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 Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (DS435, DS441)

THIRD PARTY SUBMISSION OF NEW ZEALAND

12 October 2018

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I. INTRODUCTION

1. New Zealand's continued participation in the present dispute reflects its interest in both the immediate subject matter of the case and the wider implications of the claims brought by the Dominican Republic and Honduras for the World Trade Organisation ("**WTO**") system.

2. The present appeal is directly concerned with the legitimacy of the Tobacco Plain Packaging measures ("**TPP Measures**") implemented by Australia. More broadly, however, it is concerned with the right of WTO members to regulate to protect public health within their territories. The provisions of the WTO agreements involved in the present appeal reflect a balance between the need to comply with trade commitments between WTO members, and the right of members to regulate to address legitimate policy objectives. This balance was properly recognised and upheld by the Panel in its Report. The current appeals represent a challenge to this balance and to the proper interpretation of these provisions. New Zealand considers that it is essential that this balance is upheld and maintained by the Appellate Body.

3. Smoking is a leading cause of preventable death and disease in New Zealand. In 2016, New Zealand enacted plain packaging legislation, similar to that enacted by Australia. This legislation came into force in March 2018.[1] The present appeal will be of great interest to all states that are committed to regulating the marketing of this highly addictive and deadly product.

4. The claims brought by Honduras and the Dominican Republic also challenge the Panel's interpretation of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("**DSU**"), the Agreement on Technical Barriers to Trade ("**TBT Agreement**") and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("**TRIPS**"). New Zealand has a systemic interest in the proper interpretation and implementation of these instruments. Some of the arguments raised by the two appellants would, if accepted, raise significant systemic concerns about the appropriate functioning of the dispute settlement system. New Zealand considers that it is imperative that the provisions of the DSU, and in particular Article 11 and Article 17.6, are applied in a robust and principled manner. This is especially so in the current global context where the dispute settlement system is under pressure.

II. CHALLENGE TO THE OBJECTIVITY OF THE ASSESSMENT CARRIED OUT BY THE PANEL UNDER ARTICLE 11 DSU

A. Arguments of Honduras and the Dominican Republic

5. Honduras and the Dominican Republic each allege that the Panel failed to fulfil its obligation under Article 11 DSU to carry out an objective assessment of the complainants' case. In support of this claim, both appellants provide lengthy

[1] Smoke-free Environments (Tobacco Standardised Packaging) Amendment Act 2016.

submissions identifying a large number of instances in which they claim the Panel breached Article 11.

6. Honduras and the Dominican Republic claim that these alleged failures fundamentally undermine the Panel's conclusions that:

   (a) The complainants did not demonstrate that the TPP Measures were inconsistent with Article 2.2 TBT Agreement;[2]

   (b) The complainants did not demonstrate that the TPP Measures were inconsistent with Article 20 TRIPS;[3]

7. The Dominican Republic requests that the Appellate Body reverse the Panel's overall findings under Article 2.2 TBT Agreement and Article 20 TRIPS. Honduras requests that the Appellate Body declare the Panel's findings under Article 2.2 TBT Agreement and Article 20 TRIPS moot and of no effect.

B. The Obligation to Carry Out an Objective Assessment Under Article 11 DSU

8. Article 11 DSU sets out the role of panels within the WTO dispute settlement system. This includes the requirement that a panel "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".[4] An allegation that a panel has failed to fulfil its obligation to act with objectivity is a very serious allegation.[5] Unlike other grounds of appeal, a claim under Article 11 represents a direct challenge to the propriety of the panel's assessment. As stated by the Appellate Body in *EC – Poultry*, "such an allegation goes to the very core of the integrity of the WTO dispute settlement process itself".[6]

9. The threshold for a breach of Article 11 is high. Not every error in the appreciation of the evidence can be characterised as a failure to make an objective assessment of the facts.[7] In *EC-Hormones*, the Appellate Body stated that a finding of breach under Article 11 required "a *deliberate* disregard of evidence or *gross* negligence amounting to bad faith".[8] In *EC – Poultry* the Appellate Body adopted the statements of the Appellate Body in *EC – Hormones* and stated that a violation would require "not simply an error of judgment in the appreciation of evidence but rather an *egregious error* that calls into

[2] Appellant Submission by Honduras, 19 July 2018 [*Honduras's Appellant Submission*] at para. 1080; Appellant's Submission of the Dominican Republic, 23 August 2018 [*Dominican Republic's Appellant Submission*] at: para. 589, para. 825, para. 1178, para. 1389 and para. 1539.
[3] Honduras's Appellant Submission at para. 1080. Dominican Republic's Appellant Submission at para. 1601.
[4] Article 11 DSU.
[5] Appellate Body Report, *EC – Poultry* at para. 133.
[6] Appellate Body Report, *EC – Poultry* at para. 133.
[7] Appellate Body Report, *EC – Hormones* at para. 133.
[8] Appellate Body Report, *EC – Hormones* at para. 138. Emphasis in original.

question the good faith of a panel".[9]

10. New Zealand does not consider that the Panel made incorrect findings of fact. Even so, Article 11 should not be used to circumvent the limitation on the Appellate Body's jurisdiction to hear appeals on points of law only. Article 17.6 DSU limits the jurisdiction of the Appellate Body to "issues of law" and "legal interpretations" addressed by the panel. The Appellate Body does not have jurisdiction to determine appeals against findings of fact. The word "objective" is defined as "not influenced by personal feelings or opinions in considering and representing facts" and "impartial, detached".[10] Whether a panel has acted with objectivity is not a question of whether the panel made the correct factual findings per se, it is a question of whether the panel acted in an even handed and impartial manner in making those findings. As stated by the Appellate Body in *Peru – Agricultural Products*, "an appellant may not effectively recast its arguments before the panel under the guise of an Article 11 claim".[11]

11. The Appellate Body has made it clear that the panel, as fact finder, is accorded a significant degree of discretion. The Appellate Body will not "base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding".[12] Nor will a failure to refer to evidence put before the panel, without more, amount to a breach of Article 11. While a panel is required to consider the evidence put before it, the Appellate Body has held that "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings".[13] A panel cannot realistically refer to all the evidence submitted in a case and should be allowed a "substantial margin or discretion" as to which statements are useful to refer to explicitly.[14] As noted by the Appellate Body in *Australia – Salmon*, while panels are required to carry out an objective assessment of the evidence, they are not required to accord to factual evidence presented by the parties the same meaning and weight as do the parties.[15]

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

12. Honduras and the Dominican Republic have each filed extensive submissions setting out a large number of instances in which they allege that the Panel failed to meet its obligations under Article 11. In light of its role as a Third Party, New Zealand will not address each of these allegations separately. Rather, New Zealand will focus on a discussion of the overarching defects that run

[9] Appellate Body Report, *EC – Poultry* at para. 133. Emphasis added. 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.
[10] www.oed.com. Last accessed 8 October 2018.
[11] Appellate Body Report, *Peru – Agricultural Products* at para. 5.66.
[12] Appellate Body Report, *US – Wheat Gluten* at para. 151.
[13] Appellate Body Report, *EC – Hormones* at para. 135.
[14] Appellate Body Report, *EC – Hormones* at para. 138.
[15] Appellate Body Report, *Australia – Salmon* at para. 267.

through the allegations brought by both appellants. Namely:

(a) impermissible challenges to Panel's factual findings brought under the guise of a lack of objectivity;

(b) failure to appreciate the allocation of the burden of proof between the parties;

(c) failure to recognise the scope of the Panel's discretion; and

(d) misrepresentation of the Panel's findings.

13. New Zealand hopes that these observations will assist the Appellate Body in its assessment of the vast amount of information presented by the parties in support of their allegations under Article 11.

a. The Appellants bring Impermissible Challenges to the Panel's Factual Findings under the Guise of Article 11

14. The submissions filed by both appellants in support of their Article 11 claims are extensive, spanning many hundreds of pages.[16] These submissions are not long simply because they include a large number of accusations, they are long because they dig deep into the evidence presented to the Panel and the Panel's assessment of that evidence. They discuss at length the limitations of evidence presented by experts, critique in detail the Panel's establishment 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, contrary to the express limitation set out in Article 17.6 DSU.

15. Of particular concern is the framing of purely factual appeals as allegations that the Panel "failed to provide a reasoned or adequate explanation of its findings", or that its findings "lack an evidentiary basis". The Dominican Republic, for example, argues that the failure of the Panel to refer to evidence that it submitted on the appeal of branded tobacco packaging meant that "[the Panel's] findings on the anticipated impact of the TPP Measures through the appeal and GHW mechanisms lack a sufficient evidentiary basis…in violation of Article 11 of the DSU".[17] New Zealand does not accept that the Panel failed to provide adequate explanations for its findings, or that its findings lacked an evidential basis. If the two aforementioned failings were to be accepted as touchstones of a breach of Article 11, however, the focus of an assessment under Article 11 would shift from an assessment of the propriety of the Panel's assessment, to an assessment of whether the Panel's assessment was correct. This would be inconsistent with the plain meaning of the words of Article 11, and would transform Article 11 into a gateway for appellants to challenge the factual findings of the Panel contrary to the clear limitation on appellate review set out

[16] The Dominican Republic's Article 11 arguments extend over more than 350 pages. Honduras's Article 11 arguments extend over more than 120 pages.
[17] Dominican Republic's Appellant submission at para. 728.

in Article 17.6 DSU. An error on the part of a panel should only be found to amount to a breach of Article 11 where it is clear that the error is reflective of a larger failure of the panel to act in an even handed and impartial manner.[18]

16. The allegations raised by the appellants that the Panel "failed to provide a reasoned or adequate explanation of its findings", or that its findings "lack an evidentiary basis", are not about the objectivity of the Panel's assessment. Rather, they challenge the Panel's assessment of the relevance and probative weight of evidence. At times the true nature of the appellants' objections can be seen. Honduras, for example, describes a piece of evidence relied on by the Panel as "a rather irrelevant café study".[19] In another argument, it states that the Panel's approach to the analysis "reveals its complete lack of understanding of statistics and econometric analysis".[20] The Dominican Republic sums up one of its allegations by stating "the Dominican Republic's trading partners should not be entitled to eliminate the distinctiveness of Dominican cigars …. on the basis of a study of just eight cigar smokers with a study design that any independent scientific researcher would say is not robust".[21] These are not matters going to the objectivity of the Panel. They are frustrated reflections of an unsuccessful party who disagrees with the evidential findings made against them. If the Appellate Body engages with arguments framed in this manner, there is a danger that the limitations placed on the scope of appellate review will be eroded. The more deeply ingrained an Article 11 argument is in the evidential assessment carried out by the Panel, the more alive the Appellate Body should be to the possibility that the appellant is simply seeking to revisit the panel's evidential findings.

b. The Appellants Misunderstand the Allocation of the Burden of Proof

17. A number of the allegations brought by the Dominican Republic and Honduras under Article 11 reflect a failure to appreciate the allocation of the burden of proof between the parties. They imply that the task of the Panel was to decide which out of the complainants or Australia had the stronger case. This is incorrect. An apt example is Honduras's allegation that the Panel breached Article 11 in its treatment of the post-implementation evidence.[22] The TPP Measures were brought into force alongside enlarged graphic health warnings ("**GHWs**"). The parties agreed that it was not possible, on the basis of the data available, to distinguish between the impact of the TPP Measures and the impact of the GHWs on tobacco related behaviours.[23] Honduras argues that by not making an "adjustment" to recognise the potential role that the enlarged GHWs had, the Panel "gave Australia the benefit of the doubt".[24]

[18] See discussion above at para. 10.
[19] Honduras's Appellant Submission at para. 763.
[20] Honduras's Appellant Submission para. 990.
[21] Dominican Republic's Appellant submission at para. 808.
[22] Honduras's Appellant Submission paras. 1019 – 1020.
[23] Panel Report, Appendix C, para. 2.
[24] Honduras's Appellant Submission paras. 1019 – 1020.

18. The claim that the Panel "gave Australia the benefit of the doubt" reflects a misunderstanding of the allocation of the burden of proof between the parties. The onus of proof was on the complainants to establish a *prima facie* case that, in implementing the TPP Measures, Australia breached its obligations under TBT Agreement and TRIPS. One of the ways that the complainants sought to prove their case was by arguing that the TPP Measures cannot and do not contribute to the reduction in tobacco use and exposure.[25] In respect of the post-implementation evidence, therefore, the burden of proof was on the complainants to show that the TPP Measures have not contributed to a reduction in tobacco use and exposure since their implementation by Australia. By comparison, there was no burden of proof on Australia to prove that the TPP Measures have contributed to reducing tobacco use and exposure in the period since their implementation. Australia's objective before the Panel was not to prove its own case, but rather to demonstrate that the complainants had failed to establish theirs. It followed that it was for the complainants to prove that the positive outcomes observed following the implementation of the TPP Measures and the GHWs were attributable in whole or in part to the enlarged GHWs. By accepting the post-implementation evidence, the Panel was not giving Australia the "benefit of the doubt", as Australia had no burden of proof. Rather, it was simply refusing to dismiss evidence that was inconsistent with the complainants' case in the absence of evidence conclusively discrediting it.

19. New Zealand also notes that it was not only Australia who relied on the post-implementation evidence. The Dominican Republic and Indonesia, for example, relied on post-implementation evidence in support of the argument that the TPP Measures caused downward substitution.[26] To the extent that the increased GHWs could have played a role in any theoretical downtrading, the complainants would have equally "benefitted" from the Panel's inability to separate the impact of the GHWs and the TPP Measures.

c. The Appellants Incorrectly Characterise the Exercise of the Panel's Discretion as a breach of Article 11

20. On a number of occasions, the Dominican Republic and Honduras characterise instances in which the Panel exercised its discretion as a failure to act with objectivity. In particular, the appellants target two key areas of discretion: the Panel's discretion to choose the evidence that it refers to in its Report, and the discretion to instruct an expert.

21. As discussed above, is well established that the Panel has a discretion to choose the evidence it refers to in its Report.[27] The appellants acknowledge this, but nevertheless argue that, by not referring to particular pieces of evidence submitted by the complainants in its Report, the Panel breached Article 11. An apt example is the Dominican Republic's challenge to the decision of the Panel

[25] Panel Report at para. 7.485.
[26] Panel Report, Appendix E, at paras. 1 and 3.
[27] Appellate Body Report, *EC – Hormones* at para. 135. See discussion above at para. 11.

not to refer to survey evidence regarding Australian perceptions of partially branded tobacco packaging bearing large GHWs.[28] The Dominican Republic notes the Panel's discretion in this regard but, citing the Appellate Body Report in *EC-Fasteners*, argues that this evidence was "so material to its case that the Panel's failure to address it explicitly has a bearing on the objectivity of its factual assessment".[29]

22. The exception set out in *EC-Fasteners* should be limited to cases where the materiality of the evidence is indisputable and its exclusion by the Panel can only be explained by concluding that the Panel was not acting objectively. The fact that a party considers its evidence to be material is not sufficient. Nor is it sufficient that the party believes the panel's finding to be inconsistent with that party's evidence. Parties, by definition, only submit evidence that they consider to be material, and panels will rarely be able to refer to all the evidence that has been presented by the unsuccessful party. If the *EC-Fasteners* exception is not strictly applied, the discretion of a panel to select the evidence that it relies upon will be quickly eroded.

23. In the instance referred to in paragraph 21 above, the particular evidence relied on by the Dominican Republic was not "so material to its case that the Panel's failure to address it explicitly has a bearing on the objectivity of its factual assessment". The packaging used in the study contained large GHWs covering 90% of the back and 30% of the front of the package.[30] The fact that participants found the packaging to be unappealing merely demonstrates the efficacy of large GHWs. The evidence shed no light on the appeal of the limited branding, or whether the packaging would have been even *more* unappealing if the limited branding was removed.

24. The second area of discretion challenged is the Panel's discretion to use an expert. Honduras argues that the discretion of the Panel to instruct an expert under Article 13 DSU and Article 14.2 TBT Agreement "is not boundless".[31] It argues that, in light of the complex factual issues presented by the post-implementation evidence submitted by the parties, the Panel's failure to instruct an expert "prevented it" from carrying out an objective assessment.[32] Honduras argues that, in the circumstances, the Panel had an "obligation", rather than a discretion, to instruct an expert.[33] In support of this proposition, it relies on the Appellate Body statement in *US – Continued Suspension* that "a panel may and should rely on the advice of experts".[34]

25. Honduras's attempt to use *US – Continued Suspension* to extinguish the Panel's discretion under Article 13.1 DSU and Article 14.2 TBT Agreement is misplaced

[28] Dominican Republic's Appellant Submission at paras. 700-739.
[29] Appellate Body Report, *EC – Fasteners* at para. 442.
[30] Dominican Republic's Appellant Submission at para. 703.
[31] Honduras's Appellant Submission at para. 1057.
[32] Honduras's Appellant Submission at para. 1057.
[33] Honduras's Appellant Submission at paras. 1068-1069.
[34] Appellate Body Report, *US – Continued Suspension* at para. 592.

and should be resisted. Article 14.2 TBT Agreement states that a panel "may" establish an expert group. Article 13.1 DSU states that panels "shall have the *right* to seek information and technical advice from any individual or body", while Article 13.2 states that panels "*may* consult experts to obtain their opinion". These permissive terms can be contrasted with the use of more mandatory language in Article 14.3 TBT Agreement and elsewhere in Article 13.1 DSU.[35] The Appellate Body in *US – Continued Suspension* did not intend to limit or remove the express discretion under Article 13 DSU. Nor would it have been possible for it, as a dispute settlement body, to do so. The full statement of the Appellate Body was as follows:[36]

> A panel may and should rely on the advice of experts in reviewing a WTO Member's SPS measure, in accordance with Article 11.2 of the SPS Agreement and Article 13.1 of the DSU.

It is clear that the Appellate Body used the term "should" to reflect Article 11.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("**SPS Agreement**"), which states that "[i]n a dispute under this Agreement involving scientific or technical issues, a panel *should* seek advice from experts".[37] The term "may" is included to reflect the discretion in Article 13 DSU.

26. Contrary to Honduras's submission, the Appellate Body has expressly held that the exercise of the Panel's discretion under Article 13 DSU cannot amount to a breach of Article 11. In *EC-Sardines*, the Appellate Body stated:[38]

> Panels enjoy discretion as to *whether or not* to seek information from external sources…. A contravention of the duty under Article 11 of the DSU to make an objective assessment of the facts of the case cannot result from the due exercise of the discretion permitted by another provision of the DSU, in this instance Article 13.2 of the DSU.

27. As with many of the appellants' arguments, this allegation is part of a wider attempt to convert Article 11 into an avenue for challenging the substance of the factual findings made by the Panel. Honduras suggests that the Panel made substantive errors in its assessment of the evidence because the Panel lacked the necessary expertise.[39] It then equates this with a failure to carry out an objective assessment.[40] New Zealand does not consider that the Panel made errors in its assessment of the evidence. It objects, however, to the inappropriate use of Article 11 to re-try purely factual arguments. As discussed above, an objective assessment is one that is even handed and impartial.[41]

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[35] See, for example, the use of "shall" in Article 14.3 TBT and elsewhere in Article 13.1 DSU.
[36] Appellate Body Report, *US – Continued Suspension* at para. 592. Emphasis added.
[37] Emphasis added.
[38] Appellate Body Report, *EC – Sardines* at para. 302. See also Appellate Body Report*, EC – Hormones* at para. 147 and Appellate Body Report*, Argentina – Textiles and Apparel* at paras. 84 - 86.
[39] Honduras's Appellant Submission at para. 1064.
[40] Honduras's Appellant Submission at paras. 1067-1069.
[41] See above at para. 10.

Whether an assessment was correct and whether it was undertaken objectively are separate issues. Article 11 should not be used to re-litigate factual arguments that were properly settled at the Panel stage.

d. The Appellants Misrepresent the Findings of the Panel

28. The final concern that New Zealand wishes to bring to the Appellate Body's attention is the misrepresentation of the Panel's findings. This is largely a result of the appellants reproducing only select parts of the Panel's findings. Once removed from their wider context, these statements are easily misunderstood. Two apt examples can be taken from Honduras's submission. In the first example, Honduras argues that "the Panel *consistently* finds that the evidence of the TPP Measures' actual impact on proximal and … distal outcome is *very weak or non-existent*".[42] In support of this claim, Honduras presents a summary of the Panel's findings on proximal outcomes. The summary quotes three findings, all of which conclude that the TPP Measures have a "mixed" and/or "limited" impact on the relevant proximal outcomes.[43] There is no indication that the summary provided by Honduras is not a complete summary of the Panel's findings. Indeed, the list is preceded by the question "so what are the Panel's own conclusions and findings[?]".[44] The list is not merely incomplete, it omits *five* findings made by the Panel that the TPP Measures, together with the enlarged GHWs, did have a positive impact on proximal outcomes.[45] Three of these findings record a "statistically significant" impact.[46] Honduras's summary of the Panel's findings on distal outcomes is equally skewed. Despite all the appearance of being a complete summary, it fails to mention the Panel's positive findings of impact.[47]

29. The second example of misrepresentation further highlights the importance of context. Honduras claims that the Panel's findings on the post-implementation evidence on smoking behaviours are internally inconsistent. This is because certain terms that appear in the Panel's intermediate findings do not appear in

[42] Honduras's Appellant Submission at para. 757. Emphasis added.
[43] Honduras's Appellant Submission at para. 758. Footnotes omitted.
[44] Honduras's Appellant Submission at para. 756.
[45] The Panel found that:
1) The TPP Measures and enlarged GHWs have statistically significantly reduced the appeal of cigarettes among adult smokers.
2) The TPP Measures and enlarged GHWs have statistically significantly increased GHWs' effectiveness on the noticeability of health warnings; avoidance of graphic health labels; pack concealment among adult cigarette smokers …
3) [T]he TPP Measures (together with enlarged GHWs) have contributed statistically significantly in reducing the appeal of cigarettes among adolescents …
4) There has been a decrease in perceived packaging appeal when cigar and cigarillo smokers were exposed to the TPP Measures (and enlarged GHWs) …
5) [T]here has been an increase in the noticeability of health warnings and packs concealment among cigar and cigarillo smokers.

Panel Report at para. 7.958. Formatting altered.
[46] See above n 45.
[47] Compare: Honduras's Appellate submission at para. 759 with the Panel Report at para. 7.963.

an overarching conclusion statements made later in the Panel's Report.[48] In support of this, Honduras points to short extracts pulled from the summary of intermediate findings set out in appendices C and D ("**Appendix Extracts**").[49] These are:

> [T]here 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.[50]
>
> [T]here is some econometric evidence suggesting that [the] TPP [measures] and enlarged GHWs contributed to the reduction in wholesale cigarette sales in Australia.[51]
>
> [T]he evidence before us on the evolution of consumption of cigars in the post-TPP period is more limited and does not allow us to draw clear conclusions on the effect of the TPP Measures on cigar consumption in Australia.[52]

Honduras places great weight on the inclusion of the terms "some…evidence" and "suggesting" in the extracts and emphasises the Panel's acknowledgement that there was limited evidence relating to cigar consumption and cigarillo related smoking behaviours.[53] Honduras then compares these findings to three statements extracted from the Panel's general conclusions on the impact of the measures on smoking behaviours, and its overall conclusion on the contribution of the TPP Measures to Australia's objective ("**Conclusion Extracts**").[54] These are:

> The fact 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."[55]
>
> The evidence on smoking prevalence and consumption "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." [56]
>
> Taken as a whole, the evidence presented in the case, including the post-implementation evidence, "supports the view that, as applied in combination with the comprehensive range of other tobacco control measures maintained by Australia … the TPP Measures are apt to, and do, make a meaningful

[48] Honduras's Appellant Submission at paras. 735 – 745.
[49] Honduras's Appellant Submission at para. 738. The particular extracts are taken from: Panel Report, Appendix C, at para. 123(c); Appendix D, at para. 117; Appendix D, at para. 136.
[50] Panel Report, Appendix C, at para. 123(c).
[51] Panel Report, Appendix D, at para. 117.
[52] Panel Report, Appendix D, at para. 136.
[53] Honduras's Appellant Submission at paras. 738 – 740.
[54] The specific extracts relied on by Honduras are set out in its submission at paras. 740, 741, and 743.
[55] Panel Report at para. 7.986.
[56] Panel Report at para. 7.1037.

> contribution to Australia's objective of reducing the use of, and exposure to tobacco.[57]

Honduras argues that, because these Conclusion Extracts do not reflect the limitations represented by the terms "some…evidence" and "suggesting", and do not refer to the limited evidence on cigarillos and cigars noted in the Appendix Extracts, they are inconsistent with the Panel's intermediate findings.[58]

30. Honduras's argument is based on a selective and inaccurate reading of the Panel Report. Extracts of the Panel's findings are removed from their context and attributed meaning in a vacuum. To the extent that the Panel's intermediary findings regarding the post-implementation evidence *were* "limited or qualified", these limitations were discussed by the Panel in paragraphs before or after the Conclusion Extracts cited by Honduras. The Panel, for example: noted issues arising from the comparatively short period within which implementation data was taken,[59] acknowledged the difficulty in isolating the impact of the TPP Measures from the enhanced GHWs,[60] discussed weaknesses in some of the studies relied on,[61] and considered the implications of the limited evidence available on certain behaviours relating to cigar and cigarillo use.[62] These limitations were each analysed, weighed and taken into account by the Panel in reaching its conclusions. The Conclusion Extracts also included the phrases "consistent with" and "supports the view that" rather than more definitive terms.[63] Honduras's failure to mention these aspects of the Panel's conclusions creates an inaccurate impression that the Panel ignored these matters.

31. Determining whether a panel has complied with its obligation under Article 11 to act objectively will necessarily involve scrutiny of what the panel said and did. Appellants may be tempted to present the findings of a panel in a manner that creates an inaccurate impression that the panel did not act in an even handed and impartial manner. The Appellate Body should be aware, in considering allegations brought under Article 11, of the ease with which parties can create the appearance of inconsistencies in a panel's reasons through the selective and potentially misleading manner in which they are presented.

D. Conclusion

32. For the reasons set out above, and other reasons set out in the submissions presented by Australia, which New Zealand agrees with, the Appellate Body should dismiss the allegations brought by Honduras and the Dominican Republic

[57] Panel Report at para. 7.1043.
[58] Honduras's Appellant Submission at para. 741-745.
[59] Panel Report at para. 7.983; para. 7.984; para. 7.1027; para. 7.1044.
[60] Panel Report at para. 7.908.
[61] Panel Report at para. 7.985.
[62] Panel Report at para. 7.1038.
[63] This is consistent with the case that the Panel was asked to decide. The Panel was not required to decide conclusively what the impact of the TPP Measures was. Rather, it was required to determine whether had complainants had established their case that the TPP Measures cannot and do not contribute to the reduction in tobacco use and exposure: see discussion above at para. 18.

under Article 11.

III. THE PANEL APPLIED THE CORRECT LEGAL STANDARD IN DETERMINING THE CONTRIBUTION OF THE TPP MEASURES

33. In addition to arguing that the Panel breached Article 11, Honduras argues that the Panel failed to apply the correct legal standard when assessing the degree to which the TPP Measures contributed to the objective of reducing tobacco use and exposure. It accepts that the legal standard articulated by the Panel was correct, but claims that the Panel failed to correctly apply that standard. Honduras argues that this error vitiates the Panel's finding that the complainants had failed to establish that the TPP Measures were inconsistent with Australia's obligations under Article 2.2 TBT Agreement and Article 20 TRIPS.[64]

34. As this claim covers issues largely addressed already, New Zealand will not address this claim in detail. It wishes, however, to draw the Appellate Body's attention to two brief points. First, this claim is an attempt by Honduras to re-package its Article 11 allegations as a fresh legal issue. Each of the instances in which Honduras alleges the Panel failed to apply the correct legal standard are supported by a cross reference to Honduras's Article 11 submission.[65] The arguments presented by New Zealand above in respect of the Article 11 allegations apply equally here. In particular, Honduras's objection to the manner in which the Panel applied the legal standard is an impermissible challenge to the Panel's factual findings and should not be entertained by the Appellate Body.

35. The second point to note is that Honduras's discussion of the legal standard identified by the Panel misrepresents a number of key aspects of the standard. These misrepresentations are subtle, but are significant in the context of Honduras's later allegations. First, Honduras overstates the weight that the Panel found should be placed on the post-implementation evidence. Honduras states, for example, that the Panel held that "evidence relating to actual behaviour is clearly ("a priori") *more informative* than evidence relating to perceptions or intentions of others".[66] In reality, the Panel acknowledged the potential relevance of all categories of evidence, and did not make a judgment as to what evidence ought to be given more or less weight. It stated:[67]

> [W]e consider that evidence relating to the design, structure, and operation of the TPP Measures (including their anticipated impact on "proximal" outcomes reflecting the specific mechanisms through which they are designed to operate and on smoking behaviours), as well as evidence relating to the application of the challenged measures (including evidence relating to their actual effect both on proximal outcomes reflecting the mechanisms under the TPP Act and on smoking behaviours) is *a priori* relevant to an assessment of the degree to which the TPP Measures contribute to Australia's objective of reducing the use of, and

[64] Honduras's Appellant Submission at paras. 532 - 558. The Dominican Republic adopts this claim by reference, along with each of the other claims made by Honduras on appeal: Dominican Republic's Appellant Submission at para. 30.
[65] See Honduras's Appellant Submission at para. 554. See in particular FN 303 to FN 308.
[66] Honduras's Appellant Submission at para. 541. Emphasis added. See also para. 553(i).
[67] Panel Report at para. 7.500. Underline emphasis added.

> exposure to, tobacco products.

36. Second, Honduras plays down the Panel's acknowledgment of the relevance of the wider suite of control measures to the Panel's assessment of the contribution of the TPP Measures. Honduras states that that the legal standard identified by the Panel "seeks to identify the contribution of the "plain packaging measures themselves" and not some broader group of measures".[68] While it is correct that the Panel acknowledged that its task was to assess the impact of the TPP Measures, it also confirmed the relevance of the wider suite of tobacco control measures to this assessment:[69]

> [T]he 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. 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 is a relevant consideration in our 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.

37. Third, Honduras states that the legal standard identified by the Panel "does not lead to the Panel's "own econometric assessment" *of the evidence* but rather an examination of the overall robustness of the evidence submitted in light of the arguments made and the evidence on the record."[70] The actual observation by the Panel was quite different. Rather than suggesting a limitation on the Panel's ability to carry out an econometric assessment of *the evidence*, the Panel noted that: [71]

> Our task is not to conduct our own econometric assessment of *the TPP Measures' impact* on the proximal outcomes identified above but rather to examine, on the basis of the evidence before us, the overall robustness of the econometric evidence submitted by the parties.

In other words, the Panel's observation emphasised that its role *was* to review the evidence put before it.

38. These misrepresentations are significant because they feed into Honduras's arguments that the Panel failed to apply the legal standard that it had articulated. New Zealand does not consider that the arguments raised by Honduras have merit, even based on its own articulation of the legal standard for review. New Zealand does consider, however, that it is important that the legal standard articulated by the Panel is accurately reflected.

39. For the reasons set out above, and other reasons set out in the submission presented by Australia, which New Zealand agrees with, New Zealand requests that the Appellate Body dismiss Honduras's claim that the Panel erred in is application of the legal standard for determining the degree of contribution of the

[68] Honduras's Appellant Submission at para. 553(iii).
[69] Panel Report at para. 7.506.
[70] Honduras's Appellant Submission at para. 553(vi).
[71] Panel Report, Appendix A, at para. 5. Emphasis added.

TPP Measures for the purposes of Article 2.2 TBT Agreement and Article 20 TRIPS.

IV. ANALYSIS OF THE KEY ARGUMENTS UNDER TRIPS

A. Interpretation and Application of Article 16.1 TRIPS

40. Honduras alleges that the Panel erred both in its interpretation of Article 16.1 TRIPS, as well as in applying its legal standard to the facts of this case.[72]

41. The Panel confirmed that Article 16.1 does *not* establish a trademark owner's positive right to use a registered trademark to protect its distinctiveness.[73] Rather, Article 16.1 provides a limited and negative right to prevent the unauthorised use of a trademark by third parties, under the conditions set out in the provision.[74] Based on the evidence provided, the Panel concluded that the complainants had not demonstrated that the TPP Measures, including the prohibition on the use of certain trademarks, were inconsistent with Article 16.1 TRIPS.[75]

42. Honduras argues that the Panel's interpretation of Article 16.1 fails to provide trademark owners with the minimum level of rights in relation to trademarks guaranteed by TRIPS.[76]

43. Article 16.1 provides that:

> 1. 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.

44. New Zealand considers that the Panel properly interpreted Article 16.1. New Zealand submits that TRIPS was never intended to require WTO members to uphold a trademark owner's right to exploit their intellectual property in all circumstances in the course of trade, but rather to provide a framework for its protection. This was confirmed by the Panel in *EC – Trademarks and Geographical Indications (US),* in their consideration of Article 8.1 TRIPS:[77]

> These principles reflect the fact that 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. This fundamental feature of intellectual property protection inherently grants

[72] Honduras's Appellant Submission at para. 323.
[73] Panel Report, at para. 7.2028 and 7.2029.
[74] Panel Report, at para. 7.1978.
[75] Panel Report, at paras. 7.2031 – 7.2032.
[76] Honduras's Appellant Submission at para. 353.
[77] Panel Report, *EC – Trademarks and Geographical Indications (US)* at para. 7.210.

> Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement.

45. As a result, the Panel in *EC – Trademarks and Geographical Indications (US)* interpreted the right that must be conferred under Article 16.1 as a right of the owner of the registered trademark to prevent certain uses by "all third parties" not having the owner's consent, subject to certain exceptions.[78] The Panel in *EC – Trademarks and Geographical Indications (US)* further clarified: "Article 16.1 of the TRIPS Agreement only provides for a negative right to prevent all third parties from using signs in certain circumstances."[79] The Panel's analysis aligns with this interpretation.

46. Commentary also recognises that while TRIPS provides some protection for the use a trademark, Article 16.1 does not generally grant positive rights that would mean that a WTO member is obliged to allow the trademark owner to use its trademark, no matter the circumstances.[80] It is a right that governs the relationship between traders and does not, in New Zealand's view, have any relevance to the TPP Measures. New Zealand agrees with the Panel's interpretation of Article 16.1 TRIPS.

B. Interpretation and Application of Article 20 TRIPS

47. Honduras claims that the Panel erred in law in its interpretation of the term "unjustifiably" in Article 20 TRIP.[81]

48. Article 20 TRIPS provides that:[82]

> 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.

49. The Panel held that the term "unjustifiably" implies that there may be circumstances in which good reasons exist that sufficiently support the application of encumbrances on the use of a trademark."[83] The Panel then held that a determination of whether a trade mark was being "unjustifiably" encumbered by special requirements should involve consideration of the

[78] Panel Report, *EC – Trademarks and Geographical Indications (US)* at para. 7.602.
[79] Panel Report, *EC – Trademarks and Geographical Indications (US)* at footnote 558 (found at para. 7.611).
[80] Suzy Frankel and Daniel Gervais, "Plain Packaging and the Interpretation of the TRIPS Agreement" (2013) 46 *Vanderbilt Journal of Transnational Law* 1149 at p 1197.
[81] The Dominican Republic incorporates by reference all of Honduras's arguments on appeal: Dominican Republic's Appellant Submission at para. 30.
[82] Emphasis added.
[83] Panel Report at para. 7.2396.

following three factors: [84]

> 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.

50. The Panel ultimately found that the appellants failed to demonstrate that any encumbrance imposed upon the use of trademarks in the course of trade by the TPP Measures is "unjustifiable" under a proper interpretation of that term.[85]

a. Honduras errs in its interpretation of the term "unjustifiably"

51. Honduras argues on appeal that the Panel needed to take a trademark-specific approach to the interpretation of this provision, so that that the justification for the encumbering requirements on the trademark relates to concerns with the trademark itself, rather than the product.[86] Honduras goes so far as to claim that as long as the products are lawfully available, there is "no basis" for a member to disregard the important function of trademarks in the course of trade.[87]

52. New Zealand submits that Honduras's interpretation of this provision does not properly consider the term "unjustifiably" in its context and in light of the object and purpose of TRIPS. Honduras appears to base its interpretation on the idea that there is a positive right to use a trademark inherent in Article 20 which would "prohibit imposing requirements that are specifically directed at the use of the trademark."[88] However, as noted by the Panel, the preamble, as well as Articles 7 and 8 TRIPS, highlight the careful balance between the rights of trademark owners to prevent third parties from using their trademarks in the course of trade against a member's right to regulate to pursue legitimate public policy objectives. Read against this broader context, the Panel recognised that there may be legitimate reasons for which a member may encumber the "use" of intellectual property rights used in the course of trade.[89] The Panel determined:

> 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.[90]

[84] Panel Report at para. 7.2529.
[85] Panel Report at para. 7.2594.
[86] Honduras's Appellant Submission at para. 131.
[87] Honduras's Appellant Submission at para. 203.
[88] Honduras's Appellant Submission at para. 146.
[89] Panel Report at paras. 7.2402 - 7.2405.
[90] Panel Report at para. 7.2598.

53. Honduras's contention that the term "unjustifiably" in Article 20 permits only those encumbrances that are "trademark-specific and applied in a limited manner" would intrude on Australia's right to regulate and grant additional active rights to trademark owners which are not included in TRIPS. The Panel therefore rightly dismissed Honduras's proposed legal standard.

54. New Zealand notes that there are differing views on whether the Panel's three step test, as set out above at paragraph 49, requires more than a genuine rational connection.[91] New Zealand considers that it would be helpful for the Appellate Body to clarify this. Irrespective of the answer to this question, however, New Zealand considers that the Panel was correct in finding that the TPP Measures had not "unjustifiably" encumbered the use of a trademark for the purposes of Article 20 TRIPS.[92]

55. Honduras argues in the alternative that the interpretation of the term "unjustifiably" requires a consideration of the less trademark encumbering alternative measures that provide an equivalent contribution. In formulating their argument, Honduras erroneously equates the analysis of the term "unjustifiably" under Article 20 TRIPS with the question of whether a measure is "not more trademark encumbering than necessary", similar to the analysis required under Article 2.2 TBT Agreement.[93]

56. The Panel, in their consideration of this argument, explained that the context of TRIPS highlights that the term "unjustifiably" is a deliberate choice of word and is not synonymous with the term "unnecessarily".[94] New Zealand agrees with the Panel that the use of different terms in the context of Article 20 creates a presumption that the terms were intended to have a different meaning. For example, it is well established that the use of different terminology in the general exceptions established under Article XX of GATT must be given interpretative effect. Three of those exceptions refer to measures that are "necessary" to the relevant objective, another three exceptions refer to measures "relating to" the relevant objective, and still others use different terms (such as, "undertaken in pursuance of", "imposed for the protection of" and "essential to").[95] Similarly, in Article 20 TRIPS, the ordinary meaning of the term "unjustifiably" bears no resemblance to the concepts of "necessary" or "least trade-restrictive" which appear elsewhere in the covered agreements. It is therefore reasonable to infer that the drafters of TRIPS did not intend to incorporate those notions into this provision, and to do so would undermine the ordinary meaning of the term "unjustifiably" in Article 20.

57. Furthermore, notwithstanding the Panel's confirmation that the analysis required is different to that required under Article 2.2 TBT Agreement, the Panel did acknowledge that the availability of alternative measures may inform their

[91] Appelee Submission of Australia, 2 October 2018 at para. 241.
[92] Panel Report at para. 7.2604.
[93] Honduras's Appellant Submission at para. 231.
[94] Panel Report at para. 7.2419.
[95] See, for example, Appellate Body Report, *US – Gasoline*, at pp. 17-18.

determination of whether the trademark was "unjustifiably" encumbered under Article 20 TRIPS.[96] The Panel was, however, ultimately not convinced that the alternative measures put forward by the complainants (being the same as those raised in relation to Article 2.2 TBT Agreement) call into question the sufficiency of the reasons for the TPP Measures.[97]

58. Finally, Honduras claims that the Panel paid undue attention to the Doha Declaration when considering its interpretation of the term "unjustifiably" under TRIPS. They contend that the Doha Declaration confirms the general interpretative rule and should not have any bearing specifically on the interpretation of TRIPS.[98] New Zealand submits that the Panel appropriately referenced the Doha Declaration in the context of Article 20 TRIPS to emphasise the legitimacy of public health as a policy objective. New Zealand does not believe that Honduras's arguments on whether the Doha Declaration constitutes a subsequent agreement are relevant to the appeal and disagrees that the Panel's reference to the declaration is a contentious issue.

C. The Panel did not Breach Article 11 in its Assessment of the Article 2.2 TBT Agreement Claims

59. Honduras and the Dominican Republic each allege that the Panel failed to comply with its obligation under Article 11 DSU to carry out an objective assessment of the case under Articles 16.1 and 20 TRIPS.[99] New Zealand has addressed the claims made by the appellants under Article 11 DSU at length. The observations set out above at paragraphs 14 to 32 apply equally here. In particular, the appellants' allegations constitute an impermissible attempt to challenge factual findings of the Panel and should not be entertained by the Appellate Body.

60. The Appellate Body has highlighted on a number of occasions the seriousness of an allegation under Article 11 DSU. In particular, the Appellate Body in *Peru – Agricultural Products* stated that a challenge under Article 11 DSU must "stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement."[100] The appellants' Article 11 allegations concerning the Panel's interpretation and application of Article 16.1 and Article 20 TRIPS do not stand alone and should accordingly be dismissed.

[96] Panel Report at para. 7.2598.
[97] Panel Report at para. 7.2601.
[98] Honduras's Appellant Submission at para. 254.
[99] Honduras's Appellant Submission at para. 459 and Dominican Republic's Appellant Submission at paras. 1567 - 1599.
[100] Appellate Body Report, *Peru – Agricultural Products* at para. 5.66 citing as follows:
Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)* at para. 337 (referring to Appellate Body Reports, *US – Steel Safeguards* at para. 498; *Australia – Apples* at para. 406).

D. The Panel Did Not Err in Applying the Legal Standard Under Article 20 TRIPS

61. In its submissions in relation to Article 20 TRIPS, Honduras argues that even if the Panel's interpretation were to be accepted, the Panel erred in its application of the legal standard to the facts of this case. Honduras provides lengthy submissions on this contention which attempt to pick apart isolated examples of the Panel's analysis.[101]

62. New Zealand considers that the Panel correctly applied the legal standard in its assessment under Article 20 TRIPS. The Panel presents a thorough analysis of the TPP Measures by considering a range of factors.[102] Honduras's challenge to the careful balancing exercise undertaken by the Panel under Article 20 TRIPS is an attempt to re-litigate the Panel's factual findings, contrary to the clear limitation on appeals under Article 17.6 DSU.

E Conclusion

63. For the reasons set out above, New Zealand requests that the Appellate Body dismiss the appellants' claims under Article 16.1 and Article 20 TRIPS.

V. ANALYSIS OF ARGUMENTS UNDER ARTICLE 2.2 TBT Agreement

A. The Panel correctly interpreted "Trade-Restrictiveness" under Article 2.2 TBT Agreement

64. The appellants allege that the Panel erred in its interpretation of the term "trade-restrictive" in Article 2.2 TBT Agreement. Honduras argues that an assessment of whether a particular technical regulation is "trade restrictive" should be driven by reference to the impact on the conditions of competition and competitive opportunities, rather than the effect on the volume of trade.[103] The Dominican Republic also claims that the Panel misunderstood the implications of competitive opportunities and erroneously required evidence of actual trade effects.[104]

65. Article 2.2 TBT Agreement provides:[105]

> Members shall ensure that technical regulations are not prepared, adopted or

[101] Honduras's Appellant Submission at paras. 264 – 312. For example, Honduras claims that the Panel focussed unduly on the economic impact of the encumbrances (para. 273) and that the FCTC guidelines had too much bearing on the Panel's consideration of the TPP Measures (para. 302).
[102] These factors include that the TPP Measures allow the use of word marks that denote the brand and product variant on the tobacco products (para. 7.2556); the limited economic impact of these measures (para. 7.2572); that the TPP Measures allow for the continued registration of trademarks and therefore preserve a trademark owners ability to protect the trademark as against third parties (para. 7.2574); the effectiveness of these measures in reducing the appeal of tobacco products and increase the effectiveness of the GHW (para. 7.2593); the importance of the goals of WHO Framework Convention on Tobacco Control (para. 7.2589).
[103] Honduras's Appellant Submission at para. 499.
[104] Dominican Republic's Appellant Submission at para. 1288.
[105] (emphasis added).

> 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.

66. The ordinary meaning of the term "trade-restrictive" for the purposes of Article 2.2 has been well established by the Appellate Body as "something having a limiting effect on trade".[106] The Panel considered this legal standard and confirmed that evidence of a modification to the conditions under which all manufacturers will compete against each other on the market would not, *in itself*, be sufficient to demonstrate that they are "trade-restrictive" within the meaning of Article 2.2. Rather, it needs to be shown "*how* such effects on the conditions of competition in the market give rise to a limiting effect on international trade in tobacco products".[107] The Panel ultimately concluded, however, that the TPP Measures are "trade-restrictive" as they reduce the volume of imported tobacco products into Australia.[108]

67. The Panel correctly considered the ordinary meaning of the term "trade restrictive" in its context and in light of the object and purpose of TBT Agreement. Conversely, Honduras's alleged standard of "trade-restrictiveness" is based on the ability to differentiate between brands, without the need to demonstrate a limitation on trade. Such a standard would expand the concept of "trade-restrictiveness" under Article 2.2 beyond its ordinary meaning and would render virtually all technical regulations "trade restrictive". This detracts from the object and purpose of Article 2.2 TBT Agreement which balances trade liberalisation with a member's right to regulate by allowing trade-restrictive technical regulations, subject to the condition that they are not "more trade restrictive than necessary to fulfil a legitimate objective".

68. Furthermore, Honduras's legal standard is based on the Appellate Body's confirmation in *US – COOL* and *US – COOL (Article 21.2 – Canada and Mexico)* that their analysis of whether the measure at issue would be "trade restrictive" would be based on the competitive opportunities available for imported livestock.[109] Unlike the present case, however, *US – COOL* concerned discriminatory measure where the competitive difference between imported and domestic products was crucial to the Panel's analysis of the provision. The TPP Measures are non-discriminatory internal measures and the appellants' reduced ability to compete via design features on tobacco products is not sufficient to determine if the measures had a limiting effect on international trade.

[106] Appellate Body Report, *US – Tuna II (Mexico)* at para. 319.
[107] Panel Report at para. 7.1166 – 7.1168.
[108] Panel Report at para. 7.1255.
[109] Honduras's Appellant Submission at para. 491 referencing Appellate, *US – Cool* at para. 477; and Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)* at para. 5.208.

69. The appellants claim that the Panel required a higher standard for demonstrating that the measures are "trade-restrictive" where they are non-discriminatory.[110] However, rather than applying a different standard for a non-discriminatory measure, the Panel simply confirmed that the discriminatory elements of a measure will be taken into account when determining trade restrictiveness. The Panel outlined the difference between Article 2.1 TBT Agreement (which does require an element of discrimination) and Article 2.2 (which does not) and found that discrimination was not required for demonstrating that a technical regulation was "trade-restrictive" within the meaning of Article 2.2.[111] In doing so, the Panel noted that the "appropriate evidence of such limiting effect will in particular be required in the case of a non-discriminatory internal measure".[112] This reflects the analysis of the Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)*:[113]

> [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.

70. The appellants fail to appreciate this nuance in their allegation that the Panel applied a mandatory standard for the interpretation of this provision in respect of non-discriminatory measures.

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

71. The Panel, during its application of Article 2.2 TBT Agreement to the TPP Measures, made a comparison between the TPP Measures and the four alternative measures put forward by the complainants. The Panel concluded that the complainants had failed to identify less trade-restrictive measures that would be reasonably available to Australia and make an equivalent contribution to its objective, taking account of the risks non-fulfilment would create.[114] In doing so, the Panel recognised that all tobacco products in Australia were imported products, and as a result any alternative measure that would make an equivalent contribution to the TPP Measures would necessarily be at least as trade-restrictive as the TPP Measures.[115] Nevertheless, the Panel considered the complainants' alternatives on an *arguendo* basis.

72. The appellants claim on appeal that the Panel erred in its comparative analysis of two of their proposed alternative measures when considering whether the TPP Measures were "not more trade restrictive than necessary" to fulfil a legitimate

[110] Honduras's Appellant Submission at para. 490; Dominican Republic's Appellant Submission at paras. 1313 and 1314.
[111] Panel Report at para. 7.1074.
[112] Panel Report at para. 7.1168.
[113] Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)* at para. 5.208, footnote 643 (citing *Appellate Body Report, EC – Poultry* at paras. 126-127).
[114] Panel Report at paras. 7.1471, 7.1545, 7.1624 and 7.1716.
[115] Panel Report at para. 7.1207.

objective for the purposes of Article 2.2 TBT Agreement. The two proposed measures are: (i) an increase in the minimum legal purchase age ("**MLPA**") in Australia from 18 to 21 years of age; and (ii) an increase in excise taxes. Both appellants allege that the Panel erred by assessing whether the proposed alternatives were less trade-restrictive against an allegedly erroneous legal standard.[116] The appellants' arguments include taking issue with the Panel's focus on the "synergies" among the range of measures implemented by Australia to address their public health concerns relating to tobacco.[117]

73. New Zealand notes that the appellants' claims in relation to the alternative measures are connected to their claim that the Panel applied the incorrect legal standard in ascertaining the "trade-restrictiveness" of the TPP Measures. Therefore, if the Appellate Body upholds the Panel's legal standard, New Zealand submits that the appellants' claims in respect of these alternative measures should also be dismissed.

74. In any event, New Zealand submits that the Panel's approach was correct when considering *arguendo* whether the complainants' proposed alternative measures made an equivalent contribution to Australia's legitimate objective. The Panel accepted the well-established principle that a proposed alternative is not required to contribute to an objective in an identical manner.[118] However, the Panel noted that an alternative measure may not contribute in an equivalent manner when substituting one element of a comprehensive strategy that would leave unaddressed the aspect of the problem that the challenged measure seeks to address. In doing so, the Panel properly referenced the preamble to TBT Agreement which confirms that no member should be prevented from pursuing public policy objectives "at the levels it considers appropriate".[119]

75. New Zealand agrees with the Panel's approach when considering the alternatives proposed by the appellants in the context of Australia's comprehensive policy scheme of tobacco control. Increasing the MLPA would *only* impact the availability of tobacco products for a small subset of current and potential smokers. This proposed measure would retain the design features of trademarks and tobacco packaging that contribute to making tobacco more appealing and continue to attract and retain smokers across all age groups.

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[116] Dominican Republic's Appellant Submission at para. 1420; Honduras's Appellant Submission at para. 560.
[117] Dominican Republic's Appellant Submission at paras. 1517 - 1518; Honduras's Appellant Submission at para. 689;
[118] Panel Report at para. 7.1731, referencing Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)* at para. 5.215.
[119] Panel Report at para. 7.1731, referencing the sixth recital of the preamble of TBT which states: *Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;

76. Similarly, any deterrent caused by an increase to Australia's tobacco excise taxes would continue to be undermined by the positive imagery of trademark design, especially for tobacco consumers who have already formed a habituated association with tobacco branding and packaging, or for those whom increased price was not a deterrent. These features would continue to weaken the graphic health warnings and other tobacco control measures introduced by Australia as part of their comprehensive plain packaging regime.

77. Furthermore, the Panel's rationale was sound when taking into account the fact that the TPP Measures were "part of a broader policy scheme with multiple complementary elements designed to pursue in a comprehensive manner a public health objective over time."[120] The Appellate Body has acknowledged that when considering a measure as part of a broader policy strategy, an alternative that modifies the strategy in an adverse way would not achieve an equivalent degree of contribution. The Appellate Body in *Brazil – Retreaded Tyres*, in their consideration of reasonably available alternatives as part of a wider policy scheme, stated that: "substituting one element of [a] comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect."[121]

78. As a result, New Zealand agrees with the Panel that the complainants failed to identify any less trade-restrictive measures that would be reasonably available to Australia and make an equivalent contribution to its objective.

C. The Panel did not Breach Article 11 in its Assessment of the Article 2.2 TBT Agreement Claims

79. The Dominican Republic claims that the Panel failed to meet its obligation to carry out an objective assessment in its determination of the claims brought under Article 2.2 TBT Agreement.[122] New Zealand has addressed the claims made by the appellants under Article 11 DSU at length. The observations set out above at paragraphs 14 to 31 apply equally here. In particular, the appellants' allegations constitute an impermissible attempt to challenge factual findings of the Panel and should not be entertained by the Appellate Body.

E. Conclusion

80. For the reasons set out above, New Zealand requests that the Appellate Body dismiss the appellants' claims in relation to Article 2.2 TBT Agreement.

VI. OVERALL CONCLUSION

81. The Dominican Republic and Honduras make a number of claims challenging the Panel Report. New Zealand considers that these claims are unfounded and lack a principled foundation in the legal instruments under which they are brought.

[120] Panel Report at para. 7.1730.
[121] Appellate Body Report, *Brazil – Retreaded Tyres* at para. 172.
[122] Dominican Republic's Appellant Submission at para. 1421.

82. For the reasons set out above, and other reasons contained in the submissions filed by Australia, which New Zealand agrees with, New Zealand requests that the Appellate Body reject the claims brought by Honduras and the Dominican Republic and uphold the findings set out in the Panel Report.

Word Count: 11,776