340. (fn omitted)

<sup>1276</sup> See paras. 6.428. 6.434. above.

<sup>1277</sup> See para. 6.434. above. We recall, in particular, the Panel's findings that the complainants "demonstrated that the TPP measures ... contributed to a reduction of the volume of imports of premium tobacco products both in relative and in absolute terms", and that, "as explained in more detail in Appendix E, a detailed analysis of the econometric results submitted by the complainants has led us to conclude that there is some evidence, albeit limited, that together with the enlarged GHWs introduced on the same date, the TPP measures appear to have had a negative impact on the ratio of higher- to low-priced cigarette wholesale sales." (Panel Report, para. 7.1196 (fn omitted)) This was sufficient for the Panel to proceed to examine the extent to which downtrading caused by the TPP measures had resulted in a decrease in the volume and value of imported tobacco products. (Ibid., paras. 7.1196-7.1197 and 7.1221)

<sup>1278</sup> Panel Report, Appendix E, para. 56.c. See also *ibid.*, Appendix E, para. 55.

<sup>1279</sup> At the first hearing, the Dominican Republic clarified that, in its view, even if the Panel did not rely on an "exclusive cause" standard, the Panel's findings in Appendix E are nevertheless inconsistent with Article 11 of the DSU because the Panel misattributed some part of the shift in ratio to an overall reduction in wholesale sales caused by the TPP measures, and such an error remains relevant to the correct determination of the precise degree of trade restrictiveness of the TPP measures. We note that the Panel attributed the reduction in the ratio of sales to *downtrading* as well as a *reduction in total wholesale sales volume*, and further attributed both of these effects to the TPP measures. Thus, the Panel's dichotomy between the precise mechanisms by which the TPP measures affected the shift in ratio would not appear to be relevant to the degree of trade restrictiveness of the TPP measures.

<sup>1280</sup> Panel Report, Appendix E, para. 55. See also *ibid.*, Appendix E, para. 56.c.

<sup>1281</sup> Panel Report, Appendix E, para. 14. (fn omitted)

"the difference between the shares of smokers preferring higher-priced brands and low-priced brands has, on average, continued to decrease after the introduction of the TPP measures."<sup>1282</sup>

6.457. We observe, however, that these findings in paragraph 14 of Appendix E refer to the *share* of smokers in the population, measured as a percentage of the total population.<sup>1283</sup> Those findings explain that, since the TPP measures caused the overall volume of cigarette sales to decline, it makes sense that the percentage of the population smoking high-end cigarettes (as well as the percentage of the population smoking low-end cigarettes) would decline. Thus, the combined effect of downtrading and the decline in overall wholesale sales was a more pronounced decrease in the share of high-end smokers than in the share of low-end smokers. These findings formed the basis for the Panel's conclusion, in paragraph 7.1197 of the Panel Report, that the decline in the volume of premium tobacco product sales could be attributed to the TPP measures through both downtrading and the overall decline in wholesale sales.<sup>1284</sup> However, these findings do not, in any way, reveal how or why the Panel considered that the decline in wholesale sales contributed to the shift in the *ratio* of high-end sales to low-end sales.<sup>1285</sup> Indeed, in light of the Panel's findings in paragraphs 7.1196 and 7.1197 of the Panel Report, as well as in paragraph 14 of Appendix E, it seems likely that paragraphs 55 and 56.c of Appendix E should have referred to the reduction in the *quantity of high-end cigarette wholesale sales* being partially due to downtrading and partially due to the overall reduction in the total wholesale sales volume, rather than to the decrease in the *quantity ratio* being attributable to these causes.

6.458. Given that (i) the Panel's unnecessary factual finding that part of the shift in ratio was caused by a decline in overall wholesale sales was not material to the Panel's conclusions with respect to trade restrictiveness, and (ii) this factual finding lacks any basis in the Panel Report, we moot the Panel's finding in paragraphs 55 and 56.c of Appendix E that the decrease in the ratio of high-end to low-end cigarette sales was partially caused by the decrease in overall wholesale cigarette sales volumes attributable to the TPP measures. Having mooted the relevant finding upon which the Dominican Republic's claims under Article 11 are based, we do not need to address these claims.

#### 6.1.3.4 Conclusion

6.459. For the reasons explained above, we find that the appellants have not demonstrated that the Panel erred in finding, in paragraph 7.1255 of the Panel Report, that:

[T]he 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. We also conclude 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 to date. We are also not persuaded that the complainants have demonstrated that the TPP measures impose conditions on the sale of tobacco products in Australia or compliance costs of such magnitude that they would amount to a limiting effect on trade.<sup>1286</sup>

<sup>1282</sup> Panel Report, Appendix E, para. 14.

<sup>1283</sup> See Panel Report, Appendix E, para. 14 and Figure E.6.

<sup>1284</sup> Specifically, the Panel stated that the decrease in consumption of premium tobacco products could not have been exclusively caused by downtrading, because "given that the overall consumption of tobacco products has decreased, at least some part of the decrease in the consumption of premium tobacco products has not been substituted with the consumption of non-premium products." (Panel Report, para. 7.1197)

<sup>1285</sup> It stands to reason that, in the absence of downtrading, in a market where overall consumption is declining, the ratio of high-end to low-end sales could remain perfectly constant. In this respect, we do not preclude the possibility, as a factual matter, that a reduction in wholesale sales volume can, in and of itself, lead to changes in consumption patterns with respect to high-end and low-end products, whether by some quirk of a market or even as a more general phenomenon. However, the Panel's findings do not reveal why such an outcome would occur, nor does such an outcome appear to us to be intuitive or necessary such that the Panel's factual finding is self-substantiating.

<sup>1286</sup> Panel Report, para. 7.1255.

## 6.1.4 Alternative measures

### 6.1.4.1 Overview

6.460. The appellants request us to reverse the Panel's findings that two of the alternative measures that the complainants proposed – namely, an increase in the MLPA for tobacco products and an increase in taxation of tobacco products in Australia – were not reasonably available alternative measures that would be less trade-restrictive than the TPP measures while making an equivalent contribution to Australia's legitimate objective.<sup>1287</sup> As a consequence, the appellants request us to reverse the Panel's overall conclusion under Article 2.2 of the TBT Agreement<sup>1288</sup> that the complainants failed to demonstrate that the TPP measures are more trade-restrictive than necessary to fulfil a legitimate objective, within the meaning of that provision.<sup>1289</sup>

6.461. The Appellate Body has said that a comparison of the challenged technical regulation with possible alternative measures is a conceptual tool used to ascertain whether the challenged measure is more trade-restrictive than necessary.<sup>1290</sup> In particular, as part of its *prima facie* case that a technical regulation is more trade-restrictive than necessary, a complainant<sup>1291</sup> may seek to identify a possible alternative measure that: (i) is less trade-restrictive than the challenged technical regulation; (ii) makes a contribution to the legitimate objective equivalent to that of the challenged technical regulation; and (iii) is reasonably available to the responding Member.<sup>1292</sup>

6.462. With respect to the two alternative measures at issue in these appellate proceedings, the Panel noted that Honduras and the Dominican Republic described the first proposed measure as an increase in Australia's MLPA for tobacco products from 18 years to 21 years<sup>1293</sup>, and the second proposed measure as an increase in excise taxes on tobacco products calibrated to achieve the degree of reduction in tobacco use achieved by the TPP measures.<sup>1294</sup> Australia argued that these measures are "precise replicas" of measures that Australia had already implemented as part of its comprehensive tobacco control policy (for an increase in taxation), or only "slight variations" of such measures (for an increase in the MLPA).<sup>1295</sup> On that basis, Australia submitted that neither

<sup>1287</sup> Before the Panel, the complainants proposed four alternative measures that they considered as being less trade-restrictive than the TPP measures while also being capable of making an equivalent contribution to Australia's objective: (i) an increase in the MLPA for tobacco products in Australia; (ii) an increase in taxation of tobacco products in Australia; (iii) "improvements to", or "effective", social marketing campaigns in Australia; and (iv) a pre-vetting mechanism for tobacco packaging. (Panel Report, paras. 7.1392, 7.1472, 7.1546, and 7.1625-7.1627) Only measures (i) and (ii) are at issue in these appellate proceedings.

<sup>1288</sup> Panel Report (DS435), paras. 7.1732 and 8.1.a; Panel Report (DS441), paras. 7.1732 and 8.1.b.i.

<sup>1289</sup> Honduras' Notice of Appeal, p. 5 (referring to Panel Report (DS435), paras. 7.1468-7.1471, 7.1542-7.1545, and 7.1724-7.1732); Dominican Republic's Notice of Appeal, paras. 4 and 12-13 (referring to Panel Report (DS441), paras. 7.1362-7.1391, 7.1398-7.1402, 7.1411-7.1418, 7.1432-7.1464, 7.1468-7.1471, 7.1476-7.1480, 7.1490-7.1496, 7.1506-7.1531, 7.1542-7.1545, 7.1717-7.1723, 7.1732, and 8.1.b.i).

<sup>1290</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 320.

<sup>1291</sup> We recall that the burden of demonstrating that a technical regulation is inconsistent with Article 2.2 rests with the complainant. (Appellate Body Report, *US – Tuna II (Mexico)*, para. 323)

<sup>1292</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, para. 323; *US – COOL*, para. 379; *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.213.

<sup>1293</sup> Panel Report, para. 7.1395. The Panel also noted the Dominican Republic's argument that, should the Panel consider that a greater reduction in smoking achieved by an increase in the MLPA from 18 to 21 years, on its own, necessarily means greater trade restrictiveness, the Dominican Republic offers a "calibrated" approach by which the MLPA could be raised to 19 or 20, instead of 21, so that the contribution to reducing smoking made by increasing the MLPA would remain equivalent to any contribution that the TPP measures might make. (Panel Report, para. 7.1396 (referring to Dominican Republic's response to Panel question No. 157, para. 133))

<sup>1294</sup> Panel Report, para. 7.1474. The Panel noted that, instead of prescribing a precise level of taxation or manner of implementation, Honduras and the Dominican Republic contended that the increase in taxation could be set at the level needed to make the desired contribution to Australia's objective. (Ibid.) As such, the Panel stated that it would proceed on the basis that the alternative measure proposed by the complainants is "an increase of the excise tax levied on tobacco products, with flexibility as to the exact magnitude and manner of such tax increase depending on the degree of contribution found to be achieved by the TPP measures". (Ibid., para. 7.1475)

<sup>1295</sup> Panel Report, paras. 7.1353, 7.1355, and 7.1377.

of the two proposed measures can be considered a "true" alternative for purposes of the legal assessment under Article 2.2.<sup>1296</sup>

6.463. The Panel found that, although the two alternative measures in question are *variations* of measures that already exist in Australia (i.e. the existing MLPA of 18 years and the past and planned increases in taxation on tobacco products in Australia), they still qualify as "alternatives" to the TPP measures<sup>1297</sup>, in that they "do not yet exist in the Member in question, *or at least not in the particular form proposed by the complainant*".<sup>1298</sup> The Panel also found that both measures are reasonably available to Australia.<sup>1299</sup> These findings are not challenged on appeal.

6.464. By contrast, the Panel found that the complainants had failed to demonstrate that: (i) each of the two alternative measures would be *less trade-restrictive* than the TPP measures<sup>1300</sup>; and (ii) each alternative measure would make a contribution to Australia's objective *equivalent* to that of the TPP measures.<sup>1301</sup>

6.465. The appellants claim that the Panel erred in law under Article 2.2 in reaching these conclusions. In addition, the Dominican Republic raises separate claims under Article 11 of the DSU, challenging certain aspects of the Panel's assessment of the relative trade restrictiveness and contribution of the alternative measures. Australia requests us to dismiss the appellants' claims in their entirety.<sup>1302</sup>

6.466. We address each of the appellants' claims in turn.

#### **6.1.4.2 Whether the Panel erred under Article 2.2 in its assessment of the relative trade restrictiveness of the alternative measures**

6.467. The appellants claim that the Panel erred in law<sup>1303</sup> under Article 2.2 in finding that the complainants had not demonstrated that the two alternative measures at issue would be *less trade-restrictive* than the TPP measures, because those conclusions were based on the Panel's erroneous findings, made earlier in its Report, regarding the degree of trade restrictiveness of the TPP measures. According to the appellants, in its assessment of the trade restrictiveness of the TPP measures, the Panel adopted too narrow an understanding of the concept of "trade restrictiveness", and, rather than focusing on the measures' impact on the competitive opportunities for tobacco products based on their design, structure, and intended operation, it required empirical evidence of the TPP measures' actual trade effects.<sup>1304</sup> The appellants consider that, had the Panel properly found that the TPP measures are trade-restrictive in that they, by design, reduce the competitive opportunities arising from brand differentiation, it would have reached a different conclusion, namely, that the TPP measures are more trade-restrictive than the alternative measures because the latter measures do not similarly limit competitive opportunities for tobacco products.<sup>1305</sup>

6.468. Australia observes that the appellants' claims of error in relation to the Panel's analysis of the trade restrictiveness of the proposed alternative measures are "entirely consequential" to their

<sup>1296</sup> Panel Report, para. 7.1377.

<sup>1297</sup> Panel Report, paras. 7.1400-7.1402 (for an increase in the MLPA) and 7.1468 (for an increase in taxation).

<sup>1298</sup> Panel Report, para. 7.1385 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.328). (emphasis added by the Panel)

<sup>1299</sup> Panel Report, paras. 7.1467 (for an increase in the MLPA) and 7.1541 (for an increase in taxation).

<sup>1300</sup> Panel Report, paras. 7.1417 (for an increase in the MLPA) and 7.1495 (for an increase in taxation).

<sup>1301</sup> Panel Report, paras. 7.1464 (for an increase in the MLPA) and 7.1531 (for an increase in taxation).

<sup>1302</sup> Australia's appellee's submission, para. 423.

<sup>1303</sup> Honduras claims that the Panel erred in its interpretation and application of Article 2.2 of the TBT Agreement in its assessment of the relative trade restrictiveness of the two alternative measures. (Honduras' Notice of Appeal, pp. 4-5; appellant's submission, section VII) The Dominican Republic claims that the Panel erred in its application of Article 2.2. (Dominican Republic's Notice of Appeal, para. 12; appellant's submission, para. 1394)

<sup>1304</sup> Honduras' appellant's submission, paras. 562-564; Dominican Republic's appellant's submission, paras. 1395 and 1418-1420.

<sup>1305</sup> Honduras' appellant's submission, paras. 560, 565, and 574; Dominican Republic's appellant's submission, paras. 1390 and 1419.

claim that the Panel applied an erroneous legal standard in ascertaining the trade restrictiveness of the TPP measures.<sup>1306</sup> Accordingly, Australia argues that, if we were to uphold the Panel's finding that the TPP measures are trade-restrictive only insofar as they have a limiting effect on the volume of imported tobacco products, we would necessarily conclude that the proposed alternative measures are at least as trade-restrictive as the TPP measures.<sup>1307</sup> This is because, given that the Australian market is supplied entirely through imported tobacco products<sup>1308</sup>, any equivalent contribution to Australia's objective of reducing the use of, and exposure to, tobacco products would necessarily entail an equivalent limiting effect on international trade in terms of the volume of imported tobacco products.<sup>1309</sup>

6.469. The Appellate Body has said that an assessment of the degree of trade restrictiveness of a measure can be done either in quantitative or qualitative terms, as appropriate in the particular circumstances of a given case.<sup>1310</sup> The Panel in these proceedings assessed and compared the respective degrees of trade restrictiveness of the TPP measures and each alternative measure in qualitative terms.

6.470. We recall that, with respect to the trade restrictiveness of the TPP measures, the complainants argued before the Panel that the reduced opportunities for tobacco manufacturers to compete on the basis of brand differentiation, resulting from the TPP measures, amount to a limiting effect on international trade (i.e. trade restrictiveness) within the meaning of Article 2.2.<sup>1311</sup> The complainants also argued that the TPP measures are trade-restrictive because: (i) they raise barriers to entry into the Australian market<sup>1312</sup>; (ii) they have a limiting effect on the volume and value of trade in tobacco products<sup>1313</sup>; (iii) they entail compliance costs<sup>1314</sup>; and (iv) the penalties under the TPP measures amount to a restriction on international trade.<sup>1315</sup> The Panel disagreed with the proposition that the modification of the competitive environment by the TPP measures, affecting all tobacco products on the entire market, in and of itself, suffices to establish the trade restrictiveness of the TPP measures.<sup>1316</sup> Rather, the Panel considered that "it needs to be shown *how* such effects on the conditions of competition on the market give rise to a limiting effect on international trade in tobacco products."<sup>1317</sup> On that basis, the Panel proceeded to examine the complainants' individual arguments set out under items (i) through (iv) above.<sup>1318</sup>

6.471. The Panel rejected the complainants' assertions that the TPP measures are trade-restrictive as set out under items (i), (iii), and (iv) above.<sup>1319</sup> These findings have not been appealed. With respect to item (ii), the Panel found that, to the extent that the TPP measures contribute to Australia's objective of reducing the use of, and exposure to, tobacco products, they reduce the *volume* of imported tobacco products on the Australian market, and therefore are trade-restrictive in that respect.<sup>1320</sup> With respect to the measures' impact on the value of imported tobacco products, the Panel found that the complainants did not demonstrate that the TPP measures had reduced the value of those imports on the Australian market.<sup>1321</sup> On the contrary, the Panel noted that the evidence indicated that the measures have so far led to an increase in the price of cigarettes, which has more than offset the decrease in the quantity of cigarettes consumed and has thereby

<sup>1306</sup> Australia's appellee's submission, para. 369. (emphasis omitted)

<sup>1307</sup> Australia's appellee's submission, para. 372.

<sup>1308</sup> Panel Report, para. 7.1207.

<sup>1309</sup> Australia's appellee's submission, paras. 372-373. Australia further submits that there would be no need for us to examine the Panel's findings regarding the contribution of the alternative measures if we upheld the Panel's findings regarding the trade restrictiveness of the TPP measures. (Ibid., para. 374)

<sup>1310</sup> See Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208 (referring to Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 145; *US – COOL*, para. 477; *EC – Poultry*, paras. 126-127).

<sup>1311</sup> See, for example, Panel Report, paras. 7.1090 and 7.1105.

<sup>1312</sup> Panel Report, para. 7.1172.

<sup>1313</sup> Panel Report, paras. 7.1189-7.1190.

<sup>1314</sup> Panel Report, para. 7.1228.

<sup>1315</sup> Cuba is the only complainant that made this argument before the Panel. (Panel Report, para. 7.1247)

<sup>1316</sup> Panel Report, para. 7.1167.

<sup>1317</sup> Panel Report, para. 7.1168. (emphasis original)

<sup>1318</sup> Panel Report, paras. 7.1172-7.1254.

<sup>1319</sup> Panel Report, paras. 7.1187, 7.1246, and 7.1254.

<sup>1320</sup> Panel Report, para. 7.1208.

<sup>1321</sup> Panel Report, paras. 7.1225 and 7.1255.

contributed to an increase in the overall value of the market.<sup>1322</sup> At the same time, though, the Panel did not "exclude[]" that the TPP measures may, over time, affect the overall value of tobacco imports as a result of a fall in prices through downtrading.<sup>1323</sup>

6.472. Turning to the trade restrictiveness of the two alternative measures in question, the Panel considered whether each of these measures would be less trade-restrictive than the TPP measures, by examining each measure's impact on the volume of imported tobacco products, as well as certain other considerations.

6.473. With respect to an increase in the MLPA, the Panel noted that this alternative measure 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>1324</sup> The Panel noted in this context "the importance of younger smokers to the tobacco industry".<sup>1325</sup> The Panel further stated that, to the extent that an increase in the MLPA would make a contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products equivalent to that of the TPP measures by reducing overall consumption of tobacco products, it would affect the overall volume of imports of tobacco products to an extent commensurate with that of the TPP measures.<sup>1326</sup> In addition, the Panel stated that, given that the evidence provided "only a very limited basis" upon which to assess "with any degree of precision" the potential impact of an increase in the MLPA, the Panel had no reason to assume that the impact of this measure on the total value of imports would be less than that observed in relation to the TPP measures.<sup>1327</sup> In light of these elements, the Panel concluded that the complainants had not demonstrated that an increase in the MLPA to 21 years would necessarily be less trade-restrictive than the TPP measures.<sup>1328</sup>

6.474. Regarding an increase in taxation, the Panel stated that, to the extent that a taxation increase would be calibrated to have the same degree of contribution as the TPP measures in reducing the use of, and exposure to, tobacco products<sup>1329</sup>, and would therefore have an equal impact on overall consumption of such products, it would be as trade-restrictive as the TPP measures in terms of its impact on the volume of trade in tobacco products.<sup>1330</sup> The Panel further stated that certain types of taxation measures may give rise to the same type of downtrading as the complainants had argued would arise from the TPP measures.<sup>1331</sup> The Panel also stated that the elevation of prices resulting from taxation may entail other effects on product and brand competition, such as greater market share of low-cost brands, altering the relative competitive positions of cigarette suppliers, and a consumer shift to roll-your-own tobacco.<sup>1332</sup> In light of these elements, it was "not clear to [the Panel] how an increase in taxation levels would address or avoid the concerns about 'downtrading'/downward substitution that the complainants ha[d] expressed in connection with the TPP measures, or any resulting impact on the total value of trade in tobacco products".<sup>1333</sup> Accordingly, "[o]verall", the Panel concluded that the complainants had not demonstrated that an increase in tobacco taxation would be less trade-restrictive than the TPP measures.<sup>1334</sup>

6.475. As we have noted above<sup>1335</sup>, the appellants link their claims of error regarding the relative trade restrictiveness of the alternative measures to their claims of error regarding the trade restrictiveness of the TPP measures. In particular, we understand the appellants' key contention to

<sup>1322</sup> Panel Report, paras. 7.1218, 7.1221, and 7.1224. With respect to cigars and cigarillos, the Panel noted that evidence before it was "somewhat less clear" and that none of the parties had provided econometric evidence assessing the impact of the TPP measures on cigar imports. (Panel Report, para. 7.1219)

<sup>1323</sup> Panel Report, para. 7.1225. See also *ibid.*, para. 7.1255.

<sup>1324</sup> Panel Report, para. 7.1413.

<sup>1325</sup> Panel Report, para. 7.1413.

<sup>1326</sup> Panel Report, para. 7.1414.

<sup>1327</sup> Panel Report, para. 7.1416.

<sup>1328</sup> Panel Report, para. 7.1417.

<sup>1329</sup> As noted in paragraph 6.462. above and footnote 1294 thereto, the complainants characterized the proposed increase in taxation as an excise tax increase calibrated to achieve any reduction in tobacco use resulting from the TPP measures. (Panel Report, para. 7.1474)

<sup>1330</sup> Panel Report, paras. 7.1490-7.1491.

<sup>1331</sup> Panel Report, para. 7.1492.

<sup>1332</sup> Panel Report, para. 7.1493.

<sup>1333</sup> Panel Report, para. 7.1494.

<sup>1334</sup> Panel Report, para. 7.1495.

<sup>1335</sup> See para. 6.467. above.

be that, because the TPP measures reduce the competitive opportunities arising from brand differentiation, these measures are, by design, trade-restrictive.<sup>1336</sup> The Dominican Republic also considers that the Panel erred by finding that empirical evidence did not show consumer downtrading due to the TPP measures, which the Dominican Republic argued confirmed the lost competitive opportunities.<sup>1337</sup>

6.476. We have already found, in section 6.1.3 of these Reports, that the appellants have not demonstrated that the Panel erred in its interpretation or application of Article 2.2 by rejecting, in the particular circumstances of these disputes, the complainants' propositions that: (i) the reduction in brand differentiation (i.e. a modification of the competitive environment in the tobacco product market), in and of itself, sufficed to establish the requisite limiting effect on international trade; and (ii) the TPP measures are trade-restrictive due to their impact on the overall value of imported tobacco products.<sup>1338</sup>

6.477. Under these circumstances, we do not see a sufficient basis to find that the Panel erred in concluding that neither measure was demonstrated to be less trade-restrictive than the TPP measures. We highlight, in particular, the Panel's finding that the TPP measures are trade-restrictive insofar as they affect the volume of imported tobacco products. We note in this regard that the Panel found that the Australian market is supplied entirely by imported tobacco products.<sup>1339</sup> The Panel thus considered that an alternative measure that is capable of making a degree of contribution to the objective of reducing the use of, and exposure to, tobacco products equivalent to that of the TPP measures would be as trade-restrictive as the TPP measures, as far as the import volume is concerned. In these appellate proceedings, the appellants have not explained specifically why this is not the case with respect to the two alternative measures in question.

6.478. In addition, even if the TPP measures could be considered trade-restrictive because they modify the competitive environment in the Australian tobacco product market and/or affect the overall value/price of the tobacco products<sup>1340</sup>, as argued by the appellants, we note that the Panel addressed considerations pertinent to whether, and to what extent, each alternative measure would also impact the competitive environment and/or the overall value and price of imported tobacco products, and found that such impacts were, overall, not demonstrated to be less significant than the impacts of the TPP measures.<sup>1341</sup> We note in this regard that, in their appellant's submissions, the appellants have presented little argumentation as to precisely how the Panel erred in law in making these findings, or why it should have found that the complainants had demonstrated that the TPP measures are more trade-restrictive than the two alternative measures in these additional aspects.

6.479. In light of these considerations, we find that the appellants have not demonstrated that the Panel erred in its interpretation or application of Article 2.2 in rejecting the complainants' proposition that the two alternative measures in question are less trade-restrictive than the TPP measures.

#### **6.1.4.3 Whether the Panel erred under Article 2.2 in its assessment of the relative contribution of the alternative measures**

6.480. The appellants claim that the Panel erred in law<sup>1342</sup> under Article 2.2 of the TBT Agreement in finding that the complainants had failed to demonstrate that each of the two alternative measures

<sup>1336</sup> Honduras' appellant's submission, paras. 563-565 and 573-574; Dominican Republic's appellant's submission, paras. 1390 and 1418-1419.

<sup>1337</sup> Dominican Republic's appellant's submission, para. 1418.

<sup>1338</sup> See para. 6.459. above.

<sup>1339</sup> Panel Report, para. 7.1207.

<sup>1340</sup> As noted, the Panel acknowledged that the TPP measures limit the opportunity for tobacco manufacturers to compete on the basis of brand differentiation. (Panel Report, para. 7.1167) The Panel also did not "exclude[]" that such modification of the competitive environment might, over time, affect the overall value and/or price of imported tobacco products, although it found that the evidence did not show this to be the case "to date". (Panel Report, paras. 7.1225 and 7.1255)

<sup>1341</sup> See paras. 6.473. 6.474. above.

<sup>1342</sup> In its Notice of Appeal, Honduras claims that the Panel erred in both the interpretation and application of Article 2.2 of the TBT Agreement. (Honduras' Notice of Appeal, pp. 4-5) The Dominican Republic claims that the Panel erred in its application of Article 2.2. (Dominican Republic's Notice of Appeal, para. 13)



would make a contribution to Australia's objective equivalent to the contribution of the TPP measures.

6.481. The appellants observe that the Panel found that the objective of the TPP measures relevant for its analysis under Article 2.2 is "a reduction in the use of, and exposure to, tobacco products"<sup>1343</sup>, or "reducing smoking".<sup>1344</sup> The appellants underscore that, in relation to that objective, the Panel found that the TPP measures and the two alternative measures are similarly apt to make a "meaningful" contribution.<sup>1345</sup> Nonetheless, the Panel concluded that the contribution of each alternative measure would not be equivalent to the contribution of the TPP measures. As the appellants see it, the Panel's conclusions were reached in error because: (i) the Panel rejected equivalence on the basis of the fact that the alternative measures contribute to Australia's objective through mechanisms different from the TPP measures<sup>1346</sup>; and (ii) the Panel failed to make a proper comparison between the contributions of the challenged and alternative measures, by taking into account the "synergies" purportedly created between the TPP measures and Australia's other existing tobacco control measures, while neglecting to consider any synergies that each of the alternative measures could newly create with the same existing measures.<sup>1347</sup>

6.482. Australia disputes the appellants' contention that, by using the same word, "meaningful", the Panel found that the proposed alternative measures would make equivalent degrees of contribution to Australia's objective as that of the TPP measures.<sup>1348</sup> Australia highlights in this regard that the Panel stated that an increase in the MLPA to 21 years "would in principle be *apt to make a meaningful contribution* to Australia's objective", and that an increase in excise taxes "*could, in principle, make a meaningful contribution* to Australia's objective", but did not find that these alternative measures would achieve a degree of contribution equivalent to that made by the TPP measures.<sup>1349</sup> In any event, Australia observes that the Panel did not reject equivalence because of the different mechanisms by which the alternative measures operate. On the contrary, the Panel explicitly stated that it sought to ascertain the extent to which the alternative measures could contribute to Australia's objective of "improving public health by reducing the use of, and exposure to, tobacco products" or "reducing the use of tobacco products"<sup>1350</sup>, and that "a proposed alternative measure may achieve an equivalent degree of contribution in ways different from the technical regulation at issue."<sup>1351</sup> Furthermore, Australia considers it correct for the Panel to have found that an alternative measure that merely substitutes an existing element of a comprehensive strategy for

<sup>1343</sup> Honduras' appellant's submission, para. 612.

<sup>1344</sup> Dominican Republic's appellant's submission, para. 1435.

<sup>1345</sup> Honduras' appellant's submission, para. 616; Dominican Republic's appellant's submission, para. 1495 (referring to Panel Report, paras. 7.1453 (for an increase in the MLPA) and 7.1523 (for an increase in taxation)).

<sup>1346</sup> More specifically, Honduras argues that: (i) the Panel erroneously considered the alternative measures' contribution not in the light of the legitimate objective determined by the Panel, but in light of the specific mechanisms by which the plain packaging measures were assumed to operate to meet this objective; and (ii) by using the term "substitute" throughout its analysis of equivalence, the Panel erroneously examined whether the alternative measure provides an identical contribution through the same mechanism as the challenged measure. (Honduras' appellant's submission, paras. 620 and 632-634) The Dominican Republic argues that the Panel erred in rejecting the proposed alternatives on the basis that they contributed to Australia's objective of reducing smoking through different means than the TPP measures. (Dominican Republic's appellant's submission, para. 1492)

<sup>1347</sup> More specifically, Honduras argues that the Panel erred because: (i) it failed to compare the degree of contribution of the alternative measure *in isolation* with the contribution of the TPP measures *in combination* with Australia's other tobacco control measures; and (ii) it erroneously introduced a "different and more demanding standard" for assessing equivalence for measures that are part of a "comprehensive strategy" or "suite of measures". (Honduras' appellant's submission, paras. 645-646, 658, and 662) The Dominican Republic argues that the Panel erred by assessing "synergies" on an "entirely one-sided basis" because it considered the synergies allegedly arising from interactions between the TPP measures and other Australian tobacco control measures, but neglected to consider synergies that could result from the enactment of the proposed alternatives measures. (Dominican Republic's appellant's submission, paras. 1526-1527)

<sup>1348</sup> Australia's appellee's submission, para. 392.

<sup>1349</sup> Australia's appellee's submission, para. 392 (quoting Panel Report, paras. 7.1453 and 7.1523). (emphasis added by Australia)

<sup>1350</sup> Australia's appellee's submission, para. 379 (quoting Panel Report, paras. 7.1432 and 7.1511). (emphasis omitted)

<sup>1351</sup> Australia's appellee's submission, para. 379 (quoting Panel Report, para. 7.1454, in turn referring to Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.215).



the TPP measures may weaken the policy by reducing the synergies between its components, as well as its total effect, as the Appellate Body stated in *Brazil – Retreaded Tyres*.<sup>1352</sup>

6.483. We first note that all participants agree<sup>1353</sup> with the Panel's formulation of the legal standard, applicable to an assessment of "equivalence", that what is relevant for such an assessment is "the overall degree of contribution that the technical regulation makes to the objective pursued ... rather than any individual isolated aspect or component of contribution"<sup>1354</sup>, and that "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>1355</sup> The participants also agree that the standard by which to assess equivalence remains the same where the challenged measure is implemented as part of a responding Member's comprehensive policy to address a "multifaceted"<sup>1356</sup> problem, such as smoking.<sup>1357</sup>

6.484. We further recall that the Panel determined that the objective of the TPP measures relevant for its analysis under Article 2.2 in these disputes is "to improve public health by reducing the use of, and exposure to, tobacco products".<sup>1358</sup> As we understand it, the Panel's qualification of the phrase "to improve public health" by the phrase "by reducing the use of, and exposure to, tobacco products" suggests that the focus of an assessment of the degree of contribution that a measure makes to that objective is the extent to which the measure contributes to "reducing the use of, and exposure to, tobacco products", rather than to improving public health generally. We further note that the Panel observed that the objective of reducing "exposure" to tobacco products is "directly linked to, and consequential to", the achievement of the objective of reducing "use" of tobacco products.<sup>1359</sup> In this sense, the degree to which a measure reduces the use of tobacco products – or, in other words, reduces smoking – can be considered the core element of the objective of the TPP measures, for purposes of an assessment of equivalence. We thus consider that Honduras and the Dominican Republic are not incorrect in explaining that the Panel found that the objective of the TPP measures is "a reduction in the use of, and exposure to, tobacco products"<sup>1360</sup>, or "reducing smoking".<sup>1361</sup> Australia does not contest this view.<sup>1362</sup>

6.485. In addition, with respect to the scope of the objective of the TPP measures, we take note of the Panel's rejection of Australia's proposition that the relevant objective also encompasses what Australia referred to as the three "specific objectives" or "mechanisms" of the measures, namely: (i) reducing the appeal of tobacco products; (ii) increasing the effectiveness of GHWs; and (iii) reducing the ability of packages to mislead consumers about the harms of smoking. According to the Panel, "these 'specific objectives' are more properly described as the means, or 'mechanisms', as Australia itself describes them, by which the measures are intended to achieve Australia's objective of improving public health."<sup>1363</sup>

6.486. We recall that the Panel assessed the degree of contribution that the TPP measures and each of the alternative measures make to the above objective. As the appellants highlight, the Panel

<sup>1352</sup> Australia's appellee's submission, paras. 381-383 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172) and 387-389.

<sup>1353</sup> Honduras' appellant's submission, para. 585; Dominican Republic's appellant's submission, para. 1494; Australia's appellee's submission, para. 379.

<sup>1354</sup> Panel Report, para. 7.1368 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.216 and 5.255 (emphasis omitted by the Panel)).

<sup>1355</sup> Panel Report, para. 7.1369 (referring to Appellate Body Reports, *US – COOL*, para. 373; *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.215 and 5.254). (emphasis added)

<sup>1356</sup> See, for example, Panel Report, para. 7.1528.

<sup>1357</sup> See, for example, Honduras' appellant's submission, para. 658; Dominican Republic's appellant's submission, para. 1509; Australia's appellee's submission, para. 396.

<sup>1358</sup> Panel Report, para. 7.232.

<sup>1359</sup> Panel Report, para. 7.1045. This is because "a reduced use of tobacco products by those who consume them will lead to a reduction in the exposure to these products for non-users." (Ibid.)

<sup>1360</sup> Honduras' appellant's submission, para. 612.

<sup>1361</sup> Dominican Republic's appellant's submission, para. 1435.

<sup>1362</sup> See, for example, Australia's appellee's submission, paras. 379, 383, and 392.

<sup>1363</sup> Panel Report, para. 7.227. The Panel added that "the means should not be confused with the ends in this context." (Ibid. (referring to European Union's third-party submission to the Panel, para. 68; Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.326))

qualified in each instance the measure's contribution by using the same adjective "meaningful".<sup>1364</sup> Specifically, with respect to the contribution of *the TPP measures*, the Panel found that:

Taken as a whole, therefore, we consider that the evidence before us supports the view that, as applied in combination with the comprehensive range of other tobacco control measures maintained by Australia and not challenged in these proceedings, including a prohibition on the use of other means through which branding could otherwise contribute to the appeal of tobacco products and to misleading consumers about the harmful effects of smoking, *the TPP measures are apt to, and do, make a meaningful contribution* to Australia's objective of reducing the use of, and exposure to, tobacco products.<sup>1365</sup>

6.487. With respect to *an increase in the MLPA*, the Panel found that:

Overall, in light of the above, we find that the evidence before us suggests that, notwithstanding the difficulty associated with making precise projections on the basis of the evidence before us from other jurisdictions, *an increase in the MLPA to 21 years would in principle be apt to make a meaningful contribution* to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.<sup>1366</sup>

6.488. With respect to *an increase in taxation*, the Panel found that:

Taking these considerations into account, we agree that *an increase in tobacco 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>1367</sup>

6.489. However, the Panel ultimately concluded that the complainants failed to demonstrate that the contribution of each alternative measure would be *equivalent* to that of the TPP measures.

6.490. While the specific reasoning for rejecting equivalence differs slightly for the two measures, we generally share the appellants' view that the Panel referred to the following two points in each instance: (i) the alternative measures do not address the design features of tobacco packaging that the TPP measures seek to address<sup>1368</sup>; and (ii) this would leave one aspect of Australia's comprehensive approach to tobacco control unaddressed, and reduce the "synergies" between the different components of that policy.<sup>1369</sup> At the same time, we note that the Panel's drafting of its reasoning is somewhat complicated, and there is some ambiguity as to precisely how, in the Panel's view, the contribution of each alternative measure (which the Panel described as "meaningful") cannot be considered *equivalent* to that of the TPP measures (which the Panel also described as "meaningful"). In this regard, the appellants observe that the Panel found that each alternative measure would be apt to make the *same* or a *similar degree* of "meaningful" contribution to the relevant objective of reducing the use of, and exposure to, tobacco products as the TPP measures, and yet such contribution still could not be considered equivalent because of the two considerations mentioned above.

6.491. We recall that, in the specific circumstances of these proceedings, the Panel decided to assess the respective degrees of contribution of the challenged and alternative measures in qualitative, rather than quantitative, terms.<sup>1370</sup> With respect to the contribution of the TPP measures,

<sup>1364</sup> Panel Report, paras. 7.1043 (for the TPP measures), 7.1453 (for an increase in the MLPA), and 7.1523 (for an increase in taxation).

<sup>1365</sup> Panel Report, para. 7.1043. (emphasis added)

<sup>1366</sup> Panel Report, para. 7.1453. (emphasis added)

<sup>1367</sup> Panel Report, para. 7.1523. (emphasis added)

<sup>1368</sup> Panel Report, paras. 7.1459 (for an increase in the MLPA) and 7.1526 (for an increase in taxation).

<sup>1369</sup> Panel Report, paras. 7.1461 (for an increase in the MLPA) and 7.1526-7.1528 (for an increase in taxation). The Panel relied on the Appellate Body's statement in *Brazil – Retreaded Tyres* that "[s]ubstituting one element of [Brazil's] comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect." (Ibid., para. 7.1461 and fn 3502 thereto, and para. 7.1528 and fn 3633 thereto (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172))

<sup>1370</sup> See, for example, Panel Report, paras. 7.1040 (for the TPP measures), 7.1452 (for an increase in the MLPA), and 7.1518-7.1522 (for an increase in taxation).

the Panel made the finding of a "meaningful" contribution in the context of setting out its "[o]verall conclusion on the *degree* of contribution of the TPP measures to Australia's objective".<sup>1371</sup> Similarly, the Panel used the adjective "meaningful" to describe the contribution of each alternative measure, despite Australia's request in the interim review not to do so.<sup>1372</sup> In this context, the Panel explained that its use of this adjective "reflects the Panel's assessment of the *degree* of contribution that [each] alternative is apt to make to Australia's objective".<sup>1373</sup> Under these circumstances, it seems reasonable to interpret the Panel to suggest that the ("meaningful") degree to which each alternative measure would be apt to contribute to Australia's objective of reducing the use of, and exposure to, tobacco products is similar or comparable to the ("meaningful") degree to which the TPP measures contribute to the same objective.<sup>1374</sup>

6.492. This view is also confirmed by a closer examination of how the Panel arrived at its findings of "meaningful" contribution for the TPP measures and each of the two alternative measures. Specifically, with respect to the TPP measures, we recall that, in reaching its overall finding of a "meaningful" contribution for these measures, the Panel examined: (i) the evidence relating to their design, structure, and intended operation; and (ii) the evidence relating to their application since their entry into force.<sup>1375</sup> With respect to item (i), the Panel found that the evidence supported the proposition that plain packaging of tobacco products has the capacity to have an impact on the three "proximal" outcomes mentioned above<sup>1376</sup> (i.e. reducing the appeal of tobacco products, increasing the effectiveness of GHWs, and reducing the ability of the pack to mislead consumers).<sup>1377</sup> The Panel then assessed the extent to which these "proximal" outcomes will in turn have an impact on smoking behaviour, and found that, while the relationship between perceptions, attitudes, and behaviour is complex, "it is reasonable to expect that reducing the appeal of tobacco products and enhancing clarity about their harmful effects will influence *at least some* consumers in their smoking behaviours."<sup>1378</sup> With respect to item (ii), the Panel assessed the voluminous body of available empirical evidence<sup>1379</sup> and found that this evidence largely "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>1380</sup>

6.493. To us, these intermediate findings by the Panel appear to suggest that, by using the phrase "meaningful contribution" for the TPP measures, the Panel did not consider that the measures necessarily make a particularly large contribution to the objective of reducing the use of, and exposure to, tobacco products. Rather, the Panel's statements, such as that the TPP measures are expected to "influence *at least some* consumers" and that the available empirical evidence is "consistent" with a finding that the TPP measures, together with the enlarged GHWs, contribute to

<sup>1371</sup> Panel Report, title of section 7.2.5.3.8. (emphasis added)

<sup>1372</sup> Panel Report, paras. 6.58 and 6.62.

<sup>1373</sup> Panel Report, para. 6.58. (emphasis added) See also *ibid.*, para. 6.62.

<sup>1374</sup> In this connection, Australia seems to suggest that the Panel's use of language suggesting possibility – such as "would in principle be apt to" and "could, in principle" – for the two alternative measures indicates that their contributions would be *less* than "meaningful". (Australia's appellee's submission, para. 392 (referring to Panel Report, paras. 7.1453 and 7.1523) (emphasis omitted)) We do not take such a view, because the Panel's use of the language suggesting possibility could also be understood to reflect the fact that these alternative measures are "a conceptual tool for the purpose of ascertaining whether a challenged measure is more trade restrictive than necessary" and are "of a hypothetical nature" in the sense that "they do not yet exist in the Member in question, or at least not in the particular form proposed by the complainant." (Appellate Body Reports, *US – Tuna II (Mexico)*, para. 320; *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.328)

<sup>1375</sup> See Panel Report, para. 7.1024.

<sup>1376</sup> See para. 6.485. above.

<sup>1377</sup> Panel Report, para. 7.1026.

<sup>1378</sup> Panel Report, para. 7.1031. (emphasis original) See also *ibid.*, paras. 7.697, 7.756, 7.776, 7.849, 7.854, and 7.927.

The Panel also stated that, 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 ... 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." (Panel Report, para. 7.1034 (emphasis added))

<sup>1379</sup> Panel Report, Appendices A-C.

<sup>1380</sup> Panel Report, para. 7.1037. See also *ibid.*, paras. 7.972 and 7.986.

"a reduction" in the use of tobacco products, suggest that the Panel considered that the contribution of the TPP measures is rather modest, while it could still be considered "meaningful".

6.494. Turning to the two alternative measures in question, we note that the Panel reached its finding of a "meaningful" contribution for an increase in the MLPA by considering, *inter alia*, certain studies that estimated the impact of an increase in the MLPA from 18 to 21 years on smoking initiation rates for adolescents and adult smoking prevalence in the United States, which indicated considerable long-term decreases in both parameters.<sup>1381</sup> While the Panel stated that it was reluctant to assume that these results can be "transposed directly" to provide "an exact measure" of the degree of contribution that this measure would be apt to make in the Australian market<sup>1382</sup>, the Panel did not mention any consideration suggesting that an increase in the MLPA to 21 years would be significantly less effective in Australia than in the United States. With respect to an increase in taxation, we note that the Panel's finding of a "meaningful" contribution was made by considering, *inter alia*, the price elasticity of demand for tobacco products, which the parties agreed to converge at around -0.4, and which the Panel considered "indicative of the potential contribution of increased taxation to Australia's objective".<sup>1383</sup> In addition, in the context of examining whether the proposed tax increase is reasonably available to Australia, the Panel observed that this relatively low price elasticity (less than -1.0) "is indicative that there may be room to increase excises in a manner that would increase revenues while still reducing tobacco consumption".<sup>1384</sup>

6.495. In light of these observations regarding how the Panel reached its finding of a "meaningful" contribution in each instance, we see no clear indication in the Panel's analysis that the overall degree of reduction in the use of, and exposure to, tobacco products achieved by each alternative measure (in addition to any reduction attributable to Australia's other existing tobacco control measures) would be materially smaller than that achieved by the TPP measures, such that the level of protection pursued by the TPP measures and Australia's other tobacco control measures<sup>1385</sup> necessarily goes beyond what could reasonably be achieved with one of the alternative measures used as a substitute for the TPP measures.

6.496. For these reasons, we agree with the appellants that the Panel Report can be read as indicating that, while each alternative measure may be considered apt to achieve a ("meaningful") degree of reduction in the use of, and exposure to, tobacco products similar or comparable to the ("meaningful") degree of reduction achieved by the TPP measures, the alternative measures' contributions would still fall short of being "equivalent" because such alternative measures: (i) do not address the design features of tobacco packaging; and (ii) undermine the comprehensive nature of Australia's policy by leaving unaddressed the particular aspect of the multifaceted problem that the TPP measures seek to address. This understanding of the Panel's reasoning is supported by the Panel's statement, made in the context of addressing the contribution of an increase in taxation, that, "even assuming that the *exact reduction in overall consumption* caused by the TPP measures could be isolated and quantified, an increase in taxation designed to achieve the *same overall reduction*"<sup>1386</sup> in consumption would still fail to achieve an equivalent contribution because it "would necessarily leave in place those aspects of tobacco product and retail packaging that the

<sup>1381</sup> See Panel Report, paras. 7.1448-7.1451.

<sup>1382</sup> Panel Report, para. 7.1452.

<sup>1383</sup> Panel Report, paras. 7.1515-7.1518.

<sup>1384</sup> Panel Report, para. 7.1538.

<sup>1385</sup> We note that the Panel did not identify the specific level of protection Australia seeks to achieve in its assessment of equivalence. At the same time, we note that, in the context of its determination of the relevant objective of the TPP measures, the Panel took note of Cuba's and Indonesia's contention that the TPP Bill Explanatory Memorandum referred to the "performance benchmarks" of "reducing the national smoking rates to 10 per cent of the population by 2018 and halving the Aboriginal and Torres Strait Islander smoking rate". (Panel Report, para. 7.231, quoting TPP Bill Explanatory Memorandum (Panel Exhibits AUS-2, JE-7), p. 1) The Panel disagreed with Cuba and Indonesia that these "benchmarks" form a component of the TPP measures' objective itself, but accepted that they "constitute general targets set in relation to the reduction of smoking rates in Australia, through the TPP measures and other tobacco control measures" and "thus identify a certain targeted *level* of achievement of the objective". (Panel Report, para. 7.231 (emphasis original; fn omitted))

<sup>1386</sup> Panel Report, para. 7.1526. (emphasis added) At the same time, we note that, in the specific circumstances of these disputes, the Panel found that the impact of the TPP measures is difficult to "quantify in terms of the magnitude of changes in smoking behaviours attributable to the measures" or "isolate empirically ... from other factors that also affect the evolution of smoking behaviours, including other tobacco control measures applied simultaneously with the TPP measures". (Panel Report, para. 7.1040)

TPP measures address as 'part of a more complex suite of measures directed at the same objective' of tobacco control".<sup>1387</sup>

6.497. Based on our understanding of the Panel's reasons for concluding that the contribution of each alternative measure would not be equivalent to that of the TPP measures, we agree with the appellants that the two points mentioned by the Panel in rejecting equivalence do not reflect the correct legal standard under Article 2.2.

6.498. Specifically, with respect to the first point mentioned by the Panel (i.e. that the alternative measures do not address the design features of tobacco packaging), we recall that what is relevant to an assessment of equivalence is "the overall degree of contribution that the technical regulation makes to the objective pursued"<sup>1388</sup> and that "a proposed alternative measure may achieve an equivalent degree of contribution in *ways different* from the technical regulation at issue."<sup>1389</sup> We have also noted that the Panel identified the relevant objective of the TPP measures to be "to improve public health by reducing the use of, and exposure to, tobacco products".<sup>1390</sup> In this regard, as noted, the Panel expressly rejected the proposition that the relevant objective encompasses the three specific "mechanisms" of the TPP measures, which relate to addressing the design features of tobacco packaging.<sup>1391</sup> Under these circumstances, we see no reason why, despite the uncontested finding that these mechanisms are not part of the objective pursued by the TPP measures, the proposed alternative measures would not make an equivalent contribution because they do not address the design features of tobacco packaging.<sup>1392</sup>

6.499. Turning to the second point referred to in the Panel's reasoning (i.e. that substituting one of the alternative measures for the TPP measures would undermine the comprehensiveness of Australia's policy and reduce the synergies), we have noted the participants' general agreement that, even in the context of a comprehensive policy, what is relevant for assessing equivalence remains the overall degrees of contribution that the challenged and alternative measures make to the relevant objective.<sup>1393</sup> This objective was identified by the Panel to be "to improve public health by reducing the use of, and exposure to, tobacco products"<sup>1394</sup> or, put more simply, reducing smoking.<sup>1395</sup> Therefore, if the alternative measure in question is found apt to achieve, in addition to any reduction in smoking attributable to Australia's other existing tobacco control measures, a degree of reduction in smoking similar or comparable to the degree of reduction achieved by the TPP measures, then whether the TPP measures form part of Australia's broader policy and whether

<sup>1387</sup> Panel Report, para. 7.1526 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, fn 660 to para. 5.216).

<sup>1388</sup> Panel Report, para. 7.1368 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.216 and 5.254-5.255 (emphasis omitted by the Panel)).

<sup>1389</sup> Panel Report, para. 7.1369 (referring to Appellate Body Reports, *US – COOL*, para. 373; *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.215 and 5.254). (emphasis added)

<sup>1390</sup> Panel Report, para. 7.232.

<sup>1391</sup> Panel Report, para. 7.227.

<sup>1392</sup> In this connection, we take note of Australia's observation that, with specific respect to an increase in the MLPA, the Panel offered an additional reason why the contribution of this measure could not be considered "equivalent". (Australia's appellee's submission, para. 380 (referring to Panel Report, para. 7.1459)) Specifically, the Panel noted that an increase in the MLPA would "address *only* the availability of tobacco products to individuals below 21 years of age" and "not address initiation, cessation or relapse in any age group over 21". By contrast, the Panel stated that "the TPP measures, in addition to making a contribution to discouraging initiation by adolescents and young adults, are apt to contribute to encouraging cessation and preventing relapse by smokers not falling within this age group." (Panel Report, para. 7.1459 (emphasis original))

As we see it, however, the above statements by the Panel seem essentially no different from the statement that an increase in the MLPA operates in ways different from the TPP measures, rather than qualifies as an additional reason to reject equivalence. Indeed, it seems self-evident to us that an increase in the MLPA from 18 to 21 years of age, by definition, aims to reduce smoking by eliminating legal access to tobacco products by people between 18 and 20 years of age, whereas the TPP measures are designed to achieve the same objective by nudging people of all age groups, while leaving intact legal access to tobacco products by young people of 18 to 20 years of age. However, merely pointing to the different age groups targeted by the challenged and alternative measures would not dispose of the core question of whether these measures are apt to achieve equivalent degrees of overall reduction in the use of, and exposure to, tobacco products.

<sup>1393</sup> See para. 6.483. above.

<sup>1394</sup> Panel Report, para. 7.232.

<sup>1395</sup> See para. 6.484. above.

their contribution arises partly from synergistic effects with the other components of that policy should not have been a decisive consideration in determining equivalence.

6.500. In this context, we consider highly relevant the Panel's qualification of its finding of "meaningful" contribution for the TPP measures, namely, that these measures are apt to, and do, make a meaningful contribution "as applied *in combination* with the comprehensive range of other tobacco control measures maintained by Australia".<sup>1396</sup> As we see it, this indicates that the "meaningful" contribution found with respect to the TPP measures already reflects, and captures, any synergistic effects arising from their interactions with Australia's other measures.<sup>1397</sup> This is contrasted with the Panel's findings of "meaningful" contribution for the alternative measures, which – as the appellants correctly observe – were reached *without* referring to any potential interactions of these measures with Australia's other existing measures.<sup>1398</sup> In this regard, we do not see any indication in the Panel's analysis that the effectiveness of each alternative measure would somehow be undermined (or become less than "meaningful") if it were to operate in the presence of Australia's other existing measures.<sup>1399</sup> Under these circumstances, we find it difficult to understand, from the Panel's reasoning, how the overall degree of contribution of the TPP measures, which the Panel found to be "meaningful" by taking into account their synergies with Australia's other existing measures, is necessarily greater than that of each alternative measure, which the Panel found "meaningful" without referring to any potential interaction with the same existing measures.

6.501. We also do not consider that the Appellate Body's statement in *Brazil – Retreaded Tyres*, on which the Panel relied<sup>1400</sup>, offers conclusive guidance for assessing equivalence in these proceedings. To recall, the Appellate Body stated that "[s]ubstituting one element of [Brazil's] comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect."<sup>1401</sup> At the same time, we note that this statement was offered with respect to certain measures<sup>1402</sup>, proposed by the European Communities, that the Appellate Body observed "already figure[d] as elements of a comprehensive strategy designed by Brazil to deal with waste tyres".<sup>1403</sup> Moreover, the Appellate Body's statement was offered in the context of upholding the panel's finding that these measures, as existing elements of Brazil's policy, did not constitute valid "alternatives" to the challenged import ban.<sup>1404</sup> By contrast, in the present disputes, the Panel found that both an increase in the MLPA and an increase in taxation, as strengthened variations of Australia's existing measures, qualify as "alternatives" in that they "do not yet exist in the Member in question, or at least not in the particular form proposed by the complainant".<sup>1405</sup> These findings

<sup>1396</sup> Panel Report, para. 7.1043. (emphasis added)

<sup>1397</sup> See Panel Report, paras. 7.1041-7.1042.

<sup>1398</sup> See Panel Report, paras. 7.1432-7.1453 (for an increase in the MLPA) and 7.1506-7.1523 (for an increase in taxation).

<sup>1399</sup> As noted in para. 6.494. above, the Panel's finding of a "meaningful" contribution for an increase in the MLPA was reached by considering, for example, studies that estimated the impact of an increase in the MLPA from 18 to 21 years of age on smoking initiation rates for adolescents and adult smoking prevalence in the United States, which indicated considerable long-term decreases in both parameters. Although the Panel was "reluctant" to "transpose[] directly" these studies to ascertain the exact degree of the contribution of an MLPA increase in the Australian market, it did not mention any reason why the proposed increase in the MLPA would be materially less effective in Australia than in the United States. (Panel Report, paras. 7.1448-7.1452) With respect to an increase in taxation, the Panel's finding of a "meaningful" contribution was made by considering the price elasticity of demand for tobacco products at around -0.4. (Panel Report, paras. 7.1515-7.1518) The Panel further stated that this relatively low price elasticity (less than -1.0) suggests that there may be room to increase excises without diminishing the measures' effectiveness in further reducing tobacco consumption. (Panel Report, para. 7.1538)

<sup>1400</sup> See fn 1369 above.

<sup>1401</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172.

<sup>1402</sup> These measures comprised: (i) measures to encourage domestic retreading or improve the retreadability of used tyres; and (ii) a better enforcement of the import ban on used tyres and of existing collection and disposal schemes. (Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 158 and 172)

<sup>1403</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172. See also Panel Report, *Brazil – Retreaded Tyres*, para. 7.172.

<sup>1404</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172. See also Panel Report, *Brazil – Retreaded Tyres*, paras. 7.172.

<sup>1405</sup> Panel Report, para. 7.1385 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.328). (emphasis omitted)

are not contested on appeal. Under these circumstances, we consider that the Panel's reliance on the Appellate Body's statement in *Brazil – Retreaded Tyres* is inapposite.

6.502. Moreover, while the above statement by the Appellate Body can be read to suggest that whether a measure operates in such a manner as to create synergies with other measures in the context of a Member's broader policy is a *relevant* consideration in a panel's assessment of the overall effectiveness of that measure, we do not consider it to be a *decisive* consideration in such an assessment, or in a panel's determination of equivalence. Rather, in our view, whether and to what extent a measure creates synergies with other measures is one of the factors informing the overall degree of contribution that a measure makes to a legitimate objective, which all participants agree is the central question in determining equivalence. Thus, even where the challenged measure is implemented as part of a Member's comprehensive policy, a panel assessing equivalence will not be relieved from its duty to objectively ascertain, and compare, the overall degrees of contribution that the challenged and alternative measures make to the legitimate objective by taking into account all pertinent factors. Depending on the case, such factors may include the relevant objective pursued by a Member's policy, the overall level of protection that the Member seeks to achieve through that policy<sup>1406</sup>, the respective degrees of contribution that the challenged and alternative measures are apt make to the relevant objective, and whether and to what extent the contribution of each measure would be enhanced (or diminished) in the presence of the other existing measures, including due to the synergies created between different measures.

6.503. In this context, we consider it appropriate that the Panel in these disputes took into account the synergies between the TPP measures and Australia's other control measures in reaching its finding of a "meaningful" contribution for the TPP measures.<sup>1407</sup> At the same time, this could possibly suggest that the TPP measures' contribution might be less than "meaningful" absent the measures' interaction with Australia's other measures. Under these circumstances, we consider it illogical for the Panel to have found that the TPP measures are necessarily more effective than the alternative measures (that the Panel found to be apt to make a "meaningful" contribution on their own) because of the very synergies that make the TPP measures' contribution "meaningful".

6.504. For all of these reasons, to the extent that the Panel suggested that each alternative measure may be considered apt to achieve a similar or comparable degree of "meaningful" overall reduction in smoking in Australia to that of the TPP measures, and yet its contribution would not be equivalent because of its failure to address the design features of tobacco packaging that the TPP measures seek to address in the context of Australia's broader tobacco control policy, we find that the Panel erred in its application of the legal standard under Article 2.2 of the TBT Agreement.

6.505. We caution, however, that our conclusion is made in the particular circumstances of these disputes. It should not be extrapolated that an increased MLPA or taxation on tobacco products will necessarily qualify as a reasonably available alternative measure capable of making a contribution equivalent to that of a plain packaging measure in another case or in another jurisdiction. Rather, our conclusion is reached on the basis of the uncontested Panel finding in these proceedings that the relevant objective pursued by the TPP measures is "to improve public health by reducing the use of, and exposure to, tobacco products"<sup>1408</sup> without encompassing the "specific objectives" of addressing design features of tobacco packaging<sup>1409</sup>, and the fact that Australia has not appealed the Panel's findings that both alternative measures are reasonably available to Australia.<sup>1410</sup>

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<sup>1406</sup> We recall that, in *Brazil – Retreaded Tyres*, the Appellate Body considered it relevant that the objective of the challenged import ban was the reduction of "exposure to the risks to human, animal or plant life or health ... to the maximum extent possible". The Appellate Body added that "a measure or practice will not be viewed as an alternative unless it 'preserve[s] for the responding Member its right to achieve its desired level of protection with respect to the objective pursued'." (Appellate Body Report, *Brazil – Retreaded Tyres*, para. 170 (fns omitted; emphasis added))

<sup>1407</sup> See para. 6.500. above.

<sup>1408</sup> Panel Report, para. 7.232.

<sup>1409</sup> Panel Report, para. 7.227.

<sup>1410</sup> Panel Report, paras. 7.1467 (for an increase in the MLPA) and 7.1541 (for an increase in taxation).

#### 6.1.4.4 Claims under Article 11 of the DSU

6.506. The Dominican Republic raises two sets of claims under Article 11 of the DSU with respect to the Panel's analyses of the relative trade restrictiveness and contribution of the two proposed alternative measures (i.e. an increase in the MLPA and an increase in taxation).

6.507. First, with respect to the Panel's analysis of whether each of the two alternative measures would make an equivalent contribution to Australia's objective, the Dominican Republic claims that the Panel failed to make an objective assessment of the matter under Article 11 in finding that the design features of tobacco packaging that convey messages would not be addressed "at all"<sup>1411</sup> in the absence of the TPP measures. For the Dominican Republic, this finding: (i) is not reasoned and adequate because it is "factually wrong"; (ii) is incoherent because it contradicts the Panel's own finding elsewhere in the Panel Report<sup>1412</sup>; and (iii) was reached without considering the Dominican Republic's evidence and arguments demonstrating the opposite.<sup>1413</sup>

6.508. In section 6.1.4.3 above, we have addressed the Dominican Republic's overlapping claim of error under Article 2.2 of the TBT Agreement that similarly challenged the Panel's reference to the failure of the alternative measures to address the design features of tobacco packaging. In this regard, it is our view that the Panel used the phrase "at all" simply to emphasize its view that the proposed alternative measures would not be as effective as the TPP measures because of their failure to address the design features of tobacco packaging, rather than to make a *factual* finding that there are no other measures in Australia that affect tobacco packaging.<sup>1414</sup> Under these circumstances, we do not consider it necessary or appropriate for us to address this aspect of the Dominican Republic's challenge under Article 11 of the DSU.

6.509. Second, the Dominican Republic appeals the Panel's findings regarding the trade restrictiveness and contribution of an increase in the MLPA. Specifically, the Dominican Republic observes that the Panel took into account the potential "future effects" of an increased MLPA in the context of its analysis of this measure's trade restrictiveness when it noted "the importance of younger smokers to the tobacco industry" who "determine the future trends" of the tobacco industry.<sup>1415</sup> The Dominican Republic submits that this reasoning was incoherent with the Panel's observation, in the context of its analysis of the contribution of the same alternative measure, that this measure does not address smoking behaviour "in any age group over 21".<sup>1416</sup> The Dominican Republic also considers this latter observation by the Panel to be incoherent with the Panel's assessment of the contribution of the TPP measures, with respect to which the Panel stated that it "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".<sup>1417</sup>

6.510. We agree with the Dominican Republic's view that the Panel referred to certain "future effects" in its analysis of the trade restrictiveness of the proposed MLPA increase from 18 to 21 years.<sup>1418</sup> We disagree, however, that the Panel neglected or denied such "future effects" in its analysis of the contribution of an increase in the MLPA. On the contrary, when reaching its finding that this alternative measure would be apt to make a "meaningful" contribution to Australia's

<sup>1411</sup> Panel Report, para. 7.1459. (emphasis omitted)

<sup>1412</sup> Dominican Republic's appellant's submission, para. 1456.

<sup>1413</sup> Dominican Republic's appellant's submission, para. 1472.

<sup>1414</sup> Indeed, as the Dominican Republic itself highlights, the Panel recognized throughout its Report that there are other measures in Australia that address tobacco packaging as a means of communication. (See Dominican Republic's appellant's submission, para. 1457) We note in particular that, in section 2 of its Report (titled "Factual aspects"), the Panel acknowledged the existence of such other measures, including the GHWs requirements and the regulatory regime addressing misleading aspects of tobacco packaging.

<sup>1415</sup> Dominican Republic's appellant's submission, paras. 1422-1423 and 1487-1488 (quoting Panel Report, para. 7.1413). (emphasis omitted)

<sup>1416</sup> Dominican Republic's appellant's submission, para. 1489 (quoting Panel Report, para. 7.1459). (emphasis omitted)

<sup>1417</sup> Dominican Republic's appellant's submission, paras. 1485-1486 (quoting Panel Report, para. 7.938). (emphasis omitted)

<sup>1418</sup> For example, the Panel stated that, although 18- to 21-year-olds make up only a segment of the market of people who may, or do, use tobacco products, younger smokers are important to the tobacco industry in that "[t]he future success of any cigarette brand is driven by its ability to attract younger adult smokers, between the age of 18 and 24 years old", and that "smokers aged 18-24 determine the future trends of the tobacco industry." (Panel Report, para. 7.1413 (fn omitted))



objective, the Panel took account of evidence indicating that raising the MLPA will not only likely immediately improve the health of people within the targeted age group, but also reduce intermediate and long-term adverse health effects as the initial birth cohorts affected by the policy change grow into adulthood.<sup>1419</sup> Moreover, while the Panel stated that the proposed MLPA increase would not address smoking behaviour "in any age group over 21"<sup>1420</sup>, it referred to the age group targeted by this measure as being "important".<sup>1421</sup> This seems comparable to the Panel's reference, in the context of addressing the trade restrictiveness of this alternative measure, to "the importance of younger smokers to the tobacco industry" in determining the future trends of the industry.<sup>1422</sup> Therefore, we see no inconsistency in the Panel's treatment of future effects in its assessment of the trade restrictiveness, on the one hand, and contribution, on the other hand, of an increase in the MLPA.

6.511. In addition, with respect to the contribution of the TPP measures, we note that the Panel explicitly stated that its finding of a "meaningful" contribution was based on the evidence available to it "at the time of [its] assessment".<sup>1423</sup> In this regard, we note that the Dominican Republic itself observes that the Panel's conclusion on this issue was reached "*without* taking potential future effects into account".<sup>1424</sup> As such, while the Panel stated that the impact of the TPP measures may evolve over time<sup>1425</sup>, it is evident that such reference to the future effects was only ancillary to the Panel's main reasoning. We thus do not see any basis for the Dominican Republic to argue that the Panel offered "incoherent" reasoning by relying on the "future effects" in its analysis of the contribution of the TPP measures, while neglecting or denying such future effects in its analysis of the contribution of an increase in the MLPA.

6.512. Accordingly, we find that the Dominican Republic has not demonstrated that the Panel failed to make an objective assessment of the matter before it, in accordance with Article 11 of the DSU.

#### 6.1.4.5 Conclusion regarding the Panel's assessment of the alternative measures

6.513. With respect to the appellants' claims of error under Article 2.2 of the TBT Agreement regarding the Panel's analysis of the *trade restrictiveness* of the two alternative measures at issue on appeal (i.e. an increase in the MLPA and an increase in taxation) compared to that of the TPP measures, we have found that the appellants have not demonstrated that the Panel erred in rejecting the complainants' proposition that their alternative measures are less trade-restrictive than the TPP measures. Rather, we consider that the Panel's conclusion was properly reached by addressing relevant considerations, such as the respective measures' impacts on the volume, value, and price of imported tobacco products.

6.514. With respect to the claims under Article 2.2 regarding the Panel's analysis of the *contribution* of the alternative measures compared to that of the TPP measures, we have found that, to the extent that the Panel suggested that each alternative measure may be considered apt to achieve a similar or comparable degree of "meaningful" overall reduction in smoking in Australia to that of the TPP measures, and yet its contribution would not be equivalent because of its failure to address the design features of tobacco packaging that the TPP measures seek to address in the context of Australia's broader tobacco control policy, the Panel erred in its application of Article 2.2.

6.515. In addition, with respect to the Dominican Republic's separate claims under Article 11 of the DSU challenging certain aspects of the Panel's analyses of the relative trade restrictiveness and contribution of the alternative measures, we have found that the Dominican Republic has not demonstrated that the Panel failed to make an objective assessment of the matter before it, although

<sup>1419</sup> Panel Report, para. 7.1439 (referring to R. Bonnie, K. Stratton, and L. Kwan (eds.), *Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products*, US Institute of Medicine (The National Academies Press, 2015) (Pre-publication copy: uncorrected proofs) (Panel Exhibit DOM-232), pp. S-6 and 8-20).

<sup>1420</sup> Panel Report, para. 7.1459.

<sup>1421</sup> Panel Report, para. 7.1460.

<sup>1422</sup> Panel Report, para. 7.1413.

<sup>1423</sup> Panel Report, para. 7.1044.

<sup>1424</sup> Dominican Republic's appellant's submission, para. 1485. (emphasis original)

<sup>1425</sup> Panel Report, para. 7.1044.

certain aspects of its arguments are pertinent to considering its claim under Article 2.2 of the TBT Agreement.

6.516. In light of the foregoing, we conclude that the Panel erred in finding that the complainants failed to demonstrate that each of the two alternative measures would be apt to make a contribution equivalent to that of the TPP measures.<sup>1426</sup> At the same time, we have concluded that the Panel did not err in finding that the complainants failed to demonstrate that these two alternative measures are less trade-restrictive than the TPP measures.<sup>1427</sup> Consequently, although we have concluded that the Panel erred in its application of Article 2.2 with respect to the equivalence of the contribution of each alternative measure, the Panel's findings, in paragraphs 7.1471 and 7.1545 of the Panel Report, that the complainants did not demonstrate that an increase in the MLPA and an increase in taxation would each be a less trade-restrictive alternative to the TPP measures that would make an equivalent contribution to Australia's objective, stand.

### 6.1.5 Overall conclusion under Article 2.2 of the TBT Agreement

6.517. For purposes of establishing that a measure is inconsistent with Article 2.2 of the TBT Agreement, a complainant must demonstrate that a technical regulation is "more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create". The assessment of "necessity", in the context of Article 2.2, involves a relational analysis of the following factors: (i) the trade restrictiveness of the technical regulation; (ii) the degree of contribution that it makes to the achievement of a legitimate objective; and (iii) the risks non-fulfilment would create. Moreover, establishing whether a technical regulation is "more trade-restrictive than necessary" may involve a comparison between: (i) the trade restrictiveness and the degree of contribution of the measure at issue to the legitimate objective; and (ii) the trade restrictiveness and the degree of contribution of possible alternative measures that are reasonably available to the legitimate objective, taking account of the risks non-fulfilment would create.

6.518. In its assessment of whether the complainants had demonstrated that the TPP measures are inconsistent with Article 2.2, the Panel in these disputes examined, *inter alia*: (i) the contribution of the TPP measures to Australia's objective; (ii) the trade restrictiveness of the TPP measures; and (iii) whether the alternative measures proposed by the complainants are less trade-restrictive than the TPP measures while making an equivalent contribution to Australia's objective. We have addressed the appellants' claims of error regarding each of these three aspects of the Panel's analysis.

6.519. With respect to the contribution of the TPP measures to Australia's objective, we have found that the appellants have not demonstrated that the Panel erred in finding, in paragraphs 7.1025 and 7.1043 of the Panel Report, that:

7.1025. Overall ... 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 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.

...

7.1043. Taken as a whole, therefore, we consider that the evidence before us supports the view that, as applied in combination with the comprehensive range of other tobacco control measures maintained by Australia and not challenged in these proceedings, including a prohibition on the use of other means through which branding could otherwise contribute to the appeal of tobacco products and to misleading consumers about the harmful effects of smoking, the TPP measures are apt to, and do, make a

<sup>1426</sup> Panel Report, paras. 7.1464 and 7.1531.

<sup>1427</sup> Panel Report, paras. 7.1417 and 7.1495.

meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products.<sup>1428</sup>

6.520. With respect to the trade restrictiveness of the TPP measures, we find that the appellants have not demonstrated that the Panel erred in finding, in paragraph 7.1255 of the Panel Report, that:

[T]he 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. We also conclude 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 to date. We are also not persuaded that the complainants have demonstrated that the TPP measures impose conditions on the sale of tobacco products in Australia or compliance costs of such magnitude that they would amount to a limiting effect on trade.<sup>1429</sup>

6.521. Finally, with respect to the alternative measures, we recall that the appellants challenged only the Panel's findings concerning two of the four proposed alternative measures that were examined and rejected by the Panel: (i) an increase in the MLPA for tobacco products from 18 to 21 years of age; and (ii) an increase in the taxation of tobacco products in Australia. We have found that the Panel erred in finding that the complainants failed to demonstrate that each of the two alternative measures would be apt to make a contribution equivalent to that of the TPP measures.<sup>1430</sup> Specifically, to the extent that the Panel suggested that each alternative measure may be considered apt to achieve a similar or comparable degree of "meaningful" overall reduction in smoking in Australia to that of the TPP measures, and yet its contribution would not be equivalent because of its failure to address the design features of tobacco packaging that the TPP measures seek to address in the context of Australia's broader tobacco control policy, we have found that the Panel erred in its application of Article 2.2. At the same time, we have found that the Panel did not err in finding that the complainants failed to demonstrate that these two alternative measures are less trade-restrictive than the TPP measures.<sup>1431</sup> Consequently, although we have found that the Panel erred in its application of Article 2.2 with respect to the equivalence of the contribution of each alternative measure, the Panel's findings, in paragraphs 7.1471 and 7.1545 of the Panel Report, that the complainants had not demonstrated that the increase in the MLPA and the increase in taxation would each be a less trade-restrictive alternative to the TPP measures that would make an equivalent contribution to Australia's objective, stand.

6.522. For these reasons, we uphold the Panel's conclusion, in paragraph 7.1732 of the Panel Report, that:

[T]he complainants have not demonstrated 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.<sup>1432</sup>

## 6.2 Separate opinion of one Division Member regarding Article 2.2 of the TBT Agreement

### 6.2.1 Introduction

6.523. It is well settled that not every error by a panel rises to the level of a breach of Article 11 of the DSU. Under the DSU, panels enjoy considerable discretion with respect to fact-finding and the evaluation of facts. This is underscored by the language of Article 11 that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case", read in conjunction with Article 17.6 of the DSU, which says that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." In

<sup>1428</sup> Panel Report, paras. 7.1025 and 7.1043.

<sup>1429</sup> Panel Report, para. 7.1255.

<sup>1430</sup> Panel Report, paras. 7.1464 and 7.1531.

<sup>1431</sup> Panel Report, paras. 7.1417 and 7.1495.

<sup>1432</sup> See also Panel Report (DS435), para. 8.1.a; Panel Report (DS441), para. 8.1.b.i.

other words, Article 11 claims on appeal should be reserved – and entertained – only for rare instances of "egregious" errors by panels, which call into question the good faith of the panel.<sup>1433</sup>

6.524. With respect to the appellants' claims regarding the Panel's analysis under Article 2.2 of the TBT Agreement, I concur with the majority's ultimate findings and conclusions. However, I disagree on two points: (i) that it was necessary to examine in detail the appellants' claims that the Panel erred in determining the degree of contribution of the TPP measures to Australia's objective; and (ii) that the Panel's treatment of and reliance on multicollinearity and non-stationarity constituted an error under Article 11 of the DSU.

### **6.2.2 Addressing the appellants' claims regarding the contribution of the TPP measures was not necessary to resolve the dispute**

6.525. The complainants' main argument before the Panel was that the TPP measures are more trade-restrictive than necessary because: (i) they are trade-restrictive; and (ii) they are not apt to, and do not, contribute to Australia's legitimate public health objective.<sup>1434</sup> In the alternative, the complainants argued that, even assuming that the TPP measures contribute to Australia's legitimate public health objective, they are still "more trade-restrictive than necessary" because there are alternative measures that are reasonably available to Australia and that would be less trade-restrictive while making an equivalent contribution to the objective.<sup>1435</sup>

6.526. The Panel rejected those arguments by the complainants, while noting that the TPP measures are necessarily trade-restrictive because all tobacco products are imported into Australia, and that the TPP measures contribute to Australia's public health objective by reducing consumption of tobacco products. The appellants challenge the Panel's rejection of their arguments. My discussion of that challenge centres on the two sentences in paragraph 7.1025 of the Panel Report.

6.527. In the first of these sentences, the Panel found that the complainants failed to demonstrate that the TPP measures "are not apt to make a contribution to Australia's objective".<sup>1436</sup> In the second sentence, the Panel found that, "[r]ather, ... the evidence ... , taken in its totality, supports the view that the TPP measures ... are apt to, and do in fact, contribute to Australia's objective."<sup>1437</sup>

6.528. The appellants' appeals were silent regarding the first sentence. They addressed only the second sentence. In doing that, the appellants have not explained how any errors undermining the Panel's finding in the second sentence of paragraph 7.1025 would suffice to demonstrate that the Panel erred in forming the conclusion in the first sentence of that paragraph.

6.529. In response to questioning at the second hearing, the appellants stated that it was unnecessary to raise any independent appeal or challenge of the Panel's finding in the first sentence, because the Panel's finding in that sentence is integrally linked to the Panel's finding in the second sentence. The appellants underscored that the Panel conducted an integrated analysis of the degree of contribution based on the evidence as a whole.<sup>1438</sup>

6.530. I read these two sentences as saying different things. The first sentence says that the appellants *failed to demonstrate* that the TPP measures *are not* apt to make a contribution; the second sentence says that the totality of evidence supports the view that the TPP measures *are* apt to, and *do in fact*, make a contribution.

<sup>1433</sup> Appellate Body Report, *EC – Hormones*, para. 133. See also Appellate Body Reports, *Japan – Agricultural Products II*, para. 141; *Korea – Alcoholic Beverages*, para. 164; *EC – Bed Linen (Article 21.5 – India)*, para. 177.

<sup>1434</sup> See Panel Report, paras. 7.426, 7.437, 7.485 and 7.520; Honduras' and the Dominican Republic's responses to questioning at the second hearing.

<sup>1435</sup> See Honduras' first written submission to the Panel, paras. 853 and 911; Dominican Republic's first written submission to the Panel, paras. 737-739, 980, and 1019.

<sup>1436</sup> Panel Report, para. 7.1025.

<sup>1437</sup> Panel Report, para. 7.1025.

<sup>1438</sup> Honduras' and the Dominican Republic's responses to questioning at the second hearing (referring to Panel Report, paras. 7.495-7.497).

6.531. Even assuming, *arguendo*, that the appellants are correct that the Panel relied on the totality of the evidence in forming both conclusions in these two sentences of paragraph 7.1025, I do not see how the errors alleged by the appellants pertaining to the Panel's *second-sentence* finding would vitiate the Panel's finding in the *first sentence*. The mere fact that the Panel may have relied on the same evidence for both findings does not mean that any errors in the Panel's second determination – that the evidence supports the view that the TPP measures "are apt to, and do in fact" make a contribution – also would undermine the Panel's conclusion that the *complainants failed to substantiate their burden* of demonstrating that the TPP measures are *not apt to* contribute. Those are two different conclusions.

6.532. Consequently, in order for us to overturn the Panel's conclusion that the complainants failed to demonstrate that the TPP measures are not apt to contribute to Australia's objective – expressed in the first sentence of paragraph 7.1025 – the appellants were required to demonstrate that the Panel's errors in its examination of the evidence vitiated that conclusion, and did so in a manner so egregious as to constitute a violation of Article 11 of the DSU.

6.533. As noted, the appellants did not appeal the Panel's finding in the first sentence of paragraph 7.1025. They also did not otherwise address the question of whether any errors in the Panel's evaluation of the second sentence in that paragraph would vitiate the first sentence, except to argue that the two sentences "are linked" and that the Panel's evaluation of them was based on the same evidence.

6.534. As a result, I consider that the Panel's determination that the complainants failed to demonstrate that the TPP measures are not apt to contribute to Australia's objective is undisturbed on appeal. Since measures are presumed to be WTO-consistent until shown otherwise, it follows that the TPP measures are presumed to be at least capable of making a contribution to Australia's objective<sup>1439</sup>, whether or not the Panel might have erred in determining that the totality of evidence supports the view that the TPP measures are apt to, and do in fact, make a contribution to Australia's objective.

6.535. It follows that the Panel's finding, in the first sentence of paragraph 7.1025 of the Panel Report, stands. Since the TPP measures are therefore presumed to be capable of contributing to Australia's objective, it further follows that: (i) the appellants have failed to demonstrate that the Panel erred in rejecting their principal argument; and (ii) with respect to their alternative argument, whether or not the proposed alternatives make an equivalent contribution to the TPP measures, the appellants did not present an alternative that is less trade-restrictive than the TPP measures<sup>1440</sup>, and consequently there is no basis for us to overturn the Panel's overall conclusion that the appellants failed to demonstrate that the TPP measures are inconsistent with Article 2.2.

6.536. Thus, I believe it was unnecessary, for purposes of resolving these disputes, for the majority to consider in detail the appellants' claims regarding the Panel's assessment of the TPP measures' contribution to Australia's objective. For that reason, I also believe that it was inadvisable for the majority to consider in detail the appellants' contribution claims. This could have been a much shorter report, I believe, based on the findings that the first sentence of paragraph 7.1025, regarding aptness, stands, that the appellants' proposed alternatives would not be less trade-restrictive than the TPP measures, and therefore that the appellants failed to demonstrate that the TPP measures are inconsistent with Article 2.2.

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<sup>1439</sup> Where a panel finds that the parties' evidence reveals that a measure is capable of contributing, or the evidence is unclear or mixed as to whether the measure is capable of contributing, a panel should find that the complainant has failed to demonstrate that the measure is incapable of contributing to the objective. This would at the same time mean that, to the extent that the complainant also argues that the measure is inconsistent with Article 2.2 on the basis that there are reasonably available less trade-restrictive alternative measures capable of making an equivalent contribution, the presumption of WTO-consistency requires that a panel presume that the measure is at least capable of making some contribution to the legitimate objective and, on that basis, proceed to examine the remaining factors for determining "necessity", such as the degree of the measure's trade restrictiveness and the availability of less trade-restrictive alternative measures.

<sup>1440</sup> For the reasons set forth in sections 6.1.3-6.1.4 we have upheld the Panel's findings that the alternative measures proposed by the complainants would not be less trade-restrictive than the TPP measures.

### 6.2.3 Due process and Article 11 of the DSU

6.537. I disagree with the majority's intermediate finding that, by introducing in its Interim Report econometric analyses that had not been tested with the parties, the Panel failed to observe due process in a way that constitutes a violation of Article 11 of the DSU.

6.538. In my view, the Panel's reliance on multicollinearity and non-stationarity to test the robustness of the parties' evidence was part of the Panel's reasoning, with respect to which a panel enjoys considerable discretion. The parties to this case submitted to the Panel a large amount of econometric evidence. It was appropriate for the Panel to assess the probative value of that evidence. The Panel tested the robustness of the econometric studies submitted by the parties by taking into account, *inter alia*, whether the models suffered from multicollinearity and non-stationarity. The mere fact that these two so-called "criteria" were not specifically mentioned by the parties is not sufficient to warrant a different scrutiny of the Panel's reliance on them, as compared to the Panel's reliance on other econometric concepts (e.g. overfitting and endogeneity) that the parties had identified. I therefore consider that the Panel acted within the bounds of its discretion as a trier of facts by not only examining the parameters used by each party, but also by going further in its evaluation and testing the robustness of the parties' econometric evidence for multicollinearity and non-stationarity.

6.539. With regard to the issue of due process, Australia argues that the complainants could have used the interim review stage to request the Panel to review the relevant parts of the Panel Report pursuant to Article 15 of the DSU but chose not to do so.<sup>1441</sup> The appellants submit that interim review would not have provided them with a "meaningful opportunity" to comment on the Panel's concerns regarding multicollinearity and non-stationarity.<sup>1442</sup>

6.540. Article 15.2 of the DSU says, in relevant part, that:

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.

6.541. The complainants became aware of the Panel's analysis of multicollinearity and non-stationarity when they received the Panel's Interim Report on 2 May 2017. However, the complainants did not raise any substantive concerns with respect to these aspects of the Panel's analysis in their comments on the Interim Report, nor did they request an interim review meeting. It is reasonable to read Article 15.2 as placing responsibility on the complainants to have raised the Panel's reliance on multicollinearity and non-stationarity at the interim review stage, especially given the importance that the appellants attribute to these issues on appeal. In my view, the complainants' failure to raise these issues at the interim review stage undermines the appellants' claim regarding due process.

6.542. Thus, since the complainants had an opportunity to raise these issues and did not do so, I do not agree with their claim that the Panel denied them due process by not "giving the parties any opportunity whatsoever to comment".<sup>1443</sup> Since the complainants did not attempt to raise their concerns regarding the Panel's reliance on multicollinearity and non-stationarity at the interim review stage, it is unnecessary to speculate about whether the alleged limited nature of the interim review process, which I do not find to be expressed in the text of Article 15.2, would have been sufficient. Consequently, I disagree with the majority's interim conclusion on this point.

6.543. In light of the above, I consider that the appellants have not demonstrated that the Panel failed to make an objective assessment of the facts of the case as required under Article 11 of the

<sup>1441</sup> Australia's appellee's submission, para. 464.

<sup>1442</sup> Honduras' responses to questioning at the second hearing. In addition, the Dominican Republic noted that, at the interim review stage, it could pose only "rhetorical questions" to the Panel. (Dominican Republic's responses to questioning at the second hearing)

<sup>1443</sup> Dominican Republic's appellant's submission, para. 42. (emphasis omitted)



DSU by denying the parties an opportunity to comment on the Panel's reliance on multicollinearity and non-stationarity.

### 6.3 Claims under the TRIPS Agreement

6.544. On appeal, Honduras challenges the Panel findings under Articles 16.1 and 20 of the TRIPS Agreement only.<sup>1444</sup> The Dominican Republic appeals the Panel findings under Article 20 of the TRIPS Agreement.<sup>1445</sup>

#### 6.3.1 Article 16.1 of the TRIPS Agreement

6.545. Article 16.1 provides that:

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. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

6.546. Honduras requests us to reverse the Panel's finding that Honduras did not demonstrate that the TPP measures are inconsistent with Article 16.1 of the TRIPS Agreement<sup>1446</sup>, on the grounds that: (i) the Panel's interpretation of the "rights conferred" under Article 16.1 was in error; (ii) the Panel erred in its application of Article 16.1 to the TPP measures; and (iii) the Panel failed to comply with its obligation under Article 11 of the DSU to make an objective assessment of the matter.<sup>1447</sup>

6.547. Australia contests each of Honduras' claims.<sup>1448</sup> Australia asserts that if we uphold the Panel's interpretative analysis, we "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".<sup>1449</sup>

6.548. We begin with a summary of the Panel's findings. Thereafter, we address the claims of error raised by Honduras.

##### 6.3.1.1 Summary of the Panel's findings

6.549. The Panel understood the complainants to argue that, by prohibiting the use of certain tobacco-related trademarks on tobacco packaging and tobacco products, the TPP measures erode their distinctiveness, thereby "constraining trademark owners' ability to exercise their rights under Article 16.1".<sup>1450</sup> For the Panel, this argument by the complainants hinged on whether a reduction in the distinctiveness of a registered trademark affects the rights that Members must provide to the

<sup>1444</sup> Honduras' Notice of Appeal, pp. 1-3. Before the Panel, Honduras and the Dominican Republic claimed that the TPP measures are inconsistent with Articles 6*quinquies* and 10*bis* of the Paris Convention (1967) (read in conjunction with Article 2.1 of the TRIPS Agreement) and Articles 15.4, 16.1, 20, 22.2(b), and 24.3 of the TRIPS Agreement. The Panel found that the complainants had not demonstrated that the TPP measures are inconsistent with any of the cited provisions. (Panel Report (DS435), para. 8.1.b-h; Panel Report (DS441), para. 8.1.b) Two of the other complainants in the Panel proceedings, Cuba and Indonesia, also raised a claim under Article 16.3 of the TRIPS Agreement. (Panel Report (DS458), para. 8.1.b.v; Panel Report (DS441), para. 8.1.b.iv) Other than the Panel's findings under Articles 16.1 and 20 of the TRIPS Agreement, none of the other Panel findings under the TRIPS Agreement have been appealed.

<sup>1445</sup> Dominican Republic's Notice of Appeal, paras. 14-15.

<sup>1446</sup> Honduras' Notice of Appeal pp. 2-3 (referring to Panel Report (DS435), paras. 7.2051 and 8.1.d).

<sup>1447</sup> Honduras' Notice of Appeal, pp. 2-3.

<sup>1448</sup> Australia's appellee's submission, para. 80.

<sup>1449</sup> Australia's appellee's submission, para. 145.

<sup>1450</sup> Panel Report, para. 7.1971.

trademark owner under Article 16.1. The Panel therefore began by determining the content of the rights under Article 16.1.<sup>1451</sup>

6.550. Taking note of the definition of the word "prevent", the Panel considered 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>1452</sup> In the Panel's view, the text of 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>1453</sup> In light of the ordinary meaning of the text and, in its view, consistently with prior rulings<sup>1454</sup>, the Panel agreed with the parties that Article 16.1 does not establish a trademark owner's right to use its registered trademark. Rather, Article 16.1 provides only 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>1455</sup>

6.551. With respect to the scope of the right that WTO Members are obliged to confer on owners of registered trademarks under Article 16.1, the Panel noted that the trademark owner must have the exclusive right to prevent: (i) all third parties not having the owner's consent; (ii) from using in the course of trade, identical or similar signs for goods or services that are identical or similar to those with respect to which the trademark is registered; (iii) such use where it would result in a likelihood of confusion.<sup>1456</sup> The Panel considered that, by setting out the conditions under which the trademark owner must be able to prevent third parties' activities, Article 16.1 simultaneously defines what must, at a minimum, constitute an infringement of a registered trademark.<sup>1457</sup>

6.552. The Panel recalled that, pursuant to Article 1.1 of the TRIPS Agreement, Members have the obligation to "give effect to the provisions of this Agreement". According to the Panel, if the activities of an unauthorized third party meet the conditions set out in the first sentence of Article 16.1, then the trademark owner must have the right under a Member's domestic law to prevent such activities. Therefore, the Panel found that the essence of the Article 16.1 obligation is to ensure that rights are available to obtain relief against such infringing acts. In the Panel's view, it follows that, in order to show that the TPP measures are inconsistent with 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>1458</sup>

6.553. The Panel then turned to the complainants' argument that, by prohibiting the use of non-word trademarks on tobacco products, the TPP measures would reduce the distinctiveness of registered non-word trademarks because consumers would no longer associate these trademarks with the products for which they were registered. The Panel understood the complainants to argue that this reduction of distinctiveness would reduce the ability of the trademark owner to demonstrate a "likelihood of confusion", a "condition precedent"<sup>1459</sup> for exercising rights under Article 16.1, and thus to prevent unauthorized use of similar or identical signs on similar products in the market. The complainants focused their claim on the purported effect that the TPP measures would have on the ability to demonstrate confusion in cases where identical or similar signs were used on similar products, which the complainants identified as "tobacco accessories like lighters, matches, cigarette cases, or humidors".<sup>1460</sup>

<sup>1451</sup> Panel Report, para. 7.1972.

<sup>1452</sup> Panel Report, paras. 7.1973-7.1974.

<sup>1453</sup> Panel Report, para. 7.1974.

<sup>1454</sup> Panel Report, para. 7.1978 (referring to Appellate Body Report, *US – Section 211 Appropriations Act*, para. 186; Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.611 and fn 564 thereto).

<sup>1455</sup> Panel Report, para. 7.1978.

<sup>1456</sup> Panel Report, para. 7.1979. See also *ibid.*, paras. 7.1996-7.1998.

<sup>1457</sup> Panel Report, para. 7.1980.

<sup>1458</sup> Panel Report, para. 7.1980 and fn 4447 thereto.

<sup>1459</sup> Panel Report, para. 7.1982.

<sup>1460</sup> Panel Report, para. 7.1983 and fn 4450 thereto (referring to Indonesia's response to Panel question No. 29, para. 32 and fn 28 thereto; Honduras' first written submission to the Panel, paras. 235-236 and 249; Dominican Republic's first written submission to the Panel, para. 311; Dominican Republic's response to Panel question No. 32, para. 148).



6.554. The Panel noted that the complainants were not challenging *how* the criteria for trademark infringement are defined in Australia's domestic legislation. Nor were the complainants arguing that the TPP measures have affected how the Australian legal system assesses whether a "likelihood of confusion" exists. The Panel further noted that the complainants had not claimed that the TPP measures affect the procedural or evidentiary means available to right holders in infringement procedures to demonstrate that the infringement criteria are indeed fulfilled. To the Panel, the complainants also appeared to accept that, when these infringement criteria are fulfilled, a trademark owner is entitled to take legal action in Australia. Therefore, it was the Panel's understanding that the situation that the complainants described as the basis for their claim was not so much a reduction in the trademark owners' ability to demonstrate a "likelihood of confusion". Instead, it was a reduction of the instances in which "likelihood of confusion" would arise in the market with respect to tobacco-related trademarks whose use is affected by the TPP measures.<sup>1461</sup>

6.555. For the Panel, this argument consisted of two parts: (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 trademark 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>1462</sup>

6.556. With respect to what the Panel identified as "the factual allegation"<sup>1463</sup> regarding the loss of distinctiveness, the Panel observed that the "use" of a trademark, which is in principle relevant for the acquisition and maintenance of distinctiveness, is not limited to use on packaging of a product, but rather extends to a wider range of commercial, advertising, and promotional activities. The TPP measures constrain or prohibit the use of certain registered trademarks as applied to tobacco retail packaging and products, but do not constrain other uses of trademarks, such as advertising and promotion, also relevant for acquiring and maintaining distinctiveness.<sup>1464</sup> The Panel recalled that, in the Australian context, other measures, not at issue in these proceedings, limit or prohibit advertising and promotion of tobacco products. According to the Panel, any assessment of the impact of the regulation of packaging on a reduced likelihood of confusion would need to take place against this factual context.<sup>1465</sup>

6.557. In addition, the Panel noted that Article 16.1 provides protection against the unauthorized use of "similar or identical signs" on similar or identical products, which would result in a "likelihood of confusion". The Panel considered that, while the "similarity of signs" describes the single dimension of comparison between two signs, the criterion of "likelihood of confusion" is more multi-faceted, depending, in addition, on the "similarity of goods and services" and on the specific nature of the use.<sup>1466</sup> Thus, for the Panel, an assessment of the "likelihood of confusion" with respect to a given trademark in a given situation is a factual assessment that will involve a consideration of the specific circumstances at issue, including the manner in which the potential for confusion arises in the specific market at issue. The Panel was therefore not persuaded that the operation of the TPP measures would necessarily have the impact that the complainants alleged on the existence of a "likelihood of confusion", or how this would be assessed in relation to a specific trademark.<sup>1467</sup> In any event, the Panel considered that it would need to make a determination with respect to this factual allegation only if it concluded that reducing the instances in which a trademark owner would be able to prevent the unauthorized use of similar or identical trademarks in the market, because such use is no longer likely to cause a "likelihood of confusion", leads to a violation of Article 16.1.<sup>1468</sup>

6.558. In this regard, the Panel highlighted that there is nothing in the text of the first sentence of Article 16.1 to suggest – as the complainants had implied – an obligation by Members not only to provide protection where likelihood of confusion does arise, but also to maintain market conditions

<sup>1461</sup> Panel Report, paras. 7.1985-7.1987.

<sup>1462</sup> Panel Report, para. 7.1988.

<sup>1463</sup> Panel Report, para. 7.1988.

<sup>1464</sup> Panel Report, para. 7.1989 (referring to WIPO, *WIPO Intellectual Property Handbook*, 2nd edn (Geneva, 2004; reprinted 2008) (Panel Exhibit DOM-65), paras. 2.339-2.351).

<sup>1465</sup> Panel Report, para. 7.1989.

<sup>1466</sup> Panel Report, para. 7.1991.

<sup>1467</sup> Panel Report, paras. 7.1992-7.1993.

<sup>1468</sup> Panel Report, para. 7.1993.

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. According to the Panel, whether unauthorized third parties actually use similar or identical signs on similar goods or services in the market, and whether such use actually does or does not result in a "likelihood of confusion" among consumers, is immaterial to the assessment of whether a Member ensures that a trademark owner has, at its disposal, the right to prevent such acts by third parties, in compliance with Article 16.1.<sup>1469</sup>

6.559. Rather, the Panel found that Members comply with the obligation under Article 16.1 if their domestic legislation provides owners of registered trademarks with the exclusive right to prevent the activities by third parties proscribed in that provision.<sup>1470</sup> The Panel considered this understanding to be consistent with the purpose of the exclusive rights conferred by Article 16.1, which is to protect the right owner against infringements of its registered trademarks.<sup>1471</sup> The Panel cautioned that "[t]o conclude otherwise would effectively broaden the scope of Article 16.1 to encompass an additional right to protect against reduction of distinctiveness of a trademark, or even a right to protect against lesser awareness of a trademark among consumers."<sup>1472</sup>

6.560. Next, the Panel addressed the issue of whether the TPP measures are inconsistent with Article 16.1 by impairing the distinctiveness of tobacco-related registered trademarks. The Panel noted that Cuba, the Dominican Republic, and Indonesia had claimed that Article 16.1 imposes a general obligation on Members to refrain from adopting measures that would undermine or eliminate the distinctiveness of trademarks and thus impair or eliminate the possibility to exercise the right to exclude guaranteed under Article 16.1.<sup>1473</sup>

6.561. The Panel recalled its finding that Article 16.1 does not contain a right to *use* a trademark. Rather, the Panel considered that WTO Members comply with the obligation under Article 16.1, first sentence, by providing to the owner of a registered trademark the exclusive right to prevent trademark infringements as described by the criteria set out therein. Against this background, the Panel found no indication in the text of Article 16.1, first sentence, of an obligation on Members to maintain the distinctiveness of registered trademarks, or to refrain from regulatory conduct that might negatively affect the distinctiveness of such trademarks through use.<sup>1474</sup>

6.562. In this regard, the Panel took note of the finding by the panel in *EC – Trademarks and Geographical Indications (Australia)* cited by the Dominican Republic and Indonesia. The panel in *EC – Trademarks and Geographical Indications (Australia)* stated that "[e]very trademark owner has a legitimate interest in preserving the distinctiveness ... 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>1475</sup> The Panel recalled that the panel in *EC – Trademarks and Geographical Indications (Australia)* had made this finding in the context of Article 17 of the TRIPS Agreement when examining what constitutes "legitimate interests" that need to be taken into account to justify a limited exception under that provision.<sup>1476</sup>

6.563. The Panel understood 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>1477</sup> The Panel therefore reasoned that the panel finding in *EC – Trademarks and Geographical Indications (Australia)* does not support the argument that the trademark owner's

<sup>1469</sup> Panel Report, para. 7.2000.

<sup>1470</sup> Panel Report, paras. 7.1999-7.2000.

<sup>1471</sup> Panel Report, para. 7.2001 (referring to Appellate Body Report, *US – Section 211 Appropriations Act*, para. 186).

<sup>1472</sup> Panel Report, para. 7.2002.

<sup>1473</sup> Panel Report, para. 7.2003.

<sup>1474</sup> Panel Report, para. 7.2005.

<sup>1475</sup> Panel Report, para. 7.2003 (quoting Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664).

<sup>1476</sup> Panel Report, para. 7.2006.

<sup>1477</sup> Panel Report, para. 7.2008. (emphasis original)

interest in preserving the distinctiveness of a registered trademark, and its interest in using the trademark to that end, creates a general obligation under Article 16.1 for Members to refrain from adopting measures that would undermine or eliminate the distinctiveness of trademarks.<sup>1478</sup>

6.564. The Panel emphasized that the focus of the trademark owner's right conferred by Article 16.1 is on preventing use by third parties that results in a "likelihood of confusion" in the market. For the Panel, Article 16.1 is not intended to protect against waning distinctiveness due to other reasons, such as changing market conditions, inaction of the trademark owner, or changing consumer perception. Likewise, the Panel considered that Article 16.1 does not imply that Members have a general obligation not to undermine the distinctiveness of registered trademarks through regulatory measures.<sup>1479</sup>

6.565. In this regard, the Panel took note of another finding by the panel in *EC – Trademarks and Geographical Indications (Australia)* to the effect that, because the TRIPS Agreement "provides for the grant of negative rights to prevent certain acts" rather than "positive rights to exploit or use", "many measures to attain ... public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement."<sup>1480</sup> The Panel considered that this finding confirmed its view that, in the absence of a positive right to use a trademark, regulatory measures that do not affect the negative right to prevent infringing uses are not prohibited by Article 16. The Panel opined that its view was further confirmed by the context of Article 16.1. The Panel referred to Article 19, which expressly contemplates government measures that can constitute an obstacle to trademark use. The Panel also noted that Article 20 permits certain encumbrances on trademark use by special requirements.<sup>1481</sup>

6.566. Accordingly, the Panel disagreed with the claim that Article 16.1 contains a general obligation on Members to refrain from regulatory measures that can negatively affect distinctiveness of individual registered trademarks, whether such measures affect trademarks incidentally or directly. The Panel highlighted that, since the TPP measures had not been found to be in violation of Article 16.1, the question raised by Honduras and Indonesia of whether the TPP measures are permissible as "limited exceptions" under Article 17 did not arise.<sup>1482</sup>

6.567. The Panel also addressed an argument raised by Cuba, which Honduras reiterates on appeal.<sup>1483</sup> Before the Panel, Cuba, relying on the principle of effective treaty interpretation, argued that Article 16.1 obliges Members to provide registered trademark owners with a "minimum opportunity" to use their trademarks, because otherwise the minimum rights required by Article 16.1 are not guaranteed.<sup>1484</sup>

6.568. The Panel posited that, while the TRIPS Agreement recognizes the trademark owner's legitimate interest in using the registered trademark, the legal operation of the "right to prevent" in Article 16.1 does not *per se* require use of the registered trademark itself.<sup>1485</sup> For the Panel, adopting an interpretation of Article 16 that would require Members to safeguard a minimum opportunity to use the registered trademark is not only without basis in the text of the provision itself, but would also create disharmony with those provisions of the trademark section that: (i) expressly provide for conditions under which use can be encumbered (Article 20); and (ii) address the consequences of obstacles to use (Article 19). According to the Panel, these provisions clearly foresee potential regulatory prevention of use. For these reasons, the Panel found that the obligation to give a legally operative meaning to all the provisions in Section 2 of Part II of the TRIPS Agreement harmoniously, without reducing any of them to redundancy, does not support an interpretation of the minimum

<sup>1478</sup> Panel Report, para. 7.2008.

<sup>1479</sup> Panel Report, paras. 7.2011 and 7.2014.

<sup>1480</sup> Panel Report, para. 7.2015 (quoting Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246).

<sup>1481</sup> Panel Report, paras. 7.2015-7.2016.

<sup>1482</sup> Panel Report, para. 7.2018 (referring to Honduras' first written submission to the Panel, para. 252; Indonesia's second written submission to the Panel, para. 72).

<sup>1483</sup> See, for example, Honduras' appellant's submission, paras. 153, 327-333, and 353.

<sup>1484</sup> Panel Report, para. 7.2019.

<sup>1485</sup> Panel Report, para. 7.2025 and fn 4516 thereto, and para. 7.2026.

rights in Article 16 as requiring Members to provide a minimum opportunity to use a registered trademark.<sup>1486</sup>

6.569. The Panel concluded that the possibility of a reduced occurrence of a "likelihood of confusion" in the market does not, in and of itself, constitute a violation of Article 16.1, because Members' compliance with the obligation to provide the right to prevent trademark infringements under Article 16.1 is independent of whether such infringements actually occur in the market. For the Panel, 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>1487</sup>

6.570. The Panel also found that, in order to demonstrate that the TPP measures are inconsistent with Article 16.1, the complainants would have to demonstrate that, under Australian national law, the trademark owner does not have the right to prevent third-party activities that meet the conditions set out in that provision.<sup>1488</sup> The Panel concluded that the complainants had not demonstrated that the TPP measures are inconsistent with Article 16.1 of the TRIPS Agreement.<sup>1489</sup>

### 6.3.1.2 Whether the Panel erred in its interpretation of Article 16.1

6.571. Honduras claims that the Panel erred in its interpretation of Article 16.1.<sup>1490</sup> Honduras' appeal calls for us to identify the right that is protected under Article 16.1, the scope of that right, and the corresponding obligation imposed on WTO Members with respect to that right.

6.572. As a preliminary matter, we observe that there appears to be a degree of internal tension in Honduras' arguments on appeal. On the one hand, Honduras contends that "the dispute was never about whether there exists an undefined 'positive right to use' a trademark."<sup>1491</sup> On the other hand, Honduras maintains that "the use of the trademark determines the mark's strength and thus directly affects the scope of protection conferred by Article 16."<sup>1492</sup> In the same vein, Honduras argues that the Panel's findings on 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). Honduras submits that, pursuant to Article 16.1, a trademark owner can sue in order to protect its trademark, "so that the trademark can be used" to perform its important function in the course of trade.<sup>1493</sup>

6.573. At the first hearing, we asked Honduras several questions aimed at eliciting a better understanding of Honduras' position on appeal regarding the rights conferred under Article 16.1, and its challenge to the Panel's interpretation of this provision. In response to our questions, Honduras explained that it considers use to be "essential to all of the rights conferred to trademark owners".<sup>1494</sup> In Honduras' view, the rights conferred are a means to an end. Honduras emphasized that the purpose of the right in Article 16.1 is "to protect the distinctiveness of the mark".<sup>1495</sup> Honduras added that use is essential in the maintenance of the distinctiveness of a trademark in the marketplace. Honduras asserted that, by imposing a prohibition on use, thereby reducing the

<sup>1486</sup> Panel Report, paras. 7.2028-7.2030.

<sup>1487</sup> Panel Report, para. 7.2031. The Panel made two further findings that are not the subject of these appellate proceedings: (i) that Cuba had not explained how the cancellation of a registered trademark that consists of non-inherently distinctive non-word signs and that may have lost distinctiveness due to the application of the TPP measures "constitutes a violation of Article 16.1" (Panel Report, para. 7.2040); and (ii) that Indonesia, and Cuba, by reference, had not made a *prima facie* case that the TPP measures erode a trademark owner's right under Article 16.1 by requiring the use of deceptively similar marks on identical products and at the same time depriving owners of the remedy to prevent uses of similar signs that create a "likelihood of confusion". (Panel Report, para. 7.2050)

<sup>1488</sup> Panel Report, para. 7.2050.

<sup>1489</sup> Panel Report, para. 7.2051.

<sup>1490</sup> Honduras' Notice of Appeal, pp. 2-3.

<sup>1491</sup> Honduras' appellant's submission, para. 349.

<sup>1492</sup> Honduras' appellant's submission, para. 431.

<sup>1493</sup> Honduras' appellant's submission, para. 325. (emphasis omitted)

<sup>1494</sup> Honduras' response to questioning at the first hearing.

<sup>1495</sup> Honduras' response to questioning at the first hearing.

distinctiveness of the trademarks at issue, the TPP measures have effectively "shrunk the scope of protection".<sup>1496</sup>

6.574. Based on Honduras' Notice of Appeal, appellant's submission, and responses to questioning at the first hearing, we understand the reasoning underpinning each of Honduras' arguments as focusing on three central and interconnected themes: (i) Article 16.1 of the TRIPS Agreement (read together with Articles 15, 17, 19, and 20 of the TRIPS Agreement) confers upon the owner of a registered trademark the right to use its trademark; (ii) the distinctiveness of a trademark and the "likelihood of confusion" in Article 16.1 are closely related concepts that impose a requirement on Members to protect the distinctiveness of a trademark through use; and (iii) pursuant to Article 16.1, Members must guarantee a minimum level of protection relating to the distinctiveness and use of trademarks, which then "guarantee[s] particular outcomes".<sup>1497</sup> Accordingly, in addressing Honduras' arguments, we also address, *inter alia*, these three recurring themes.

6.575. We begin with Honduras' contention that the Panel findings on 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). Honduras submits that pursuant to Article 16.1, a trademark owner can sue in order to protect its trademark, "so that the trademark can be used" to perform its important function in the course of trade.<sup>1498</sup> Honduras argues that the Panel ignored the importance of "use" to the enforcement of trademarks and read Article 16 without considering the context of, in particular, Articles 15, 19, and 20, which, according to Honduras, put the functional use of trademarks at the heart of the trademark rights protected by the TRIPS Agreement.<sup>1499</sup>

6.576. For Australia, the necessary implication of Honduras' 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>1500</sup> In Australia's view, Article 16.1 does not require Members to confer upon the owner of a registered trademark a right to use that trademark.<sup>1501</sup>

6.577. The starting point of our analysis is the text of the TRIPS Agreement. Given the unique structure of the TRIPS Agreement as compared to the other covered agreements<sup>1502</sup>, in order to establish properly the right that is protected under Article 16.1 and the corresponding obligation on WTO Members, we consider it useful to place Article 16.1 in its proper context in the TRIPS Agreement.<sup>1503</sup>

<sup>1496</sup> Honduras' response to questioning at the first hearing.

<sup>1497</sup> Honduras' appellant's submission, para. 375.

<sup>1498</sup> Honduras' appellant's submission, para. 325. (emphasis omitted)

<sup>1499</sup> Honduras' appellant's submission, para. 366.

<sup>1500</sup> Australia's appellee's submission, para. 123 and fn 135 thereto (referring to Honduras' appellant's submission, para. 359).

<sup>1501</sup> Australia's appellee's submission, para. 87.

<sup>1502</sup> The TRIPS Agreement addresses intellectual property rights, which are private rights held by natural or legal persons. (TRIPS Agreement, fourth recital of the Preamble) For purposes of the TRIPS Agreement, the natural or legal persons that are the right holders must be nationals of WTO Members. (TRIPS Agreement, fn 1 to para. 3) In addition, the TRIPS Agreement derives a significant proportion of its content from pre-existing international intellectual property agreements or conventions that were negotiated outside the GATT 1947/WTO framework. Moreover, the TRIPS Agreement, as an agreement addressing intellectual property rights, is principally concerned with the creation and protection of *exclusive* private rights. By definition, these exclusive rights act to restrict commercial activity and require an active intervention of government to enforce these restrictions. As the panels in *EC – Trademarks and Geographical Indications (Australia)* and *EC – Trademarks and Geographical Indications (US)* stated, the TRIPS 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". (Panel Reports, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246; *EC – Trademarks and Geographical Indications (US)*, para. 7.210)

<sup>1503</sup> As the Appellate Body has said, "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously." (Appellate Body Report, *Argentina – Footwear (EC)*, para. 81 (referring to Appellate Body Reports, *Korea – Dairy*, para. 81; *India – Patents (US)*, fn 25 to para. 45; *US – Gasoline*, p. 3, DSR 1996:I, p. 23; *Japan – Alcoholic Beverages II*, p. 97, DSR 1996:I, p. 106) (emphasis original))

6.578. Article 1.1 imposes an obligation on Members to "give effect to the provisions of" the TRIPS Agreement. Specifically, as regards trademarks, Members have an obligation to give effect to the provisions of Articles 15-21 of the TRIPS Agreement.

6.579. Article 15.1 defines the subject matter that is protectable as a trademark.<sup>1504</sup> According to Article 15.1, 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. Thus, a trademark serves to distinguish the goods or services of one undertaking from those of other undertakings. Article 15.1 also states that "[w]here signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use." Hence, Article 15.1 suggests that, in terms of eligibility for registration, the norm is the presentation of signs that are "inherently" distinctive. It is only in situations when a sign is not inherently distinctive that the "distinctiveness acquired through use" becomes relevant. We observe that the "distinctiveness" of a sign, discussed in Article 15.1, relates to the eligibility for registration of a sign as a trademark, and not to the rights conferred to the trademark owner once its trademark is registered. We recall that the question whether a sign is eligible for registration as a trademark is not at issue in these proceedings.

6.580. While Article 15 defines the subject matter that may be protected as a trademark and the rules governing the eligibility for registration of a sign as a trademark, Article 16 addresses the rights conferred on a trademark owner following such registration.<sup>1505</sup> Article 16.1 states:

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. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.<sup>1506</sup>

6.581. The first sentence of Article 16.1 identifies the holder of the exclusive right conferred under this provision as the "owner of a registered trademark". The trademark owner can exercise its exclusive right as against "all third parties not having the owner's consent" (unauthorized third parties). Thus, the owner of a registered trademark can exercise its exclusive right under Article 16.1 as against an unauthorized third party, but not against the WTO Member in whose territory the trademark is protected. Rather, in accordance with Article 1.1, WTO Members are required to "give effect" to Article 16.1 by ensuring that, in the Members' domestic legal regimes, the owner of a registered trademark can exercise its exclusive right as against unauthorized third parties.<sup>1507</sup>

6.582. Pursuant to Article 16.1, the owner of a registered trademark has the exclusive right to "prevent" all unauthorized third parties from behaving in a certain manner in the course of trade. Hence, the exclusive right conferred under Article 16.1 is one that grants a trademark owner the authority to "prevent" certain behaviour, which may be understood as the authority to "preclude,

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<sup>1504</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.600. Article 15.1 of the TRIPS Agreement 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.

<sup>1505</sup> Articles 16.2 and 16.3, which are not at issue in these appellate proceedings, concern the protection of well-known marks pursuant to Article 6*bis* of the Paris Convention (1967).

<sup>1506</sup> We note that the Paris Convention (1967) contains no analogous provision to Article 16.1 of the TRIPS Agreement.

<sup>1507</sup> As the Appellate Body stated in *US – Section 211 Appropriations Act*, "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." (Appellate Body Report, *US – Section 211 Appropriations Act*, para. 186) (emphasis original)

stop, or hinder"<sup>1508</sup> such behaviour. As the panel in *EC – Trademarks and Geographical Indications (Australia)* said, the TRIPS 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".<sup>1509</sup> Specifically, Article 16.1 grants a trademark owner the exclusive right to preclude unauthorized third parties from using, in the course of trade, identical or similar signs for goods or services that are identical or similar to those with respect to which the trademark is registered.<sup>1510</sup>

6.583. However, a trademark owner may only exercise its exclusive right under Article 16.1 against an unauthorized third party once certain cumulative conditions are met: (i) the unauthorized third party must be using the identical or similar signs for goods or services "in the course of trade"; (ii) the goods or services, with respect to which the unauthorized third party is using the identical or similar signs, must be identical or similar to the goods or services with respect to which the trademark is registered; and (iii) the unauthorized third party's use of the identical or similar signs "would result in a likelihood of confusion".

6.584. With respect to this third condition, we recall that, pursuant to Article 15.1, for a sign to be "eligible for registration" as a trademark, it must be "capable of distinguishing the goods or services of one undertaking from those of other undertakings". In our view, the likelihood of confusion, which may result from the conduct of unauthorized third parties identified in Article 16.1, relates to the distinguishing function of the trademark in question. This view is supported by the second sentence of Article 16.1, which clarifies that in the case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. Indeed, the use of identical signs would effectively do away with the capability of a trademark to "distinguish[]" the goods or services of one undertaking from those of other undertakings", as reflected in Article 15.1.

6.585. Nonetheless, while we agree with Honduras that the risk of a "likelihood of confusion" in Article 16.1 relates to the distinguishing function of a trademark, we caution against extrapolating too broadly from this relationship. In this regard, we note Honduras' contention that the protection of the distinctiveness through the use of a trademark is implied from the purpose of Article 16.1. According to Honduras:

Article 16.1 provides private parties with a means to an end: the "rights conferred" are to be guaranteed in order to allow the trademark owner to protect the distinctiveness of the trademark by taking legal action against unauthorised use of similar signs. But the ability to take this legal action is not an end in itself; rather, it is ultimately only a means that serves a particular purpose. The owner can sue in order to protect his or her trademark, so that the trademark can be used to perform its important function in the course of trade. This, in turn, will allow the trademark owner to further develop goodwill based on that trademark.

The Panel's findings on 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). The result is a formalistic and exceedingly narrow view of these means, viewed in near-total isolation, leading to minimal protection that is devoid of meaning.<sup>1511</sup>

6.586. We note that, in putting forward this argument, Honduras makes no reference to the text of Article 16 or indeed any other provision of the TRIPS Agreement. We too have not come across any

<sup>1508</sup> Oxford English Dictionary online, definition of "prevent", <https://www.oed.com/view/Entry/151073?rskey=rO5lqh&result=2&isAdvanced=false#eid>, accessed 24 February 2020.

<sup>1509</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246; see also Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.210.

<sup>1510</sup> We observe that the third sentence of Article 16.1 qualifies the right conferred by the first sentence. (Panel Reports, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.602; *EC – Trademarks and Geographical Indications (US)*, para. 7.602) The third sentence notes that the exclusive rights described in the first sentence "shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use". This third sentence reflects the reality that, depending on a Member's domestic legal regime, ownership of a trademark may be acquired through registration, or through use. (Appellate Body Report, *US – Section 211 Appropriations Act*, para. 199)

<sup>1511</sup> Honduras' appellant's submission, paras. 325-326. (emphasis omitted)

language in the TRIPS Agreement that endorses the position that the *purpose* of the exclusive right articulated in Article 16.1 is to allow a trademark owner to protect the distinctiveness of the trademark through the trademark owner's continued use of that trademark. In this vein, we recall that Article 2.1 of the TRIPS Agreement provides that, "[i]n respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)." None of these referenced provisions of the Paris Convention (1967) grant a trademark owner a positive right to use its trademark, or a right to protect the distinctiveness of that trademark through use.<sup>1512</sup> Hence, neither the TRIPS Agreement nor the provisions of the Paris Convention (1967) that are incorporated by reference into the TRIPS Agreement confer upon a trademark owner a positive right to use its trademark or a right to protect the distinctiveness of that trademark through use. Accordingly, there is no corresponding obligation on Members to "give effect"<sup>1513</sup> to such "rights". Rather, in accordance with Article 1.1 of the TRIPS Agreement, Members are required to give effect to Article 16.1 by ensuring that, in the Members' domestic legal regimes, the owner of a registered trademark can exercise its "exclusive right to prevent" the infringement of its trademark by unauthorized third parties.

6.587. As the panel in *EC – Trademarks and Geographical Indications (Australia)* observed, the TRIPS 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".<sup>1514</sup> Specifically, Article 16.1 grants a trademark owner the exclusive right to preclude unauthorized third parties from using, in the course of trade, identical or similar signs for goods or services that are identical or similar to those with respect to which the trademark is registered. The owner of a registered trademark can exercise its "exclusive right" as against an unauthorized third party but not against the WTO Member in whose territory the trademark is protected. Instead, in accordance with Article 1.1, Members are required to give effect to Article 16.1 by ensuring that, in the Members' domestic legal regimes, the owner of a registered trademark can exercise its "exclusive right to prevent" the infringement of its trademark by unauthorized third parties. Hence, for purposes of WTO dispute settlement, in order to establish that a WTO Member has acted inconsistently with Article 16.1, the complaining Member must demonstrate that, under the responding Member's domestic legal regime, the owner of a registered trademark cannot exercise its "exclusive right to prevent" the infringement of its trademark by unauthorized third parties.

6.588. For these reasons, we find that the Panel was correct in finding 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>1515</sup>

6.589. Honduras also challenges the Panel's finding that there is "no indication in the text of Article 16.1, first sentence, of an obligation on Members to maintain the distinctiveness of registered trademarks, or to refrain from regulatory conduct that might negatively affect the distinctiveness of such trademarks through use".<sup>1516</sup> Honduras submits that this dispute was never about whether there exists an undefined "positive right to use" a trademark, nor was the dispute about the "entitlement to maintain or extend the distinctiveness of an individual trademark" in light of market conditions.<sup>1517</sup> According to Honduras, the question put before the Panel was whether measures that

<sup>1512</sup> In this respect, we note that Australia submitted to the Panel a response by WIPO in 1994 to enquiries from law firms as to whether the Paris Convention (1967) requires countries to permit the use of trademarks. WIPO stated that the Paris Convention (1967) contains a number of provisions setting standards for the registration and protection of trademarks. However, WIPO indicated that "[t]he Paris Convention does not contain any obligation to the effect that the use of a registered trademark must be permitted." (Australia's first written submission to the Panel, para. 246 (quoting Letter dated 6 July 1994 from D. Latham of Lovell, White, Durrant to J. Smithson, Public Affairs Manager, Rothmans International Services Limited, attaching letter dated 5 July 1994 from L. Baeumer, Director, Industrial Property Law Department, WIPO, to D. Latham of Lovell, White, Durrant, Bates Nos. 502592535-502592536 (Panel Exhibit AUS-234)))

<sup>1513</sup> Article 1.1 of the TRIPS Agreement.

<sup>1514</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246; see also Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.210.

<sup>1515</sup> Panel Report, para. 7.1978.

<sup>1516</sup> Honduras' appellant's submission, para. 342 (quoting Panel Report, para. 7.2005).

<sup>1517</sup> Honduras' appellant's submission, paras. 348-349 (quoting Panel Report, para. 7.2015).



reduce the scope of the rights conferred by Article 16.1 in a direct and deliberate manner are consistent with the obligation under Article 16.1 of guaranteeing minimum protection. Honduras contends that the Panel "never addressed that question and made general findings that are inapposite to the case at hand".<sup>1518</sup> In this regard, Honduras refers to the Appellate Body's reasoning in *US – Section 211 Appropriations Act* that "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" to assert that Article 16 imposes an obligation on WTO Members to guarantee particular outcomes.<sup>1519</sup>

6.590. Australia responds by asserting that an interpretation based on an implied "right of use", "right of distinctiveness", or "right of confusion" has no foundation in the text. According to Australia, a proper interpretative analysis under Article 31 of the Vienna Convention<sup>1520</sup> establishes that none of these "rights" is protected by Article 16.1, and Honduras' argument that the Panel erred by not reading any of these non-existent "rights" into the text of that provision is without merit.<sup>1521</sup>

6.591. We note Honduras' reference to the Appellate Body's reasoning in *US – Section 211 Appropriations Act*.<sup>1522</sup> The Appellate Body stated that:

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.<sup>1523</sup>

6.592. When referring to the "exclusive rights" that Members must guarantee in their domestic legislation, the Appellate Body was careful to underline that these "exclusive rights" protect the owner against infringement of the registered trademark by unauthorized third parties.<sup>1524</sup> Indeed, with respect to Article 16.1, Members must guarantee that, in their domestic legislation, the owner of a registered trademark has the "exclusive right to prevent" unauthorized third parties from infringing its trademark. Contrary to what Honduras suggests, Article 16.1 does not require Members to "guarantee particular outcomes"<sup>1525</sup>, beyond what is expressly articulated in the provision. Thus, we consider that the Panel was correct in finding that:

7.1980. ... The essence of the Article 16.1 obligation is to ensure that rights are available to obtain relief against such infringing acts. It follows that, in order to show that the TPP measures violate Australia's obligation 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.

...

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[**\*fn original**] <sup>4447</sup> Under Article 1.1 of the TRIPS Agreement, Members have the obligation to "give effect to the provisions of this Agreement".

7.2005. We recall our finding above that Article 16.1 does not contain a right to use a trademark, and that Members comply with the obligation in Article 16.1, first sentence,

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<sup>1518</sup> Honduras' appellant's submission, para. 349.

<sup>1519</sup> Honduras' appellant's submission, para. 375 (quoting Appellate Body Report, *US – Section 211 Appropriations Act*, para. 186 (emphasis added by Honduras)).

<sup>1520</sup> Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331 (Vienna Convention).

<sup>1521</sup> Australia's appellee's submission, para. 140.

<sup>1522</sup> Honduras' appellant's submission, para. 375 (quoting Appellate Body Report, *US – Section 211 Appropriations Act*, para. 186 (emphasis added by Honduras)). We note that despite several exchanges at the first hearing in these appellate proceedings, Honduras provided no specific response to what it considered to be the "minimum rights that Members must protect under the TRIPS Agreement". (Honduras' appellant's submission, para. 420)

<sup>1523</sup> Appellate Body Report, *US – Section 211 Appropriations Act*, para. 186. (fn omitted; emphasis omitted)

<sup>1524</sup> Appellate Body Report, *US – Section 211 Appropriations Act*, para. 186.

<sup>1525</sup> Honduras' appellant's submission, para. 375.

by providing to the owner of a registered trademark the exclusive right to prevent trademark infringements as described by the criteria set out therein. ... [C]ompliance with this obligation is independent of whether trademark infringements actually occur in the market, or whether the right owners actually choose to exercise the right to prevent available to them. Against this background, we find no indication in the text of Article 16.1, first sentence, of an obligation on Members to maintain the distinctiveness of registered trademarks, or to refrain from regulatory conduct that might negatively affect the distinctiveness of such trademarks through use.<sup>1526</sup>

6.593. Still in connection with the text of Article 16.1, we take note of Honduras' argument concerning the words "exclusive right to prevent" in this provision. Honduras refers to the panel report in *EC – Trademarks and Geographical Indications (Australia)*. That panel noted that the "exclusive right" referred to in Article 16.1 indicates that "this right belongs to the owner of the registered trademark alone, who may exercise it to prevent certain uses by 'all third parties' not having the owner's consent."<sup>1527</sup> Honduras suggests that the panel report in *EC – Trademarks and Geographical Indications (Australia)*, along with Sections 20 and 26 of Australia's Trade Marks Act 1995 (Cth) (TM Act), illustrates that "saying that the owner has the exclusive right to prevent use by others is in fact no different from saying that the owner is the only one who is able to use the mark."<sup>1528</sup>

6.594. Honduras' argument conflates the rights conferred to trademark owners in Australia under Articles 20 and 26 of Australia's TM Act, with the rights conferred to trademark owners under Article 16.1 of the TRIPS Agreement. On the one hand, pursuant to Article 16.1, the owner of a registered trademark shall have the "exclusive right to prevent" all unauthorized third parties from using in the course of trade identical or similar signs for goods or services that are identical or similar to those with respect to which the trademark is registered where such use would result in a likelihood of confusion. On the other hand, Section 20 of Australia's TM Act – which is not challenged in these disputes – provides that "[i]f a trade mark is registered, the registered owner of the trade mark has, subject to this Part, the exclusive rights: (a) to use the trade mark ... in relation to the goods and/or services in respect of which the trade mark is registered."<sup>1529</sup> Similarly, Section 26 of the TM Act states that:

Subject to any agreement between the registered owner of a registered trade mark and an authorised user of the trade mark, the authorised user may do any of the following:

(a) the authorised user may use the trade mark in relation to the goods and/or services in respect of which the trade mark is registered, subject to any condition or limitation subject to which the trade mark is registered[.]<sup>1530</sup>

6.595. The TM Act expressly refers to the right of the trademark owner, or its authorized user, to "use" the trademark. No such language exists in Article 16.1 of the TRIPS Agreement. Moreover, any allegation concerning the infringement of Australia's domestic laws is subject to adjudication and enforcement under Australia's domestic legal regime. As stated in paragraph 6.587. above, in accordance with Article 1.1, Members are required to give effect to Article 16.1 by ensuring that, in the Members' domestic legal regimes, the owner of a registered trademark can exercise its "exclusive right to prevent" the infringement of its trademark by unauthorized third parties. Hence, for purposes of WTO dispute settlement, in order to establish that a WTO Member has acted inconsistently with Article 16.1, the complaining Member must demonstrate that under the responding Member's domestic legal regime, the owner of a registered trademark cannot exercise its "exclusive right to prevent" the infringement of its trademark by unauthorized third parties. Thus, Honduras' reliance on Australia's TM Act<sup>1531</sup>, which is not a measure at issue in these disputes, has no bearing on the

<sup>1526</sup> Panel Report, paras. 7.1980 and 7.2005.

<sup>1527</sup> Honduras' appellant's submission, para. 408 (quoting Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.602). (emphasis added by Honduras omitted)

<sup>1528</sup> Honduras' appellant's submission, para. 411 and fns 190-191 thereto (referring to the TM Act (Panel Exhibit JE-6), Sections 20 and 26).

<sup>1529</sup> TM Act (Panel Exhibit JE-6), Section 20(1).

<sup>1530</sup> TM Act (Panel Exhibit JE-6), Section 26(1)(a).

<sup>1531</sup> Honduras' appellant's submission, para. 411 and fns 190-191 thereto (referring to the TM Act (Panel Exhibit JE-6), Sections 20 and 26).

right conferred under Article 16.1. Nor does Australia's TM Act introduce a general obligation under Article 16.1 for Members to protect a trademark owner's right to use its trademark.

6.596. Rather, we understand Australia, through its TM Act, to have provided for the "more extensive protection" contemplated in the second sentence of Article 1.1 of the TRIPS Agreement. The second sentence states that "Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement."<sup>1532</sup> Thus, when a Member individually provides for "more extensive protection", this does not imply additional obligations under the TRIPS Agreement. Rather, the "more extensive protection" becomes a matter for domestic adjudication and enforcement. For these reasons, we reject Honduras' assertion that "saying that the owner has the exclusive right to prevent use by others is in fact no different from saying that the owner is the only one who is able to use the mark."<sup>1533</sup>

6.597. Honduras also refers to the phrase "likelihood of confusion" in Article 16.1 to argue that the use of the trademark determines the trademark's strength and thus directly affects the scope of protection conferred by Article 16.1. Honduras maintains that an action against the infringement of even an inherently distinctive mark is likely to fail because of an absence of a likelihood of confusion as a result of the weak marketplace strength of the trademark. Rather, Honduras considers that distinctiveness of a trademark, its use, and likelihood of confusion "are closely related concepts".<sup>1534</sup> Thus, Honduras contends that "[t]reating 'likelihood of confusion' as a separate triggering condition ignores this feature of trademark law."<sup>1535</sup> In Honduras' view, a Member that directly and deliberately seeks to reduce the strength of the mark, thereby making it impossible, over time, to demonstrate a likelihood of confusion other than in the context of the use of identical signs on identical products (when such a likelihood is presumed), acts inconsistently with Article 16.1.<sup>1536</sup>

6.598. In its appellant's submission, Honduras did not identify the aspects of the Panel's interpretation that it was challenging under this rubric of "likelihood of confusion". In response to questioning at the first hearing, Honduras indicated that the Panel conflated the notion of "likelihood of confusion" in Article 16.1 of the TRIPS Agreement with the actual confusion that is prohibited under Article 10*bis* of the Paris Convention (1967)<sup>1537</sup>, which is incorporated into the TRIPS Agreement through Article 2.1. Specifically, Honduras pointed to the following statements by the Panel:

There is nothing in the text of the first sentence of Article 16.1 to suggest – as the complainants imply – an obligation by Members not only to provide protection where likelihood of confusion does arise but also to 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>1538</sup>

6.599. First, contrary to Honduras' assertion, it is apparent from the quote above that the Panel did not conflate the notions of "actual confusion" and "likelihood of confusion". Rather, in its own words, the Panel was referring to the "market conditions that would enable the circumstances set out in this provision, including a likelihood of confusion, to *actually* occur".<sup>1539</sup> Second, as discussed above, a trademark owner may exercise its exclusive right under Article 16.1 only once certain cumulative conditions are met.<sup>1540</sup> In accordance with Article 1.1, Members are required to give effect to

<sup>1532</sup> See also Panel Report, *China – Intellectual Property Rights*, para. 7.513.

<sup>1533</sup> Honduras' appellant's submission, para. 411 and fns 190-191 thereto (referring to the TM Act (Panel Exhibit JE-6), Sections 20 and 26).

<sup>1534</sup> Honduras' appellant's submission, para. 428.

<sup>1535</sup> Honduras' appellant's submission, para. 429.

<sup>1536</sup> Honduras' appellant's submission, paras. 429-435.

<sup>1537</sup> Article 10*bis* (3)1 of the Paris Convention (1967) provides that "all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor" shall be prohibited.

<sup>1538</sup> Panel Report, para. 7.2000. (emphasis original)

<sup>1539</sup> Panel Report, para. 7.2000. (emphasis added)

<sup>1540</sup> As noted in paragraph 6.583. , these cumulative conditions are that: (i) the unauthorized third party must be using the identical or similar signs for goods or services "in the course of trade"; (ii) the goods or services, with respect to which the unauthorized third party is using the identical or similar signs must be

Article 16.1 by ensuring that, in the Members' domestic legal regimes, the owner of a registered trademark can exercise its "exclusive right to prevent" the infringement of its trademark by unauthorized third parties in the event of the occurrence of these three cumulative conditions. For this reason, we agree with the Panel's statement that "Members must ensure that in the event that these circumstances *do* arise, a right to prevent such use is provided."<sup>1541</sup>

6.600. More substantively, based on our understanding of Honduras' appellant's submission and responses to questioning at the first hearing, Honduras' position is that, if the owner of a registered trademark is not permitted to use its trademark, then the factual situation leading to a "likelihood of confusion" would be less likely to occur. Thus, Honduras posits that the reduction in the occurrence of the factual scenario contemplated in Article 16.1 undermines the right conferred on the owner of a registered trademark under Article 16.1. This understanding of Honduras' argument comports with the Panel's explanation that "the complainants contend[ed] 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>1542</sup>

6.601. We recall that the "likelihood of confusion", which may result from the conduct of unauthorized third parties identified in Article 16.1, relates to the distinguishing function of the trademark in question, described in Article 15.1. However, as the Panel observed, "Members have not taken on a general responsibility for safeguarding the distinctiveness of signs, either before or after such signs have been registered as trademarks."<sup>1543</sup> Moreover, except for the situation described in its second sentence, Article 16.1 does not delineate the criteria for the examination of whether an unauthorized third party's use of similar signs "would result in a likelihood of confusion". Thus, contrary to what Honduras suggests, Article 16.1 does not: (i) require Members to provide a "minimum opportunity" for a trademark owner to use its trademark in order to preserve or strengthen the distinctiveness of the trademark; (ii) provide the criteria for assessing whether the unauthorized use by third parties of similar signs has "result[ed] in a likelihood of confusion" with the registered trademark; or (iii) require Members to ensure that the factual scenario contemplated by the cumulative conditions in Article 16.1 occurs.

6.602. For these reasons, we consider that the Panel did not err in finding that:

[T]he possibility of a reduced occurrence of a "likelihood of confusion" in the market does not, in and of itself, constitute a violation of Article 16.1, because Members' compliance with the obligation to provide the right to prevent trademark infringements under Article 16.1 is independent of whether such infringements actually occur in the market. 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>1544</sup>

6.603. As regards the relevant context of Article 16.1, Honduras refers to Article 20 of the TRIPS Agreement to assert that, when interpreting this provision, the Panel confirmed that "use is protected by the TRIPS Agreement."<sup>1545</sup> For Honduras, the "exclusive rights" under Article 16.1 are conferred against the background of a presumption of unencumbered use, which finds reflection in Article 20.<sup>1546</sup> Thus, according to Honduras, the Panel found that any requirements that directly affect the use and distinctiveness of trademarks are subject to a demonstration of "good reasons sufficient to justify" the encumbrance. In Honduras' view, this "confirms that the object and purpose of the TRIPS Agreement is the protection of intellectual property rights in general and the orderly use of trademarks in commerce in particular."<sup>1547</sup> Honduras posits that "Article 20 is important context for Article 16.1 and imposes the exact obligation on Members that the Panel refuses to read

identical or similar to the goods or services with respect to which the trademark is registered; and (iii) the unauthorized third party's use of the identical or similar signs "would result in a likelihood of confusion".

<sup>1541</sup> Panel Report, para. 7.2000. (emphasis original)

<sup>1542</sup> Panel Report, para. 7.1986. (fn omitted)

<sup>1543</sup> Panel Report, para. 7.2028.

<sup>1544</sup> Panel Report, para. 7.2031.

<sup>1545</sup> Honduras' appellant's submission, para. 415.

<sup>1546</sup> Honduras' appellant's submission, para. 415.

<sup>1547</sup> Honduras' appellant's submission, para. 415.

into Article 16.1 or to incorporate as part of the context of this provision."<sup>1548</sup> Honduras considers that the Panel's interpretation of Article 16.1 denied this important context "which confirms the importance of use for purposes of understanding the nature and scope of the rights conferred by Article 16.1".<sup>1549</sup> Honduras emphasizes that a Member's encumbrances on the use of a trademark "may affect also the private rights conferred to trademark owners per Article 16.1".<sup>1550</sup> Honduras contends that the relevant questions that the Panel should have asked were whether the encumbrance is such as to reduce the level of protection below the minimum guarantee of Article 16.1 and, if so, whether it could be justified as a limited exception under Article 17 of the TRIPS Agreement. However, Honduras argues that the Panel did not even consider this possibility based on its isolated reading of Article 16.1.<sup>1551</sup>

6.604. Australia disagrees with Honduras' argument 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>1552</sup> Australia highlights that 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>1553</sup> Australia also agrees with the Panel finding 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 [Articles 19 and 20] that 'clearly foresee potential regulatory prevention of use'".<sup>1554</sup>

6.605. Contrary to Honduras' contention, we do not read the Panel's interpretation as being "based on its isolated reading of Article 16.1".<sup>1555</sup> Nor does the Panel's interpretation "den[y] this important context"<sup>1556</sup> provided by the other provisions of Section 2 of Part II of the TRIPS Agreement. Instead, in arriving at its interpretation of Article 16.1, the Panel provided the following explanation:

7.2027. Other provisions in Section 2 of Part II address the use of registered trademarks. Among those is Article 19, 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. 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. We further note that the trademark owners' interest in using its trademark in relation to the relevant goods or services has been recognised as part of its legitimate interest in preserving the distinctiveness of its trademark in the context of Article 17, and which thus needs to be taken into account when assessing the legitimacy of exceptions to the exclusive rights provided by Article 16.1.

7.2028. ... The importance of use of a trademark is recognized in the TRIPS Agreement by conditioning measures that encumber such use in the context of Article 20, and by recognizing the right owner's interest in using the trademark to maintain distinctiveness as a factor in determining permissible exceptions in the context of Article 17. At the same time, it is 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.

7.2029. Adopting an interpretation of Article 16 that would require Members to safeguard a minimum opportunity to use the registered trademark is therefore not only without basis in the text of the provision itself, but would also create disharmony with those provisions of the trademark section that (a) expressly provide for conditions under

<sup>1548</sup> Honduras' appellant's submission, para. 347.

<sup>1549</sup> Honduras' appellant's submission, para. 416.

<sup>1550</sup> Honduras' appellant's submission, para. 416.

<sup>1551</sup> Honduras' appellant's submission, para. 416.

<sup>1552</sup> Australia's appellee's submission, para. 127 (quoting Honduras' appellant's submission, para. 366).

<sup>1553</sup> Australia's appellee's submission, para. 129 (quoting Panel Report, para. 7.2015).

<sup>1554</sup> Australia's appellee's submission, para. 129 (quoting Panel Report, para. 7.2029).

<sup>1555</sup> Honduras' appellant's submission, para. 416.

<sup>1556</sup> Honduras' appellant's submission, para. 416.

which use can be encumbered (Article 20); and (b) address the consequences of obstacles to use (Article 19). These provisions clearly foresee potential regulatory prevention of use. Further, 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>1557</sup>

6.606. Article 19 of the TRIPS Agreement, titled "Requirement of Use", provides, in relevant part:

1. 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 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.<sup>1558</sup>

6.607. The first sentence of Article 19.1 begins with the word "if" when identifying a particular requirement in domestic legal regimes. This provision recognizes that, while some domestic legal regimes may require "use" of a trademark to maintain its registration, not all do. Thus, the conditional "if" confirms that the *use* of a registered trademark by its owner is not a requirement imposed by the TRIPS Agreement. Importantly, even in domestic legal regimes where Article 19.1 applies, this provision notes that there may be obstacles to the use of a trademark that may provide its owner with justification against cancellation of the registration of its trademark. The second sentence of Article 19.1 provides examples of such obstacles, stating that "[c]ircumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the 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." Hence, far from providing for the right of a trademark owner to use its trademark, as the Panel observed, "Article 19 expressly contemplates government measures that can constitute an obstacle to trademark use."<sup>1559</sup>

6.608. Article 20, titled "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.<sup>1560</sup>

6.609. We begin by addressing Honduras' assertion that "Article 20 is important context for Article 16.1 and imposes the exact obligation on Members that the Panel refuses to read into Article 16.1 or to incorporate as part of the context of this provision."<sup>1561</sup> Article 20, like Article 16.1, concerns trademarks and forms part of Section 2 of Part II of the TRIPS Agreement. Hence, we agree with Honduras that Article 20 serves as relevant context for the purpose of understanding the right conferred under Article 16.1. Having said that, we disagree with Honduras' assertion that Article 20 "imposes the exact obligation on Members that the Panel refuses to read into Article 16.1".<sup>1562</sup> As highlighted above, in accordance with Article 1.1, Members are required to give

<sup>1557</sup> Panel Report, paras. 7.2027-7.2029. (fns omitted)

<sup>1558</sup> Article 19 of the TRIPS Agreement is similar in content to Article 5(C)(1) of the Paris Convention (1967), which states that, "[i]f, in any country, use of the registered mark is compulsory, the registration may be cancelled only after a reasonable period, and then only if the person concerned does not justify his inaction."

<sup>1559</sup> Panel Report, para. 7.2016.

<sup>1560</sup> We observe that the remaining sections of Part II of the TRIPS Agreement, which address the other categories of intellectual property, do not include a provision that is equivalent to Article 20. This may be due to the fact that only trademarks can be the subject of "special requirements" like "use with another trademark" or "use in a special form".

<sup>1561</sup> Honduras' appellant's submission, para. 347.

<sup>1562</sup> Honduras' appellant's submission, para. 347.

effect to Article 16.1 by ensuring that, in the Members' domestic legal regimes, the owner of a registered trademark can exercise its "exclusive right to prevent" the infringement of its trademark by unauthorized third parties. Article 20, for its part, imposes a positive obligation on Members to refrain from unjustifiably encumbering, by special requirements, "the use of a trademark in the course of trade".

6.610. Furthermore, it is significant that unlike Article 17<sup>1563</sup>, Article 20 is not identified as an "exception" to the "rights conferred" on a trademark owner. Rather, Article 20 imposes a positive obligation limiting the regulatory autonomy that Members otherwise enjoy. As noted above, Article 20 imposes an obligation on Members to refrain from unjustifiably encumbering, by special requirements, "the use of a trademark in the course of trade". Significantly, Article 20 does not state that "the use of a trademark in the course of trade" is a right conferred on a trademark owner. Instead, this provision regulates the imposition of special requirements when a trademark owner is using its trademark in the course of trade. In the factual scenario where a trademark is being used in the course of trade, Article 20 protects such use from being unjustifiably encumbered by special requirements. Moreover, the words "unjustifiably encumbered" in Article 20 suggest that justifiable encumbrance by special requirements is compatible with that provision. Leaving aside the question of the standard against which an adjudicator should test whether an encumbrance is justifiable – which is at issue in these appellate proceedings<sup>1564</sup> – the fact that Members should refrain from unjustifiable encumbrances does not suggest that Article 20 confers a right to use a trademark when special requirements are not involved. On the contrary, the provision allows, inversely, Members to justifiably encumber, by special requirements, the use of a trademark in the course of trade. Moreover, the second sentence of Article 20 "expressly provide[s] for conditions under which use can be encumbered"<sup>1565</sup> by indicating that the obligation outlined in the first sentence of Article 20 does "not preclude a requirement prescribing the use of the trademark" alongside another trademark. These reasons undermine Honduras' argument that "the 'exclusive rights' conferred by Article 16.1 are conferred against the background of a presumption of unencumbered use."<sup>1566</sup>

6.611. With respect to Article 17, we take note of Honduras' assertion that the Panel arrived at its conclusion that "a Member may deny the 'rights conferred' on trademark owners by Article 16 ... without even examining whether such a derogation from the minimum rights of the mark owner can be justified under Article 17 of the TRIPS Agreement."<sup>1567</sup> Honduras argues that whether the "deliberate weakening of the 'rights conferred' reduces the level of protection below the minimum guaranteed by Article 16"<sup>1568</sup> could be justified as a limited exception under Article 17 was a relevant question that the Panel failed to engage with owing to "its isolated reading of Article 16.1".<sup>1569</sup>

6.612. Article 17 of the TRIPS Agreement identifies limited exceptions to the "rights conferred".<sup>1570</sup> Given the situation of Article 17 in Section 2 of Part II of the TRIPS Agreement, which addresses trademarks, these "rights conferred" may be understood as being a reference to the rights articulated in Article 16, as this provision bears the heading "Rights Conferred". The "exclusive right to prevent" infringement of a trademark by unauthorized third parties in Article 16.1 is the only "right conferred" on trademark owners that is at issue in these appellate proceedings. Furthermore, the status of Article 17 as a limited exception to the right conferred under Article 16.1 implies that the need for a WTO Member to rely on Article 17 to defend its measure would be triggered only if the Member failed to meet its obligation to give effect to Article 16.1 – by failing to ensure that, in its domestic legal regime, the owner of a registered trademark can exercise its exclusive right to prevent the infringement of its trademark by unauthorized third parties.

<sup>1563</sup> Article 17 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."

<sup>1564</sup> See section 6.3.2 below.

<sup>1565</sup> Panel Report, para. 7.2029.

<sup>1566</sup> Honduras' appellant's submission, para. 415.

<sup>1567</sup> Honduras' appellant's submission, para. 5.

<sup>1568</sup> Honduras' appellant's submission, para. 331.

<sup>1569</sup> Honduras' appellant's submission, para. 416.

<sup>1570</sup> Article 17 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."

6.613. As Honduras did not succeed in its claim before the Panel that Australia had breached its obligation under Article 16.1, we agree with the Panel that "the question ... of whether the[] [TPP measures] are permissible as 'limited exceptions' under Article 17 d[id] not arise."<sup>1571</sup> Accordingly, we see no merit in Honduras' assertion that the Panel erred by arriving at its conclusion that "a Member may deny the 'rights conferred' on trademark owners by Article 16 ... without even examining whether such a derogation from the minimum rights of the mark owner can be justified under Article 17 of the TRIPS Agreement."<sup>1572</sup> Honduras' assertion warrants no further scrutiny.

6.614. For all of these reasons, we conclude that the Panel did not err in making the following findings:

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.

7.1980. ... [I]n order to show that the TPP measures violate Australia's obligation 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>1573</sup>

6.615. We recall that the Panel considered that an assessment of the "likelihood of confusion" with respect to a given trademark in a given situation was a factual assessment that would involve a consideration of the specific circumstances at issue, including the manner in which the potential for confusion arises in the specific market at issue.<sup>1574</sup> The Panel considered that it would need to make a determination with respect to this factual allegation only if it found that, from an interpretative standpoint, reducing the instances in which a trademark owner would be able to prevent the unauthorized use of similar or identical trademarks in the market, because such use is no longer likely to cause a likelihood of confusion, "leads to a violation of Article 16.1".<sup>1575</sup>

6.616. We recall our conclusion, in paragraph 6.602. above, that the Panel did not err in finding that "the possibility of a reduced occurrence of a 'likelihood of confusion' in the market does not, in itself, constitute a violation of Article 16.1, because Members' compliance with the obligation to provide the right to prevent trademark infringements under Article 16.1 is independent of whether such infringements actually occur in the market."<sup>1576</sup> Consequently, we agree with the Panel that there was "no need to examine further the complainants' factual allegation that the TPP measures' prohibition on the use of certain tobacco-related trademarks will in fact reduce the distinctiveness of such trademarks, and lead to a situation where a 'likelihood of confusion' with respect to these trademarks is less likely to arise in the market".<sup>1577</sup>

6.617. In this regard, we take note of Honduras' claim that the Panel erred in its application of the law to the facts by allegedly failing to examine whether the TPP measures reduce the distinctiveness of trademarks and thus reduce the scope of protection of the trademarks, such that the level of protection falls below the minimum level guaranteed under Article 16.<sup>1578</sup> Honduras adds that "[b]y failing to apply the law to the facts, the Panel errs in law and, as a result of this false exercise of judicial economy, it also fails to comply with its obligation under Article 11 of the DSU."<sup>1579</sup>

6.618. Having found no error in the Panel's interpretation, we agree with the Panel that there was "no need to examine further the complainants' factual allegation that the TPP measures' prohibition on the use of certain tobacco-related trademarks will in fact reduce the distinctiveness of such

<sup>1571</sup> Panel Report, para. 7.2018. (fn omitted)

<sup>1572</sup> Honduras' appellant's submission, para. 5.

<sup>1573</sup> Panel Report, paras. 7.1978 and 7.1980. (fns omitted)

<sup>1574</sup> Panel Report, para. 7.1992.

<sup>1575</sup> Panel Report, para. 7.1993.

<sup>1576</sup> Panel Report, para. 7.2031.

<sup>1577</sup> Panel Report, para. 7.2032.

<sup>1578</sup> Honduras' appellant's submission, paras. 443-444 (referring to Panel Report, para. 7.2032).

<sup>1579</sup> Honduras' appellant's submission, para. 333.



trademarks, and lead to a situation where a 'likelihood of confusion' with respect to these trademarks is less likely to arise in the market".<sup>1580</sup> Honduras' claims that the Panel erred in its application of Article 16.1 and failed to make an objective assessment of the matter as required by Article 11 of the DSU are conditioned on our reversal of the Panel's interpretation. The condition on which Honduras' appeal is predicated, i.e. the reversal of the Panel's interpretation, has not been satisfied. Consequently, we need not address Honduras' remaining claims of error.

6.619. In light of the foregoing, we uphold the Panel's conclusion that "the complainants have not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 16.1 of the TRIPS Agreement."<sup>1581</sup>

### 6.3.2 Article 20 of the TRIPS Agreement

#### 6.3.2.1 Introduction

6.620. Honduras challenges the Panel's analysis under Article 20 of the TRIPS Agreement on two grounds. First, Honduras claims that the Panel erred in its interpretation of the term "unjustifiably" in Article 20.<sup>1582</sup> Second, assuming that the Panel's interpretation of Article 20 was correct, Honduras submits an alternative claim that the Panel erred in applying the legal standard that it had developed to the facts of the present dispute.<sup>1583</sup> In this respect, Honduras argues that the Panel erred by: (i) focusing on the economic value of trademarks and in its assessment of the allegedly mitigating factors<sup>1584</sup>; (ii) finding that the TPP measures contribute to the reduction in the use of tobacco<sup>1585</sup>; (iii) rejecting the alternative less trademark-encumbering measures proposed by the complainants<sup>1586</sup>; and (iv) attributing undue legal weight to the FCTC guidelines.<sup>1587</sup>

6.621. The Dominican Republic argues that, by failing to address the Dominican Republic's claim regarding individual cigarette sticks, the Panel acted inconsistently with Articles 7.1 and 11 of the DSU.<sup>1588</sup> Moreover, the Dominican Republic submits that, to the extent that we reverse the Panel's findings under Article 2.2 of the TBT Agreement, upon which the Panel relied in its analysis under Article 20, we should also reverse the Panel's findings under Article 20 of the TRIPS Agreement.<sup>1589</sup>

6.622. Australia responds that the Panel properly rejected Honduras' interpretation of the term "unjustifiably" because such interpretation "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".<sup>1590</sup> Australia further observes that Honduras' interpretation of the term "unjustifiably" "is based on an unfounded attempt to read a 'right of use'" into Part II, Section 2, of the TRIPS Agreement and to

<sup>1580</sup> Panel Report, para. 7.2032.

<sup>1581</sup> Panel Report (DS435), paras. 7.2051 and 8.1.d; Panel Report (DS441), paras. 7.2051 and 8.1.b.iii.

<sup>1582</sup> Honduras' appellant's submission, paras. 102-259. Honduras does not challenge other elements of the Panel's interpretation of Article 20 of the TRIPS Agreement.

<sup>1583</sup> Honduras' appellant's submission, para. 260.

<sup>1584</sup> Honduras' appellant's submission, paras. 264-276.

<sup>1585</sup> Honduras' appellant's submission, paras. 280-284.

<sup>1586</sup> Honduras' appellant's submission, paras. 285-298.

<sup>1587</sup> Honduras' appellant's submission, paras. 299-312.

<sup>1588</sup> Dominican Republic's appellant's submission, paras. 1543-1545. We recall that, in its Notice of Appeal, the Dominican Republic stated that it "incorporate[d] by reference into this appeal the claims on appeal made by Honduras". (Dominican Republic's Notice of Appeal, para. 16) In addition, in the "Introduction" section of its appellant's submission, in the context of summarizing its claim of error under Article 20 of the TRIPS Agreement, the Dominican Republic stated that "it incorporate[d] by reference into this appeal the claims on appeal, and arguments, made by Honduras." (Dominican Republic's appellant submission, para. 30) In response to questioning at the first hearing, the Dominican Republic confirmed that it incorporated all of Honduras' claims and arguments on appeal. Accordingly, we understand that any reference to Honduras' claims and arguments under Article 20 of the TRIPS Agreement also includes a reference to the claims and arguments of the Dominican Republic.

<sup>1589</sup> Dominican Republic's appellant's submission, paras. 1546-1548. Specifically, the Dominican Republic refers to the Panel's findings that: (i) the TPP measures made a contribution to Australia's objective and (ii) none of the Dominican Republic's proposed alternatives would be apt to make an equivalent contribution to Australia's objective. (Ibid., para. 1547)

<sup>1590</sup> Australia's appellee's submission, para. 232.

interpret Article 20 "as a 'limited' exception" to that right.<sup>1591</sup> Australia further disagrees with Honduras' claim that the Panel erred in applying the legal standard to the facts.<sup>1592</sup> With respect to the Dominican Republic's claim under Articles 7.1 and 11 of the DSU, Australia submits that it is clear from the Panel Report that the Panel examined the Dominican Republic's claim under Article 20 of the TRIPS Agreement concerning cigarette sticks.<sup>1593</sup>

### 6.3.2.2 Summary of the Panel's findings

6.623. In addressing the complainants' claims under Article 20 of the TRIPS Agreement, the Panel examined whether: (i) the TPP measures involve "special requirements"; (ii) the special requirements imposed by the TPP measures "encumber" "[t]he use of a trademark in the course of trade"; and (iii) the TPP measures encumber the use of trademarks in the course of trade "unjustifiably".<sup>1594</sup> In findings that are not appealed, the Panel concluded that "the trademark requirements of the TPP measures amount to special requirements that encumber 'the use of a trademark in the course of trade'".<sup>1595</sup>

6.624. The Panel started its analysis of whether the special requirements at issue "unjustifiably" encumber the use of a trademark in the course of trade by elucidating the ordinary meaning of the term "unjustifiably".<sup>1596</sup> Having reviewed a number of definitions, the Panel concluded that the term "unjustifiably" "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>1597</sup> To the Panel, this indicated that "there may be circumstances in which good reasons exist that sufficiently support the application of encumbrances on the use of a trademark in a reasonable manner."<sup>1598</sup> To determine what reasons may form the basis for "justifiability" of an encumbrance, the Panel turned to the context provided by other provisions of the TRIPS Agreement.

6.625. The Panel examined, in particular, the contextual significance of the first recital of the preamble to the TRIPS Agreement<sup>1599</sup>, as well as Articles 7 ("Objectives")<sup>1600</sup> and 8 ("Principles") of the TRIPS Agreement. In particular, the Panel considered that Article 8 offers "useful contextual guidance for the interpretation of the term 'unjustifiably' in Article 20".<sup>1601</sup> The Panel noted that "the principles reflected in Article 8.1 express the intention of the drafters of the TRIPS Agreement to preserve the ability for WTO Members to pursue certain legitimate societal interests, at the same time as it confirms their recognition that certain measures adopted by WTO Members for such purposes may have an impact on IP rights, and requires that such measures be 'consistent with the provisions of the [TRIPS] Agreement'".<sup>1602</sup> The Panel was of the view that, while the objectives expressly identified in Article 8.1<sup>1603</sup> do not necessarily exhaust the scope of what may constitute a

<sup>1591</sup> Australia's appellee's submission, para. 232.

<sup>1592</sup> Australia's appellee's submission, paras. 244-254.

<sup>1593</sup> Australia's appellee's submission, para. 256.

<sup>1594</sup> Panel Report, para. 7.2156.

<sup>1595</sup> Panel Report, para. 7.2292.

<sup>1596</sup> Panel Report, para. 7.2392.

<sup>1597</sup> Panel Report, para. 7.2395.

<sup>1598</sup> Panel Report, para. 7.2396.

<sup>1599</sup> As the Panel noted, the first recital of the preamble to the TRIPS Agreement "expresses a key objective of the TRIPS Agreement, namely to 'reduce distortions and impediments to international trade' and takes into account the need, on the one hand, 'to promote effective and adequate protection of intellectual property rights' and, on the other, 'to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade'". (Panel Report, para. 7.2398)

<sup>1600</sup> Article 7 of the TRIPS Agreement provides: "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

<sup>1601</sup> Panel Report, para. 7.2404.

<sup>1602</sup> Panel Report, para. 7.2404.

<sup>1603</sup> Article 8.1 of the TRIPS Agreement provides: "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."

basis for "justifiability" of encumbrances under Article 20, public health is "unquestionably" among such interests.<sup>1604</sup>

6.626. The Panel then observed that paragraph 5(a) of the Declaration on the TRIPS Agreement and Public Health (Doha Declaration) "is formulated in general terms, inviting the interpreter of the TRIPS Agreement to read 'each provision of the TRIPS Agreement' in light of the object and purpose of the Agreement, as expressed in particular in its objectives and principles".<sup>1605</sup> In the Panel's view, this provision "may ... be considered to constitute a 'subsequent agreement' of WTO Members within the meaning of Article 31(3)(a) of the Vienna Convention".<sup>1606</sup> According to the Panel, "[t]his agreement, rather than reflecting a particular interpretation of a specific provision of the TRIPS Agreement, confirms the manner in which 'each provision' of the Agreement must be interpreted, and thus 'bears specifically' on the interpretation of each provision of the TRIPS Agreement."<sup>1607</sup> According to the Panel, the fact that paragraph 5(a) of the Doha Declaration is consistent "with the applicable rules of interpretation, which require a treaty interpreter to take account of the context and object and purpose of the treaty being interpreted" confirmed the Panel's view that Articles 7 and 8 of the TRIPS Agreement provide important context for the interpretation of Article 20.<sup>1608</sup>

6.627. The Panel noted that, while the term "necessary" is used in a number of other provisions of the TRIPS Agreement<sup>1609</sup>, the degree of connection between the societal interest and the measure under appraisal under Article 20 is expressed through the term "unjustifiably".<sup>1610</sup> The Panel thus did not consider that the term "unjustifiably" in Article 20 should be viewed as synonymous with the term "unnecessarily".<sup>1611</sup> The Panel also did not consider that "the term 'unjustifiably' as used in Article 20 should be assumed to have exactly the same meaning as the term 'unjustifiable' as used in the *chapeau* of Article XX of the GATT 1994."<sup>1612</sup> The Panel considered that, "in the context of Article 20 of the TRIPS Agreement, the term 'unjustifiably' should [not] be understood to require *only* the existence of some rational connection between encumbrances imposed on the use of a trademark and the reason for which they are imposed."<sup>1613</sup> Rather, in the Panel's view, due account must also be taken of the action that is to be justified, i.e. the encumbrance resulting from special requirements.<sup>1614</sup> The Panel further noted that the context provided by Article 17 of the TRIPS Agreement, titled "Exceptions", confirms that, in assessing whether encumbrances are unjustifiable, account must be taken of the legitimate interest of the trademark owner in using the trademark and the extent to which the relevant trademarks are prevented from performing their function in the marketplace.<sup>1615</sup>

6.628. The Panel thus concluded that a determination of whether a trademark is being "unjustifiably" encumbered involves a consideration of the following factors:

<sup>1604</sup> Panel Report, para. 7.2406.

<sup>1605</sup> Panel Report, para. 7.2408. Paragraph 5(a) of the Doha Declaration provides: "In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles."

<sup>1606</sup> Panel Report, para. 7.2409. The Panel recalled that the Doha Declaration was adopted by consensus at the Fourth Ministerial Conference of the WTO. (Ibid., para. 7.2410)

<sup>1607</sup> Panel Report, para. 7.2410. (fn omitted)

<sup>1608</sup> Panel Report, para. 7.2411.

<sup>1609</sup> In particular, Articles 3.2, 8.1, 27.2, 39.3, 43.2, 50.5, and 73(b), as well as Article 11(3) of the Paris Convention (1967) and Article 17 of the Berne Convention. The Panel observed that the term "necessary" is also used in Article 31*bis* of the TRIPS Agreement, as well as in paragraphs 1(a) and 2(b)(i) of the Annex to the TRIPS Agreement. (Panel Report, para. 7.2419)

<sup>1610</sup> Panel Report, para. 7.2418-7.2419.

<sup>1611</sup> Panel Report, para. 7.2419.

<sup>1612</sup> Panel Report, para. 7.2420.

<sup>1613</sup> Panel Report, para. 7.2422. (emphasis original)

<sup>1614</sup> Panel Report, para. 7.2423.

<sup>1615</sup> Panel Report, para. 7.2427. The Panel recalled the statement of the panel in *EC – Trademarks and Geographical Indications (Australia)* that "[e]very 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." (Ibid. (referring to Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664))

- 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>1616</sup>

6.629. The Panel further rejected the complainants' argument that the TPP measures are *per se* inconsistent with Article 20 because they do not provide for an individual assessment of trademarks and their specific features. The Panel was of the view that "[t]he 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."<sup>1617</sup> In the Panel's view, "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 requirements may need to focus on their overall rationale as it relates to the reason for adopting them."<sup>1618</sup>

6.630. The Panel then turned to examine the application of the legal interpretation it had developed under Article 20 to the measures at issue. With respect to the nature and extent of the encumbrance resulting from the TPP measures, the Panel observed, in particular, that the TPP measures "prevent any non-word components of the relevant trademarks, such as fonts, size, colours and placement of the trademark on the product, as well as all other distinctive visual content, from contributing to distinguishing the products in the marketplace".<sup>1619</sup> The Panel noted that "[t]he complainants have not sought to demonstrate that consumers have in fact been unable to distinguish the commercial source of tobacco products of one undertaking from those of other undertakings" as a result of the TPP measures.<sup>1620</sup> The Panel further observed that, while the TPP measures prevent a trademark owner from extracting economic value from the design features of its trademark, the implications of such prohibitions are "partly mitigated" by the use of word trademarks.<sup>1621</sup> With regard to price competition, the Panel concluded that the evidence before it did not support the complainants' argument that the TPP measures would lead to an increase in price competition, a fall in prices, and, consequently, a decrease in the sales value of tobacco products and the total value of imports.<sup>1622</sup> With regard to downward substitution, the Panel was not persuaded that the decrease in consumption and imports of premium tobacco products was exclusively the result of downtrading (i.e. a transfer of consumption/imports from premium to non-premium products) caused by the TPP measures. The Panel took this view because: (i) due to the overall decrease in consumption of tobacco products, at least some part of the decrease in consumption of premium products was not substituted with consumption of non-premium products; and (ii) it appeared to the Panel that the higher- and lower-priced segments of the market have evolved on the basis of distinct trends even before the implementation of the TPP measures.<sup>1623</sup>

6.631. As regards the reasons for the adoption of the TPP measures, for purposes of Article 20, the Panel found that "the reason for which Australia applies the trademark requirements, as an integral

<sup>1616</sup> Panel Report, para. 7.2430.

<sup>1617</sup> Panel Report, para. 7.2505.

<sup>1618</sup> Panel Report, para. 7.2505.

<sup>1619</sup> Panel Report, para. 7.2558.

<sup>1620</sup> Panel Report, para. 7.2564. (emphasis omitted)

<sup>1621</sup> Panel Report, paras. 7.2569-7.2570.

<sup>1622</sup> Panel Report, para. 7.2572. The Panel noted, however, that, "[w]hile 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 measure on consumption only or as a result of this effect combined with a fall in prices." (Ibid. (fn omitted))

<sup>1623</sup> Panel Report, para. 7.2573. We recall that, in its Article 20 analysis, the Panel did not refer to its finding in its assessment of the trade-restrictiveness of the TPP measures, in the context of applying Article 2.2 of the TBT Agreement, that the facts did not support the Dominican Republic's argument that downtrading led to a reduction in the value of trade, because the evidence showed that prices did not remain constant or decline. (See Panel Report, para. 7.1221. See also para. 6.428. above.)

part of the TPP measures, is to improve public health by reducing the use of, and exposure to, tobacco products."<sup>1624</sup>

6.632. The Panel then turned to consider whether the reasons for trademark requirements provide sufficient support for the resulting encumbrances. The Panel noted that the fact that the special requirements under the TPP measures "are capable of contributing, and do in fact contribute, to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products[]" suggests that the reasons for which these special requirements are applied provide sufficient support for the application of the resulting encumbrances on the use of trademarks".<sup>1625</sup>

6.633. Thereafter, the Panel addressed the complainants' argument that the legal standard under Article 20 requires assessing whether an alternative less trademark-encumbering measure that would make an equivalent contribution could have been deployed.<sup>1626</sup> The Panel considered that "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."<sup>1627</sup> In the Panel's view, however, this did 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."<sup>1628</sup> The Panel did "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".<sup>1629</sup> The Panel considered that this could be possible in a case where "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>1630</sup> In its examination of the available alternatives, the Panel referred to its previous analysis under Article 2.2 of the TBT Agreement.<sup>1631</sup>

6.634. Overall, the Panel was "not persuaded that the complainants have demonstrated that Australia has acted beyond the bounds of the latitude available to it under Article 20 to choose an appropriate policy intervention to address its public health concerns".<sup>1632</sup> The Panel thus concluded that the complainants have not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement.<sup>1633</sup>

### **6.3.2.3 Whether the Panel erred in its interpretation of the term "unjustifiably" in Article 20 of the TRIPS Agreement**

6.635. We recall that in setting out, its interpretation of the term "unjustifiably" in Article 20, the Panel stated 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;

<sup>1624</sup> Panel Report, para. 7.2586.

<sup>1625</sup> Panel Report, para. 7.2592.

<sup>1626</sup> Panel Report, para. 7.2597.

<sup>1627</sup> Panel Report, para. 7.2598.

<sup>1628</sup> Panel Report, para. 7.2598.

<sup>1629</sup> Panel Report, para. 7.2598.

<sup>1630</sup> Panel Report, para. 7.2598.

<sup>1631</sup> Panel Report, para. 7.2600.

<sup>1632</sup> Panel Report, para. 7.2604.

<sup>1633</sup> Panel Report, paras. 7.2605-7.2606.

- 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>1634</sup>

6.636. Honduras challenges the Panel's interpretation of the term "unjustifiably" in Article 20 on two main grounds.<sup>1635</sup> First, Honduras claims that the Panel erred in setting out its understanding, in paragraph 7.2430 of the Panel Report, of the factors that should be considered in a determination of whether the use of a trademark in the course of trade is being unjustifiably encumbered by special requirements.<sup>1636</sup> Second, assuming that the Panel's interpretation is correct, Honduras submits an alternative claim that the Panel erred by not considering it necessary for a Member to adopt less trademark-encumbering special requirements.<sup>1637</sup> We address Honduras' arguments pertaining to these two challenges in turn.

6.637. As its first ground of appeal, Honduras claims that the Panel "failed to read the term 'unjustifiably' in its proper trademark context and in the light of the object and purpose of the TRIPS Agreement".<sup>1638</sup> Honduras observes that the Panel read the term "unjustifiably" as referring to an absence of "good reasons sufficient to support the measure".<sup>1639</sup> In Honduras' view, by doing so, "the Panel introduced a broad policy exception in Article 20 which is entirely decoupled from trademark-specific concerns and which permits even the most far-reaching encumbrances irrespective of the concerns allegedly raised by the specific trademarks affected by the measure."<sup>1640</sup> For Honduras, "[t]he term 'unjustifiably' in Article 20 provides for a qualified exception to the general rule that no special requirements shall be encumbering the use of a mark in the course of trade."<sup>1641</sup> In Honduras' view, "the concerns that can permissibly trigger an encumbrance ... are circumscribed to those concerns that are directly linked to the trademark, such as, among others, its potentially misleading nature."<sup>1642</sup> In this connection, Honduras recalls that the non-exhaustive list of trademark-specific concerns that are contained in Article 6*quinquies* B of the Paris Convention(1967), as referred to in Article 15.2 of the TRIPS Agreement, "form[s] the basis for a refusal to grant protection through registration, remove such protection or ... prevent use of the trademark in the course of trade".<sup>1643</sup>

6.638. Australia responds that "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>1644</sup> Australia submits that, while the complainants have sought to interpret the term "unjustifiably" as being equivalent to the standard of necessity, the text of Article 20 does not use the term "unnecessarily", which connotes a more stringent nexus between a measure and its objective.<sup>1645</sup> Australia considers that "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."<sup>1646</sup> Australia further observes that Honduras relied on contextual arguments to articulate the premise that Article 20 articulates a prohibition/exception relationship.<sup>1647</sup> According to Australia, "[t]he

<sup>1634</sup> Panel Report, para. 7.2430.

<sup>1635</sup> Honduras' appellant's submission, para. 104.

<sup>1636</sup> Honduras' appellant's submission, para. 52.

<sup>1637</sup> Honduras' appellant's submission, para. 54.

<sup>1638</sup> Honduras' appellant's submission, para. 105.

<sup>1639</sup> Honduras' appellant's submission, para. 52.

<sup>1640</sup> Honduras' appellant's submission, para. 105.

<sup>1641</sup> Honduras' appellant's submission, para. 161.

<sup>1642</sup> Honduras' appellant's submission, para. 52. As examples of such misleading trademarks, Honduras refers to a colourful logo that suggests that a dangerous chemical is an innocent household detergent or trademarks that refer to tobacco products as "light" or "mild". (Ibid., para. 109)

<sup>1643</sup> Honduras' appellant's submission, para. 108.

<sup>1644</sup> Australia's appellee's submission, para. 162 (quoting Australia's first written submission to the Panel, para. 369; response to Panel question No. 107).

<sup>1645</sup> Australia's appellee's submission, paras. 162 and 164.

<sup>1646</sup> Australia's appellee's submission, para. 177. Australia notes, however, that, while it has reservations with the Panel's interpretation of Article 20, the Panel's finding that the TPP measures are not "unjustifiable" under Article 20 is correct, which is why Australia decided not to appeal the Panel's interpretation and application of Article 20. (Ibid., paras. 178-179)

<sup>1647</sup> Australia's appellee's submission, para. 195.

notion that the 'use' of a trademark is a 'protected right' under Part II of the TRIPS Agreement suffuses Honduras' submission.<sup>1648</sup> In Australia's view, contrary to what Honduras implies, the Panel did not find that Article 20 confers a right of use upon the owners of registered trademarks.<sup>1649</sup> Australia submits that, even if Honduras is correct in its contention that the term "special requirements" refers only to the requirements related to a trademark, it does not follow from this that any encumbrance resulting from such special requirements will be justifiable if it is limited in its effects and "based on the specific nature of the trademark".<sup>1650</sup>

6.639. Article 20 of the TRIPS Agreement provides:

*Other Requirements*

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.

6.640. Article 20 contains two sentences that regulate the imposition of "special requirements" on the "use" of trademarks. The first sentence of Article 20 prohibits Members from imposing "special requirements" that "unjustifiably encumber[]" the use of a trademark in the course of trade. The first sentence also provides an illustrative list of 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". The second sentence of Article 20 qualifies the obligation enshrined in the first sentence by identifying the type of "special requirements" that a Member may impose, namely, "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".

6.641. Article 20 does not prohibit all measures that impose encumbrances on the use of a trademark in the course of trade. Rather, it proscribes only those special requirements that "unjustifiably encumber" the use of a trademark in the course of trade. This implies that there may be circumstances in which an "encumbrance" on the use of a trademark will be "justifiable".<sup>1651</sup> Accordingly, we do not share Honduras' view that Article 20 imposes a "general prohibition ... on governmental encumbrances on use".<sup>1652</sup> In this connection, we note that Article 19.1 of the TRIPS Agreement, which concerns the requirement of use, provides that "[c]ircumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the 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." Article 19.1 thus contemplates that a Member may impose obstacles such as restrictions on goods or services protected by a trademark, which would result in the non-use of the trademark by its owner.

6.642. We take note of Australia's argument that "[t]he notion that the 'use' of a trademark is a 'protected right' under Part II of the TRIPS Agreement suffuses Honduras' submission."<sup>1653</sup> In Australia's view, contrary to what Honduras implies, the Panel did not find that Article 20 confers a right of use upon the owners of registered trademarks.<sup>1654</sup> We share Australia's view that many of Honduras' arguments on appeal appear to be premised on the idea that Article 20 of the TRIPS Agreement somehow reflects the trademark owner's right to use its trademark in the course of trade. Indeed, in its appellant's submission, as well as in answering our questions at the first hearing, Honduras suggested that there is a presumption of an unencumbered use of, or even a

<sup>1648</sup> Australia's appellee's submission, para. 204.

<sup>1649</sup> Australia's appellee's submission, para. 211.

<sup>1650</sup> Australia's appellee's submission, para. 200. (fn omitted)

<sup>1651</sup> The second sentence of Article 20 expressly provides for conditions under which use can be encumbered by indicating that the obligation outlined in the first sentence of Article 20 does "not preclude a requirement prescribing the use of the trademark" alongside another trademark.

<sup>1652</sup> Honduras' appellant's submission, para. 141.

<sup>1653</sup> Australia's appellee's submission, para. 204.

<sup>1654</sup> Australia's appellee's submission, para. 211.

right to use, a trademark under Article 20 of the TRIPS Agreement.<sup>1655</sup> In section 6.3.1 above, we have explained that Article 16.1 of the TRIPS Agreement, which addresses the rights conferred on an owner of a trademark, does not confer upon the owner a positive right to use its trademark, or a right to protect the distinctiveness of that trademark through use. Rather, Article 16.1 "provides for a *negative* right to prevent all third parties from using signs in certain circumstances".<sup>1656</sup> Likewise, nothing in the text of Article 20 indicates that "the use of a trademark in the course of trade" is a positive right conferred on a trademark owner. Rather, the opening clause of Article 20 ("[t]he use of a trademark in the course of trade...") suggests that this provision regulates the imposition of special requirements in the factual scenario when there is a use of a trademark in the course of trade. The fact that Article 20 presupposes that the use of a trademark may be encumbered "justifiably" further indicates that there is no positive right of use of a trademark by its owner, nor is there an obligation on Members to protect such a positive right.

6.643. Unlike Article 17 of the TRIPS Agreement, Article 20 is not identified as an "exception" to the "rights conferred" on a trademark owner under the TRIPS Agreement. Rather, this provision imposes a positive obligation on Members to refrain from unjustifiably encumbering the use of a trademark in the course of trade by encumbrances resulting from special requirements. The structure of the first sentence of Article 20 suggests that it establishes a single obligation, rather than an obligation and exception thereto.<sup>1657</sup> Accordingly, it is the complainant's burden to establish a *prima facie* case of inconsistency with Article 20.<sup>1658</sup> The text of Article 20 indicates that, in order to establish an inconsistency with this provision, the following elements must be established: (i) the existence of "special requirements"; (ii) such requirements must "encumber" "[t]he use of a trademark in the course of trade"; and (iii) they must do so "unjustifiably". Once the complainant has made its *prima facie* case of inconsistency under Article 20, it is for the respondent to rebut the complainant's case.

6.644. Honduras' appeal calls upon us to interpret the term "unjustifiably" used in the first sentence of Article 20. In Article 20, the adverb "unjustifiably" qualifies the verb "encumbered".<sup>1659</sup> What shall not be "unjustifiably encumbered" is "[t]he use of a trademark in the course of trade".<sup>1660</sup> The term "unjustifiably" is also linked to the "special requirements".<sup>1661</sup> Thus, what should not be "unjustifiabl[e]" is the encumbrance on the use of a trademark in the course of trade that results from special requirements.

6.645. As regards the ordinary meaning, the term "unjustifiably" is an adverb that derives from the adjective "unjustifiable", which has been defined as "not justifiable" or "indefensible".<sup>1662</sup> Other definitions describe the term "unjustifiable" as "not able to be shown to be right or reasonable"<sup>1663</sup> or "unacceptable and wrong because there is no good or fair reason for it".<sup>1664</sup> The antonym of the

<sup>1655</sup> In particular, in its appellant's submission, Honduras stated that, "[b]y rejecting Australia's arguments and findings that Article 20 covers prohibitions on use, the Panel is rightly confirming that trademark 'use' is protected by the TRIPS Agreement." (Honduras' appellant's submission, para. 69) In addition, Honduras observed that "[t]he term 'unjustifiably' in Article 20 provides for a qualified exception to the general rule that no special requirements shall be encumbering the use of a mark in the course of trade." (Ibid., para. 161)

<sup>1656</sup> Panel Reports, *EC – Trademarks and Geographical Indications (Australia)*, fn 564 to para. 7.611; *EC – Trademarks and Geographical Indications (US)*, fn 558 to para. 7.611. (emphasis added)

<sup>1657</sup> The obligation under Article 20 is to not impose special requirements that "unjustifiably encumber" the use of a trademark in the course of trade.

<sup>1658</sup> See Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 335.

<sup>1659</sup> The Panel provided its interpretation of the term "encumbered", which is not challenged on appeal, in paragraphs 7.2234-7.2239 of the Panel Report.

<sup>1660</sup> The Panel provided its interpretation of the what constitutes "use" of a trademark "in the course of trade", which is not challenged on appeal, in paragraphs 7.2260-7.2264 and 7.2279-7.2286 of the Panel Report.

<sup>1661</sup> The Panel provided its interpretation of what constitutes "special requirements", which is not challenged on appeal, in paragraphs 7.2221-7.2233 of the Panel Report.

<sup>1662</sup> *Shorter Oxford English Dictionary*, 6th edn, L. Brown and A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 2, p. 3445.

<sup>1663</sup> Oxford English Dictionary online, definition of "unjustifiable": <https://en.oxforddictionaries.com/definition/unjustifiable>, accessed 24 February 2020.

<sup>1664</sup> Cambridge Dictionary online, definition of "unjustifiable": <https://dictionary.cambridge.org/dictionary/english/unjustifiable>, accessed 24 February 2020.



term "unjustifiable" is "justifiable", a word that denotes the existence of a "good reason"<sup>1665</sup> for something or refers to something that is "able to be shown to be right or reasonable; defensible".<sup>1666</sup> The various meanings attributed to the concept of justifiability thus indicate that it connotes something that is fair and capable of being reasonably explained. By contrast, something is "unjustifiable" when there is no fair reason for it and when it cannot be reasonably explained.<sup>1667</sup>

6.646. The term "unjustifiably" suggests the degree of rationalization that needs to be provided for imposing encumbrances on the use of a trademark by special requirements under Article 20. By contrast, several other provisions of the TRIPS Agreement refer to different permutations of the concept of necessity.<sup>1668</sup> This indicates that a different meaning is sought to be reflected through the use of the term "unjustifiably" as opposed to terms conveying the concept of necessity in the sense of Article XX of the GATT 1994 or Article 2.2 of the TBT Agreement. We recall, in this respect, that it is well established that different words in a treaty are generally intended to convey a different meaning.<sup>1669</sup> At the same time, the use of a similar term ("unjustifiable") in the provisions of other covered agreements, such as the *chapeau* of Article XX of the GATT 1994, which refers to "arbitrary or unjustifiable discrimination", does not imply that the meaning imparted to this term in other contexts can be easily transplanted to the interpretation of Article 20 of the TRIPS Agreement.<sup>1670</sup>

6.647. In our view, the term "unjustifiably" in Article 20 of the TRIPS Agreement reflects the degree of regulatory autonomy that Members enjoy in imposing encumbrances on the use of trademarks through special requirements. The reference to the notion of justifiability rather than necessity in Article 20 suggests that the degree of connection between the encumbrance on the use of a trademark imposed and the objective pursued reflected through the term "unjustifiably" is lower than it would have been had a term conveying the notion of "necessity" been used in this provision. Accordingly, a consideration of whether the use of a trademark has not been "unjustifiably" encumbered should not be equated with the necessity test within the meaning of Article XX of the GATT 1994 or Article 2.2 of the TBT Agreement.

6.648. Honduras argues that only concerns that are directly linked to the trademark, such as its potentially misleading nature, can permissibly trigger an encumbrance on the trademark's use.<sup>1671</sup> According to Honduras, by failing to read the term "unjustifiably" in its proper trademark context,

<sup>1665</sup> Cambridge Dictionary online, definition of "justifiable":

<https://dictionary.cambridge.org/dictionary/english/justifiable>, accessed 24 February 2020.

<sup>1666</sup> Oxford English dictionary online, definition of "justifiable":

<https://en.oxforddictionaries.com/definition/justifiable>, accessed 24 February 2020.

<sup>1667</sup> The French version of the TRIPS Agreement uses the term "de manière injustifiable", which likewise connotes something that has been done in a way that cannot be justified, defended, or shown to be right or reasonable. In a similar vein, the Spanish version of the TRIPS Agreement uses the adverb "injustificablemente".

<sup>1668</sup> For example, Article 41.2 of the TRIPS Agreement provides that procedures concerning the enforcement of intellectual property rights "shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays". The term "necessary" is used in Articles 3.2 ("exceptions are necessary to secure compliance with laws and regulations"), 8.1 ("measures necessary to protect public health and nutrition"), 27.2 ("inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality"), 39.3 ("except where necessary to protect the public"), 43.2 ("a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information"), 50.5 ("[t]he applicant may be required to supply other information necessary for the identification of the goods"), and 73(b) ("[n]othing in this Agreement shall be construed ... to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests") of the TRIPS Agreement.

<sup>1669</sup> Appellate Body Report, *EC – Hormones*, para. 164. In examining the operative terms of the different paragraphs of Article XX of the GATT 1994 ("necessary", "relating to", "in pursuance of"), the Appellate Body observed that "[i]t does not seem reasonable to suppose that the WTO Members intended to require, with respect to each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized." (Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, pp. 17-18)

<sup>1670</sup> The nature and purpose of the TRIPS Agreement is different from that of other covered agreements. As noted in footnote 1502 above, the TRIPS Agreement is principally concerned with the creation and protection of exclusive private rights, which may necessitate restricting commercial activity and requiring the active intervention of Members to enforce these restrictions. By contrast, other covered agreements are focused on the liberalization of international trade, effected through the progressive reduction, through mutual agreement, of barriers to trade.

<sup>1671</sup> Honduras' appellant's submission, para. 108.

"the Panel introduced a broad policy exception in Article 20 which ... opens the door potentially to any policy considerations, and any type of encumbrances on trademarks."<sup>1672</sup>

6.649. In our view, reasons for the imposition of special requirements do not have to relate to the trademark itself. Article 15.2 of the TRIPS Agreement and Article 6*quinquies* B of the Paris Convention (1967), which Honduras refers to<sup>1673</sup>, set out trademark-specific concerns that may serve as a basis for denying registration of a trademark or its invalidation, which include, *inter alia*, concerns pertaining to a trademark's deceitful nature.<sup>1674</sup> In particular, Article 6*quinquies* of the Paris Convention (1967) provides that registration of a trademark may be denied, or a trademark may be invalidated, if it is contrary to morality or public order and is of such a nature as to deceive the public. These concerns, however, are pertinent to *the registration or invalidation of a trademark*. By contrast, Article 20, which regulates the imposition of encumbrances on the use of a trademark through special requirements, is silent as to the reasons for which special requirements may be imposed. In this connection, we note that Article 8 of the TRIPS Agreement, titled "Principles"<sup>1675</sup>, provides, in paragraph 1, that Members may "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".<sup>1676</sup> Measures seeking to protect public health and nutrition encompass a range of measures specifically contemplated by the TRIPS Agreement, including through exceptions to exclusive patent rights (Article 30), compulsory licences (Article 31), and the disclosure to the public of test data (Article 39.3). In this vein, we agree with the Panel that encumbrances on the use of trademarks by special requirements under Article 20 may also be imposed in pursuit of public health objectives.<sup>1677</sup>

6.650. Honduras further argues that the context provided by Article 17 of the TRIPS Agreement suggests that encumbrances on the use of trademarks under Article 20 cannot be determined by public policy concerns and "must be 'limited' in nature".<sup>1678</sup> We recall that Article 17 of the TRIPS Agreement stipulates that Members may provide "limited" exceptions to the rights conferred by a trademark, provided that such exceptions "take account of the legitimate interests of the owner of the trademark". Accordingly, pursuant to Article 17, Members should give consideration to such "legitimate interests" along with other factors (including the legitimate interests of third parties) before reaching a decision on whether to provide for a limited exception to the rights conferred by a trademark.<sup>1679</sup> As the panel in *EC – Trademarks and Geographical Indications (Australia)* and *EC – Trademarks and Geographical Indications (US)* observed, "[e]very 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>1680</sup> While Article 20, unlike Article 17, is not an exception to the rights conferred by a trademark, both provisions concern restrictions on trademarks. Furthermore, in these appellate proceedings it is uncontested that a

<sup>1672</sup> Honduras' appellant's submission, para. 105.

<sup>1673</sup> Honduras' appellant's submission, para. 108.

<sup>1674</sup> According to Article 6*quinquies* B, a trademark registration may be denied, if a trademark: (i) is of such a nature as to infringe rights acquired by third parties in the country where protection is claimed; (ii) is devoid of any distinctive character, or consists exclusively of signs or indications that 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; or (iii) is contrary to morality or public order and, in particular, of such a nature as to deceive the public. (Paris Convention (1967), Article 6*quinquies* B)

<sup>1675</sup> We note that paragraph 5 of the Doha Declaration provides that "[i]n applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles."

<sup>1676</sup> TRIPS Agreement, Article 8.1. The scope of measures referred to in Article 8.1 is limited by two conditions. First, a measure must be "necessary" to protect public health and nutrition, and second, it must be consistent with the provisions of the TRIPS Agreement.

<sup>1677</sup> Panel Report, para. 7.2406.

<sup>1678</sup> Honduras' appellant's submission, para. 160.

<sup>1679</sup> As the panel in *EC – Trademarks and Geographical Indications (Australia)* and *EC – Trademarks and Geographical Indications (US)* explained, "[g]iven 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." (Panel Reports, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.662; *EC – Trademarks and Geographical Indications (US)*, para. 7.662)

<sup>1680</sup> Panel Reports, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664; *EC – Trademarks and Geographical Indications (US)*, para. 7.664.

trademark owner has a "legitimate interest" in using its trademark in the course of trade.<sup>1681</sup> We therefore consider that, in examining whether the use of a trademark has been unjustifiably encumbered by special requirements under Article 20, the legitimate interests of the trademark owner in using the trademark and preserving its distinctiveness should be taken into account. Therefore, while we agree with Honduras that Article 17 provides relevant context for the interpretation of Article 20, we do not consider that it informs that provision in the way suggested by Honduras.

6.651. By using the term "unjustifiably", Article 20 of the TRIPS Agreement provides to Members a certain margin of discretion in imposing encumbrances on the use of trademarks. As noted, the term "unjustifiably" connotes an action for which there is no fair reason, and which cannot be reasonably explained. Accordingly, we understand that a Member that imposes encumbrances on the use of trademarks through special requirements must be able to provide a reasonable explanation of how an objective pursued by introducing special requirements warranted the resulting encumbrances. At the same time, we agree with the Panel that the term "unjustifiably" should not be understood to "require *only* the existence of some rational connection between encumbrances imposed on the use of a trademark and the reason for which they are imposed."<sup>1682</sup> Due account should also be taken of the nature and extent of the encumbrance at issue, including the extent to which the relevant trademarks are affected. Therefore, we agree with the Panel that a determination of whether the use of a trademark in the course of trade is being "unjustifiably" encumbered by special requirements could involve a consideration of: (i) the nature and extent of encumbrances resulting from special requirements, taking into account the legitimate interest of the trademark owner in using its trademark in the course of trade; (ii) the reasons for the imposition of special requirements; and (iii) a demonstration of how the reasons for the imposition of special requirements support the resulting encumbrances.<sup>1683</sup>

6.652. Honduras further argues that, "even if the Panel's interpretation was correct that Article 20 enshrines a broad policy exception that could justify any blunt encumbrance not linked to trademark-specific concerns, the Panel errs by adopting an excessively low bar for considering special requirements to be 'justifiably' encumbering the use of a trademark by failing to respect the proportionality principle."<sup>1684</sup> In particular, Honduras considers that "the Panel errs by not considering it necessary for a Member, when imposing such special requirements, to opt for a less trademark-encumbering special requirement if such is available and provides an equivalent contribution."<sup>1685</sup> In Honduras' view, Article XX of the GATT 1994 and Article 2.2 of the TBT Agreement lend context to this interpretation of Article 20 of the TRIPS Agreement.<sup>1686</sup> For Honduras, "to the extent that the measures affect trademark rights, they must at least be 'necessary' in order to be 'justifiable'."<sup>1687</sup>

6.653. Honduras' suggestion that the encumbrances imposed by special requirements "must at least be 'necessary' in order to be 'justifiable'"<sup>1688</sup> presupposes that the standard of "unjustifiability" under Article 20 should be at least equivalent to the standard of "necessity". As noted, the use of the term "unjustifiably" in Article 20, as opposed to other provisions of the TRIPS Agreement, which refer to the concept of necessity, indicates that the degree of discretion granted to Members through

<sup>1681</sup> Honduras appellant's submission, para. 154; Australia's appellee's submission, paras. 90-93 (quoting Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.662 and 7.664).

<sup>1682</sup> Panel Report, para. 7.2422. (emphasis original)

<sup>1683</sup> Panel Report, para. 7.2430. We note, however, that, in paragraph 7.2430 of its Report, the Panel used the auxiliary verb "should" in introducing the factors pertinent to the examination of whether the use of a trademark in the course of trade is unjustifiably encumbered by special requirements. Later, the Panel stated that "a consideration of whether the use of a trademark is 'unjustifiably encumbered' *will normally involve* a consideration of various elements, including the nature and extent of the encumbrance arising from the special requirements at issue, the reasons for which these requirements are applied, and whether these reasons sufficiently support them." (Panel Report, para. 7.2441 (emphasis added)) We wish to clarify that, while an inquiry under Article 20 could include the consideration of the above-mentioned factors, the degree of discretion vested in Members under Article 20 does not call for a rigid and exact set of considerations that are relevant for the examination of whether the use of a trademark is unjustifiably encumbered by special requirements.

<sup>1684</sup> Honduras' appellant's submission, para. 111.

<sup>1685</sup> Honduras' appellant's submission, para. 111.

<sup>1686</sup> Honduras' appellant's submission, para. 235.

<sup>1687</sup> Honduras' appellant's submission, para. 236.

<sup>1688</sup> Honduras' appellant's submission, para. 236.

the term "unjustifiably" is higher than it would have been, had a term conveying the notion of "necessity" been used. Therefore, we do not consider that the test of necessity, which includes a consideration of alternative measures, could be transposed into the examination of whether the use of a trademark is unjustifiably encumbered by special requirements under Article 20 of the TRIPS Agreement. This does not mean that, in the circumstances of a particular case, the existence of an alternative measure involving a lesser degree of encumbrance on the use of a trademark cannot be used as a consideration in evaluating the justifiability of special requirements and related encumbrances on the use of a trademark. However, such an examination is not a necessary inquiry under Article 20 of the TRIPS Agreement.

6.654. We recall that the Panel did not include the consideration of alternative measures into the list of factors it considered to be relevant for an examination of whether the use of trademark is unjustifiably encumbered by special requirements, as set out in paragraph 7.2430 of the Panel Report. In applying the legal standard it had developed to the facts of this case, the Panel stated that the latitude vested in Members under Article 20 "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".<sup>1689</sup> In particular, the Panel did "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".<sup>1690</sup>

6.655. In our view, the Panel did not err by not including an examination of alternative measures as a requisite consideration for determining whether the use of a trademark has been "unjustifiably" encumbered by special requirements. Indeed, as Australia argues, if a consideration of alternative measures was required under Article 20, this would equate the concept of justifiability reflected in Article 20 of the TRIPS Agreement with the concept of necessity, within the meaning of Article 2.2 of the TBT Agreement and Article XX of the GATT 1994. In our view, this would defy the drafters' intention to provide greater latitude to Members by using the term "unjustifiably" – as opposed to a term reflecting the notion of necessity – in Article 20 of the TRIPS Agreement. Accordingly, while it may be possible that, in the circumstances of a particular case, an alternative measure that would lead to at least an equivalent contribution could call into question whether the reasons for the adoption of the special requirements sufficiently support the resulting encumbrances on the use of the trademark, such an examination is not a necessary inquiry under Article 20.

6.656. Finally, Honduras asserts that the Panel erred in relying on the Doha Declaration in its interpretation of Article 20. In Honduras' view, the Doha Declaration is not relevant to the interpretation of Article 20 because "it relates to the question of access to medicines and patents, and does not relate to any provisions of the TRIPS Agreement concerning trademarks."<sup>1691</sup> According to Honduras, "[t]he Doha Declaration is not, and was never intended to be, a more general declaration that would seek to allow Members to adopt public health related measures in violation of the TRIPS Agreement in general or of the section on trademarks in particular."<sup>1692</sup> Australia responds that the Panel referred to the Doha Declaration to merely confirm that public health considerations are "unquestionably" among the societal interests that can "justify" an encumbrance upon the use of trademarks.<sup>1693</sup> In Australia's view, in any event, "[w]hether or not the Doha Declaration constitutes a subsequent agreement ... is ultimately beside the point" because "Article 8.1 of the TRIPS Agreement, by itself, makes clear that Members may adopt measures necessary for the protection of public health."<sup>1694</sup>

6.657. We recall that paragraph 5(a) of the Doha Declaration provides that, "[i]n applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in

<sup>1689</sup> Panel Report, para. 7.2598.

<sup>1690</sup> Panel Report, para. 7.2598. The Panel clarified that "[t]his 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." (Ibid.)

<sup>1691</sup> Honduras' appellant's submission, para. 256.

<sup>1692</sup> Honduras' appellant's submission, para. 256.

<sup>1693</sup> Australia's appellee's submission, para. 242.

<sup>1694</sup> Australia's appellee's submission, para. 242.

its objectives and principles." We agree with the Panel that paragraph 5(a) of the Doha Declaration reflects "the applicable rules of interpretation, which require a treaty interpreter to take account of the context and object and purpose of the treaty being interpreted".<sup>1695</sup> Accordingly, regardless of the legal status of the Doha Declaration, we see no error in the Panel's reliance on this general principle of treaty interpretation.

6.658. Furthermore, we note that the Panel referred to paragraph 5(a) of the Doha Declaration to confirm that "Articles 7 and 8 of the TRIPS Agreement provide important context for the interpretation of Article 20."<sup>1696</sup> It appears that the Panel had reached the conclusion about the contextual relevance of Articles 7 and 8 of the TRIPS Agreement before it turned to paragraph 5(a) of the Doha Declaration and used the latter to simply reconfirm its view.<sup>1697</sup> In particular, before turning to the Doha Declaration, the Panel observed that "Article 8 offers ... useful contextual guidance for the interpretation of the term 'unjustifiably' in Article 20."<sup>1698</sup> The Panel also remarked that the societal interests referred to in Article 8 may provide a basis of the justification of measures under Article 20.<sup>1699</sup> Thus, we agree with Australia that, in any event, the reliance on the Doha Declaration was not of decisive importance for the Panel's reasoning since the Panel had reached its conclusions about the contextual relevance of Articles 7 and 8 of the TRIPS Agreement to the interpretation of Article 20 before it turned to the Doha Declaration. The Panel relied on the Doha Declaration simply to reconfirm its previous conclusions regarding the contextual relevance of Articles 7 and 8 of the TRIPS Agreement.

6.659. In sum, the ordinary meaning of the term "unjustifiably", as read in the context of other provisions of the TRIPS Agreement, indicates that Members enjoy a certain degree of discretion in imposing encumbrances on the use of trademarks under Article 20 of the TRIPS Agreement.<sup>1700</sup> In order to establish that the use of a trademark in the course of trade is being unjustifiably encumbered by special requirements, the complainant has to demonstrate that a policy objective pursued by a Member imposing special requirements does not sufficiently support the encumbrances that result from such special requirements. We agree with the Panel that such a demonstration could include a consideration of: (i) the nature and extent of encumbrances resulting from special requirements, taking into account the legitimate interest of the trademark owner in using its trademark in the course of trade; (ii) the reasons for the imposition of special requirements; and (iii) a demonstration of how the reasons for the imposition of special requirements support the resulting encumbrances.

6.660. We therefore consider that the Panel did not err in its interpretation of the term "unjustifiably" in Article 20 of the TRIPS Agreement. Consequently, we uphold the Panel's interpretation, in paragraph 7.2430 of the Panel Report, of the term "unjustifiably".

#### **6.3.2.4 Whether the Panel erred in its application of Article 20 of the TRIPS Agreement**

6.661. In its appeal, Honduras focuses on two elements of the Panel's application of the legal standard under Article 20 of the TRIPS Agreement. Specifically, Honduras argues that the Panel erred in: (i) its focus on the economic value of trademarks and in its assessment of the allegedly mitigating factors<sup>1701</sup>, and (ii) its determination that "good reasons" provide "sufficient support" for the encumbrance.<sup>1702</sup> With respect to the latter part of its claim, Honduras argues that: (i) the Panel's finding that the TPP measures contribute to reducing the use of tobacco is vitiated by several errors of law<sup>1703</sup>; (ii) the Panel erred by rejecting the reasonably available, less trademark-encumbering measures proposed by the complainants<sup>1704</sup>; and (iii) the Panel gave undue

<sup>1695</sup> Panel Report, para. 7.2411.

<sup>1696</sup> Panel Report, para. 7.2411.

<sup>1697</sup> Panel Report, paras. 7.2402-7.2406. In particular, before turning to paragraph 5(a) of the Doha Declaration, the Panel concluded that Articles 7 and 8 of the TRIPS Agreement "provide relevant context" to Article 20. (Ibid., para. 7.2399)

<sup>1698</sup> Panel Report, para. 7.2404.

<sup>1699</sup> Panel Report, para. 7.2406.

<sup>1700</sup> The degree of discretion reflected through the term "unjustifiably" in Article 20 is higher than it would have been, had the term reflecting the notion of "necessity" been used in this provision.

<sup>1701</sup> Honduras' appellant's submission, paras. 264-276.

<sup>1702</sup> Honduras' appellant's submission, paras. 277-317.

<sup>1703</sup> Honduras' appellant's submission, paras. 280-284.

<sup>1704</sup> Honduras' appellant's submission, paras. 285-298.

legal weight to the FCTC Guidelines.<sup>1705</sup> In addition, Honduras claims that the Panel, despite its stated intention, did not engage in any weighing and balancing of the public health concerns underlying the TPP measures against their implications on the use of trademarks in the course of trade.<sup>1706</sup>

6.662. The Dominican Republic independently argues that the Panel's findings under Article 20 of the TRIPS Agreement are in error because the Panel failed to make an objective assessment of the matter under Article 11 of the DSU.<sup>1707</sup> In particular, the Dominican Republic takes issue with the Panel's analysis of the contribution of the TPP measures and that of the proposed alternative measures under Article 2.2 of the TBT Agreement, which the Panel subsequently referred to in its analysis under Article 20. With respect to these findings, the Dominican Republic argues that, should we reverse the relevant Panel's findings on contribution and less trade-restrictive alternative measures under Article 2.2, we should also reverse the Panel's findings under Article 20 of the TRIPS Agreement.<sup>1708</sup>

6.663. Australia argues that Honduras errs in considering that the Panel placed an "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>1709</sup> Australia acknowledges that the Panel took into account the economic value of the trademarks in its consideration of the impact of the TPP measures, but not to the exclusion of the distinguishing function of trademarks.<sup>1710</sup> In Australia's view, the Panel's analysis did not detract from the far-reaching nature of the encumbrances under the TPP measures, but rather examined their "*practical implications*".<sup>1711</sup> Australia further submits that the appellants' argument regarding the Panel's analysis of possible alternatives wrongly presupposes that the examination of alternatives under a standard of "unjustifiability" is identical to the examination under the standard of "necessity".<sup>1712</sup> With respect to Honduras' assertion that the Panel gave "undue legal weight"<sup>1713</sup> to the FCTC Guidelines, Australia considers that "[t]he 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>1714</sup>

#### **6.3.2.4.1 The Panel's examination of the nature and extent of encumbrances resulting from the TPP measures**

6.664. Honduras' first ground of appeal concerns the Panel's allegedly erroneous focus on the economic value of trademarks in examining the nature and extent of the encumbrances resulting from the special requirements under the TPP measures. In Honduras' view, the Panel erred by not focusing on the use of a trademark in terms of its distinguishing function and by concluding that there was a mitigating effect resulting from the permissible use of certain word marks.<sup>1715</sup> Honduras submits that the relevant inquiry under Article 20 of the TRIPS Agreement is not whether the trademark owner can distinguish its goods in light of the encumbrances imposed, but how a trademark and its function have been affected.<sup>1716</sup> Honduras underscores that "[t]he prohibition on the use of any figurative signs is the 'ultimate encumbrance' on the use of such trademarks."<sup>1717</sup>

<sup>1705</sup> Honduras' appellant's submission, paras. 299-312.

<sup>1706</sup> Honduras' appellant's submission, paras. 281-282 (referring to Panel Report, paras. 7.2592-7.2594).

<sup>1707</sup> Dominican Republic's appellant's submission, para. 1587.

<sup>1708</sup> Dominican Republic's appellant's submission, para. 1588.

<sup>1709</sup> Australia's appellee's submission, para. 246 (quoting Honduras' appellant's submission, para. 266).

<sup>1710</sup> Australia's appellee's submission, para. 247.

<sup>1711</sup> Australia's appellee's submission, para. 248 (quoting Panel Report, para. 7.2570). (emphasis added by Australia)

<sup>1712</sup> Australia's appellee's submission, para. 250.

<sup>1713</sup> Australia's appellee's submission, para. 253 (quoting Honduras' appellant's submission, paras. 299 and 312).

<sup>1714</sup> Australia's appellee's submission, para. 254 (quoting Panel Report, para. 7.2596).

<sup>1715</sup> Honduras' appellant's submission, para. 266.

<sup>1716</sup> Honduras' response to questioning at the second hearing.

<sup>1717</sup> Honduras' appellant's submission, para. 267.

6.665. Australia responds that, in its analysis, the Panel focused exactly on what Honduras argues it should have focused, i.e. "the implications of the TPP trademark requirements *on a trademark's ability to distinguish goods and services of undertakings in the course of trade*".<sup>1718</sup> Australia points out that the Panel took into account the "far-reaching" encumbrances that the TPP measures impose in evaluating whether the TPP measures impose an unjustifiable encumbrance upon the use of trademarks.<sup>1719</sup> In Australia's view, the Panel's consideration of the economic consequences "did not detract from the 'far-reaching' encumbrance".<sup>1720</sup> Rather, "[t]he Panel's point was that the '*practical implications* of those prohibitions' were 'partially mitigated' by the fact that tobacco companies can still use word trademarks to distinguish their products from those of other undertakings."<sup>1721</sup>

6.666. We start by recalling that the first step of the legal test under Article 20 of the TRIPS Agreement that the Panel set out for itself was to examine "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".<sup>1722</sup> In applying this element of the test to the facts of the case, the Panel agreed with the complainants that the trademark requirements of the TPP measures are "far-reaching".<sup>1723</sup> In this regard, the Panel recalled that "[t]he TPP measures eliminate the possibility of applying figurative trademarks, or figurative or stylized elements of composite and word marks to tobacco retail packaging and products, to distinguish the goods of one undertaking in this manner from those of other undertakings."<sup>1724</sup> According to the Panel, in this way, "[t]he TPP measures thus prevent any non-word components of the relevant trademarks ... from contributing to distinguishing the products in the marketplace."<sup>1725</sup>

6.667. Thereafter, the Panel recalled the panel's statement in *EC – Trademarks and Geographical Indications (US)* that "[t]he function of trademarks can be understood by reference to Article 15.1 [of the TRIPS Agreement] as distinguishing goods and services of undertakings in the course of trade" and that "[e]very trademark owner has a legitimate interest in preserving the distinctiveness, or capacity to distinguish, of its trademark so that it can perform that function"<sup>1726</sup>, which includes its interest in using its trademarks. In the view of the panel in *EC – Trademarks and Geographical Indications (US)*, "[t]aking account of that legitimate interest will also take account of the trademark owner's interest in the economic value of its mark arising from the reputation that it enjoys and the quality that it denotes."<sup>1727</sup> While this statement was made by the panel in *EC – Trademarks and Geographical Indications (US)* in the context of examining "the legitimate interests of the owner of the trademark" in Article 17 of the TRIPS Agreement, the Panel considered it to be important contextual guidance for the purposes of its analysis under Article 20 of the TRIPS Agreement.<sup>1728</sup> The Panel recognized the legitimacy of the trademark owner's interest in using its trademark for various purposes, including identification of the source of the product and communication of its tangible or intangible benefits, and considered that it needed to examine the impact of the TPP measures on the right holder's ability to use trademarks for these various purposes.<sup>1729</sup>

6.668. The Panel noted that "[t]he complainants have not sought to demonstrate that consumers have in fact been unable to distinguish the commercial *source* of tobacco products of one undertaking from those of other undertakings ... as a result of the TPP trademark requirements."<sup>1730</sup> The Panel further noted the complainants' argument that the removal of the figurative elements under the TPP measures undermined the ability of trademarks to signal individual tobacco products' quality,

<sup>1718</sup> Australia's appellee's submission, para. 246 (quoting Panel Report, para. 7.2563). (emphasis added by Australia)

<sup>1719</sup> Australia's appellee's submission, para. 247.

<sup>1720</sup> Australia's appellee's submission, para. 248 (quoting Panel Report, para. 7.2569).

<sup>1721</sup> Australia's appellee's submission, para. 248. (emphasis original)

<sup>1722</sup> Panel Report, para. 7.2430.a.

<sup>1723</sup> Panel Report, para. 7.2557.

<sup>1724</sup> Panel Report, para. 7.2557.

<sup>1725</sup> Panel Report, para. 7.2558.

<sup>1726</sup> Panel Report, para. 7.2560 (quoting Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.664).

<sup>1727</sup> Panel Report, para. 7.2560 (quoting Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.664).

<sup>1728</sup> Panel Report, para. 7.2562.

<sup>1729</sup> Panel Report, para. 7.2562.

<sup>1730</sup> Panel Report, para. 7.2564. (emphasis original)

characteristics, and reputation to consumers.<sup>1731</sup> In the Panel's view, however, preventing such design features from creating positive product perceptions and discouraging the use of tobacco products by consumers was "the very purpose of the TPP measures".<sup>1732</sup>

6.669. The Panel considered that, "by disallowing the use of design features of trademarks ... the TPP measures prevent a trademark owner from extracting economic value from any design features of its trademark."<sup>1733</sup> The Panel therefore concluded that the TPP measures' prohibitions on the use of figurative trademarks on tobacco retail packaging and products and of the figurative and stylized elements of composite and word marks "are far-reaching in terms of the trademark owner's expected possibilities to extract economic value from the use of such features".<sup>1734</sup> The Panel remarked, however, that "[t]he practical implications of those prohibitions 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>1735</sup> The Panel further reiterated that "the complainants have not sought to demonstrate that, as a result of the encumbrances resulting from the trademark-related requirements of the TPP measures, consumers have in fact been unable to distinguish tobacco products of one undertaking from those of other undertakings."<sup>1736</sup>

6.670. Honduras contends that, contrary to what the Panel found, the encumbrances imposed by the TPP measures represented the "ultimate encumbrance" on the use of trademarks because the TPP measures prohibit the use of any figurative signs on tobacco products and packaging.<sup>1737</sup> In this regard, we note that the Panel recognized that the TPP measures "eliminate the possibility of applying figurative trademarks, or figurative or stylized elements of composite and word marks to tobacco retail packaging and products"<sup>1738</sup> and that they thus prohibit "any non-word components of the relevant trademarks".<sup>1739</sup> Having recognized that the TPP measures permit the use of word marks that appear in the form prescribed by the TPP Regulations and prohibit the use of any non-word components of the relevant trademarks, the Panel characterized the encumbrances as "far-reaching".<sup>1740</sup> In doing so, the Panel recognized the comprehensive nature of the TPP measures' prohibition on the use of the non-word components of the relevant trademarks. At the same time, the Panel referred to both permissive (i.e. use of word marks in the form prescribed by the TPP Regulations) and prohibitive (i.e. prohibition on the use of non-word components of the trademarks) elements of the TPP measures. It appears to us that, considering the two elements together, the Panel characterized the degree of the encumbrances at issue as "far-reaching" as opposed to constituting an "ultimate encumbrance" on the use of trademarks.

6.671. Honduras argues that the Panel erred by not focusing on the use of an individual trademark in terms of its distinguishing function and by focusing instead on a mitigating economic effect resulting from the permissible use of certain word marks.<sup>1741</sup> We recall that, pursuant to Article 15.1 of the TRIPS Agreement, "[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." Distinctiveness of signs (as such or acquired through use) is thus key to their eligibility to be registered as a trademark.<sup>1742</sup> Furthermore, as the panel in *EC – Trademarks and Geographical Indications (Australia)* and *EC – Trademarks and Geographical Indications (US)* observed in the context of its analysis under Article 17 of the TRIPS Agreement, a trademark owner "has a legitimate interest in preserving the distinctiveness, or capacity to distinguish", of its trademark, which "includes its interest in using its own trademark".<sup>1743</sup> The trademark owner's

<sup>1731</sup> Panel Report, para. 7.2564.

<sup>1732</sup> Panel Report, para. 7.2567.

<sup>1733</sup> Panel Report, para. 7.2569.

<sup>1734</sup> Panel Report, para. 7.2569.

<sup>1735</sup> Panel Report, para. 7.2570.

<sup>1736</sup> Panel Report, para. 7.2570. (fn omitted)

<sup>1737</sup> Honduras' appellant's submission, para. 267.

<sup>1738</sup> Panel Report, para. 7.2557.

<sup>1739</sup> Panel Report, para. 7.2558.

<sup>1740</sup> Panel Report, paras. 7.2557 and 7.2569.

<sup>1741</sup> Honduras' appellant's submission, para. 266.

<sup>1742</sup> Appellate Body Report, *US – Section 211 Appropriations Act*, para. 154.

<sup>1743</sup> Panel Reports, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664; *EC – Trademarks and Geographical Indications (US)*, para. 7.664.



legitimate interest in preserving the distinctiveness and using its trademark in the course of trade includes the interest in extracting the economic value from its trademark.<sup>1744</sup>

6.672. In this regard, we note that, in its analysis, the Panel reiterated several times that the complainants had not sought to demonstrate before the Panel that, as a result of the trademark-related requirements of the TPP measures, consumers have been unable to distinguish the commercial source of tobacco products of one undertaking from those of other undertakings.<sup>1745</sup> Given that the complainants did not seek to establish that, as result of the TPP measures, consumers have been unable to distinguish the source of tobacco products at issue, we consider that it was appropriate for the Panel to examine another aspect of the trademark owner's legitimate interests – the potential for extracting economic value from its trademark.<sup>1746</sup> In examining the ability of the trademark owners "to otherwise extract economic value from those trademarks", the Panel addressed the arguments regarding price competition and downward substitution that the complainants themselves had raised.<sup>1747</sup>

6.673. Honduras also takes issue with the Panel's statement that "[t]he practical implications [of prohibitions on the use of any non-word components of the relevant trademarks] are partly mitigated by the fact that the TPP measures allow tobacco manufacturers to use word trademarks ... to distinguish their products."<sup>1748</sup> As noted, the Panel considered both prohibitive and permissive elements of the TPP measures. In our view, in making this statement, the Panel recognized that, despite the prohibition on the use of non-word components of trademarks, consumers can distinguish the source of tobacco products due to the permission on the use of word marks. This understanding is bolstered by the fact that, in the next sentence, the Panel reiterated that the complainants had not sought to establish that consumers had been unable to distinguish the source of the tobacco products.<sup>1749</sup>

6.674. Moreover, we do not consider that this observation affected or detracted from the Panel's general characterization of the encumbrances on the use of trademarks resulting from the TPP measures as "far-reaching".<sup>1750</sup> In this respect we recall that, in paragraph 7.2604, summarizing its analysis under Article 20 of the TRIPS Agreement, the Panel repeated its understanding that "the special requirements are far-reaching in terms of the trademark owners' possibilities to extract economic value from the use of figurative or stylized features of trademarks."<sup>1751</sup>

6.675. In sum, we consider that, having assessed both prohibitive and permissive elements of the trademark-related requirements of the TPP measures, the Panel characterized the nature and extent of the encumbrance resulting from the special requirements under the TPP measures as "far-reaching".<sup>1752</sup> The Panel's observation that the "practical implications" of the prohibitions on the use of non-word elements of trademarks were "partly mitigated" by the permission to use word trademarks did not diminish this conclusion.<sup>1753</sup> Rather, in making this statement, the Panel explained that, despite prohibitions on the use of non-word components of the trademarks, consumers could still distinguish the source of tobacco products due to the use of word marks. Furthermore, given that the complainants did not contest that it was possible to distinguish the commercial source of the tobacco products at issue, the Panel addressed the legitimate interests of the trademark owners by examining the owners' potential to extract economic value from their trademarks.

<sup>1744</sup> Panel Reports, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.664; *EC – Trademarks and Geographical Indications (US)*, para. 7.664.

<sup>1745</sup> Panel Report, paras. 7.2564 and 7.2570.

<sup>1746</sup> Panel Report, para. 7.2571.

<sup>1747</sup> Panel Report, paras. 7.2571-7.2572.

<sup>1748</sup> Panel Report, para. 7.2570.

<sup>1749</sup> Panel Report, para. 7.2570.

<sup>1750</sup> Panel Report, paras. 7.2557 and 7.2569.

<sup>1751</sup> Panel Report, para. 7.2604.

<sup>1752</sup> Panel Report, paras. 7.2557, 7.2569, and 7.2604.

<sup>1753</sup> Panel Report, paras. 7.2570-7.2571.

#### 6.3.2.4.2 The Panel's assessment of whether the reasons for the special requirements provide sufficient support for the resulting encumbrances

6.676. Honduras' challenge of the Panel's conclusion that the reasons for special requirements under the TPP measures sufficiently support the resulting encumbrances rests on several grounds. First, Honduras argues that the Panel's finding that the TPP measures contribute to the reduction in the use of tobacco was vitiated by several errors of law, including the lack of weighing and balancing in the Panel's analysis and the lack of objectivity in the Panel's assessment of evidence under Article 11 of the DSU.<sup>1754</sup> Second, Honduras submits that the Panel erred by rejecting the reasonably available, less trademark-encumbering alternative measures proposed by the complainants.<sup>1755</sup> We address each of these concerns in turn.

6.677. Honduras' first argument is that the Panel did not undertake the weighing and balancing of the public health concerns and their implications on the use of trademarks in the course of trade. Instead, Honduras argues that, "[i]n three short paragraphs, the Panel simply repeat[ed] the fact that the protection of health is an important concern and recalls its (erroneous) finding made in respect of the claim under Article 2.2 of the TBT Agreement that the plain packaging measures contribute to the reduction of smoking."<sup>1756</sup> Australia responds that the Panel engaged in weighing and balancing in section 7.3.5.5.3.4 of its Report.<sup>1757</sup>

6.678. We recall that, as a first step of its analysis, the Panel defined the degree of encumbrance resulting from the trademark-related requirements of the TPP measures as "far-reaching".<sup>1758</sup> As a second step of its analysis, the Panel established that, "for the purposes of Article 20, the reason for which Australia applies the trademark requirements, as an integral part of the TPP measures, is to improve public health by reducing the use of, and exposure to, tobacco products."<sup>1759</sup> The Panel recalled the Appellate Body's observation that the preservation of human life and health is "both vital and important in the highest degree".<sup>1760</sup> Honduras does not take issue with this finding.

6.679. Thereafter, the Panel turned to its examination of whether the reasons for the application of the trademark requirements under the TPP measures sufficiently support the resulting encumbrances. In doing so, the Panel stated that it would have to assess the public health concerns that underlie the TPP measures' trademark requirements against the resulting encumbrances. Thereafter, the Panel stated that:

The fact that these special requirements, as part of the overall TPP measures and in combination with other tobacco-control measures maintained by Australia, are capable of contributing, and do in fact contribute, to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products, suggests that the reasons for which these special requirements are applied provide sufficient support for the application of the resulting encumbrances on the use of trademarks.<sup>1761</sup>

6.680. The fact that the Panel made this statement upfront may have prompted Honduras' allegation that the Panel did not conduct any weighing and balancing. We note, however, that, after making that statement, the Panel elaborated on the reasons that led it to this conclusion. In particular, the Panel recalled its finding, made in the context of analysis under Article 2.2 of the TBT Agreement, that the rationale for the imposition of the TPP measures was that the removal of design features on retail packaging and cigarettes had been determined to be apt to reduce the appeal of tobacco products and increase the effectiveness of GHWs. The Panel then underscored that the standardization of packaging was an integral part of the TPP measures and recalled its previous rejection of a pre-vetting mechanism as an alternative measure due to administrative discretion embodied in such a mechanism.<sup>1762</sup> We consider that, by doing so, the Panel connected the requirements of the TPP measures to the public health concern that they sought to address, which demonstrated that Australia's public health objectives could be achieved only by uniform and

<sup>1754</sup> Honduras' appellant's submission, paras. 280-284.

<sup>1755</sup> Honduras' appellant's submission, paras. 285-298.

<sup>1756</sup> Honduras' appellant's submission, para. 281 (referring to Panel Report, paras. 7.2592-7.2594).

<sup>1757</sup> Australia's appellee's submission, para. 249.

<sup>1758</sup> Panel Report, paras. 7.2557 and 7.2569.

<sup>1759</sup> Panel Report, para. 7.2586.

<sup>1760</sup> Panel Report, para. 7.2587. (fn omitted)

<sup>1761</sup> Panel Report, para. 7.2592.

<sup>1762</sup> Panel Report, para. 7.2594.

standardized requirements that did not leave any space for possible administrative discretion or non-uniform application. Thereafter, the Panel addressed the complainants' arguments about the possible alternative less trademark-encumbering measures.

6.681. In light of the above, we do not agree with Honduras that the Panel did not undertake any weighing and balancing in its analysis. In our view, the Panel's analysis contains the basic elements of the weighing and balancing exercise, such as an assessment of the objectives pursued and the nature of the measures imposed, as well as an examination of the possible alternative measures. Moreover, we do not consider that the weighing and balancing that the Panel was supposed to undertake under Article 20 is the same as that under Article 2.2 of the TBT Agreement. The term "unjustifiably" in Article 20 of the TRIPS Agreement cannot be equated with the term "unnecessary" in Article 2.2 of the TBT Agreement, and consideration of less trademark-encumbering alternative measures is not a necessary element in the assessment of justifiability under Article 20.

6.682. Honduras also takes issue with the Panel's treatment of the proposed alternative measures. Honduras contends that, by finding that it is not always necessary to examine the availability of less trademark-encumbering alternative measures, the Panel rejected the notion that a measure would be "unjustifiably" encumbering the use of a trademark under Article 20, if the encumbrance goes beyond what suffices to address the specific policy objective.<sup>1763</sup> Honduras further argues that the Panel "failed to apply its own legal test to the facts of the case".<sup>1764</sup> Honduras recalls the Panel's statement that the availability of an alternative measure could call into question the reasons for the adoption of a measure challenged 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>1765</sup> However, Honduras claims that later the Panel effectively changed this legal test by demanding that the alternative measures proposed by Honduras be "*manifestly better* in contributing towards Australia's public health objective, *operating in a manner comparable to* the TPP measures as an integral part of Australia's comprehensive tobacco control policies and at the level desired by Australia".<sup>1766</sup>

6.683. Australia points out that Honduras' argument assumes that, as a matter of law, "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'", which Australia disagrees with.<sup>1767</sup> Australia also disputes Honduras' assertion that the Panel failed to "examine the alternative measures' contribution in light of their lesser degree of *trademark* encumbrance".<sup>1768</sup> Australia considers that Honduras' position reflects the erroneous belief that the TRIPS Agreement establishes a right to use the trademark.<sup>1769</sup> Australia submits that, in any event, the Panel found that none of the proposed alternatives would have made an equivalent contribution to Australia's objective in the absence of the TPP measures.<sup>1770</sup>

6.684. As explained in paragraph 6.654. above, the Panel did not consider that an examination of available less trademark-encumbering alternative measures is required in examining whether the use of a trademark in the course of trade is unjustifiably encumbered by special requirements under Article 20 of the TRIPS Agreement.<sup>1771</sup> This is consistent with our understanding that an examination

<sup>1763</sup> Honduras' appellant's submission, para. 285.

<sup>1764</sup> Honduras' appellant's submission, para. 286.

<sup>1765</sup> Honduras' appellant's submission, para. 286 (quoting Panel Report, para. 7.2598). (emphasis added by Honduras)

<sup>1766</sup> Honduras' appellant's submission, para. 288 (quoting Panel Report, para. 7.2601). (emphasis added by Honduras)

<sup>1767</sup> Australia's appellee's submission, para. 250. (fn omitted) See also Australia's appellee's submission, part III.D.2(c).

<sup>1768</sup> Australia's appellee's submission, para. 251 (quoting Honduras' appellant's submission, para. 290). (emphasis original)

<sup>1769</sup> Australia's appellee's submission, para. 251.

<sup>1770</sup> Australia's appellee's submission, para. 252.

<sup>1771</sup> In this regard, the Panel stated:

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

of whether the use of a trademark is unjustifiably encumbered by special requirements under Article 20 may include a consideration of less trademark-encumbering alternative measures, but this is not a necessary element in the assessment of justifiability under Article 20 TRIPS. We thus see no error in the Panel's approach.

6.685. We now turn to address Honduras' argument that the Panel failed to "examine the alternative measures' contribution in light of their lesser degree of *trademark* encumbrance".<sup>1772</sup> In Honduras' view, the Panel erroneously transposed its analysis under Article 2.2 of the TBT Agreement, which focuses on trade restrictiveness, to Article 20 of the TRIPS Agreement, which focuses on trademark encumbrance.<sup>1773</sup>

6.686. We recall that Article 2.2 of the TBT Agreement provides that 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", and that such regulations shall not be "more trade-restrictive than necessary to fulfil a legitimate objective". In the context of an analysis under Article 2.2, a comparison of the challenged technical regulation with possible *alternative measures* is "a conceptual tool for the purpose of ascertaining whether a challenged measure is more trade-restrictive than necessary".<sup>1774</sup> The Appellate Body has clarified that, in order for a possible alternative measure to render the challenged measure inconsistent with Article 2.2, it must be "reasonably available *and* less trade-restrictive than the challenged measure, taking account of the risks non-fulfilment would create".<sup>1775</sup> Moreover, the Appellate Body has stated that the obligation to consider "the risks non-fulfilment would create" under Article 2.2 suggests a further element of the analysis, namely, a determination of whether a possible alternative measure "would make an equivalent contribution to the relevant legitimate objective", taking account of the risks of non-fulfilment.<sup>1776</sup>

6.687. Unlike Article 2.2 of the TBT Agreement, which refers to "*unnecessary* obstacles to international trade", Article 20 of the TRIPS Agreement requires that the use of a trademark in the course of trade not be "*unjustifiably* encumbered" by special requirements.<sup>1777</sup> Thus, whereas the aim of Article 2.2 is the prevention of unnecessary obstacles to international trade by ensuring that technical regulations are not more trade-restrictive than necessary, the purpose of Article 20 is to prevent the imposition of unjustifiable encumbrances on the use of trademarks. Indeed, the main interest protected under Article 2.2 of the TBT Agreement is the unhindered flow of international trade, while under Article 20 of the TRIPS Agreement it is the prevention of unjustifiable encumbrances of the use of a trademark by its owner in the course of trade.<sup>1778</sup> Accordingly, whereas under Article 2.2 of the TBT Agreement an alternative measure must be reasonably available and less trade-restrictive than the challenged measure, an alternative proposed under Article 20 of the TRIPS Agreement should entail a lesser degree or no encumbrance on the use of a trademark. As a result, a simple transplantation of an examination of the possible alternative measures under Article 2.2 of the TBT Agreement into the analysis under Article 20 of the TRIPS Agreement would not be apposite because the focus of the inquiries under the two provisions is different. At the same time, the same alternative measure may have both trade-restrictive and trademark-encumbering

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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.

(Panel Report, para. 7.2598)

<sup>1772</sup> Honduras' appellant's submission, para. 290. (emphasis original)

<sup>1773</sup> Honduras' appellant's submission, paras. 290-295.

<sup>1774</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 320.

<sup>1775</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 320 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 166, addressing "necessity" in the context of Article XX of the GATT 1994 and Article XIV of the GATS). (emphasis original)

<sup>1776</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 321. The definition of the term "equivalent" includes "[e]qual in value, significance, or meaning" and "having the same effect". (*Shorter Oxford English Dictionary*, 5th edn, W. R. Trumble and A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 851)

<sup>1777</sup> Emphasis added.

<sup>1778</sup> We recall, in this respect that, according to the preamble to the TRIPS Agreement, intellectual property rights are private rights.

aspects. In this case, the trade-restrictive elements of such a measure would be examined under Article 2.2 of the TBT Agreement, and the measure's potential to encumber the use of trademarks would be examined under Article 20 of the TRIPS Agreement.

6.688. We recall that, in its analysis of the alternative measures, the Panel first indicated that the complainants "refer[red], in the context of their claims under Article 20 of the TRIPS Agreement, to the same four measures as under Article 2.2 of the TBT Agreement".<sup>1779</sup> These were: (i) an increase in taxation of tobacco products; (ii) an increase in the MLPA; (iii) an improvement of anti-smoking social marketing campaigns; and (iv) the creation of a pre-vetting mechanism for tobacco packaging. The Panel considered that the first three of these alternatives would not involve any encumbrances on the use of trademarks, while creation of a pre-vetting mechanism would involve some encumbrances on the use of trademarks.<sup>1780</sup> As noted above, the Panel relied on its analysis of the alternative measures in the context of Article 2.2 of the TBT Agreement in its assessment under Article 20 of the TRIPS Agreement.

6.689. As the Panel observed, the same four alternative measures had been put forward by the complainants under Article 2.2 of the TBT Agreement and under Article 20 of the TRIPS Agreement.<sup>1781</sup> As we observed above, even if an alternative measure had both trade-restrictive and trademark-encumbering aspects, the focus of the inquiry under Article 20 of the TRIPS Agreement is different from that under Article 2.2 of the TBT Agreement. The inquiry under Article 20 of the TRIPS Agreement must focus on the trademark-encumbering aspects of the alternative measure. In this respect, we note that the Panel did consider in its analysis whether the proposed alternative measures would involve encumbrances on the use of trademarks. The Panel found that "[t]hree of these alternatives would not involve any encumbrances on the use of trademarks, while a pre-vetting mechanism would also involve encumbrances on the use of trademarks."<sup>1782</sup> Accordingly, contrary to what Honduras argues, the Panel did address the alternative measures from a trademark perspective.

6.690. Honduras' third ground for challenging the Panel's analysis of the alternative measures concerns the Panel's articulation of the degree of contribution that the proposed alternative measures should achieve. In Honduras' view, the Panel first stated that the alternative measures must "lead to at least equivalent outcomes", but then changed the standard by requiring that the alternative measures be "manifestly better" than the TPP measures in contributing towards Australia's objective.<sup>1783</sup> Thus, in Honduras' view, "the Panel's finding is based on a standard that is different from the one it appeared to have set for itself."<sup>1784</sup>

6.691. We recall that, in setting out its approach to the analysis of the alternative measures, the Panel stated that the challenged measure would be called into question "if a readily available alternative would lead to at least equivalent outcomes in terms of the policy objective of the challenged measure".<sup>1785</sup> The Panel then recalled that, in its previous analysis of the alternative measures under Article 2.2 of the TBT Agreement, it found that "none of these alternative measures would be apt to make a contribution to Australia's objective equivalent to that of the TPP measures."<sup>1786</sup> In light of these previous findings under Article 2.2 of the TBT Agreement, the Panel concluded that "the complainants have not shown that any of the proposed measures alone or in combination would be manifestly better in contributing towards Australia's public health objective."<sup>1787</sup>

<sup>1779</sup> Panel Report, para. 7.2599.

<sup>1780</sup> Panel Report, para. 7.2599.

<sup>1781</sup> Panel Report, para. 7.2599.

<sup>1782</sup> Panel Report, para. 7.2599.

<sup>1783</sup> Honduras' appellant's submission, paras. 286 and 288 (quoting Panel Report, paras. 7.2598 and 7.2601). (emphasis omitted)

<sup>1784</sup> Honduras' appellant's submission, para. 289.

<sup>1785</sup> Panel Report, para. 7.2598.

<sup>1786</sup> Panel Report, para. 7.2600.

<sup>1787</sup> Panel Report, para. 7.2601. The Panel addressed one of the proposed alternative measures – the creation of a pre-vetting mechanism – in more detail. The Panel recalled 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 standardizing packaging and product appearance." (Ibid., para. 7.2603) (fn omitted) The Panel concluded that, since Australia is not required to conduct and assessment

6.692. Indeed, the Panel's references to the level of contribution of the alternative measures were not consistent. In articulating the standard by which it would abide, the Panel stated that the readily available alternative measure should lead to "*at least equivalent outcomes*" as the challenged measure.<sup>1788</sup> By contrast, later in its analysis, the Panel concluded that the complainants have not shown that any of the proposed alternative measures "*would be manifestly better*" in contributing towards Australia's objective.<sup>1789</sup> However, we recall that, in its examination of the alternative measures under Article 20 of the TRIPS Agreement, the Panel relied on its previous analysis of the alternative measures in the context of Article 2.2 of the TBT Agreement. The Panel considered the findings it had made under Article 2.2 of the TBT Agreement "relevant" for its analysis under Article 20 of the TRIPS Agreement and made its conclusions with respect to the alternative measures under Article 20 of the TRIPS Agreement "[i]n light of these earlier findings" under Article 2.2 of the TBT Agreement.<sup>1790</sup> Specifically, the Panel relied on its earlier finding under Article 2.2 of the TBT Agreement that none of the alternative measures "would be apt to make a contribution to Australia's objective *equivalent* to that of the TPP measures".<sup>1791</sup>

6.693. In light of the above, we recognize that the language that the Panel used in referring to the expected degree of contribution of the alternative measures in its analysis under Article 20 of the TRIPS Agreement was inconsistent. However, in reaching its conclusions regarding the contribution of the alternative measures under Article 20 of the TRIPS Agreement, the Panel relied on its earlier findings with respect to the contribution of the alternative measures under Article 2.2 of the TBT Agreement, which were premised on the standard of equivalence. Accordingly, notwithstanding the terminological inconsistency, we consider that, in fact, the standard by which the Panel abided was the same as under Article 2.2 of the TBT Agreement – i.e. at least an equivalent contribution to the stated objective.<sup>1792</sup>

6.694. We recall that we have found that the Panel erred in finding that the complainants failed to demonstrate that two alternative measures – the MLPA for tobacco products and an increase in taxation of tobacco products – would be apt to make a contribution equivalent to that of the TPP measures.<sup>1793</sup> Specifically, to the extent that the Panel suggested that each alternative measure may be considered apt to achieve a similar or comparable degree of "meaningful" overall reduction in smoking in Australia to that of the TPP measures, and yet its contribution would not be equivalent because of its failure to address the design features of tobacco packaging that the TPP measures seek to address in the context of Australia's broader tobacco control policy, we have found that the Panel erred in its application of Article 2.2.<sup>1794</sup> Having found that the Panel committed legal error in its findings concerning the contribution of these two alternative measures in the context of Article 2.2 of the TBT Agreement, we consider that the Panel could not rely on these findings in assessing the contribution of these two alternative measures in the context of Article 20 of the TRIPS Agreement.<sup>1795</sup>

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of trademarks and their features on an individual basis, the availability of a pre-vetting mechanism, which amounts to a method of conducting such an assessment, would not call into question whether Australia's public health objective sufficiently supports the encumbrances resulting from the TPP trademark restrictions. (Ibid.)

<sup>1788</sup> Panel Report, para. 7.2598. (emphasis added)

<sup>1789</sup> Panel Report, para. 7.2601. (emphasis added)

<sup>1790</sup> Panel Report, para. 7.2601.

<sup>1791</sup> Panel Report, para. 7.2600. (emphasis added)

<sup>1792</sup> We recall that, in response to questioning at the second hearing, Honduras stated that it considered the standard of equivalent contribution to be the correct standard for the examination of the alternative measures under Article 20 of the TRIPS Agreement.

<sup>1793</sup> Panel Report, paras. 7.1464 and 7.1531.

<sup>1794</sup> At the same time, we have concluded that the Panel did not err in finding that the complainants failed to demonstrate that these two alternative measures are less trade-restrictive than the TPP measures. Consequently, although we have concluded that the Panel erred in its application of Article 2.2 with respect to the equivalence of the contribution of each alternative measure, the Panel's findings, that the complainants have not demonstrated that the increase in the MLPA and the increase in taxation would each "be a less trade-restrictive alternative to the TPP measures, that would make an equivalent contribution to Australia's objective", stand. (Panel Report, para. 7.1545)

<sup>1795</sup> Having said so, we do not need to further address the Dominican Republic's claim that the Panel made a consequential error by relying on its findings, made under Article 2.2 of the TBT Agreement, that none of the alternative measures proposed by the Dominican Republic would achieve the same level of contribution in the context of its analysis under Article 20 of the TRIPS Agreement. (Dominican Republic's appellant's submission, para. 1547)

6.695. Having said that, we recall our understanding that, while it may be possible that, in the circumstances of a particular case, an alternative measure that would lead to at least an equivalent contribution could call into question whether the reasons for the adoption of the special requirements sufficiently support the resulting encumbrances on the use of the trademark, such an examination is not a necessary inquiry under Article 20. In our view, given the degree of regulatory autonomy provided to Members under Article 20 through the use of the term "unjustifiably", an analysis of alternative measures is not required in each and every case, and does not provide decisive guidance in determining whether the encumbrances in question are imposed "unjustifiably". We further recall our finding, in paragraph 6.655. above, that the Panel did not err in the interpretation of Article 20 of the TRIPS Agreement by not considering an examination of alternative measures to be a necessary element of an inquiry under Article 20.

6.696. We recall that, before turning to the analysis of the alternative measures in the context of Article 20, the Panel underlined that, through an overall standardization of tobacco packaging and product appearance, the trademark requirements of the TPP measures make a contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.<sup>1796</sup> For the Panel, "[t]his overall design of the TPP measures, of which the trademark-related requirements are an integral part" provided support for the conclusion that the reasons for their adoption sufficiently supported these requirements, and that they therefore were not imposed unjustifiably.<sup>1797</sup> The Panel thus may be seen as having reached the conclusion that the reasons for the adoption of the TPP trademark requirements sufficiently supported the resulting encumbrances on the trademarks even before it turned to the examination of the proposed alternative measures. Furthermore, in reaching its final conclusion as to whether the reasons for the special requirements under the TPP measures supported the resulting encumbrances, the Panel did not rely on its conclusions regarding the alternative measures under Article 20. Rather, having recognized that trademarks "have substantial economic value" and that the special requirements under the TPP measures "are far-reaching in terms of the trademark owners' possibilities to extract economic value from the use of figurative or stylized features of trademarks", the Panel noted that "the TPP measures, including their trademark restrictions, are an integral part of Australia's comprehensive tobacco control policies, and designed to complement the pre-existing measures."<sup>1798</sup>

6.697. In our view, the Panel's overall conclusion 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 would stand despite the Panel's error in its analysis of the alternative measures. As noted, Members enjoy a certain degree of regulatory autonomy in encumbering the use of trademarks by special requirements under Article 20 and an analysis of alternative measures is not required under this provision.<sup>1799</sup> In light of the contribution to Australia's objective that the trademark requirements of the TPP measures make, we consider that Australia's public health reasons for the adoption of the TPP measures sufficiently supported the far-reaching encumbrances on the use of trademarks resulting from the trademark requirements of the TPP measures.

6.698. Finally, we turn to address the appellants' consequential claims of error under Article 11 of the DSU. The appellants submit that, as a result of the Panel's reliance on its findings regarding contribution of the TPP measures made in the context of Article 2.2 of the TBT Agreement, which the appellants challenge under Article 11 of the DSU, the Panel's conclusions regarding contribution in the context of analysis under Article 20 are also flawed.<sup>1800</sup> We recall that, in its analysis under Article 20 of the TRIPS Agreement, the Panel relied on its conclusions that the TPP measures are apt to and do make a contribution to Australia's objective, made in the context of Article 2.2 of the TBT Agreement. In paragraph 6.373. above, we have upheld the Panel's findings under Article 2.2 of the TBT Agreement that the TPP measures are apt to and do make a contribution to Australia's objective of reducing the use of, and exposure to, tobacco products. We therefore dismiss the

<sup>1796</sup> Panel Report, para. 7.2593.

<sup>1797</sup> Panel Report, para. 7.2593.

<sup>1798</sup> Panel Report, para. 7.2604.

<sup>1799</sup> As noted, while it may be possible that, in the circumstances of a particular case, an alternative measure that would lead to at least an equivalent contribution could call into question whether the reasons for the adoption of the special requirements sufficiently support the resulting encumbrances on the use of the trademark, such an examination is not a necessary inquiry under Article 20.

<sup>1800</sup> Honduras' appellant's submission, para. 284; Dominican Republic's appellant's submission, para. 1547.

appellants' consequential claim under Article 11 of the DSU regarding these findings raised in the context of Honduras' challenge under Article 20 of the TRIPS Agreement.

6.699. In light of all of the above, we consider that the Panel did not err in its examination of whether the reasons for special requirements under the TPP measures sufficiently support the resulting encumbrances.

#### 6.3.2.4.3 The weight attributed by the Panel to the FCTC Guidelines

6.700. Honduras claims that the Panel gave undue legal weight to the FCTC and its Guidelines.<sup>1801</sup> Honduras considers that the Panel's conclusion that the "good reasons" of public health protection "sufficiently support[ed]" the TPP measures was based on two main elements: (i) the contribution to the reduction of smoking; and (ii) Australia's pursuance of 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, including the Article 11 and Article 13 FCTC Guidelines".<sup>1802</sup> Honduras considers that the FCTC does not include any binding "commitment" to adopt plain packaging<sup>1803</sup>, and that its Guidelines cannot be used to justify WTO-inconsistent plain packaging measures, especially in situations where countries go beyond the requirements of the FCTC, as Australia does.<sup>1804</sup>

6.701. Australia responds that no party ever argued that the FCTC mandated the adoption of tobacco plain packaging, nor did the Panel find that the FCTC Guidelines could be used to justify otherwise WTO-inconsistent measures.<sup>1805</sup> Australia points out that the adoption of the recommendation by 180 countries is "highly relevant"<sup>1806</sup> to the analysis of unjustifiability.<sup>1807</sup>

6.702. At the outset, we recall that Australia had argued before the Panel that Articles 11 and 13 of the FCTC Guidelines<sup>1808</sup> constitute a "relevant international standard" for tobacco plain packaging within the meaning of Article 2.5 of the TBT Agreement.<sup>1809</sup> The Panel disagreed with Australia that Articles 11 and 13 of the FCTC Guidelines constitute a "standard" within the meaning of Annex 1.2 to the TBT Agreement and considered that it did not have to further examine whether they are "international".<sup>1810</sup> The Panel remarked that "the FCTC and certain FCTC Guidelines have been specifically discussed and relied on as evidence in at least two previous WTO disputes", which are *Dominican Republic – Import and Sale of Cigarettes* and *US – Clove Cigarettes*.<sup>1811</sup> The Panel noted that Australia and certain complainants referred to the FCTC and its Guidelines as "evidence in support of specific arguments".<sup>1812</sup> The Panel saw no reason to assume that the FCTC and its Guidelines "could not inform, together with other relevant evidence", the Panel's understanding of relevant aspects of the matters at issue, such as "tobacco control measures ... to reduce ... the prevalence of tobacco use".<sup>1813</sup> These preliminary observations about the FCTC and its Guidelines

<sup>1801</sup> Honduras' appellant's submission, paras. 299-312.

<sup>1802</sup> Honduras' appellant's submission, para. 299 (quoting Panel Report, para. 7.2604).

<sup>1803</sup> Honduras' appellant's submission, para. 302.

<sup>1804</sup> Honduras' appellant's submission, paras. 303-306.

<sup>1805</sup> Australia's appellee's submission, paras. 253-254.

<sup>1806</sup> Australia's appellee's submission, para. 254. (emphasis original)

<sup>1807</sup> Australia's appellee's submission, para. 254.

<sup>1808</sup> Article 11 of the FCTC Guidelines concerns packaging and labelling of tobacco products. Article 13 of the FCTC Guidelines concerns measures against tobacco advertising, promotion, and sponsorship.

<sup>1809</sup> Panel Report, para. 7.264.

<sup>1810</sup> Panel Report, paras. 7.397 and 7.400.

<sup>1811</sup> Panel Report, paras. 7.412-7.414 (referring to Panel Reports, *Dominican Republic – Import and Sale of Cigarettes*, paras. 1.6, 4.370, and 7.216; *US – Clove Cigarettes*, paras. 2.2, 2.30, 7.4, and 7.229-7.232).

<sup>1812</sup> Panel Report, para. 7.416. In particular, the Panel noted that "Honduras and Cuba cite[d] Article 11 of the FCTC in the course of their arguments regarding 'wear-out' effects of GHWs." (Panel Report, fn 1272 to para. 7.416 (referring to Honduras' response to Panel question No. 126, p. 38 and fn 148 thereto; second written submission to the Panel, para. 51 and fn 50 thereto; Cuba's second written submission to the Panel, para. 155 and fn 56 thereto)). The Panel further noted that the Dominican Republic referenced Article 11 of the FCTC and relied on Article 11 of the FCTC Guidelines. (Panel Report, fn 1272 to para. 7.416 (referring to Dominican Republic's comments on Australia's response to Panel question No. 148, para. 87 and fn 105 thereto; comments on Australia's response to Panel question No. 204, para. 891 and fn 958 thereto, and para. 897 and fn 973 thereto))

<sup>1813</sup> Panel Report, para. 7.416 (quoting FCTC (Panel Exhibits AUS-44, JE-19), Article 3).



suggest that the Panel intended to use them, where relevant, "as evidence" rather than as an interpretative tool.

6.703. In the part of its analysis under Article 20 of the TRIPS Agreement that examined whether the reasons for the trademark requirements under the TPP measures sufficiently supported the resulting incumbrances, the Panel made the following reference to the FCTC Guidelines:

7.2595. We recall that the Article 11 FCTC Guidelines provide that the Parties to the FCTC "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)". Similarly, the Article 13 FCTC Guidelines recommend that the Parties to the FCTC "consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging". The Guidelines elaborate on the standard features of plain packaging as including nothing other than a brand or product name, without any logos or other features, in a prescribed font style and size.

7.2596. We note the reference made in the TPP Act and its Explanatory Memorandum to Australia's intention of giving effect to certain obligations under the FCTC through the adoption of the TPP measures. In our view, the importance of the public health reasons for which the trademark-related special requirements under the TPP measures are applied is further underscored by the fact that Australia pursues its domestic public health objective in line with its commitments under the FCTC, which "was developed in response to the globalization of the tobacco epidemic" and has been ratified by 180 countries.<sup>1814</sup>

6.704. In this statement, having recalled the content of Articles 11 and 13 of the FCTC Guidelines, the Panel observed that "the importance of the public health reasons" for the adoption of the TPP measures "is *further underscored* by the fact that Australia pursues its domestic public health objective in line with its commitments under the FCTC".<sup>1815</sup> We recall, in this respect, that the Panel had previously established that the objective pursued by Australia through the TPP measures was "to improve public health by reducing the use of, and exposure to, tobacco products".<sup>1816</sup> Contrary to what Honduras argues, we do not see the Panel suggesting that the FCTC Guidelines, in particular Articles 11 and 13, include a commitment to adopt TPP. Rather, as the Panel explicitly recognized, that Article 11 of the FCTC Guidelines provides "that the Parties to the FCTC 'should consider adopting'" TPP measures and that "the Article 13 FCTC Guidelines recommend that the Parties to the FCTC 'consider adopting plain packaging requirements'".<sup>1817</sup>

6.705. Further, in reaching its conclusion as to whether the reasons for the trademark requirements under the TPP measures sufficiently supported the resulting incumbrances, the Panel made the following observation:

Overall, we are not persuaded that the complainants have demonstrated that Australia has acted beyond the bounds of the latitude available to it under Article 20 to choose an appropriate policy intervention to address its public health concerns in relation to tobacco products, in imposing certain special requirements under the TPP measures that encumber the use of trademarks in the course of trade. ... As noted above, the fact that the special requirements, as part of the overall TPP measures and in combination with other tobacco-control measures maintained by Australia, are capable of contributing, and do in fact contribute, to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products, suggests that the reasons for which these special requirements are applied provide sufficient support for the application of the resulting encumbrances on the use of trademarks. We further note that Australia, while having been the first country to implement tobacco plain packaging, has pursued its relevant domestic public health objective in line with the emerging multilateral public

<sup>1814</sup> Panel Report, paras. 7.2595-7.2596. (fns omitted)

<sup>1815</sup> Panel Report, para. 7.2596. (emphasis added)

<sup>1816</sup> Panel Report, para. 7.2586. (fn omitted)

<sup>1817</sup> Panel Report, para. 7.2595.

health policies in the area of tobacco control as reflected in the FCTC and the work under its auspices, including the Article 11 and Article 13 FCTC Guidelines.<sup>1818</sup>

6.706. We note that, in the structure of the Panel's analysis under Article 20 of the TRIPS Agreement, the above statement is contained in the penultimate paragraph, before the Panel's overall finding that the complainants failed to establish the inconsistency of the trademark-related requirements of the TPP measures. Moreover, we note that, in the structure of the paragraph at issue, the observation about the FCTC Guidelines comes in the last sentence, after the Panel's conclusion that it was "not persuaded that the complainants have demonstrated that Australia has acted beyond the bounds of the latitude available to it under Article 20".<sup>1819</sup> In this sentence, the Panel recognizes, as a matter of fact, that Australia was the first country to implement tobacco plain packaging and that it did so "in line with the emerging multilateral public health policies in the area of tobacco control as reflected in the FCTC ..., including the Article 11 and Article 13 FCTC Guidelines".<sup>1820</sup> Moreover, this observation is introduced by the phrase "[w]e further note"<sup>1821</sup>, which suggests that the Panel relied on it as a further confirmation of the findings that it had already made about the importance of Australia's objective.

6.707. In light of the above, we do not agree with Honduras that the Panel attributed undue legal weight to Articles 11 and 13 of the FCTC Guidelines in its analysis by relying on those provisions to justify Australia's imposition of the TPP measures. In our view, the Panel referred to Articles 11 and 13 of the FCTC Guidelines as additional factual support to its previous conclusion that the complainants failed to establish that Australia acted inconsistently with Article 20 of the TRIPS Agreement.

#### **6.3.2.5 Whether the Panel acted inconsistently with Articles 7.1 and 11 of the DSU in its analysis of the TPP measures' requirements for individual cigarette sticks**

6.708. The Dominican Republic claims that the Panel failed to assess its claim under Article 20 of the TRIPS Agreement regarding the prohibition of all trademarks on individual cigarette sticks and thus acted inconsistently with Articles 7.1 and 11 of the DSU.<sup>1822</sup> The Dominican Republic argues that such prohibition on the use of trademarks on cigarette sticks is "materially different" from the prohibition regarding tobacco packaging and cigar sticks.<sup>1823</sup> In the Dominican Republic's view, the Panel "entirely failed to consider the situation of cigarette sticks in the context of its analysis under Article 20 of the TRIPS Agreement"<sup>1824</sup> despite this important distinction and thus "disregarded the Dominican Republic's claim against a discrete element of the TPP measures".<sup>1825</sup> The Dominican Republic thus requests that we reverse the Panel's findings under Article 20 of the TRIPS Agreement because the Panel did not make "any assessment"<sup>1826</sup> of the part of the matter related to the appearance of individual cigarette sticks and that the Panel violated Articles 7.1 and 11 of the DSU in this regard.

6.709. Australia responds that the Panel did examine the Dominican Republic's claim concerning individual cigarette sticks under Article 20 of the TRIPS Agreement.<sup>1827</sup> Australia notes that the Panel made findings with respect to the TPP measures, which include prohibitions on the use of any trademarks on individual cigarette sticks.<sup>1828</sup> Australia also considers that the Panel's reasoning

<sup>1818</sup> Panel Report, para. 7.2604.

<sup>1819</sup> Panel Report, para. 7.2604.

<sup>1820</sup> Panel Report, para. 7.2604.

<sup>1821</sup> Panel Report, para. 7.2604.

<sup>1822</sup> Dominican Republic's appellant's submission, para. 1545. The Dominican Republic argues that it made sufficiently clear in its panel request and its first written submission to the Panel that the "matter" at issue covered the appearance of individual cigarette sticks. (Ibid., paras. 1576-1578 (referring to Dominican Republic's panel request, pp. 2-3; first written submission to the Panel, para. 648))

<sup>1823</sup> Dominican Republic's appellant's submission, para. 1569. The Dominican Republic observes that the Panel evaluated and made findings on the justifiability of the TPP measures' restrictions on the use of trademarks on tobacco product packaging and cigar sticks. (Ibid., para. 1543)

<sup>1824</sup> Dominican Republic's appellant's submission, para. 1569.

<sup>1825</sup> Dominican Republic's appellant's submission, para. 1543.

<sup>1826</sup> Dominican Republic's appellant's submission, para. 1582. (emphasis original)

<sup>1827</sup> Australia's appellee's submission, para. 256.

<sup>1828</sup> Australia's appellee's submission, para. 256.

encompasses the requirements affecting the appearance of both retail packaging and tobacco products.<sup>1829</sup>

6.710. We recall that, in its panel request, the Dominican Republic stated that the TPP measures establish comprehensive regulation of the appearance and form of the retail packaging of tobacco products, as well as of the tobacco products themselves. The TPP measures, *inter alia*, "establish that individual cigarettes may not display trademarks, geographical indications or any other marking other than an alphanumeric code for product identification purposes".<sup>1830</sup> We note, however, that in its written submissions to the Panel, the Dominican Republic did not make a separate case of inconsistency with Article 20 with respect to the TPP measures' requirements on the appearance of cigarette sticks.<sup>1831</sup> Nor did it request that the Panel make separate findings regarding whether this specific aspect of the TPP measures is inconsistent with Article 20. Rather, the Dominican Republic requested the Panel to find that the TPP measures themselves are inconsistent with Article 20.<sup>1832</sup>

6.711. In its examination of the nature and extent of the encumbrances resulting from the TPP measures, the Panel first recalled that the TPP measures cover the retail packaging of tobacco products and the appearance of tobacco products themselves (including individual cigarette sticks and cigars).<sup>1833</sup> The Panel described the requirements that apply for each category of products covered by the TPP measures.<sup>1834</sup> In particular, the Panel noted that "[i]n respect of tobacco products, the TPP measures prohibit the use of all trademarks on cigarettes."<sup>1835</sup> This suggests that, at the beginning of its analysis, the Panel indicated that its inquiry would cover the TPP measures' requirements for the packaging of tobacco products and the tobacco products themselves, i.e. cigars and cigarette sticks.

6.712. In its subsequent analysis, the Panel focused on the prohibition on the use of figurative trademarks, as well as of the figurative and stylized elements of composite and word marks. The Panel characterized the prohibitions under the TPP measures as "far-reaching" and underlined that the TPP measures "prevent any non-word components of the relevant trademarks" from appearing on tobacco packaging and products.<sup>1836</sup> At the same time, the Panel noted that "the TPP measures

<sup>1829</sup> Australia's appellee's submission, paras. 257-263 and 270.

<sup>1830</sup> Dominican Republic's panel request, section A, p. 2. (emphasis original)

<sup>1831</sup> The Dominican Republic's arguments focused on the lack of "evidence" for the imposition of prohibitions on all trademarks on cigarette sticks (Dominican Republic's first written submission to the Panel, paras. 43-44, 361, 648-649, 655, 659, and 869; second written submission to the Panel, para. 204, 548-549, and 551-552) We note that, although the Dominican Republic argued that the requirement on cigarette sticks is "formally distinct from the packaging requirements" and that the Panel should "consider this requirement separately from trademark requirements relating to the packaging", in our view the Dominican Republic's arguments regarding cigarette sticks were not materially different from its arguments regarding retail packaging. (Dominican Republic's second written submission to the Panel, para. 549) Regarding cigarette sticks, the Dominican Republic argued that there was no "evidence base" for the requirement pertaining to cigarette sticks, that the mechanisms through which the [T]PP measures are intended to contribute to Australia's objective do not apply to cigarette sticks, and that, even if they did, the evidence indicates that the TPP measures have not made such a contribution. (Ibid., paras. 549-554) In our view, these arguments are identical to the Dominican Republic's arguments that the plain packaging requirements were not "justifiable" on the basis that "Australia's predictions regarding the expected impact of the PP measures were wrong", "Australia's conceptual framework rests on fundamental misconceptions regarding behavioural theory", and the evidence showed that "the PP measures have not even changed Australia's posited antecedents of behaviour, which provide the foundation for Australia's case that the measure will change smoking behaviour in the future." (Ibid., paras. 312-313 and 378)

<sup>1832</sup> See Dominican Republic's first written submission to the Panel, para. 1032; second written submission to the Panel, para. 1012.

<sup>1833</sup> Panel Report, para. 7.2556.

<sup>1834</sup> The Panel noted that, with respect to the retail packaging, the TPP measures "permit the use of word marks that denote the brand, business or company name, or the name of the product variant, so long as these trademarks appear in the form prescribed by the TPP Regulations, but prohibit the use of stylized word marks, composite marks and figurative marks". The Panel noted that, with respect to cigars, the TPP measures "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". (Panel Report, para. 7.2556) (fn omitted)

<sup>1835</sup> Panel Report, para. 7.2556. We recall that, while all trademarks are prohibited from appearing on individual cigarette sticks, a cigarette may be marked with an alphanumeric code, which may appear on the cigarette only once. (Ibid., para. 2.34)

<sup>1836</sup> Panel Report, para. 7.2558.

allow undertakings to use word marks that denote the brand, business or company name, or the name of the product variant on retail packaging of tobacco products for the purposes of distinguishing their tobacco products from those of other undertakings."<sup>1837</sup> The Panel stated that the complainants had "not sought to demonstrate that consumers have in fact been unable to distinguish the commercial *source* of tobacco products of one undertaking from those of other undertakings (i.e. the identity of the source or maker of the product) as a result of the TPP trademark requirements".<sup>1838</sup> Summarizing the complainants' claim further, the Panel added that "they argue that the removal of figurative elements has undermined the ability of trademarks to signal individual tobacco products' quality, characteristics and reputation to consumers."<sup>1839</sup>

6.713. In its reasoning, the Panel then focused on the "role played ... by colours and other design features, the use of which is prohibited by the TPP measures", recalling that "the TPP measures prevent these trademark features from being used by trademark owners in the marketplace as a means of product promotion or differentiation."<sup>1840</sup> The Panel nevertheless considered that these prohibitions were "partly mitigated by the fact that the TPP measures allow[ed] tobacco manufacturers to use word trademarks".<sup>1841</sup> The Panel then analysed the effect of the TPP measures on the trademark owners' ability to extract economic value from its trademark.<sup>1842</sup>

6.714. In its final conclusion regarding the consistency of the TPP measures with Article 20 of the TRIPS Agreement, the Panel stated 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>1843</sup>

6.715. Having reviewed the relevant parts of the Panel's analysis, we note that, at the beginning of the section addressing the nature and extent of the encumbrances at issue, in summarizing the requirements of the TPP measures, the Panel indicated that its inquiry would cover the TPP measures' requirements for, *inter alia*, the appearance of individual cigarette sticks.<sup>1844</sup> We recall our understanding, expressed above, that, in its analysis, the Panel examined the permissive and prohibitive elements of the TPP measures together and that it reached its conclusion that the encumbrances at issue were "far-reaching"<sup>1845</sup>, taking into account both the permissive and prohibitive elements of the TPP measures. Moreover, it appears to us that the Panel examined the consistency of the TPP measures with Article 20 of the TRIPS Agreement as a whole, without differentiating between the specificities of their application to tobacco packaging and products.

6.716. We recall, in this respect, that, in our view, the Panel characterized the encumbrances imposed by the TPP measures as "far-reaching" (as opposed to, for example, constituting an ultimate degree of encumbrance) because, despite the prohibition on the use of figurative marks on tobacco products and packaging and all marks on cigarette sticks, the TPP measures permitted the use of word marks on tobacco packaging and cigars. Moreover, we consider that the fact that the Panel placed an emphasis on the TPP measures' prohibition on the use of non-word marks can be explained by the arguments raised by the complainants before the Panel. In this respect, we note that, in summarizing the complainants' arguments, the Panel stated that "they argue[d] that the removal of figurative elements has undermined the ability of trademarks to signal individual tobacco products' quality, characteristics and reputation to consumers."<sup>1846</sup> Furthermore, as stated above, the complainants do not appear to have made a separate case of inconsistency with Article 20 with respect to the TPP measures' requirements on cigarette sticks.

6.717. Finally, we note that the Panel reached its conclusions under Article 20 with respect to the TPP measures as whole. The Panel found 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>1847</sup> In our view,

<sup>1837</sup> Panel Report, para. 7.2564.

<sup>1838</sup> Panel Report, para. 7.2564. (emphasis original)

<sup>1839</sup> Panel Report, para. 7.2564.

<sup>1840</sup> Panel Report, para. 7.2567.

<sup>1841</sup> Panel Report, para. 7.2570.

<sup>1842</sup> Panel Report, paras. 7.2571-7.2573.

<sup>1843</sup> Panel Report, para. 7.2605.

<sup>1844</sup> Panel Report, para. 7.2556.

<sup>1845</sup> Panel Report, paras. 7.2557 and 7.2569.

<sup>1846</sup> Panel Report, para. 7.2564.

<sup>1847</sup> Panel Report, para. 7.2605.

this conclusion covers the trademark requirements of the TPP measures as they apply to packaging of tobacco products as well as tobacco products themselves, including cigarette sticks.

6.718. In light of the foregoing, we do not consider that the Panel failed to address the Dominican Republic's claim that the TPP measures' requirements for individual cigarette sticks, which prohibit the use of any trademarks on a cigarette, are inconsistent with Article 20 of the TRIPS Agreement. We therefore reject the Dominican Republic's claim under Articles 7.1 and 11 of the DSU.

### 6.3.2.6 Conclusion

6.719. In light of the above, we consider that the Panel did not err in its interpretation, in paragraph 7.2430 of the Panel Report, of the term "unjustifiably" in Article 20 of the TRIPS Agreement and in its application of this interpretation to the facts of the present dispute. Consequently, we uphold the Panel's finding that the complainants have not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement.<sup>1848</sup>

## 7 FINDINGS AND CONCLUSIONS

7.1. For the reasons set out in these Reports, the Appellate Body makes the following findings and conclusions:

### 7.1 Article 2.2 of the TBT Agreement

7.2. With respect to the contribution of the TPP measures to Australia's objective, we have found that the appellants have not demonstrated that the Panel erred in finding, in paragraphs 7.1025 and 7.1043 of the Panel Report, that:

7.1025. Overall ... 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 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.

...

7.1043. Taken as a whole, therefore, we consider that the evidence before us supports the view that, as applied in combination with the comprehensive range of other tobacco control measures maintained by Australia and not challenged in these proceedings, including a prohibition on the use of other means through which branding could otherwise contribute to the appeal of tobacco products and to misleading consumers about the harmful effects of smoking, the TPP measures are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products.<sup>1849</sup>

7.3. With respect to the trade restrictiveness of the TPP measures, we find that the appellants have not demonstrated that the Panel erred in finding, in paragraph 7.1255 of the Panel Report, that:

[T]he 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. We also conclude 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 to date. We

<sup>1848</sup> Panel Report (DS435), paras. 7.2606 and 8.1.e; Panel Report (DS441), paras. 7.2606 and 8.1.b.iv.

<sup>1849</sup> Panel Report, paras. 7.1025 and 7.1043.

are also not persuaded that the complainants have demonstrated that the TPP measures impose conditions on the sale of tobacco products in Australia or compliance costs of such magnitude that they would amount to a limiting effect on trade.<sup>1850</sup>

7.4. With respect to the alternative measures, we have found that the Panel erred in finding that the complainants failed to demonstrate that each of the two alternative measures would be apt to make a contribution equivalent to that of the TPP measures.<sup>1851</sup> Specifically, to the extent that the Panel suggested that each alternative measure may be considered apt to achieve a similar or comparable degree of "meaningful" overall reduction in smoking in Australia to that of the TPP measures, and yet its contribution would not be equivalent because of its failure to address the design features of tobacco packaging that the TPP measures seek to address in the context of Australia's broader tobacco control policy, we have found that the Panel erred in its application of Article 2.2.

7.5. At the same time, we have found that the Panel did not err in finding that the complainants failed to demonstrate that these two alternative measures are less trade-restrictive than the TPP measures.<sup>1852</sup> Consequently, although we have found that the Panel erred in its application of Article 2.2 with respect to the equivalence of the contribution of each alternative measure, the Panel's findings, in paragraphs 7.1471 and 7.1545 of the Panel Report, that the complainants had not demonstrated that the increase in the MLPA and the increase in taxation would each "be a less trade-restrictive alternative to the TPP measures that would make an equivalent contribution to Australia's objective", stand.

7.6. For these reasons, we uphold the Panel's conclusion, in paragraph 7.1732 of the Panel Report, that:

[T]he complainants have not demonstrated 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.<sup>1853</sup>

## 7.2 Article 16.1 of the TRIPS Agreement

7.7. Article 16.1 of the TRIPS Agreement grants a trademark owner the exclusive right to preclude unauthorized third parties from using, in the course of trade, identical or similar signs for goods or services that are identical or similar to those with respect to which the trademark is registered. The owner of a registered trademark can exercise its "exclusive right" as against an unauthorized third party but not against the WTO Member in whose territory the trademark is protected. Neither the TRIPS Agreement nor the provisions of the Paris Convention (1967) that are incorporated by reference into the TRIPS Agreement confer upon a trademark owner a positive right to use its trademark or a right to protect the distinctiveness of that trademark through use. Accordingly, there is no corresponding obligation on Members to give effect to such "rights". Instead, in accordance with Article 1.1 of the TRIPS Agreement, Members are required to give effect to Article 16.1 by ensuring that, in the Members' domestic legal regimes, the owner of a registered trademark can exercise its "exclusive right to prevent" the infringement of its trademark by unauthorized third parties. Hence, for purposes of WTO dispute settlement, in order to establish that a WTO Member has acted inconsistently with Article 16.1, the complaining Member must demonstrate that, under the responding Member's domestic legal regime, the owner of a registered trademark cannot exercise its "exclusive right to prevent" the infringement of its trademark by unauthorized third parties.

7.8. For these reasons, we conclude that the Panel did not err in its interpretation in finding, in paragraphs 7.1978, 7.1980, and 7.2031 of the Panel Report, that:

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

<sup>1850</sup> Panel Report, para. 7.1255.

<sup>1851</sup> Panel Report, paras. 7.1464 and 7.1531.

<sup>1852</sup> Panel Report, paras. 7.1417 and 7.1495.

<sup>1853</sup> See also Panel Report (DS435), para. 8.1.a; Panel Report (DS441), para. 8.1.b.i.

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.

7.1980. [I]n order to show that the TPP measures violate Australia's obligation 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.

7.2031. [W]e therefore conclude that the possibility of a reduced occurrence of a "likelihood of confusion" in the market does not, in itself, constitute a violation of Article 16.1, because Members' compliance with the obligation to provide the right to prevent trademark infringements under Article 16.1 is independent of whether such infringements actually occur in the market. 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>1854</sup>

7.9. Having found no error in the Panel's interpretation, we agree with the Panel that there was "no need to examine further the complainants' factual allegation that the TPP measures' prohibition on the use of certain tobacco-related trademarks will in fact reduce the distinctiveness of such trademarks, and lead to a situation where a 'likelihood of confusion' with respect to these trademarks is less likely to arise in the market".<sup>1855</sup> Honduras' claims that the Panel erred in its application of Article 16.1 and failed to make an objective assessment of the matter as required by Article 11 of the DSU are conditioned on our reversal of the Panel's interpretation. The condition on which Honduras' appeal is predicated, i.e. the reversal of the Panel's interpretation, has not been satisfied. Consequently, we have found that we need not address Honduras' remaining claims of error.

7.10. In light of the foregoing, we uphold the Panel's conclusion, in paragraph 7.2051 of the Panel Report, that "the complainants have not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 16.1 of the TRIPS Agreement."<sup>1856</sup>

### 7.3 Article 20 of the TRIPS Agreement

7.11. The ordinary meaning of the term "unjustifiably", read in the context of other provisions of the TRIPS Agreement, indicates that Members enjoy a certain degree of discretion in imposing encumbrances on the use of trademarks under Article 20 of the TRIPS Agreement.<sup>1857</sup> In order to establish that the use of a trademark in the course of trade is being unjustifiably encumbered by special requirements, the complainant has to demonstrate that a policy objective pursued by a Member imposing special requirements does not sufficiently support the encumbrances that result from such special requirements. Such a demonstration could include a consideration of: (i) the nature and extent of encumbrances resulting from special requirements, taking into account the legitimate interest of the trademark owner in using its trademark in the course of trade; (ii) the reasons for the imposition of special requirements; and (iii) a demonstration of how the reasons for the imposition of special requirements support the resulting encumbrances.<sup>1858</sup> Moreover, while in the circumstances of a particular case, the existence of an alternative measure involving a lesser degree of encumbrance on the use of a trademark could be used as a consideration in evaluating the justifiability of special requirements and related encumbrances on the use of a trademark, such an examination is not a necessary inquiry under Article 20 of the TRIPS Agreement.

7.12. We therefore consider that the Panel did not err in the interpretation of Article 20 of the TRIPS Agreement in stating, in paragraph 7.2430 of the Panel Report, that:

<sup>1854</sup> Panel Report, paras. 7.1978, 7.1980, and 7.2031. (fns omitted)

<sup>1855</sup> Panel Report, para. 7.2032.

<sup>1856</sup> Panel Report (DS435), paras. 7.2051 and 8.1.d; Panel Report (DS441), paras. 7.2051 and 8.1.b.iii.

<sup>1857</sup> The degree of discretion reflected through the term "unjustifiably" in Article 20 is higher than it would have been, had the term reflecting the notion of "necessity" been used in this provision.

<sup>1858</sup> Panel Report, para. 7.2430.

[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>1859</sup>

7.13. We also find that the Panel did not err in its application of this interpretation to the facts of the present dispute. Consequently, we uphold the Panel's conclusion, in paragraph 7.2606 of the Panel Report, that the complainants have not demonstrated that the TPP measures are inconsistent with Australia's obligations under Article 20 of the TRIPS Agreement.<sup>1860</sup>

#### 7.4 Recommendation

7.14. The Panel rejected the complainants' claims and found that Honduras and the Dominican Republic had not demonstrated that the TPP measures are inconsistent with the provisions of the covered agreements at issue. In light of these findings, the Panel declined Honduras' and the Dominican Republic's requests that the Panel recommend, in accordance with Article 19.1 of the DSU, that the DSB request Australia to bring the measures at issue into conformity with the TRIPS Agreement and the TBT Agreement.

7.15. Having upheld the Panel's findings under Article 2.2 of the TBT Agreement and Articles 16.1 and 20 of the TRIPS Agreement, it follows that we also agree with the Panel that Honduras and the Dominican Republic have not succeeded in establishing that Australia's TPP measures are inconsistent with the provisions of the covered agreements at issue. Accordingly, we make no recommendation to the DSB, pursuant to Article 19.1 of the DSU.

Signed in the original in Geneva this 31st day of March 2020 by:



Shree B. C. Servansing  
Presiding Member



Ujal Singh Bhatia  
Member



Thomas R. Graham  
Member

<sup>1859</sup> Panel Report, para. 7.2430. We note, at the same time, that, in paragraph 7.2430 of its Report, the Panel used the auxiliary verb "should" in introducing the factors pertinent to the examination of whether the use of a trademark in the course of trade is unjustifiably encumbered by special requirements. We wish to clarify that, while an inquiry under Article 20 could include the consideration of the above-mentioned factors, the degree of discretion vested in Members under Article 20 does not call for a rigid and exact set of considerations that are relevant for the examination of whether the use of a trademark is unjustifiably encumbered by special requirements.

<sup>1860</sup> Panel Report (DS435), paras. 7.2606 and 8.1.e; Panel Report (DS441), paras. 7.2606 and 8.1.b.iv.