

***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  
AT THE SECOND ORAL HEARING**

**November 19, 2019**

## I. INTRODUCTION

Mr. Chairman, members of the Division:

1. In this statement, the United States will present its systemic views on certain claims raised under the DSU.<sup>1</sup>
2. A proper resolution of these issues, and the issues raised by the United States in its previous oral statement and written submission, would not disturb the ultimate conclusions of the Panel in these disputes.

## II. COMPLAINANTS' CLAIMS UNDER ARTICLE 11 OF THE DSU

3. The appellants cannot succeed in their numerous claims of breach under Article 11 of the DSU for what are clearly alleged factual errors by the Panel in its reports. These attempts by appellants to re-litigate dozens of unfavorable factual determinations 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 “function” of a panel is to “make an objective assessment” of the matter before it.
4. In Article 17.6 of the DSU, Members agreed that the scope of appellate review would be limited. It states that “[a]n appeal shall be limited to *issues of law* covered in the panel report and *legal interpretations* developed by the panel.” Nevertheless, appellants like Honduras and the Dominican Republic continue to request the Appellate Body to review a panel’s findings of fact.
5. Entertaining these appeals significantly expands the scope of appellate review and undermines the dispute settlement system as agreed by Members in the DSU. There already have been tremendous expenditures of both time and resources over the past seven years relating to these disputes, and the Division is projected to spend more time in oral hearings for this appeal than was spent in the panel meetings themselves.
6. Indeed, these appeals are a manifestation of the systemic concerns the United States has raised regarding such Article 11 claims.<sup>2</sup> For example, the appellant submission of Honduras identifies six possible standards of review under Article 11 of the DSU.<sup>3</sup> Honduras evidently does not know what the standard under Article 11 should be, and therefore argues under nearly every articulation it can find.
7. Further, appellants now assert that a “ghost expert” assisted the Panel in its analysis of the data presented by the parties and that such assistance was a violation of “due process” under

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<sup>1</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

<sup>2</sup> See Statement of the United States, 26 September 2018 Meeting of the DSB (WT/DSB/M/419), paras. 4.7–4.11; Statement of the United States, 27 August 2018 Meeting of the DSB (WT/DSB/M/417), paras. 4.2–4.17.

<sup>3</sup> See Honduras Appellant Submission, para. 710.

Article 11 of the DSU.<sup>4</sup> There is no evidence that the Panel consulted outside experts during the panel proceedings, as alleged by the Complainants, and therefore there is not even a factual basis for the alleged error.

8. Appellants argue that the Panel used an outside expert to make factual conclusions in favor of Australia in breach of a “fundamental due process right.”<sup>5</sup> Contrary to appellants’ arguments, however, there is no catch-all “due process” requirement under Article 11 of the DSU.

9. In the DSU, Members agreed to the opportunities that are “due” each party to ensure that procedural fairness is maintained as a panel assists the parties in seeking to resolve the dispute. Specifically, Appendix 3 to the DSU sets out Working Procedures providing for written submissions and an opportunity to be heard by the panel, and Article 12 of the DSU requires that parties be granted sufficient time to prepare their submissions, also stating that the panel procedures “should provide sufficient flexibility so as to ensure high-quality panel reports.”

10. Article 15 of the DSU then provides an opportunity for parties to comment on a panel’s report in the interim review stage of the dispute. Paragraph 1 requires the panel to present the descriptive sections of the draft report for comment. Paragraph 2 provides the parties an opportunity to review the full interim report of the panel and to request review of precise aspects of that report, including the panel’s findings and conclusions on the issues of fact and law. If requested by a party, “the panel shall hold a further meeting with the parties on the issues identified in the written comments.”

11. Therefore, the panel provided the “due” opportunity for the parties to comment on the panel’s resolution of the issues raised, as required under the DSU. However, neither Honduras nor the Dominican Republic chose to raise its concerns, during the interim review stage, regarding the alleged use of an outside expert. Had they done so, such arguments could have been addressed by the Panel itself at that time.

12. Appellants’ arguments under Article 11 of the DSU in this appeal would undermine the express provisions of the DSU providing the parties with the opportunity to engage with the panel concerning its interim conclusions. This would further diminish the role of the panel and its work — having already been deliberately side-lined by complainants — in favor of protracted appellate review. Therefore, the Division should reject appellants’ attempts to raise these issues on appeal under Article 11 of the DSU, and confine itself to those legal issues properly raised by the parties under the appropriate substantive legal provisions.

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<sup>4</sup> See Dominican Republic Appellant Submission, Sections II.A.1.a, II.D.3.c.i(1)(c)(i)(1), II.D.3.c.i(2)(c)(i)(1) and (2); Dominican Republic Exec. Summ. Appellant Submission, Section I.A; Honduras Appellant Submission, Section VIII.2.4; Honduras Exec. Summ. Appellant Submission, Section VII.4.

<sup>5</sup> See, e.g., Dominican Republic Exec. Summ. Appellant Submission, paras. 31–32; Honduras Exec. Summ. Appellant Submission, para 55.