

As delivered

IN THE WORLD TRADE ORGANIZATION

Before the Appellate Body

**Australia – Certain Measures Concerning Trademarks, Geographical
Indications and other Plain Packaging Requirements Applicable to Tobacco
Products and Packaging**

(WT/DS435/441)

Oral Statement

by

Norway as a Third Participant

**Second Hearing of the Appellate Body
Geneva**

19 November 2019

Presiding Member, Members of the Division,

1. Norway welcomes this opportunity to make a statement as a Third Participant before the Appellate Body in this appeal. In the following, we will very briefly offer a few remarks on the interpretation of Article 11 of the DSU.
2. During the course of this hearing, the Division will address the Appellants' numerous claims of error related to Article 2.2 of the TBT Agreement and Article 11 of the DSU in respect of the contribution of the measure. Many of these claims are directly linked to the Panel's assessment of facts and evidence. According to the Appellants, the Panel has committed errors which in turn allegedly constitutes failure to carry out an objective assessment, as required by the DSU Article 11.
3. We are all very well aware of the requirements in Article 17.6 of the DSU that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel".¹ Hence, the DSU precludes appeals over a panel's determinations of fact and evidence *per se*. A possibility to have a panel's factual findings reversed on appeal is therefore if the Appellate Body finds that the panel has acted contrary to Article 11 of the DSU.
4. According to Article 11, "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements". In this respect, the Appellate Body has repeatedly held that "panels enjoy a 'margin of discretion' as triers of fact".² Norway agrees.
5. Norway thus shares the concerns expressed by Australia and other Third Participants who, during the course of these proceedings, have cautioned against allowing parties to a dispute to re-litigate a panel's factual determinations on appeal by claiming breach of Article 11 of the DSU.
6. Thank you.

¹ Emphasis added.

² Appellate Body Report, *Japan – Apples*, para. 221, citing previous Appellate Body Reports.