

WORLD TRADE ORGANIZATION

*Appeal brought pursuant to Article 17 of the Understanding on Rules and Procedures
Governing the Settlement of Disputes*

***Australia – Certain Measures Concerning Trademarks,
Geographical Indicators and Other Plain Packaging
Requirements Applicable to Tobacco Products and
Packaging
(DS435; DS441)***

THIRD PARTY ORAL SUBMISSION OF NEW ZEALAND

11-14 June 2019

1. Mr Chairman, distinguished members of the Appellate Body.

The Panel Carried Out an Objective Assessment of the Case in Accordance With Article 11 DSU

2. We first address the appellants' claims under Article 11 of the DSU.
3. Article 11 requires panels to carry out an objective assessment of the cases before them. The term 'objective' is defined as "impartial" and "detached".¹ Article 11 is not concerned with whether the panel made the correct factual findings per se. It is concerned with whether the panel acted in an even-handed and impartial manner.
4. The threshold for a breach of Article 11 is necessarily high. In *EC-Hormones*, the Appellate Body stated that an Article 11 breach required "a *deliberate* disregard of evidence or *gross* negligence amounting to *bad faith*".² In *EC – Poultry* the Appellate Body held it would require "an *egregious error* that calls into question the *good faith* of a panel".³ These are grave transgressions that will only arise in a very small number of cases.
5. Article 11 is not a gateway for parties to appeal the factual findings of a panel. The scope of appellate review is set out in Article 17.6 DSU, which limits the jurisdiction of the Appellate Body to "issues of law" and "legal interpretations" of the panel.
6. The submissions filed by both appellants in support of their Article 11 claims are extensive. They discuss at length the limitations of expert evidence, critique in detail the Panel's finding of causative links, and challenge its analysis of the probative weight of competing evidence. These are arguments which, at their very core, call on the Appellate Body to reconsider the factual assessments made by the Panel. This is contrary to the express limitation set out in Article 17.6 and should be resisted. It is imperative in the current climate that the provisions of the DSU, and in particular Articles 11 and 17.6, are applied in a robust and principled manner.

Interpretation and Application of Article 20 TRIPS

7. Turning to Article 20 TRIPS –
8. The term 'unjustifiably' in Article 20 reflects a balance between the interests of

¹ www.oed.com. Last accessed 8 October 2018.

² Appellate Body Report, *EC – Hormones* at para. 138.

³ Appellate Body Report, *EC – Poultry* at para. 133. See also Appellate Body Report, *Australia – Salmon* at para. 266; Appellate Body Report, *Korea – Alcoholic Beverages* at para. 164; Appellate Body Report, *Japan – Agricultural Products II* at paras. 141; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)* at para. 177.

trademark owners and the right of Members to regulate in pursuit of legitimate objectives. This balance is significant. It reflects the *degree* to which members agreed to give up their sovereign right to regulate on entering the TRIPS Agreement. To interpret this provision more narrowly than it was intended would deprive states of sovereign rights that they have not consented to give up.

9. There is no requirement under article 20 that an encumbrance be justified on the basis of concerns regarding the *trademark*.⁴ A justification can just as readily be based on concerns regarding the trademarked *product*. This is clear from the context to Article 20. In particular, Article 15 TRIPS, which permits Members to deny registration of a trademark. Article 15.4 expressly states, however, that registration *cannot* be denied on the basis of the *nature of the goods* in question. This is essentially the same qualification that Honduras claims should be read into Article 20. If Article 20 were limited in this way, one would expect it to be set out expressly, as it is in Article 15.4.
10. Article 20 does not require that encumbrances be 'limited'.⁵ While other provisions, including Articles 17 and 30 TRIPS expressly include the term 'limited', Article 20 does not. 'Limited' and 'unjustifiably' are distinct terms that each reflect a different balance between intellectual property holders' interests and the rights of Members to regulate. The term 'limited' achieves balance through a *quantitative* cap. The balance set by 'unjustifiably' is different. Here the balance rests on the existence of a legitimate *justification*, not the extent of the encumbrance.

The Panel did not err in its Analysis of Alternative Measures under Article 2.2 TBT Agreement

11. Turning to the Panel's assessment of the proposed alternative measures -
12. Assessing the degree of contribution of a measure to a legitimate objective is not a precise exercise. It cannot be reduced to a number. Rather, a panel must ascertain the degree of contribution by identifying all the various *ways* in which a measure contributes. This is a holistic exercise. In carrying out *this* process, the Panel was not suggesting that an alternative measures would have to make an *identical* contribution to the plain packaging measures. Rather, the Panel was correctly identifying the *full scope* of the contribution of the plain packaging measures, to provide a baseline against which the alternative measures could be compared. The Panel then carried out the same assessment for the alternative measures, including considering whether they would make contributions that the plain packaging measures do not.⁶ This was the correct approach to apply in

⁴ See contrary argument: Honduras's Appellant Submission at paras. 131, 137, 146.

⁵ See contrary argument: Honduras's Appellant Submission at paras. 160-161.

⁶ For example, see: Panel Report at paras. 7.1434 – 7.1444, see also para 7.1454 and paras 7.1459 – 7.1460.

determining whether the measures would make an equivalent contribution to Australia's objective.

Conclusion

13. Thank you.