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

(DS435 / DS441)

EXECUTIVE SUMMARY OF THIRD PARTICIPANT SUBMISSION OF THE UNITED STATES OF AMERICA

October 12, 2018

I. INTRODUCTION[1]

1. The United States welcomes the opportunity to present its views on issues raised on appeal by Honduras and the Dominican Republic. Pursuant to the communication from the Division on July 23, 2018, the United States is providing its third-participant submissions in the appeals in these two disputes as a single document.[2] In this document, the United States will present its views on the proper legal treatment of the *Declaration on the TRIPS Agreement and Public Health* ("Doha Declaration on TRIPS") and the claims raised in relation to Articles 7.1 and 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

2. The United States focuses on the two sets of issues identified above to address systemic concerns that arise from these appeals. A proper resolution of these two sets of issues would not disturb the ultimate conclusions of the Panel in these disputes.

II. CLARIFICATION REGARDING THE PANEL'S TREATMENT OF THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH

3. 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] The Panel correctly understood that, consistent with Article 3.2 of the DSU, it should interpret the term applying customary rules of interpretation of public international law, reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention").

4. 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]

5. On appeal, Honduras argues that the Panel committed legal error 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]

6. 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. Rather than engage in this appeal on this issue, the Appellate Body could instead exercise judicial economy over Honduras's claim of error, which has no bearing on the appeal of the Panel's legal interpretation or conclusion.

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[1] This executive summary contains a total of 776 words (including footnotes), and the U.S. third participant submission contains 8573 words (including footnotes).
[2] *See* Appellate Body Procedural Ruling (23 July 2018).
[3] Panel Report, para. 7.2396 *et seq*.
[4] *Id.* at para. 7.2409 (italics added).
[5] Honduras Appellant Submission, para. 254.

III. COMPLAINANTS' CLAIMS OF ERROR UNDER THE DSU

7. Honduras and the Dominican Republic both appeal dozens of factual findings under DSU Article 11. Both appeals by Honduras and the Dominican Republic to the Appellate Body make numerous claims under Article 11 of the DSU of what clearly are alleged factual errors by the Panel. By agreement of all WTO Members, the DSU expressly limits the scope of an appeal to alleged *legal errors* by a panel, not factual errors.[6] The United States disagrees with these attempts to re-litigate dozens of unfavorable factual determinations by the Panel through claims of breach of Article 11 of the DSU.

8. 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. Given the lack of textual basis in the DSU for appellate review of panel fact-finding, the Appellate Body could instead reassert that the proper issues for appeal are issues of law and legal interpretations covered by a panel report.[7]

9. 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. The claim appears to be an attempt to reopen the dispute by incorrectly alleging that the Panel failed to address the Dominican Republic's claim that Australia's plain packaging measures as to individual cigarette packaging breach Article 20 of the TRIPS Agreement. 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. Both of these bases for appeal are seriously flawed and must be rejected.

[6] *See* DSU Article 17.6.
[7] *Id.* ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.").