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

(DS435, DS441)

THIRD PARTICIPANT ORAL STATEMENT OF THE UNITED STATES OF AMERICA

June 11, 2019

I. INTRODUCTION

Mr. Chairman, members of the Division:

1. In this statement, the United States will present its views on the claims raised in relation to Articles 7.1 and 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), in light of its systemic interest in the correct interpretation of those provisions, as well as the proper legal treatment of the *Declaration on the TRIPS Agreement and Public Health* ("Doha Declaration on TRIPS").

2. A proper resolution of these two sets of issues would not disturb the ultimate conclusions of the Panel in these disputes.

II. COMPLAINANTS' CLAIMS OF ERROR UNDER THE DSU

3. First, Honduras and the Dominican Republic both appeal dozens of factual findings under Article 11 of the DSU. By agreement of all WTO Members, the DSU expressly limits the scope of an appeal to "issues of *law* covered in the panel report and *legal* interpretations developed by the panel." These attempts by appellants to re-litigate dozens of unfavorable factual determinations by the Panel are not supported by the text of Article 11 of the DSU, which does not impose an obligation on a panel, but rather recognizes that the task of a panel is to "make an objective assessment" of the matter before it.

4. The appeals of Honduras and the Dominican Republic in this dispute would serve only to add complexity, duplication, and delay to a dispute that began seven years ago, and highlight the burden placed on the Appellate Body and other parties when parties appeal what are clearly factual determinations by a panel. The Appellate Body has an opportunity in this appeal to reconsider how its originally limited approach to review the "objective assessment" of a panel has been seized by appellants to cover practically all factual determinations by a panel. The Appellate Body should take this opportunity to confirm it does not have the authority to review panel findings of fact, and to reassert that the proper issues for appeal are limited to issues of law and legal interpretations covered by a panel report, as set out in Article 17.6 of the DSU.

5. The United States therefore agrees with Australia that the appellants' numerous claims of breach of Article 11 of the DSU for what are clearly alleged factual errors by the Panel in its reports are unfounded.

6. In addition, the United States agrees with Australia that the Dominican Republic's claim of a breach under Article 7.1 of the DSU is unfounded. As the United States explained in its third participant submission, the Panel did address this claim, and the issue would in any event go to an erroneous legal conclusion, not a terms of reference issue. Despite a discrepancy within the panel request of the Dominican Republic regarding the definitions of "tobacco products" as they relate to Australia's plain packaging measures, the Panel in its report set out and defined the measures at issue in these disputes as the "TPP measures" and the Panel then made findings based on and referring specifically back to that definition. The Panel included a separate section in the report, entitled "Requirements with respect to cigarettes," when defining the TPP measures

for the purposes of the Panel's analysis.[1] The Panel then referred to those collective TPP measures when conducting its analysis of the complainants' claims of breach of Article 20 of the TRIPS Agreement.[2] The Panel's findings that the complainants did not establish a breach of Article 20 of the TRIPS Agreement by Australia's implementation of the TPP measures included, by definition, the part of the TPP measures relating to individual cigarettes themselves. Therefore, it is not necessary to determine whether any possible differences between the descriptions within the panel request of the Dominican Republic had any effect on the terms of reference.

III. Clarification Regarding the Panel's Treatment of the Doha Declaration on the TRIPS Agreement and Public Health

7. Second, in its report, the Panel considered the types of reasons that would sufficiently support the application of an encumbrance on the use of a trademark so as to determine the meaning of the term "unjustifiably" in Article 20 of the TRIPS Agreement.[3] As part of its analysis, the Panel stated that paragraph 5(a) of the Doha Declaration on TRIPS "may, in our view, be considered to constitute a 'subsequent agreement' of WTO Members within the meaning of Article 31(3)(a) of the Vienna Convention."[4]

8. On appeal, Honduras argues that the Panel committed legal error in finding that paragraph 5 of the Doha Declaration on TRIPS "constitutes a 'subsequent agreement' in the sense of Article 31.3(a) of the Vienna Convention that must be taken into consideration as part of the context of the term 'unjustifiably' in Article 20 of the TRIPS Agreement."[5]

9. The issue of whether statements agreed by Members may constitute a "subsequent agreement on interpretation" has raised difficulties for the functioning of some WTO committees. As the United States explained in its third participant submission, the Panel's conclusion under Article 20 did not rely on a finding that paragraph 5 constituted a subsequent agreement, and the resolution of this issue therefore would have no bearing on the appeal of the Panel's legal interpretation or conclusion. Therefore, rather than engage on this issue, the Appellate Body could instead exercise judicial economy over Honduras's claim of error in this respect.

IV. Conclusion

10. This concludes the U.S. oral statement. The United States thanks the Appellate Body for consideration of its views.

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[1] Panel Report, para. 2.34.
[2] *E.g.* Panel Report, para. 7.2531.
[3] Panel Report, para. 7.2396 *et seq*.
[4] Panel Report, para. 7.2409.
[5] Honduras Appellant Submission, para. 254.