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

**NOTIFICATION OF AN APPEAL BY THE DOMINICAN REPUBLIC UNDER ARTICLE 16.4 AND  
ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE  
SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE  
WORKING PROCEDURES FOR APPELLATE REVIEW**

The following communication, dated 23 August 2018, from the delegation of the Dominican Republic, is being circulated to Members.

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

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

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

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

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

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

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

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

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

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

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

8. The Dominican Republic appeals the Panel's overall findings<sup>6</sup> and intermediate findings<sup>7</sup> resulting from its assessment of the evidence from the period *prior to* the implementation of the TPP measures ("pre-implementation evidence") on the *anticipated* impact of the TPP measures. The Panel failed to make an objective assessment of the matter before it, as required under Article 11 of the DSU.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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