

WORLD TRADE ORGANIZATION

*Panel established pursuant to Article 6 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
(WT/DS435/441/458/467)**

Second Written Submission of Australia

Geneva, 16 September 2015

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TABLE OF CASES

Short Title	Full Case Title and Citation
<i>Brazil – Retreaded Tyres</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, p. 1649.
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527.
<i>Canada – Continued Suspension</i>	Appellate Body Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS321/AB/R, adopted 14 November 2008, DSR 2008:XIV, p. 5373.
<i>Canada – Pharmaceutical Patents</i>	Panel Report, <i>Canada – Patent Protection of Pharmaceutical Products</i> , WT/DS114/R, adopted 7 April 2000, DSR 2000:V, p. 2289.
<i>China – Rare Earths</i>	Panel Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R.
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<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014.

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<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5.
<i>Mexico – Telecoms</i>	Panel Report, <i>Mexico – Measures Affecting Telecommunications Services</i> , WT/DS204/R, adopted 1 June 2004, DSR 2004:IV, p. 1537.
<i>Thailand – Cigarettes (Philippines)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299.
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<i>US – COOL</i>	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745.
<i>US – COOL</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449.
<i>US – COOL (Article 21.5 – Canada and Mexico)</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico</i> , WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015.
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<i>US – Clove Cigarettes</i>	Panel Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012: XI, p. 5865.
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012, DSR 2012: XI, p. 5751.

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<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (Corr.1, DSR 2006:XII, p. 5475).
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3.
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755.
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS277/AB/RW, adopted 9 May 2006.
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837.
<i>US – Tyres (China)</i>	Panel Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/R, 2010, adopted as upheld by Appellate Body, 5 October 2011. DSR 2011:IX, p. 4945

GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Abbreviation / Acronym	Full title
ACCC	Australian Competition and Consumer Commission
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
FCTC	<i>World Health Organization Framework Convention on Tobacco Control</i>
FCTC COP	Conference of the Parties to the <i>Framework Convention on Tobacco Control</i>
FCTC Guidelines	Guidelines for the Implementation of the <i>World Health Organization Framework Convention on Tobacco Control</i>
GATS	<i>General Agreement on Trade in Services, 1994</i>
GATT	<i>General Agreement on Tariffs and Trade, 1947</i>
GATT 1994	<i>The General Agreement on Tariffs and Trade, 1994</i>
GHW	Graphic Health Warning
GI	Geographic Indication
ISO	International Organization for Standardization
Paris Convention	<i>Paris Convention for the Protection of Industrial Property (as Revised at Stockholm in 1967)</i>
SPS Agreement	<i>Agreement on the Application of Sanitary and Phytosanitary Measures</i>
TBT Agreement	<i>Agreement on Technical Barriers to Trade</i>
TPP Act	<i>Tobacco Plain Packaging Act 2011 (Cth)</i>
TPP Bill	Tobacco Plain Packaging Bill 2011 (Cth)
TPP Regulations	<i>Tobacco Plain Packaging Regulations 2011 (Cth)</i>
Trade Marks Act	<i>Trade Marks Act 1995 (Cth)</i>
TRIPS Agreement	<i>Agreement on Trade-Related Aspects of Intellectual Property Rights</i>
Vienna Convention	<i>The Vienna Convention on the Law of Treaties</i>
WHO	World Health Organization

Abbreviation / Acronym	Full title
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
WTO Agreement	<i>Marrakesh Agreement Establishing the World Trade Organization</i>

LIST OF EXHIBITS

Exhibit Number	Description of Exhibit
AUS-531	Second Expert Report of G. Fong (8 September 2015).
AUS-532	Second Expert Report of P. Slovic (11 September 2015).
AUS-533	Second Expert Report of A. Biglan (10 September 2015).
AUS-534	Second Expert Report of T. Brandon (4 September 2015).
AUS-535	Third Expert Report of T. Chipty (14 September 2015).
AUS-536	World Intellectual Property Organization, <i>Protection Against Unfair Competition: Analysis of the Present World Situation</i> (WIPO, 1994).
AUS-537	<i>Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd</i> [2002] FCAFC 157.
AUS-538	General Committee – Document No. 268A, Committee IV, Article 10bis, 25 October 1958, pp. 1, 10-11.
AUS-539	<i>The Shorter Oxford English Dictionary</i> , 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, pp. 15, 16, 488, 719, 1174.
AUS-540	J.T. McCarthy, <i>McCarthy on Trademarks and Unfair Competition</i> (Clark Boardman Callaghan, looseleaf service, June 2012) Chapter 3.
AUS-541	D. Kitchin, D. Llewellyn, J. Mellor, R. Meade, T. Moody-Stuart, D. Keeling, <i>Kerly's Law of Trademarks and Trade Names</i> , 14th ed., (Sweet & Maxwell Ltd, 2005) Sections 2-003-2-006.
AUS-542	T. Cohen, C. Van Nispen and T. Huydecoper, <i>European Trademark Law: Community Trademark Law and Harmonized National Trademark Law</i> (Kluwer Law International, 2010) Sections 2.2.2-2.2.3.
AUS-543	<i>Scandecor Development AB v. Scandecor Marketing AB</i> [2002] F.S.R. 7.
AUS-544	Philip Morris, <i>1991 Original Budget: Marketing Presentation October 3, 1990</i> , Bates no. 2504107139A/7171.
AUS-545	<i>The Shorter Oxford English Dictionary</i> , 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, pp. 2481, 2553.
AUS-546	United States Department of Health and Human Services, <i>Reducing the Health Consequences of Smoking: 25 Years of Progress: A Report of the Surgeon General</i> (1989) Chapter 7.
AUS-547	B.S. Lynch and R.J. Bonnie (eds), <i>Growing up Tobacco Free: Preventing Nicotine Addiction in Children and Youth</i> (Institute of Medicine Publication, National Academy Press, 1994) Chapter 8.
AUS-548	US Department of Health and Human Services, <i>Reducing Tobacco Use: A Report of the Surgeon General</i> (2000) Chapter 5.

Exhibit Number	Description of Exhibit
AUS-549	New Zealand Ministry of Health, <i>Proposal to introduce plain packaging of tobacco products in New Zealand: Consultation Paper and Regulatory Impact Statement: Plain Packaging of Tobacco Products</i> (2012).
AUS-550	House of the Oireachtas, Joint Committee on Health and Children, <i>Report on hearings in relation to the General Scheme of the Public Health (Standardised Packaging of Tobacco) Bill</i> , Volume 1 (April 2014).
AUS-551	United Kingdom Department of Health, Oral statement to Parliament: Chantler report on standardised packaging of tobacco products (Statement of Parliamentary Under-Secretary of State for Public Health, Jane Ellison MP) (3 April 2014).
AUS-552	World Trade Organization, France's Notification to the Committee on Technical Barriers to Trade, G/TBT/N/FRA/163 (15 June 2015).
AUS-553	Norwegian Ministry of Health and Care Services, <i>Consultation on the proposal for standardised tobacco packaging and the implementation of Article 5.3 of the Framework Convention on Tobacco Control</i> (consultation paper, 17 March 2015).
AUS-554	Packaging Business Review, 'Chile proposes plain packaging for cigarettes' (19 August 2015), available at: http://containers.packaging-business-review.com/news/chile-proposes-plain-packaging-for-cigarettes-190815-4650223 (last accessed 13 September 2015).
AUS-555	D. Hammond, <i>Standardized packaging of tobacco products: Evidence review prepared on behalf of the Irish Department of Health</i> (March 2014).
AUS-556	British American Tobacco, <i>British American Tobacco Half-Year Results 2015</i> (transcript, 29 July 2015), available at: http://www.bat.com/group/sites/uk__9d9kcy.nsf/vwPagesWebLive/DO72TJQU/\$FILE/medMD9Z3HKK.pdf?openelement (last accessed 9 September 2015).
AUS-557	M. Wakefield, D. Germain, S. Durkin, D. Hammond, R. Goldberg, R. Borland, "Do larger pictorial health warnings diminish the need for plain packaging of cigarettes?" <i>Addiction</i> , Vol. 6 (2012), 1159.
AUS-558	<i>Public Health Amendment (Tobacco-Free Generation) Bill 2014</i> (Tasmania).
AUS-559	Philip Morris Ltd, <i>Submission to the Legislative Council Government Administration Committee 'A' inquiring into the: Public Health Amendment (Tobacco Free Generation) Bill 2014</i> , June 2015 (last accessed 9 September 2015).
AUS-560	ABAC, 'Pre-vetting services contract specifications', available at: http://www.abac.org.au/wp-content/uploads/2013/10/Pre-vetting-Services-Contract-Specification.pdf (last accessed 9 September 2015) pp. 1-2.
AUS-561	<i>Federal Food, Drug, and Cosmetic Act</i> , 21 USC Section 387j.

Exhibit Number	Description of Exhibit
AUS-562	Food and Drug Administration, <i>Guidance for Industry: Demonstrating the Substantial Equivalence of a New Tobacco Product: Responses to Frequently Asked Questions</i> (4 March 2015).
AUS-563	T. Mickle, "Tobacco Companies Drop Suit Against FDA Over Labeling", <i>The Wall Street Journal</i> (2 June 2015), available at http://www.wsj.com/articles/tobacco-companies-drop-suit-against-fda-over-labeling-1433264233 (last accessed 9 September 2015).

I. INTRODUCTION AND SUMMARY

1. This submission presents Australia's rebuttal to the arguments advanced by the complainants in their first written submissions, at the first substantive meeting of the Panel, and in their answers to the Panel's written questions both before and after the first substantive meeting.

2. For the reasons that Australia will set out in this submission, the Panel should reject the complainants' claims in their entirety. The complainants' claims under the TRIPS Agreement, the TBT Agreement, and the GATT 1994 are unfounded both in law and in fact.

3. As a matter of law, the complainants' claims either rely on misinterpretations of the relevant provisions of the covered agreements or fail to satisfy the legal requirements for establishing a claim of violation under those provisions. For example:

- As Australia will discuss in Part II.B, each of the complainants' claims under Articles 2.1, 15.4, 16.1, 16.3, 22.2(b), and 24.3 of the TRIPS Agreement hinges upon the existence of a "right of use" in relation to signs, trademarks, or GIs. As the complainants have now expressly acknowledged that no such "right of use" exists, these claims must fail.
- In Part II.C, Australia will outline that the complainants' claims under Article 20 of the TRIPS Agreement are based on their implicit assertion that the use of trademarks to advertise and promote products is a relevant "use" of trademarks under this provision, notwithstanding the fact that there is no interpretative support for this proposition. In addition, the complainants continue to misinterpret the term "unjustifiably" as functionally equivalent to a standard of "necessity", based on elaborate theories of "protected interests" that find no support in applicable principles of treaty interpretation under the Vienna Convention.
- With regard to the complainants' claims under Article 2.2 of the TBT Agreement, Australia will demonstrate in Part III.B that Australia's tobacco plain packaging measure has been adopted in accordance with the FCTC Guidelines for the

implementation of Articles 11 and 13 of the FCTC, which establish the relevant international standard for the plain packaging of tobacco products. Because the complainants have failed to adduce any evidence to rebut the presumption established by Article 2.5 of the TBT Agreement, their claims under Article 2.2 must fail.

- Notwithstanding their failure to rebut the presumption established by Article 2.5, the complainants' claims under Article 2.2 would fail in any event because they have not established a *prima facie* case that the tobacco plain packaging measure is "trade-restrictive" under a proper interpretation of that provision. As Australia will establish in Part III.C, the complainants' claims of "trade-restrictiveness" ignore the text of Article 2.2, misread the relevant jurisprudence under this provision, and are based on an attempt to elevate the concept of "competitive opportunities" into a freestanding legal test that bears no relationship to their burden to demonstrate that the tobacco plain packaging measure creates "unnecessary obstacles to *international trade*".

4. These and other errors of law that Australia will discuss in this submission should lead the Panel to reject the complainants' claims. However, even if the Panel were to find that the complainants have established the *prima facie* applicability of the relevant legal provisions, the complainants have still failed to prove, as a matter of evidence, their claims of violation.

5. Under the two principal provisions at issue in this dispute – Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement – the complainants have undertaken the burden of proving that the tobacco plain packaging measure is incapable of contributing to its public health objectives, the legitimacy and importance of which are not in doubt. The complainants appear to have abandoned their argument that the tobacco plain packaging measure has "backfired" by causing an increase in tobacco prevalence and consumption. The complainants are therefore left in the position of having to prove that the tobacco plain packaging measure will make *no* contribution to its public health objectives.

6. Australia will demonstrate in this submission that the complainants have failed to discharge this burden. Most importantly:

- The foundation of the complainants' argument as to why tobacco plain packaging is incapable of contributing to its objectives is their contention that the appearance of tobacco packages and products – whether fully branded or plain – is incapable of affecting human behaviour. Yet this contention is contradicted by their argument that the appearance of tobacco packaging and products affects human behaviours such as brand switching, brand loyalty, and willingness to pay. The complainants have offered no theory of human behaviour, nor any other evidence, to support their assertion that the appearance of tobacco packaging and products is capable of affecting some human behaviours, but not others.
- Setting aside their inability to reconcile this contradiction in their arguments, the complainants' contention that tobacco plain packaging is incapable of contributing to its objectives is based on a rejection of evidence from many of the world's leading medical and public health authorities, including the WHO, the United States Surgeon General and the United States National Cancer Institute, of the factors that influence tobacco initiation, consumption, cessation, and relapse. As Australia will review in Parts II.C.5(b) and III.D.3 of this submission, there is overwhelming evidence to support the conclusion that a standardised, plain appearance for tobacco packages and products can reduce the appeal of tobacco products, increase the effectiveness of GHWs and reduce the ability of the package to mislead consumers as to the harms of tobacco use, and that these effects, in turn, can contribute to important reductions in the use of, and exposure to, tobacco products. The complainants' attempts to dismiss the views of the international scientific community on this topic are baseless and fail to establish that tobacco plain packaging is incapable of contributing to its objectives.
- Unable to meet their burden of proof by reference to the qualitative evidence in support of tobacco plain packaging, the complainants have taken the position that the test of whether the tobacco plain packaging measure is capable of making a contribution to its objectives is whether it has made an immediately observable and quantifiable contribution to those objectives in the limited period since its implementation. This position ignores the fact that the tobacco plain packaging

measure, due to the nature of its public health objectives and by its design and structure, will have its greatest effects over time. The complainants' purported inability to isolate a statistically significant effect of the measure in short-term prevalence and consumption datasets does not prove that the measure is incapable of contributing to its public health objectives. In any event, as Australia will discuss in Part III.D.4(b), the empirical methods used by the complainants' own experts, when properly applied, produce results that are consistent with the conclusion that the tobacco plain packaging measure is capable of contributing to its objectives and in fact has already done so.

7. Australia's tobacco plain packaging measure is one element of a comprehensive suite of tobacco control measures that Australia has adopted to reduce the use of and exposure to tobacco products. As Australia has explained previously, the tobacco plain packaging measure is a logical extension of Australia's existing tobacco control measures, especially its comprehensive restrictions on tobacco advertising and promotion. By specifying a standardised, plain appearance for all tobacco products and packaging, the tobacco plain packaging measure curtails the ability of tobacco companies to use figurative and other design elements to increase the appeal of tobacco products, distract from GHWs, and mislead consumers as to the harms of tobacco use. At the same time, by allowing tobacco companies to use brand and variant names on the package, the measure allows tobacco companies to distinguish their products from those of other undertakings in the course of trade.

8. The complainants have failed to prove that the tobacco plain packaging measure is inconsistent with Australia's obligations under the covered agreements, and the Panel should therefore reject the complainants' claims.

II. THE COMPLAINANTS HAVE FAILED TO DEMONSTRATE THAT THE TOBACCO PLAIN PACKAGING MEASURE IS INCONSISTENT WITH THE TRIPS AGREEMENT

A. INTRODUCTION TO PART II

9. Australia will demonstrate in this Part that the complainants' claims under the TRIPS Agreement are based on interpretations of the relevant provisions that find no basis in the ordinary meaning of these provisions, properly interpreted in their context and in light of the object and purpose of the Agreement. The complainants' claims under the TRIPS Agreement are, instead, based on theories of "interests" that supposedly "pervade" the TRIPS Agreement, and on attempts to rewrite various provisions of the TRIPS Agreement to say something other than what they actually say.

10. As Australia has demonstrated in its first written submission, and will briefly recall in Part II.B below, each of the complainants' claims under Articles 2.1 (incorporating Article 6*quinquies* A(1) and Article 10*bis* of the Paris Convention), 15.4, 16.1, 16.3, 22.2(b), and 24.3 of the TRIPS Agreement hinges upon the existence of a "right of use" in relation to signs, trademarks or GIs.¹ As the complainants have now expressly acknowledged that there is no such "right of use", their claims under each of these provisions must fail.

11. In Part II.C, Australia will address the complainants' claim that the tobacco plain packaging measure is inconsistent with Article 20 of the TRIPS Agreement. Australia will first demonstrate that the complainants have failed to show that the tobacco plain packaging measure encumbers by special requirements a relevant "use" of trademarks, and have therefore failed to establish the threshold applicability of Article 20. Australia will then demonstrate, *arguendo*, that even if the complainants had established the applicability of Article 20, they have misinterpreted the term "unjustifiably" to be functionally equivalent to a standard of "necessity", and have failed to prove that any encumbrance upon the use of

¹ As Ukraine is no longer a complainant, Australia will not address the Article 15.1 claim that was made by Ukraine only.

trademarks resulting from the tobacco plain packaging measure is "unjustifiable" under *any* interpretation of this term that has been advocated before the Panel.

B. THE COMPLAINANTS ACKNOWLEDGE THAT THERE IS NO "RIGHT OF USE" UNDER THE TRIPS AGREEMENT, AND SO THEIR CLAIMS UNDER ARTICLES 2.1, 15.4, 16.1, 16.3, 22.2(B) AND 24.3 MUST FAIL

1. The complainants acknowledge that there is no "right of use" under the TRIPS Agreement

12. The foundation for each of the complainants' claims under the TRIPS Agreement is that Members are obligated under the relevant provisions to protect a positive "right of use" with respect to signs, registered trademarks and GIs. The complainants' arguments can be summarised as follows:

- In relation to Article 2.1 of the TRIPS Agreement, incorporating Article 6*quinquies* A(1) of the Paris Convention, Honduras maintains that Members are required to "ensur[e] that trademark owners can 'use' their trademarks" in order for those trademarks to be "accepted for filing and protected as is".²
- In relation to Article 15.4, the complainants argue that Members must guarantee (or at least not prevent) the use of all signs that are not yet "capable of distinguishing" goods, so that these "non-inherently distinctive" signs may then potentially become distinctive in the future, so that they may constitute a trademark that is then eligible for registration.
- In relation to Article 16.1, the complainants argue that Members must ensure that trademarks can be used in order to ensure that a "likelihood of confusion" is created in the market, so that trademark owners have increased opportunities to exercise their right of exclusion to prevent this confusion.

² Honduras' first written submission, para. 266.

- In relation to Article 16.3, Indonesia argues that Members are obligated to allow trademark owners to use their trademarks in order to maintain their well-known status or to become well known in the future.
- In relation to Article 2.1 incorporating Article 10*bis* of the Paris Convention, the complainants argue that Members must allow the use of signs and trademarks on tobacco packaging because the omission of these signs and trademarks is liable to confuse and mislead consumers and constitutes an act of unfair competition.
- In relation to Article 22.2(b), the complainants argue that Members must guarantee the use of GIs so that consumers are not misled into thinking that all tobacco products from all geographical origins are the same (which, they contend, constitutes an act of unfair competition).
- Finally, in relation to Article 24.3, the complainants maintain that Members are obligated to allow GIs to be used in a manner that will "allow for indications to acquire, maintain, or enforce their status as geographical indications".³

13. The necessary implication of each of these arguments is that Members may not implement measures that restrict the use of signs, trademarks or GIs – a conclusion which only follows if there is a protected "right of use" under the relevant provisions.

14. Despite the fact that the complainants' claims are necessarily dependent on the existence of a "right of use", Honduras, the Dominican Republic and Indonesia have properly acknowledged in their recent submissions and statements before the Panel that no such right is protected in the relevant provisions of the TRIPS Agreement.⁴ The complainants have nonetheless attempted to salvage their claims by appealing to concepts such as the "importance of use".⁵

³ Dominican Republic's response to Panel Question No. 48, para. 216.

⁴ Indonesia's response to Panel Question No. 96; Honduras' opening statement at the first substantive meeting of the Panel, para. 21; Honduras' response to Panel Question Nos. 96, 99; Dominican Republic's opening statement at the first substantive meeting of the Panel, para. 10; Dominican Republic's response to Panel Question Nos. 94, 96. Cf. Cuba's response to Panel Question No. 99.

⁵ Dominican Republic's response to Panel Question Nos. 38, 89, 94, 99, 104; Dominican Republic's first written submission, paras. 247-263; Honduras' response to Panel Question No. 99; Honduras' first written

(continued)

15. Australia considers that it is an uncontroversial proposition that the TRIPS Agreement "contemplates" that owners may use their signs, trademarks or GIs in the course of trade.⁶ However, the fact that the TRIPS Agreement refers to the "use" of a trademark in various provisions does *not* translate into a "right of use", a "protected interest" in use,⁷ or a "minimum opportunity to use"⁸ (or whatever terminology the complainants choose to employ). There is simply no basis to conclude that Members have an obligation under the TRIPS Agreement to *guarantee* that the owners of signs, trademarks and GIs can exercise this market freedom as if it were a right. Nor are Members under any obligation to refrain from implementing measures that prohibit (whether directly or indirectly) the use of signs, trademarks and GIs. Rather, what the TRIPS Agreement protects is the right of owners of registered trademarks and GIs to *prevent* the unauthorised use of signs, trademarks and GIs by third parties in certain circumstances. Indeed, the *only* provision in the TRIPS Agreement that disciplines a Member's ability to regulate the use of trademarks in the course of trade is Article 20.⁹ Even under Article 20, it is presumed that Members can encumber the use of trademarks by special requirements, so long as any encumbrance is not imposed "unjustifiably".¹⁰

16. In addition to having no textual foundation, the complainants' "right of use"-based claims have significant implications for the scope of the TRIPS Agreement. An acceptance of such claims would seem to lead to the conclusion that a wide variety of measures commonly

submission, paras. 165-175; Indonesia's response to Panel Question No. 96; Indonesia's first written submission, paras. 137-146.

⁶ See Indonesia's response to Panel Question No. 96; Indonesia's opening statement at the first substantive meeting of the Panel, para. 44. In its opening statement at the first substantive meeting of the Panel, the Dominican Republic noted that it "does not assert, and has not asserted, that the TRIPs grants and owner a "right" of use. Rather the Dominican Republic, like most third parties, understands that "use" *permeates* the TRIPs provisions relating to trademark and GI protections." (para. 10) (emphasis added). During the first meeting of the Panel Indonesia noted that it has never argued that there was a right to use, but the concept of use is "littered" throughout the TRIPS Agreement. See also Honduras' first written submission, paras. 168, 171.

⁷ Dominican Republic's response to Panel Question No. 99; Indonesia's response to Panel Question No. 99. The Dominican Republic also refers to use as a "protected treaty interest": Dominican Republic's response to Panel Question Nos. 89, 108.

⁸ Indonesia's opening statement at the first substantive meeting of the Panel, para. 44.

⁹ Australia notes that by its terms Article 20 only applies to the use of trademarks – it does not apply to the use of GIs. There is also no provision equivalent to Article 20 in Part II Section 3 (Geographical Indications) of the TRIPS Agreement.

¹⁰ See Part II.C.4(c)iv for a discussion of the complainants' misguided reliance on the concept of a "protected treaty interest" in support of their claims under Article 20 of the TRIPS Agreement.

implemented by Members, including product bans or measures that regulate legally available products (e.g. sales restrictions, mandatory safety warnings and advertising bans), are in violation of Members' obligations under the TRIPS Agreement. In response to this conundrum, the complainants simply assert that such measures are excluded from the scope of the TRIPS Agreement, while the tobacco plain packaging measure remains within its scope.¹¹ There is no plausible textual¹² or factual¹³ basis for the distinction that the complainants attempt to draw. In the absence of such a credible basis, Australia submits that the Panel cannot accept the complainants' arguments in respect of a right of use, without also considering the significant policy implications of such an interpretation.

17. Despite their protestations to the contrary, it is evident that the complainants' interpretations of Articles 2.1, 15, 16, 22 and 24 of the TRIPS Agreement depend on an implied "right of use" that has no basis in the text and would have significant implications for the scope of these provisions. As the complainants themselves have now expressly acknowledged that no "right of use" is found in the TRIPS Agreement, and given that the complainants have not offered any new legal justification or evidence in support of their claims, Australia will only briefly reiterate below why the complainants' claims under these provisions must necessarily fail.

¹¹ See, e.g. Honduras' opening statement at the first substantive meeting of the Panel, para. 27; Cuba's response to Panel Question No. 95. See also Indonesia's response to Panel Question No. 95; Dominican Republic's response to Panel Question Nos. 95, 96; Honduras' response to Panel Question Nos. 28, 95.

¹² Honduras argues, for example, that Article 19.1 of the TRIPS Agreement indicates that "governments retain full rights to regulate trade in goods" *so long as* these measures only have an "incidental effect" on the use of trademarks: Honduras' opening statement at the first substantive meeting of the Panel, paras. 24-25; see also Honduras' response to Panel Question Nos. 38, 95; Honduras' first written submission, para. 206. While it is correct that Article 19.1 makes clear that Members can implement measures that "constitute an obstacle to the use of the trademark", there is no basis for Honduras' assertion that Article 19.1 only applies with respect to measures that "incidentally" affect trademarks. Most third parties that address this issue do not agree with Honduras' assertion regarding the scope of Article 19.1. See South Africa's third party response to Panel Question No. 12; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's ("Chinese Taipei") third party response to Panel Question No. 12; New Zealand's third party response to Panel Question No. 12; Singapore's third party response to Panel Question No. 12; Canada's third party response to Panel Question No. 12; the European Union's third party response to Panel Question No. 12.

¹³ As Australia has previously explained in detail, the tobacco plain packaging measure is an extension of Australia's pre-existing restrictions on advertising and promotion of tobacco products. See Australia's first written submission, paras. 54-59; Australia's opening statement at the first substantive meeting of the Panel, paras. 8-9.

2. Honduras has failed to demonstrate that the tobacco plain packaging measure is inconsistent with Article 2.1 of the TRIPS Agreement incorporating Article 6quinquies A(1) of the Paris Convention

18. Honduras' claim under Article 2.1 of the TRIPS Agreement, incorporating Article 6quinquies A(1) of the Paris Convention, is based on its argument that the obligation to accept for filing and protect a trademark "as is", "necessarily involves ensuring that trademark owners can 'use' their trademarks."¹⁴ Honduras argues that "a measure that prohibits the use of trademarks cannot qualify as a measure that protects trademarks."¹⁵

19. As noted above, Honduras has now expressly stated that it is "not asserting that there exists a positive right to use the trademark that results from registration".¹⁶ Accordingly, there is now a fundamental contradiction in Honduras' claim. It is not possible for Honduras to continue to interpret Article 6quinquies A(1) as imposing an obligation on Members to *ensure* that trademark owners can use their trademarks, while at the same time acknowledging that trademark owners have no positive right to use those trademarks.

20. Honduras asserts that Australia "simply reads out of the scope of Article 6quinquies an independent obligation to 'protect' a trademark 'as is', making this obligation redundant or inutile."¹⁷ On the contrary, Australia submits that the term "protected" refers to the protection that may or may not flow as a result of a trademark being registered in its original form. Article 6quinquies A(1) does not set out minimum standards with respect to the *nature* of the protection that may be conferred as a result of registration.

21. Australia has outlined in detail in its first written submission that its interpretation of Article 6quinquies A(1) is based on the plain text of this provision interpreted in accordance with the Vienna Convention and is consistent with the views of the Appellate Body and WIPO.¹⁸ While several third parties have expressly agreed with Australia's interpretation,¹⁹

¹⁴ Honduras' first written submission, para. 266. Cuba states that it "endorses" and "incorporates" Honduras' submissions on Article 6quinquies A(1): Cuba's first written submission, para. 428.

¹⁵ Honduras' first written submission, para. 264.

¹⁶ Honduras' response to Panel Question No. 96.

¹⁷ Honduras' opening statement at the first substantive meeting of the Panel, para. 33.

¹⁸ Australia's first written submission, paras. 290-297.

Honduras has received no third party support for its claim. Australia's interpretation also appears to be supported by Professor Dinwoodie,²⁰ Cuba,²¹ and seemingly even Honduras itself.²²

22. In order to establish a *prima facie* case of violation under Article 6*quinquies* A(1), properly interpreted, Honduras would need to demonstrate that Australia's tobacco plain packaging measure prevents the *registration* of trademarks that are registered in the territory of another Member *based on their form*. As Australia outlined in its first written submission, Section 28 of the TPP Act expressly provides that the operation of the TPP Act does not affect a trademark owner's ability to register a trademark under the Trade Marks Act.²³ Honduras has therefore failed to demonstrate that the tobacco plain packaging measure is inconsistent with Article 2.1 of the TRIPS Agreement incorporating Article 6*quinquies* A(1) of the Paris Convention.

3. The complainants have failed to demonstrate that the tobacco plain packaging measure is inconsistent with Article 15.4 of the TRIPS Agreement

23. Each of the complainants' claims under Article 15.4 of the TRIPS Agreement is based on the existence of an implied obligation of Members to recognise a "right of use" in relation to certain signs that are, pursuant to Article 15.1 of the TRIPS Agreement, not "capable of distinguishing" the relevant goods. Given that the Dominican Republic, Honduras and

¹⁹ Singapore's third party submission, para. 11; New Zealand's third party submission, paras. 14-15; South Africa's third party oral statement at the first substantive meeting of the Panel, paras. 3.1-3.2.

²⁰ Ukraine's expert, Professor Dinwoodie, agrees that "the overall context – including the lack of any general guarantee of rights accorded the owner of a trade mark – suggests that the registration provisions of the Paris Convention did not articulate a right to use a mark." See Expert Report of G. Dinwoodie (13 July 2014), Exhibit UKR-1, para. 47.

²¹ In its response to Panel Question No. 93, Cuba noted that Article 6*quinquies* of the Paris Convention and Article 15.2 of the TRIPS Agreement on the one hand, and Article 20 on the other, deal with different aspects of the life-cycle of a brand (i.e. registration vs. use). Cuba therefore appears to agree that Article 6*quinquies* deals with registration and does *not* deal with *use* of a trademark.

²² See Honduras' response to Panel Question No. 93: "Article 6*quinquies*/15 and 20 deal with different aspects in the life cycle of a trademark (i.e. initial registration vs. ongoing use)". See also Honduras' first written submission, para. 146: "WIPO-administered treaties did not establish substantive standards for the protection of intellectual property rights."

²³ See Australia's first written submission, paras. 267-271, 297.

Indonesia have now acknowledged there is no such "right of use", their claims under this provision must be dismissed.²⁴

24. The complainants' arguments with respect to their claims under Article 15.4 have not altered since their first written submissions. Article 15.4 of the TRIPS Agreement provides that "[t]he nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark." Despite the fact that Article 15.4 refers to the registration of a *trademark*, the complainants argue that by preventing the use of certain non-inherently distinctive "signs", the tobacco plain packaging measure violates this provision.²⁵ The complainants are essentially arguing that Members are under an obligation to guarantee the use of all non-inherently distinctive "signs" so that they may potentially acquire distinctiveness through use in the course of trade, and thereby, *in the future*, constitute a "trademark" that may be eligible for registration.²⁶

25. Australia has explained in its prior submissions that the complainants are confusing the concepts of "signs" and "trademarks".²⁷ Honduras maintains that this distinction is "artificial",²⁸ but Honduras fails to confront the fact that Article 15.1 makes clear that if a sign is non-inherently distinctive, and has not yet acquired distinctiveness through use (for whatever reason), it is simply not capable of constituting a "trademark".²⁹ Honduras also suggests that it is somehow relevant that many jurisdictions grant rights to trademark owners only once their trademarks are registered (and do not grant protections with respect to

²⁴ Cuba "endorses and incorporates" the arguments of the Dominican Republic, Honduras and Indonesia under Article 15.4 and therefore Cuba's claim under this Article must also be dismissed. Cuba's first written submission, para. 428.

²⁵ See, e.g. Dominican Republic's first written submission, para. 274; Honduras' first written submission, para. 193; Indonesia's first written submission, para. 190.

²⁶ Indonesia asserts that the obligation under Article 15.4 "exists independent of a 'right to use' in the underlying trademark", but has provided no explanation for how this can be the case: Indonesia's opening statement at the first substantive meeting of the Panel, para. 54. If Indonesia is arguing that Members are obliged to ensure that signs may be used to the extent they become distinctive (or are prohibited from preventing the use of signs), then Indonesia is, by necessary implication, arguing that Members must recognise a right to use signs.

²⁷ Australia's first written submission, paras. 303-305.

²⁸ Honduras' opening statement at the first substantive meeting of the Panel, para. 30.

²⁹ The first sentence of Article 15.1 provides that "[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark." See Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.654: "a purely descriptive term on its own is not distinctive and is not protectable as a trademark".

unregistered trademarks).³⁰ However, even in "registration-based" jurisdictions, signs must still meet the definition of a trademark in order to be eligible for registration.

26. As Australia has outlined in its first written submission, Article 15.4 makes clear that a Member can regulate a product in a way that may restrict or prohibit the use of a trademark in its territory, as long as a Member does not refuse to *register* that *trademark* based on the nature of a product. This is clear from the plain text of this provision interpreted in accordance with the Vienna Convention, and is supported by key commentators, WIPO, and various third parties.³¹

27. In order to establish a *prima facie* case of violation of Article 15.4, the complainants would need to establish that under the tobacco plain packaging measure, Australia does not register trademarks based on the nature of the underlying product. The complainants have failed to do so.³² If a sign indeed qualifies as a trademark, even if it is for a tobacco product, that trademark will be registered in Australia.³³

4. The complainants have failed to demonstrate that the tobacco plain packaging measure is inconsistent with Article 16.1 of the TRIPS Agreement

28. The basis for the complainants' claims under Article 16.1 is that by preventing the use of certain trademarks, the tobacco plain packaging measure reduces the likelihood that consumers will be confused by the use of identical or similar signs in relation to similar goods, and trademark owners will have fewer opportunities to exercise their rights of

³⁰ Honduras' opening statement at the first substantive meeting of the Panel, para. 30.

³¹ Australia's first written submission, paras. 244-246, 298-301. See also Singapore's third party submission, paras. 23-26; Norway's third party submission, paras. 27-30; New Zealand's third party submission, paras. 17-25; Uruguay's third party submission, para. 50; Argentina's third party submission, para. 22; Canada's third party submission, paras. 35-43; South Africa's third party oral statement at the first substantive meeting of the Panel, paras. 3.3-3.5; Oman's third party oral statement at the first substantive meeting of the Panel, para. 4.

³² In its comment on Panel Question No. 27, Honduras argues that it provided evidence in its first written submission of the Australian trademark Registrar's refusal to register the words "PLAIN PACKAGE" for tobacco products. The refusal to register this "sign" is not evidence of a failure to register a "trademark" under Article 15.4 due to the nature of the underlying goods. This sign was not registered because it is not capable of distinguishing the tobacco products of different undertakings (most likely because it is descriptive of the goods), and therefore does not meet the definition of a trademark. As noted by Canada, "[t]he complainants' arguments and examples demonstrate that it is the element of the sign itself (that it is not distinctive), rather than a measure that prohibits use, that creates the obstacle to registration." Canada's third party submission, para. 39.

³³ Australia's first written submission, paras. 267-271, 308.

exclusion to prevent this confusion. The complainants are effectively arguing that Article 16.1 confers not only negative rights of exclusion, but also a positive right to use trademarks (or a "minimum opportunity to use" trademarks³⁴) so that trademark owners can exercise their negative rights of exclusion more frequently. However, in the undisputed absence of such a "right of use", the complainants' claims under Article 16.1 must fail.

29. With the exception of Indonesia, the complainants' claims under Article 16.1 arise only with respect to the use of identical or similar signs by third parties on *similar* products.³⁵ As Australia has explained, however, to the extent that the use of such identical or similar signs on similar products would create a likelihood of confusion, the owner of a registered trademark in Australia can continue to exercise its negative rights of exclusion to prevent such use. In other words, the rights that are protected under Article 16.1 of the TRIPS Agreement are unaffected by the tobacco plain packaging measure.³⁶

30. As explained by Canada in its third party written submission, "[a] measure that prevents the *owner* from using the registered trademark is not a measure that violates Article 16.1."³⁷ This is because there is no "right of use" under the TRIPS Agreement, and there is certainly no "right of confusion" under Article 16.1. Whether the complainants frame Article 16.1 as imposing a positive obligation on Members to guarantee the use of a trademark to ensure that a likelihood of confusion arises, or as a negative obligation on Members not to prevent the use of a trademark so that the likelihood of confusion may

³⁴ Indonesia's opening statement at the first substantive meeting of the Panel, para. 44.

³⁵ See Honduras' response to Panel Question Nos. 29, 35; Dominican Republic's response to Panel Question No. 32.

³⁶ Australia's first written submission, paras. 317-318.

³⁷ Canada's third party submission, para. 52. The majority of third parties that address the complainants' claims under Article 16.1 agree with Australia's interpretation of the scope of this provision. See, e.g. New Zealand's third party written submission, paras. 26-33; Singapore's third party submission, paras. 27-30; Norway's third party submission, paras. 31-33; Uruguay's third party submission, paras. 46, 107; Argentina's third party submission, para. 26; South Africa's third party oral statement at the first substantive meeting of the Panel, paras. 2.3-2.5, 3.6-3.7; Singapore's third party oral statement at the first substantive meeting of the Panel, para. 13; Uruguay's third party oral statement at the first substantive meeting of the Panel, paras. 15-16; Oman's third party oral statement at the first substantive meeting of the Panel, paras. 4, 15; Singapore's third party response to Panel Question Nos. 11, 15; South Africa's third party response to Panel Question No. 15; Norway's third party response to Panel Question No. 15.

arise,³⁸ their arguments cannot be reconciled with their admission that Article 16.1 obliges Members to confer only negative rights of exclusion on trademark owners.³⁹

31. Indonesia alone claims that the tobacco plain packaging measure is inconsistent with Article 16.1 because it allegedly "create[s] a regime in which trademark owners are *required* to use similar signs on identical goods".⁴⁰ However, as Australia noted in its first written submission, if the brand and variant names at issue have all been registered, the Registrar has determined that these word trademarks are in fact capable of distinguishing the goods of the trademark applicant from the goods of other undertakings.⁴¹ Further, Indonesia fails to recognise that, if it *were* the case that a competitor used a word on a tobacco product that was identical or similar to an existing registered trademark such as to create a likelihood of confusion (for example, if a competitor attempted to sell cigarettes under the brand name "Marblerow"), then the trademark owner would be able to exercise its negative rights of exclusion in accordance with Article 16.1.

32. As Australia outlined in its first written submission, in order for the complainants to establish a *prima facie* case of violation of Article 16.1, properly interpreted, the complainants would need to establish that the tobacco plain packaging measure prevents owners of registered trademarks from exercising their right to seek forms of relief in the event that a third party uses an identical or similar sign on an identical or similar product in the course of trade where such use creates a likelihood of confusion.⁴² The complainants have

³⁸ The Dominican Republic attempts to argue that although Members are not required to *guarantee* that trademarks are used, they are under an obligation under Article 16.1 not to take any action to prevent trademarks from being used, and that somehow this distinction means that there is no obligation to recognise a right of use: Dominican Republic's response to Panel Question No. 94. However, whether this obligation is framed in the negative or the positive, if Members are unable to restrict or prevent the use of trademarks, they are effectively under an obligation to recognise a "right of use" of trademark owners.

³⁹ Dominican Republic's response to Panel Question No. 96; Indonesia's response to Panel Question No. 94; Honduras' response to Panel Question No. 96.

⁴⁰ Indonesia's response to Panel Question No. 95 (emphasis added). As a preliminary point, it is not accurate to suggest that all design trademarks must "appear in a deceptively similar format" (Indonesia's response to Panel Question No. 95). The *only* trademarks that may be used on tobacco packaging are word trademarks that denote the brand, business or company name or variant name on tobacco products.

⁴¹ If any person were to disagree with the decision of the Registrar to register the trademark, it can either oppose registration or seek removal from the register in accordance with the Trade Marks Act. See Australia's first written submission, Annexure D: Protection of Trademarks and Geographical Indications in Australia, paras. 3-7.

⁴² Australia's first written submission, paras. 310-313.

failed to do so. Consistent with Article 16.1, by ensuring that trademarks can be registered and remain on the register, the tobacco plain packaging measure does not prevent owners of registered trademarks from exercising the rights granted under the Trade Marks Act to seek relief against infringement.⁴³

5. Indonesia has failed to demonstrate that the tobacco plain packaging measure is inconsistent with Article 16.3 of the TRIPS Agreement

33. Indonesia's claims under Article 16.3 are also based on the existence of a "right of use".⁴⁴ Specifically, Indonesia maintains that Members are under an obligation under Article 16.3 to guarantee (or at least not prevent) the use of trademarks by their owners so that they may "become" well known or "maintain" well known status.⁴⁵ By preventing the use of certain trademarks for tobacco products, Indonesia argues that the tobacco plain packaging measure is inconsistent with Article 16.3. Again, Indonesia's acknowledgement that there is no obligation under the TRIPS Agreement to recognise a "right of use" is sufficient to dismiss this claim.

34. The rights conferred under Article 16.3 of the TRIPS Agreement (and Article 6*bis* of the Paris Convention) are negative rights of exclusion.⁴⁶ This is clear from the ordinary meaning of the terms in these provisions, interpreted in their context and in light of the object and purpose of the relevant treaties. This interpretation is also supported by a number of third parties.⁴⁷

⁴³ Australia's first written submission, paras. 317-318.

⁴⁴ Australia refers to Indonesia alone because Honduras has not brought a claim under Article 16.3, the Dominican Republic's Article 16.3 arguments are made in its capacity as a third party, and Cuba merely "endorses" Indonesia's Article 16.3 claim. See Dominican Republic's first written submission, para. 316; Cuba's first written submission, paras. 32(f), 428.

⁴⁵ See Indonesia's response to Panel Question No. 31; Indonesia's first written submission, para. 242. See also Dominican Republic's first written submission, para. 320.

⁴⁶ See Expert Report of C. Correa (10 March 2015), Exhibit AUS-16, para. 18: "Article 16.3 of the TRIPS Agreement confirms and extends the protection conferred by the Paris Convention against the *use by third parties* of well-known trademarks. This right to exclude can only be transformed into a (positive) right to use enforceable *against the State* by speculative thinking." (emphasis original).

⁴⁷ Canada's third party written submission, paras. 54-57; New Zealand's third party written submission, paras. 34-39; Singapore's third party written submission, paras. 31-34; Uruguay's third party written submission, paras. 46, 107; Argentina's third party written submission, para. 26; Oman's third party oral statement at the first substantive meeting of the Panel, paras. 4, 15; Singapore's third party oral statement at the first substantive meeting of the Panel, para. 13; Uruguay's third party oral statement at the first substantive meeting of the Panel, paras. 15-16; Singapore's third party response to Panel Question No. 11.

35. Article 16.3 does *not* grant a positive right to owners of registered well known trademarks to use their trademarks to *maintain* well known status, or a positive right to use a trademark to enable it to *become* well known. The subject matter protected under Article 16.3 is well known registered trademarks – not trademarks that may become well known in the future or trademarks that were once well known.

36. In order to establish a *prima facie* case of violation under Article 16.3, Indonesia would need to demonstrate that the tobacco plain packaging measure prevents Australia from granting negative rights of exclusion to owners of *current* well known trademarks in the circumstances outlined in Article 6*bis* of the Paris Convention and Article 16.3 of the TRIPS Agreement. As Australia has outlined in its first written submission, nothing in the tobacco plain packaging measure prevents a trademark owner from availing itself of the protections that are afforded to owners of registered well known trademarks in accordance with Article 16.3.⁴⁸

6. The complainants have failed to demonstrate that the tobacco plain packaging measure is inconsistent with Article 2.1 of the TRIPS Agreement (incorporating Article 10*bis* of the Paris Convention)

37. The complainants' claims under Article 10*bis* of the Paris Convention, like their claims under Articles 15 and 16 of the TRIPS Agreement, are entirely divorced from the text of the relevant provision. It is worth recalling what Article 10*bis* actually says. Article 10*bis* provides that:

- (1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
- (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
- (3) The following in particular shall be prohibited:
 - (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
 - (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;

⁴⁸ Australia's first written submission, para. 331.

(iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

38. Pursuant to the ordinary meaning of its terms, Article 10*bis* requires Members to assure effective protection against "particular deeds" of "dishonest" or "untruthful" commercial "rivalry" – i.e. attempts by a market actor to gain a commercial advantage over a rival market actor that are liable to influence consumers on the basis of false or misleading representations.⁴⁹ In its first written submission, Australia described in detail the range of legal mechanisms that it provides for affected private parties to prevent or obtain redress for false or misleading representations.⁵⁰ It is in this way that Australia gives effect to its obligations under Article 10*bis*, and the tobacco plain packaging measure has *no* impact on the availability of these legal mechanisms.⁵¹ Moreover, the complainants have not suggested otherwise.

39. Rather, the complainants' argument in relation to their claims under Article 10*bis* boils down to the proposition that Australia must allow the use of signs, trademarks and GIs in order to advertise and promote a dangerous product, because by disallowing such use, Australia has failed to assure effective protection against "particular deeds" of "dishonest" or "untruthful" commercial "rivalry". The convoluted nature of this argument should be evident.

40. The complainants recognise there is a valid distinction between "regulatory" measures and "private" acts.⁵² However, the complainants maintain that, despite this distinction, the tobacco plain packaging measure falls within the scope of Article 10*bis* because the measure

⁴⁹ See Australia's first written submission, paras. 446-449.

⁵⁰ See Australia's first written submission, para. 458.

⁵¹ See Australia's first written submission, para. 459.

⁵² The Dominican Republic states that the term "act" in Article 10*bis*, "is used in the sense of an action of a private party, rather than an act of government (such as a legislative or administrative act)": Dominican Republic's response to Panel Question No. 22, para. 127. The "acts of unfair competition" at issue under the Dominican Republic's claims are *not* regulatory acts by Australia. The relevant acts of unfair competition are the private acts by competitors in the market place of presenting their competing products in virtually identical packaging. See also Honduras' response to Panel Question No. 17: "[t]he "normal" situation that Article 10*bis* disciplines is of course that of firms engaging in acts of commercial dishonesty."

allegedly "compels" private actors to engage in acts of unfair competition.⁵³ The complainants have failed to provide any explanation based on the text of Article 10*bis* to support this assertion – one which, if accepted, would significantly broaden the scope of this obligation.⁵⁴ Australia finds it telling that while multiple third parties expressly agreed with Australia that the complainants' claims under Article 10*bis* are fundamentally misplaced, the complainants received *no* third party support for their arguments.⁵⁵

41. Even assuming, *arguendo*, that government regulations that compel private actors to engage in acts of competition could fall within the scope of Article 10*bis*, the complainants would still need to demonstrate that the tobacco plain packaging measure in fact compels private actors to engage in acts of *competition*⁵⁶ – that is, acts of "striving for custom" between rivals or attempts to increase market share by "offering the most favourable

⁵³ Indonesia's first written submission, paras. 151, 161-168, 178-181; Cuba's first written submission, paras. 383-388; Dominican Republic's first written submission, paras. 854-856, 875-879, 883; Honduras' first written submission, paras. 687-690, 694.

⁵⁴ Instead of relying on the text of Article 10*bis*, the complainants rely on the panel report in *Mexico – Telecoms* to support their argument. Dominican Republic's first written submission, para. 879; Honduras' first written submission, paras. 659-660; Honduras' response to Panel Question No. 17; Indonesia's first written submission, para. 178; Cuba's first written submission, para. 383, fn 428. In *Mexico – Telecoms*, the panel found that the measure at issue, which specifically required all Mexican telecommunications suppliers to charge a uniform settlement rate, breached Mexico's obligation to maintain "appropriate measures ... for the purpose of preventing suppliers ... from engaging in or continuing anti-competitive practices" (Panel Report, *Mexico – Telecoms*, paras. 7.265-7.269). The panel's analysis in *Mexico – Telecoms* must be understood against the backdrop of the telecommunications industry, which has a long history of state-owned and/or state-regulated monopolies (as in the case of Mexico). The fact that the Federal Telecommunications Commission required Telmex (the dominant Mexican supplier) and other Mexican suppliers to engage in a price-fixing arrangement was clearly contrary to Mexico's commitment in its Reference Paper to maintain appropriate measures to "prevent" major suppliers "from engaging in or continuing anti-competitive practices". This specific context was explicitly acknowledged by the panel, which noted that the measures at issue were "exceptional" and that its findings were "limited to the interpretation of Mexico's GATS obligations under Section 1 of its Reference Paper, with respect to the United States, and with respect to the very specific anti-competitive measures in the relevant market for telecommunications." (paras. 7.267-268). Unlike Mexico's Reference Paper, Article 10*bis* is not concerned with the government's role as a regulator. It is concerned with the government's role as a provider of legal protections against acts of unfair competition in the marketplace. The introduction of a general public health measure like the tobacco plain packaging measure in no way engages this latter role of government and thus in no way falls within the scope of Article 10*bis*.

⁵⁵ See Singapore's third party submission, paras. 15-16, 61; Canada's third party submission, paras. 24-25; China's third party submission, paras. 59-61.

⁵⁶ See, e.g. Canada's third party submission, para. 26: "The complainants argue that a Member cannot legally require the behaviour it has undertaken to prevent and protect against. It follows from the complainants' assertions that a Member's regulatory flexibility is only constrained by the obligations it actually undertakes. In the case of Article 10*bis*, the obligation is to protect against unfair competition, which is defined as certain acts of competition. If a Member's measure fails to constitute such an act, then Article 10*bis* does not apply and the Member consequently retains its regulatory flexibility in this regard." (footnote omitted).

terms".⁵⁷ Furthermore, the complainants would need to demonstrate that these acts of competition are *unfair* within the meaning of Article 10bis – that is, acts of competition that are "dishonest" or "untruthful".⁵⁸ The complainants have failed to make their case on both counts.

42. In relation to whether the tobacco plain packaging measure compels private actors to engage in acts of *competition*, Australia notes that the regulatory environment for the sale of tobacco products in Australia is shaped by a range of public health measures. Each of these regulatory measures "compels" relevant market actors to comply with specific requirements in the course of manufacturing, advertising and selling their tobacco products. However, none of these measures – including the tobacco plain packaging measure – compels market actors to engage in acts of "competition".

43. The Australian Government is not compelling private actors, through the tobacco plain packaging measure, to engage in acts of rivalry or to compete for market share by encouraging consumers to purchase more of one particular brand of tobacco product in relation to those of a competitor.⁵⁹ Rather, the plain packaging design achieves its public health objectives by eliminating the ability of *all* tobacco companies to use figurative design elements to increase the appeal of the package or to create any positive association with the product. This is because the measure requires the standardisation of the packaging of *all* tobacco products sold in the Australian market. At the same time, the measure allows consumers to continue to distinguish between different offerings in the market by reference to the brand and variant names on the packaging. The complainants have therefore failed to demonstrate that the tobacco plain packaging measure compels "acts of competition" that fall within the scope of Article 10bis.

⁵⁷ See Australia's first written submission, para. 447. See also Honduras' first written submission, paras. 662-664; Dominican Republic's first written submission, paras. 842-843.

⁵⁸ Australia's first written submission, paras. 448-450; Dominican Republic's first written submission, para. 845;

⁵⁹ Australia's tobacco plain packaging measure is not designed to encourage *any* consumers to purchase *any* tobacco products.

44. The complainants have also failed to demonstrate that any alleged "acts of competition" compelled by the measure are acts of *unfair* competition within the meaning of Article 10*bis*(2) – that is, acts of competition that are "dishonest" or "untruthful".⁶⁰

45. In relation to the structure of Article 10*bis*, Article 10*bis*(1) comprises an overarching obligation that requires Members to assure effective protection against "unfair competition", the nature and scope of which is defined in Article 10*bis*(2) and illustrated by reference to certain specific acts of "unfair competition" in the subparagraphs of Article 10*bis*(3).⁶¹ The complainants contend that the tobacco plain packaging measure compels acts of competition that are "unfair" generally within the meaning of Article 10*bis*(1), as well as "unfair" in the specific manner described in Articles 10*bis*(3)(i) and 10*bis*(3)(iii). Australia will address the complainants' specific claims under Articles 10*bis*(3)(i) and 10*bis*(3)(iii) at the outset, and then return to the complainants' general unfair competition claim under Article 10*bis*(1).

(a) Article 10*bis*(3)(i)

46. Indonesia alone argues that the tobacco plain packaging measure is inconsistent with Article 10*bis*(3)(i) because it compels acts that allegedly create confusion with the establishment, the goods, or the industrial or commercial activities of a competitor, thereby compelling acts of competition that are "unfair".

47. With respect to Indonesia's claim, Australia first recalls that Australia's obligation in relation to Article 10*bis*(3)(i) is to *prohibit* acts that create confusion between the goods of one market actor and those of a rival competitor as to the proper commercial source of the goods.⁶² Indonesia has not even attempted to demonstrate that Australia has failed to *prohibit* such acts. Instead, Indonesia argues that the measure *compels* acts of competition that are

⁶⁰ Australia's first written submission, paras. 447-448.

⁶¹ Dominican Republic and Honduras have expressly confined their claims under Article 10*bis* to measures that fall within the scope of Article 10*bis*(2), though they suggest that the scope of "unfair competition" in Article 10*bis*(1) is potentially broader than "acts of competition contrary to honest practices". See Dominican Republic's response to Panel Question No. 18; Honduras' response to Panel Question No. 18.

⁶² WIPO notes that the relevant test of "confusion" under Article 10*bis*(3)(i) is "whether the similar mark so resembles the protected mark that it is liable to confuse a substantial number of average consumers as to the commercial source of the goods or services": World Intellectual Property Organization, *Protection Against Unfair Competition: Analysis of the Present World Situation* (WIPO, 1994), Exhibit AUS-536, para. 45.

unfair, because the measure requires tobacco manufacturers to present their products with a "virtually identical" appearance.⁶³

48. For the reasons discussed above, the tobacco plain packaging measure is not itself an "act of competition", nor does it compel "acts of competition". Furthermore, even if the measure did compel "acts of competition", Indonesia has failed to demonstrate that the tobacco plain packaging measure compels acts that "create confusion" between the goods of one market actor and those of a rival competitor as to the proper commercial source of the goods.

49. Indonesia argues that if a firm were to adopt voluntarily a product appearance that is nearly identical to that of a competitor, this would create confusion, which necessarily suggests that tobacco plain packaging would also create confusion.⁶⁴ Honduras' example of the Federal Court of Australia case *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* is helpful to respond to this argument by way of contrast. In that case, the manufacturer of "Red Bull" energy drink asserted that the appearance (other than the brand name) of the "LiveWire" energy drink was substantially identical with, and deceptively similar to, that of the "Red Bull" energy drink.⁶⁵ The LiveWire packaging was found to create a likelihood of confusion that LiveWire energy drinks were "produced by, or with the approval of Red Bull."⁶⁶ Despite the complainants' contention to the contrary, this case is not remotely analogous to the tobacco plain packaging measure.

50. Under tobacco plain packaging, manufacturers can continue to indicate clearly the different sources of the individual products through brand, business, or company and variant names. In contrast to the energy drink market, where different manufacturers are free to use a

⁶³ Indonesia asserts that tobacco plain packaging requires competitors to use their trademarks in a "non-distinct, uniform manner": Indonesia's opening statement at the first substantive meeting of the Panel, para. 53. This is not accurate. The tobacco plain packaging does not allow the use of *any* trademarks on tobacco packaging, other than trademarks that denote brand, business or company and variant names. As Australia has explained in response to Indonesia's claim under Article 16.1, to the extent that a competitor uses a brand name or variant on a tobacco product that is liable to create confusion with a trademarked brand or variant name of a competitor, the trademark owner can exercise its rights of exclusion to prevent that use.

⁶⁴ Indonesia's response to Panel Question No. 17, para. 16.

⁶⁵ *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157, Exhibit AUS-537. See Honduras' first written submission, para. 525; response to Panel Question No. 24.

⁶⁶ *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157, Exhibit AUS-537, para. 133.

range of designs on their packaging, *all* tobacco products must have a standardised appearance under the tobacco plain packaging measure. Consumers will look to the *non*-standardised elements – such as the brand and variant names – to distinguish between products.⁶⁷ Further, where the packaging is standardised across *all products*, it is implausible that consumers could be confused about whether *all* plain packaged tobacco products in Australia come from the same source, particularly given that the plain packaging design does not resemble the appearance of any tobacco product that existed before the introduction of the measure.⁶⁸

51. Indonesia has provided no evidence, or indeed any explanation, particularly in the context of Australia's dark market, as to *how* consumers have been, or could be, confused with the establishment, the goods, or the commercial activities of a competitor under the tobacco plain packaging measure. Indonesia has thus failed in every respect to establish a *prima facie* case that Australia's tobacco plain packaging measure is inconsistent with Article 10*bis*(3)(i) of the Paris Convention.

(b) Article 10*bis*(3)(iii)

52. In relation to Article 10*bis*(3)(iii), Honduras, the Dominican Republic and Indonesia each maintain that the tobacco plain packaging measure compels acts of competition that are "unfair", because it compels tobacco manufacturers to "mislead" consumers by imposing standardised packaging and appearance requirements, thereby indicating that all tobacco products are similar or identical.⁶⁹

53. As above, Australia would first recall that Australia's obligation in relation to Article 10*bis*(3)(iii) is to *prohibit* tobacco manufacturers from using "indications" or "allegations" that are liable to mislead the public as to the "nature, manufacturing process,

⁶⁷ As noted by Singapore: "the use of brand, business or company names with variant names on tobacco packaging (which is allowed, and which themselves may be trademarks) in a uniform and consistent manner on all packaging enables consumers to easily focus on, and compare, the words only that are used, thus enabling consumers to clearly distinguish the tobacco products of one undertaking from another." Singapore's third party submission, para. 19.

⁶⁸ See Australia's first written submission, paras. 465-466, citing the Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 128.

⁶⁹ See Honduras' first written submission, para. 721; Dominican Republic's first written submission, paras. 875-877; Indonesia's first written submission, paras. 179-180.

characteristics, suitability for purpose, or quantity" of their goods during the course of trade.⁷⁰ The complainants have not demonstrated that Australia fails to prohibit such acts of unfair competition. Nor, as discussed above, have they demonstrated that the tobacco plain packaging measure is itself an "act of competition" or that it compels "acts of competition".

54. Furthermore, even if the tobacco plain packaging measure did compel "acts of competition", as the complainants contend, the complainants have failed to demonstrate how the measure compels tobacco manufacturers to allegedly mislead consumers *in the course of trade*, pursuant to the language of Article 10bis(3)(iii). Australia reiterates that in the context of Australia's dark market for the sale of tobacco products, consumers generally do not see the packaging of tobacco products at the time of purchase, and instead are required to ask for the product by reference to the brand name and variant. Once the consumer has purchased the product, it is no longer "in the course of trade".⁷¹ Accordingly, given that tobacco products were purchased by using brand and variant names prior to plain packaging, and are purchased by using the same brand and variant names after plain packaging, it is difficult to understand how the measure could potentially cause tobacco manufacturers to mislead consumers "in the course of trade".⁷²

55. Finally, Australia would also note that even if the alleged acts of competition compelled by the measure were "in the course of trade", the complainants have failed to demonstrate that the tobacco plain packaging measure compels tobacco companies to

⁷⁰ The ordinary meaning of "mislead" is to "lead astray in action or conduct; cause to have an incorrect impression or belief": *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-243, p. 1799. WIPO notes that the nature of indications or allegations "liable to mislead the public" within the meaning of Article 10bis(3)(iii) are those that have "some enticing effect on the consumer", such as by trying "to entice customers with incorrect information": World Intellectual Property Organization, *Protection Against Unfair Competition: Analysis of the Present World Situation* (WIPO, 1994), Exhibit AUS-536, paras. 70, 84; see also World Intellectual Property Organisation, *Introduction to Intellectual Property Theory and Practice* (Kluwer Law International, 1997), UKR-80, paras. 12.71, 12.85. WIPO observes that, unlike Article 10bis(3)(i) and Article 10bis(3)(ii), Article 10bis(3)(iii) disciplines the actions of competitors in "creating a false impression of ... [their] own products or services". WIPO, Exhibit UKR-80, para. 12.65.

⁷¹ As Australia explained in response to Panel Question No. 42 on the meaning of "course of trade", Australia agrees with the Dominican Republic and Indonesia that use of a trademark in the "course of trade" includes use in commerce such as in a broadcast advertisement and in wholesale trade. However, the course of trade (or "commerce") comes to an end when the consumer purchases the product. The High Court of Australia has made it clear that with respect to the use of a trademark, "the course of trade" ends at the point of purchase.

⁷² Indonesia notes that the course of trade can extend to the wholesale purchase of tobacco products (Indonesia's response to Panel Question No. 20, para. 23), and Australia agrees; see Australia's response to Panel Question No. 42, para. 111. However, tobacco plain packaging does not prevent the use of signs and trademarks on the wholesale packaging of tobacco products.

"mislead" consumers via "indications" or "allegations" as to the "nature, manufacturing process, characteristics, suitability for purpose, or quantity" of their goods.

56. As Australia explained in its first written submission, the ordinary meaning of "indication" is, in relevant part, "the action or an instance of indicating; something that indicates or suggests".⁷³ The ordinary meaning of "to indicate" is "[p]oint out or to, make known, show".⁷⁴ The ordinary meaning of "allegation" is, in relevant part, "[a] claim or assertion".⁷⁵ The complainants have failed to provide a compelling explanation for how preventing tobacco companies from using certain signs, trademarks and GIs constitutes an "indication" or "allegation" within the ordinary meaning of these terms.

57. To be clear, Australia agrees with the complainants that an "omission" could potentially constitute a misleading "indication" or "allegation".⁷⁶ However, as explained in the WIPO Handbook, there can only be deception in relation to an omission "if the public, in the absence of express information, expects a certain characteristic to be present".⁷⁷ The complainants have put *no* evidence before the Panel to suggest that in the absence of certain signs, trademarks and GIs on tobacco products and their packaging, consumers have certain false affirmative expectations about the "nature, manufacturing process, characteristics, suitability for purpose, or quantity of those goods". The complainants have not explained, for example, how the *absence* of gold lettering, pink background, or italic script on tobacco product packaging would lead a consumer to have a false expectation about the objective information listed in Article 10*bis*(3)(iii) in relation to the underlying product.⁷⁸

⁷³ Australia's first written submission, para. 469, citing *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-243, p. 1364.

⁷⁴ Australia's first written submission, para. 469, citing *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-243, p. 1364.

⁷⁵ Australia's first written submission, para. 469, citing *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-243, p. 56.

⁷⁶ See Honduras' first written submission, paras. 708-710.

⁷⁷ World Intellectual Property Organization, "WIPO Intellectual Property Handbook", Second Edition (WIPO Publication No. 489(E) 2004, Reprinted 2008) (excerpts only), Exhibit HON-40, para. 2.817. WIPO provides the following example: "if it is claimed that a particular slice of bread has fewer calories than others, while this is solely due to the fact that it is thinner, the omission of this information can create as strong an incorrect impression as an express statement would have done."

⁷⁸ The Dominican Republic suggests that the omission of certain geographical information on tobacco packaging (namely, the region or locality) is liable to mislead consumers with respect to whether a particular tobacco product is from a specific region or locality in that country: see Dominican Republic's response to Panel Question No. 54, para. 239, citing Dominican Republic's first written submission, paras. 882-885, 901-911.

(continued)

58. The complainants also argue that the *standardisation* of packaging is a misleading *positive* indication that all tobacco products have the same "characteristics".⁷⁹ However, the complainants have failed to identify any aspect of the standardised packaging of tobacco products under Australia's measure that constitutes a positive indication or allegation about the "nature, manufacturing process, characteristics, suitability for purpose, or quantity" of tobacco products that is false and could *mislead* consumers. As Australia has explained, by standardising the packaging, the measure *removes* the ability of signs and trademarks to increase the appeal of tobacco products, distract from GHWs and mislead consumers as to the harms of smoking.⁸⁰

59. For all of these reasons, the complainants have failed to establish a *prima facie* case that Australia's tobacco plain packaging measure is inconsistent with Article 10bis(3)(iii) of the Paris Convention.

(c) Article 10bis(1)

60. Finally, with respect to the complainants' "general" unfair competition claim under Article 10bis(1), the complainants now appear to agree that regulations that affect *general competitive conditions* do not fall within the scope of Article 10bis.⁸¹ However, the complainants continue to assert that evidence of general competitive conditions in the

Australia notes, however, that "origin" is not listed in the list of objective attributes in Article 10bis(3)(iii). In fact, the term "origin" in this subparagraph was expressly rejected during the negotiation of Article 10bis, and thus cannot be read into Article 10bis(3)(iii): General Committee – Document No. 268 A, Committee IV, Article 10bis, 25 October 1958, Exhibit AUS-538, pp. 1, 10-11. See also G.H.C. Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property as Revised at Stockholm in 1967* (WIPO Publications, 1969), Exhibit HON-39, p. 146: Article 10bis(3)(iii) "does not relate to ... indications or allegations as to the *origin* or *source* of the goods" (emphasis original).

⁷⁹ Dominican Republic's first written submission, paras. 876-877; Honduras' first written submission, paras. 718-726; Indonesia's first written submission, paras. 179-181; Cuba's first written submission, para. 385.

⁸⁰ As outlined with respect to the complainants' "omission" claims, the complainants have also largely ignored the fact that the tobacco plain packaging measure *allows* a large range of information about tobacco products to be presented on tobacco packaging, including brand, business, company and variant names. Further, "variant name" is defined broadly in Subsection 4(1) of the TPP Act as:

the name used to distinguish that kind of tobacco product from other tobacco products that are supplied under the same brand, business or company name, by reference to one or more of the following: (a) containing or not containing menthol; (b) being otherwise differently flavoured; (c) purporting to differ in strength; (d) having or not having filter tips or imitation cork tips; (e) being of different length or mass.

⁸¹ Honduras' response to Panel Question No. 17; Indonesia's response to Panel Question No. 17; Dominican Republic's response to Panel Question No. 17, para. 90.

Australian market, such as alleged downtrading effects⁸² and alleged increases in illicit trade,⁸³ is *indicative* of the existence of dishonest commercial practices, rendering the measure inconsistent with Article 10bis(1).⁸⁴

61. In relation to these assertions, the complainants have not demonstrated: (i) that there is any causal link between these alleged effects and tobacco plain packaging,⁸⁵ and, crucially, (ii) that these effects have been caused by "acts of competition" compelled by the measure that are "contrary to honest practices".

62. With respect to this last point, as discussed above, the complainants have not demonstrated that the measure compels private actors to engage in acts of competition – that is, acts of "striving for custom" between rivals or attempts to increase market share by "offering the most favourable terms" – of *any* type. Moreover, even if the complainants had demonstrated that Australia's measure compels acts of competition by tobacco producers, the complainants have not demonstrated that these acts of competition are "dishonest" or "untruthful". The complainants have presented no evidence that consumers will confuse the goods of one tobacco manufacturer with the goods of another as a result of the tobacco plain packaging measure, and the complainants' contention that tobacco plain packaging will mislead consumers in relation to the objective characteristics of tobacco products is pure speculation.

63. The complainants are simply asking the Panel to *assume* that there is some form of general forced commercial dishonesty arising from the tobacco plain packaging measure, and that these dishonest acts are the cause of any alleged brand switching or increases in illicit trade. Australia submits that the case put forward by the complainants in relation to this general claim of "unfair competition" is insufficient to establish a *prima facie* case of violation.

⁸² Honduras' first written submission, paras. 692-694, 725; Cuba's first written submission, para. 382. See also Dominican Republic's first written submission, para. 859; and Indonesia's first written submission, paras. 169-171.

⁸³ Indonesia's response to Panel Question No. 23.

⁸⁴ Honduras' response to Panel Question No. 17; Dominican Republic's response to Panel Question No. 17.

⁸⁵ Australia's first written submission, paras. 540-546, 653-657.

(d) Conclusion

64. The complainants' claims under Article 10*bis* have no discernible relationship to the actual text of the provision at issue. As Australia has explained, the complainants have failed to demonstrate that a government's regulatory measure is subject to the disciplines of Article 10*bis* at all. Even assuming that government regulations that compel private actors to behave in certain ways fall within the scope of Article 10*bis*, the complainants have failed to demonstrate that the measure compels acts of *competition* or that the measure compels acts of competition that are *unfair*. Accordingly, Australia submits that there are numerous junctures at which the Panel should conclude that the complainants have not made their case in relation to their unfair competition claims.

7. The complainants have failed to demonstrate that the tobacco plain packaging measure is inconsistent with Article 22.2(b) of the TRIPS Agreement

65. As Australia explained in its first written submission, the complainants have failed to demonstrate that the tobacco plain packaging measure is inconsistent with Australia's obligation to prevent any use of GIs that constitutes an act of "unfair competition" pursuant to Article 22.2(b) of the TRIPS Agreement.⁸⁶

66. In their responses to questions from the Panel, the complainants have tried to reframe their claims under Article 22.2(b) by arguing that Australia's tobacco plain packaging measure is inconsistent with this provision because it reduces consumers' ability to distinguish products, including premium products. For example, Honduras argues that "by not permitting the owner of a geographical indication to place its geographical indication on the tobacco packaging", the measure will lead consumers to "gain the erroneous impression that all tobacco products from all geographical origins are the same and have the same characteristics".⁸⁷ Similarly, the Dominican Republic argues that it depends on the protections provided for GIs in Article 22 of the TRIPS Agreement "to differentiate its premium export products".⁸⁸ The complainants are once again attempting to read into the

⁸⁶ See Australia's first written submission, paras. 477-487.

⁸⁷ Honduras' response to Panel Question No. 109.

⁸⁸ Dominican Republic's response to Panel Question No. 109, para. 184.

TRIPS Agreement a *positive* right for interested parties to use GIs by transforming Article 22.2(b) into a provision that *prohibits any restriction* on the use of GIs by interested parties.

67. As Australia explained in its first written submission, such an interpretation is contrary to the plain text of Article 22.2(b). This provision obligates Members to provide the legal means for interested parties to *prevent* any act of using a GI that constitutes an act of unfair competition (as defined by Article 10*bis* of the Paris Convention). Hence, Article 22.2(b) requires Members to establish legal avenues for interested parties to prevent *third parties* from falsely or dishonestly using a GI to entice consumers to purchase goods that are not identified by that GI. It is clear from the language and context of Article 22.2(b) that the nature of the protection provided is *negative*.⁸⁹

68. The complainants' arguments fundamentally mischaracterise the protection provided by Article 22.2(b). As Australia has explained, and Honduras, the Dominican Republic and Indonesia have now correctly acknowledged, no "right of use" exists for GIs (or for trademarks) under the TRIPS Agreement. The complainants' arguments with respect to Article 22.2(b) are but another example of the complainants' attempt to read a positive right of use into the TRIPS Agreement, and should be dismissed.

8. The complainants have failed to demonstrate that the tobacco plain packaging measure is inconsistent with Article 24.3 of the TRIPS Agreement

69. The complainants' claims under Article 24.3 are based on the existence of a protected "right of use" in relation to GIs under Australian law at the time of entry into force of the TRIPS Agreement. As the complainants have now correctly acknowledged that no "right to use" GIs existed under Australian law prior to 1 January 1995,⁹⁰ the complainants' claims under Article 24.3 of the TRIPS Agreement must be dismissed.

⁸⁹ Australia's first written submission, paras. 480-485.

⁹⁰ See Dominican Republic's response to Panel Question No. 48, para. 213; Indonesia's response to Panel Question No. 48, citing its response to Panel Question No. 44 (Indonesia states that it "supports the arguments of the Dominican Republic, Honduras and Cuba" with regard to GIs).

70. Australia's position remains that the complainants have failed to establish their claims in respect of Article 24.3 because, first, they have not established that Australia's tobacco plain packaging measure is a measure adopted to implement the provisions of Part II, Section 3 of the Agreement.⁹¹ Second, even if the Panel were to accept that the measure falls within the scope of Article 24.3, the complainants have failed to demonstrate that the level of protection for *individual* GIs that existed as at 1 January 1995 has been diminished by virtue of the tobacco plain packaging measure. As outlined in its first written submission,⁹² Australia relies on the panel's reasoning in *EC – Trademarks and Geographical Indications (Australia)* to support its view that for the purposes of Article 24.3, "the protection of GIs that existed in that Member immediately prior to the date of entry into force of the WTO Agreement" means "the state of protection of GIs immediately prior to 1 January 1995, in terms of the individual GIs which were protected at that point in time."⁹³

71. As Australia observed in its first written submission, only Cuba has identified a specific GI, "Habanos", which it alleges was protected in Australia prior to 1 January 1995.⁹⁴ To the extent that Cuba is able to prove that "Habanos" was entitled to any common law or statutory protections in Australia prior to 1 January 1995,⁹⁵ such statutory and common law protections have not been diminished by the implementation of the tobacco plain packaging measure.⁹⁶

72. Finally, even if the Panel were to find that the tobacco plain packaging measure falls within the scope of Article 24.3, and even if the Panel were to agree with the complainants

⁹¹ See Australia's first written submission, paras. 492-493. In trying to rebut this argument, the Dominican Republic argues that "[i]n implementing this Section" refers to "any act or omission that *affects the implementation* of a provision" in the Section. Dominican Republic's response to Panel Question No. 51, paras. 224-232. Such an interpretation attempts to read words in the provision that do not exist and is inconsistent with the panel's reasoning in *EC – Trademarks and Geographical Indications (Australia)*. See Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.632.

⁹² See Australia's first written submission, paras. 488-505.

⁹³ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.636.

⁹⁴ See Australia's first written submission, para. 494.

⁹⁵ Although Cuba has submitted significant evidence about the use of the term "Habanos" in other jurisdictions, it has not submitted any evidence that it was entitled to protections in Australia prior to 1 January 1995. The fact that the composite trademark "Habanos" with a specific font and a picture of a leaf was subsequently (after 1 January 1995) registered as a *regular* trademark in Australia (not as a certification trademark) is not evidence that it was entitled to statutory and common law protections prior to 1 January 1995.

⁹⁶ See Australia's first written submission, para. 494.

that the reference to "the protection of geographical indications" in Article 24.3 is a reference to a Member's "system of protection", the complainants have still failed to establish a *prima facie* case under their own interpretation of the scope of Article 24.3. This is because, as the complainants have now expressly acknowledged, no "right of use" existed for GIs under Australian law prior to 1 January 1995.⁹⁷

73. Despite this acknowledgement, the complainants have attempted to keep their Article 24.3 claims alive in their responses to questions from the Panel by arguing that the tobacco plain packaging measure violates Article 24.3 because "interested parties are no longer able to use indications in a manner that will allow for indications to acquire, maintain, or enforce their status as geographical indications".⁹⁸ In advancing this argument, Cuba,⁹⁹ the Dominican Republic¹⁰⁰ and Honduras¹⁰¹ refer to footnote 3 of the TRIPS Agreement.¹⁰²

74. Australia considers that the definition of "protection" set out in footnote 3 of the TRIPS Agreement is limited in application to Articles 3 and 4.¹⁰³ Australia does not agree that a footnote intended to clarify the meaning of a term in a different provision can be interpreted so as to expand the protection of GIs beyond what is expressly articulated in Article 22 of the TRIPS Agreement, entitled "Protection for Geographical Indications", "as the legal means for interested parties to *prevent any use...*".¹⁰⁴

75. For all of the foregoing reasons, it is evident that the complainants have failed to demonstrate that the tobacco plain packaging measure has diminished the protection of GIs that existed in Australia prior to 1 January 1995.

⁹⁷ See Dominican Republic's response to Panel Question No. 48, para. 213; Indonesia's response to Panel Question No. 48, citing its response to Panel Question No. 44 (Indonesia states that it "supports the arguments of Dominican Republic, Honduras and Cuba" with regard to GIs).

⁹⁸ Dominican Republic's response to Panel Question No. 48, paras. 214-217.

⁹⁹ Cuba's first written submission, para. 372.

¹⁰⁰ Dominican Republic's first written submission, para. 916.

¹⁰¹ Honduras' first written submission, para. 760.

¹⁰² TRIPS Agreement footnote 3 states:

For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

¹⁰³ Australia's response to Panel Question No. 60.

¹⁰⁴ Australia's response to Panel Question No. 60 (emphasis original).

9. Conclusion to Part II.B

76. For the reasons articulated above, Australia requests that the Panel reject the complainants' claims under Article 2.1 (incorporating Article 6*quinquies* A(1) and 10*bis* of the Paris Convention), Article 15.4, Article 16.1, Article 16.3, Article 22.2(b) and Article 24.3 of the TRIPS Agreement.

C. THE COMPLAINANTS HAVE FAILED TO SHOW THAT THE TOBACCO PLAIN PACKAGING MEASURE IS INCONSISTENT WITH ARTICLE 20 OF THE TRIPS AGREEMENT

1. Introduction to Part II.C

77. In this section, Australia will demonstrate that the complainants have failed to show that the tobacco plain packaging measure is inconsistent with Article 20 of the TRIPS Agreement.

78. To recall, Article 20 provides that:

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.

79. In Part II.C.2 below, Australia will demonstrate that the complainants have failed to show that the tobacco plain packaging measure encumbers by special requirements the "use" of a trademark in the course of trade, and have therefore failed to establish the threshold applicability of Article 20. The relevant "use" of a trademark under Article 20 is the use of a trademark to distinguish the goods or services of one undertaking from those of other undertakings in the course of trade. The complainants have failed to demonstrate how any special requirements imposed by the tobacco plain packaging measure encumber this use of trademarks. Instead, through their submissions, it has become apparent that the complainants' claim under Article 20 is that the tobacco plain packaging measure encumbers the use of trademarks to advertise and promote tobacco products. This is not a relevant use of

trademarks under Article 20, and the complainants' assertions in respect of this use of trademarks are therefore irrelevant to establishing the threshold applicability of Article 20. The Panel should dismiss the complainants' claims under Article 20 for this reason alone.

80. In Part II.C.3 below, Australia will briefly discuss the complainants' failure to provide a coherent interpretative or factual basis for their assertion that the prohibitive elements of the tobacco plain packaging measure are "special requirements" that fall within the scope of Article 20. The complainants have been unable to explain why the prohibitive elements of the tobacco plain packaging measure are within the scope of Article 20, while other widely-adopted measures that affect the use of trademarks are not. Properly interpreted, Article 20 encompasses only the aspects of the tobacco plain packaging measure that impose special requirements upon the appearance of brand and variant names.

81. Parts II.C.4 and II.C.5 below proceed on an *arguendo* basis, in the event that the Panel considers that the complainants have established an encumbrance upon a relevant use of trademarks. In Part II.C.4, Australia will discuss the proper interpretation of the term "unjustifiably" and demonstrate that, contrary to the complainants' contentions, this term is not functionally equivalent to a standard of "necessity". Properly interpreted in accordance with the Vienna Convention, an encumbrance upon the use of trademarks in the course of trade is not "unjustifiable" if there is a rational connection between the encumbrance and the pursuit of a legitimate objective. In order to establish that there is no rational connection between an encumbrance upon the use of trademarks and its objective, a complainant must demonstrate that the encumbrance is not capable of making a contribution to that objective.

82. In Part II.C.5, Australia will demonstrate that the complainants have failed to show that any encumbrance upon the use of trademarks resulting from the tobacco plain packaging measure has been imposed "unjustifiably". The proposition that tobacco plain packaging is capable of making a contribution to a reduction in tobacco prevalence and consumption is supported by the clear weight of the evidence. Such evidence was outlined extensively in Australia's first written submission,¹⁰⁵ and is supported by many of the world's leading medical and public health authorities, including the WHO, the United States Surgeon

¹⁰⁵ Australia's first written submission, paras. 148-205, 212-216.

General, and the United States National Cancer Institute. The complainants' assertion that tobacco plain packaging is incapable of contributing to its objectives amounts, at most, to a request that the Panel take a different view of this evidence. This is insufficient as a matter of law to establish that there is no credible evidentiary support for the conclusion that tobacco plain packaging is capable of contributing to its objectives. Moreover, the central premise of the complainants' argument that tobacco plain packaging is incapable of contributing to its objectives – that the appearance of tobacco packaging and products is incapable of affecting human behaviours – is contradicted by their own arguments in this dispute.

2. The complainants have failed to establish that the tobacco plain packaging measure encumbers by special requirements the use of trademarks in the course of trade

83. In order to demonstrate the applicability of Article 20, the complainants must first establish a *prima facie* case that the tobacco plain packaging measure imposes "special requirements" and that these special requirements "encumber" the "use of a trademark in the course of trade". It is only if the complainants are able to demonstrate that "the use of a trademark in the course of trade" has been "encumbered by special requirements" that the analysis under Article 20 may proceed to an evaluation of whether that encumbrance, so demonstrated, has been imposed "unjustifiably".

84. The parties do not appear to disagree concerning the meaning of the term "encumber".¹⁰⁶ Nor do the parties appear to disagree that the relevant "use" of a trademark for the purposes of Article 20 is the use of a trademark to distinguish the goods or services of one undertaking from those of other undertakings.¹⁰⁷ Where the parties do disagree, however, is

¹⁰⁶ As Australia explained in its first written submission, the verb "encumber" is defined, in relevant part, to mean "[h]amper, impede ...; act as a check or restraint on": Australia's first written submission, para. 347; see also Honduras' first written submission, para. 283; Indonesia's first written submission, paras. 269, 272; Dominican Republic's first written submission, para. 349; Cuba's first written submission, para. 310. Australia notes, however, that it disagrees with the complainants' argument that once it is established that a measure imposes "special requirements", these special requirements *necessarily* encumber the use of trademarks. Australia submits that it is clear from the text of Article 20 that once the complainants have established the existence of special requirements, they must then go on to establish that these special requirements "encumber" the "use" of trademarks "in the course of trade". See Honduras' response to Panel Question No. 39; Indonesia's response to Panel Question No. 39; Dominican Republic's response to Panel Question No. 39.

¹⁰⁷ Australia's first written submission, para. 348. Indonesia's first written submission, paras. 138-140, response to Panel Question No. 99; Cuba's first written submission, para. 311, response to Panel Question No.

(continued)

with respect to the meaning of the term "distinguish" and, in particular, what it means for a trademark "to *distinguish* the goods or services of one undertaking from those of other undertakings".

85. In Australia's view, it is evident from the text of the TRIPS Agreement that the relevant "use" of a trademark under Article 20 is to distinguish the products or services of one undertaking from those of other undertakings, such that a consumer is able to tell that the goods or services at issue are from one commercial source as opposed to a different commercial source. The complainants maintain, however, that the relevant "use" of a trademark under Article 20 also encompasses the use of a trademark to "distinguish" products "in terms of their quality, characteristics, and reputation". As Australia will demonstrate, this proposition has no interpretative foundation. The complainants' formula of "quality, characteristics, and reputation" is simply a euphemism for the use of trademarks to advertise and promote tobacco products. While trademarks are indeed used for advertising and promotional purposes, this is not a use of trademarks that is relevant under Article 20 of the TRIPS Agreement. Any encumbrance upon the use of trademarks for this purpose is therefore irrelevant to demonstrating the *prima facie* applicability of Article 20.

(a) The relevant "use" of a trademark under Article 20 of the TRIPS Agreement is the use of a trademark to distinguish the goods or services of one undertaking from those of other undertakings

86. All parties agree that Article 15.1 of the TRIPS Agreement provides the basis for identifying the relevant "use" of a trademark under Article 20.¹⁰⁸ On this basis, the parties further appear to agree that the relevant "use" of a trademark under Article 20 is the use of a trademark by a trademark owner to distinguish its goods or services from those of other undertakings in the course of trade. This conclusion follows from the definition of "protectable subject matter" set forth in Article 15.1, which provides that "[a]ny sign, or any

99; Honduras' first written submission, paras. 271-272, response to Panel Question No. 99; Dominican Republic's first written submission, paras. 342-344, 347, response to Panel Question No. 99.

¹⁰⁸ See Dominican Republic's first written submission, para. 248; Indonesia's first written submission, para. 132; Honduras' first written submission, para. 155; Cuba's response to Panel Question No. 87.

combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark."

87. In order to demonstrate under Article 20 that a measure encumbers the "use" of a trademark in the course of trade, a complainant must demonstrate that the measure encumbers the use of a trademark "to *distinguish* the goods or services of one undertaking from those of other undertakings". The ordinary meaning of the term "distinguish", as it pertains here, is "[s]erve to make different (*from*); constitute a difference between, differentiate."¹⁰⁹ The question is in what ways, or in what respects, does a trademark serve to distinguish among the products or services of different enterprises.

88. The parties appear to agree that trademarks distinguish the products of one enterprise from those of other enterprises by allowing consumers to identify the commercial source of the product. A trademark indicates that goods bearing that trademark come from the same commercial source and not from the commercial source of similar products bearing different trademarks.¹¹⁰ As Professor Dinwoodie explains,

A consumer seeing the mark ADIDAS emblazoned on a pair of running shoes understands that those shoes come from a particular producer and are different from running shoes bearing the mark NIKE. The core function that the trade mark serves is to identify the source or origin of particular goods ...¹¹¹

89. A sign cannot function as a trademark unless it is capable of distinguishing the commercial source of a product from the commercial source of similar products in the course of trade. This is why a sign must be inherently distinctive in order to function as a trademark, or must have acquired distinctiveness through use. While trademarks may serve other functions, as discussed below, the ability of a sign to distinguish the commercial source of the

¹⁰⁹ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-539, p. 719.

¹¹⁰ It is well established that a trademark need not indicate the specific name of the corporation that manufactured the product. As one leading commentator has explained:

[T]he 'source' identified by a trademark need not be known by name to the buyer. It may be anonymous in the sense that the buyer does not know, or care about, the name of the corporation that made the product or the name of the corporation which distributes it. But the buyer is entitled to assume that all products carrying the same trademark are somehow linked with or sponsored by that single, anonymous source.

J.T. McCarthy, *McCarthy on Trademarks and Unfair Competition* (Clark Boardman Callaghan, looseleaf service, June 2012), Section 3.9, Exhibit AUS-540.

¹¹¹ Expert Report of G. Dinwoodie (13 July 2014), Exhibit UKR-1, para. 6.

product is what makes the sign a *trademark*. The "source identification" function is therefore the only essential function of a trademark.¹¹²

90. Closely related to the "source identification" function of a trademark is the function of indicating that products bearing the same trademark are manufactured under the control of the same commercial source and that, as a result, consumers may expect a consistency of experience with products bearing that trademark.¹¹³ While this is sometimes referred to as the "quality" or "guarantee" function of trademarks, it is important to emphasise that trademarks do not need to signify or guarantee anything about the intrinsic "qualities" of the product, or that the product is necessarily a "high quality" product, in order to distinguish products in this sense. Rather, the trademark allows, but does not require, the trademark owner to guarantee that "all goods or services that bear it have been manufactured or rendered under the control of a single undertaking to which responsibility for their quality may be attributed."¹¹⁴ As one commentator explains, "the consumer who acquired the good indicated by a particular trademark ... may repeat this choice when considering a later purchase, provided the experience was positive, or in the event of a negative experience, can make a different choice."¹¹⁵

¹¹² See, e.g. D. Kitchin, D. Llewlyn, J. Mellor, R. Meade, T. Moody-Stuart, D. Keeling, *Kerly's Law of Trademarks and Trade Names*, 14th ed., (Sweet & Maxwell Ltd, 2005), Exhibit AUS-541, Sections 2-003 to 2-006; J.T. McCarthy, *McCarthy on Trademarks and Unfair Competition* (Clark Boardman Callaghan, looseleaf service, June 2012), Exhibit AUS-540, Section 3.3.

¹¹³ J.T. McCarthy, *McCarthy on Trademarks and Unfair Competition* (Clark Boardman Callaghan, looseleaf service, June 2012), Exhibit AUS-540, Sections 3.2, 3.10; T. Cohen, C. Van Nispen and T. Huydecoper, *European Trademark Law: Community Trademark Law and Harmonized National Trademark Law* (Kluwer Law International, 2010), Exhibit AUS-542, Section 2.2.2.

¹¹⁴ T. Cohen, C. Van Nispen and T. Huydecoper, *European Trademark Law: Community Trademark Law and Harmonized National Trademark Law* (Kluwer Law International, 2010), Exhibit AUS-542, Section 2.2.2, (footnotes omitted). See also *Scandecor Development AB v. Scandecor Marketing AB* [2002] F.S.R. 7, at para. 19 (Lord Nicholls), Exhibit AUS-543 ("Although the use of trade marks is founded on customers' concern about the quality of goods on offer, a trade mark does not itself amount to a representation of quality. Rather it indicates that the goods are of the standard which the proprietor is content to distribute 'under his banner'"); J.T. McCarthy, *McCarthy on Trademarks and Unfair Competition* (Clark Boardman Callaghan, looseleaf service, June 2012), Exhibit AUS-540, Section 3.10 ("It is important to note that the quality function of marks does not mean that marks always signify 'high' quality goods or services – merely that the quality level, whatever it is, will remain consistent among all goods or services supplied under the mark.").

¹¹⁵ T. Cohen, C. Van Nispen and T. Huydecoper, *European Trademark Law: Community Trademark Law and Harmonized National Trademark Law* (Kluwer Law International, 2010), Exhibit AUS-542, Section 2.2.2 (footnotes omitted).

(b) The use of trademarks to advertise and promote the trademarked product is not a relevant "use" of trademarks under Article 20 of the TRIPS Agreement

91. In addition to distinguishing the products of one undertaking from those of other undertakings, it is widely recognised that trademarks serve to advertise and promote the trademarked product.¹¹⁶ Broadly speaking, trademarks advertise and promote the trademarked product in two related ways. First, a trademark "may have a certain appeal in and of itself, which makes the public ascribe positive characteristics to that trademark" and the products on which it appears.¹¹⁷ A trademark that depicts an alpine meadow, for example, conveys positive associations with cleanliness, purity, and nature. Second, a trademark can become "charged" with positive associations, or have the associations that the trademark conveys reinforced, through other forms of advertising and promotion that incorporate the trademark. For example, an advertising campaign might depict the use of the "alpine meadow" product in a beautiful mountain setting, thereby reinforcing the associations that the trademark itself conveys.

92. The complainants have sought to manufacture confusion about the advertising and promotion function of trademarks by engaging in semantics about what it means for a trademark to be "appealing". The Dominican Republic, for example, cites the Longbeach brand of cigarettes as an example of a trademarked brand that is aesthetically "unappealing", at least compared to other tobacco brands, but that is nevertheless the trademark of a widely-

¹¹⁶ J.T. McCarthy, *McCarthy on Trademarks and Unfair Competition* (Clark Boardman Callaghan, looseleaf service, June 2012), Exhibit AUS-540, Section 3.2 (identifying four functions that trademarks perform: "(1) to identify one seller's goods and distinguish them from goods sold by others; (2) to signify that all goods bearing that trademark come from or are controlled by a single, albeit anonymous, source; (3) to signify that all goods bearing the trademark are of an equal level of quality; and (4) as a prime instrument in advertising and selling the goods."). Another leading treatise on trademark law describes the advertising function as relating to the "cachet" or "aura" which the consumer associates with the mark. D. Kitchin, D. Llewellyn, J. Mellor, R. Meade, T. Moody-Stuart, D. Keeling, *Kerly's Law of Trademarks and Trade Names*, 14th ed., (Sweet & Maxwell Ltd, 2005), Exhibit AUS-541, Section 2-006. See also Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 34: "it is my view – and I believe this to be the accepted view – that the branding on packaging (including the use of trademarks) serves important persuasive communication functions beyond merely identifying the brand."

¹¹⁷ T. Cohen, C. Van Nispen and T. Huydecoper, *European Trademark Law: Community Trademark Law and Harmonized National Trademark Law* (Kluwer Law International, 2010), Exhibit AUS-542, Section 2.2.3.

sold brand of cigarettes in the Australian market.¹¹⁸ On this basis, the Dominican Republic seeks to persuade the Panel that there is no connection between the "appeal" of a trademark and whether consumers purchase and consume the trademarked product.

93. The Dominican Republic's argument is based on a mischaracterisation of what it means for a trademark to "appeal". Trademarks serve an advertising function by conveying certain associations with the trademarked product, and those associations are often reinforced through other means of advertising and promotion. Those associations are not random or chosen without thought. Particularly in the case of a largely undifferentiated consumer product like tobacco products, trademark owners carefully calibrate the associations conveyed by the trademark in order to position the product somewhere in the market.¹¹⁹ A tobacco trademark might be used to convey associations with exclusivity and wealth, femininity, masculinity, youthfulness or even "value for money". Each of these associations appeals to a *particular* segment of consumers or prospective consumers. In short, different trademarks may "appeal" to different market segments.

94. Longbeach is a perfect example. In the study undertaken by GfK Bluemoon, the Longbeach brand was associated with cigarettes that are "budget", "ordinary", and "plain". These associations were unappealing to respondents other than respondents in lower socioeconomic groups, for whom the brand had a positive association with being "good value for money".¹²⁰ The relatively "unappealing" aesthetic of the Longbeach brand is not unintentional, and the associations that it conveys are certainly known to the company that creates the product.¹²¹

¹¹⁸ Dominican Republic's response to Panel Question No. 108, para. 144.

¹¹⁹ See Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, Sections 2.1-2.4; Australia's first written submission, paras. 71-82, 85-86, and exhibits cited therein.

¹²⁰ See Australia's closing statement at the first substantive meeting of the Panel, paras. 10-12.

¹²¹ The manufacturer of Longbeach branded products, Philip Morris, itself has noted that the Longbeach brand's "packaging and advertising have been found to project a personality that many super value smokers aspire to ... [p]articularly its attitude of freedom, escape, mildness and its genuine mainstream brand value." Philip Morris, *1991 Original Budget: Marketing Presentation October 3, 1990*, Bates no. 2504107139A/7171, Exhibit AUS-544, p. 18. The success of this brand in appealing to "super value smokers" led Philip Morris to conclude as early as 1991 that "we shouldn't change or meddle with the basic offer right now." Philip Morris, *1991 Original Budget: Marketing Presentation October 3, 1990*, Bates no. 2504107139A/7171, Exhibit AUS-544, p. 18. As the Dominican Republic has repeatedly emphasised, Philip Morris has not, in fact, "meddled with the basic offer" since that time, preferring to keep the stylised wavy beach as the dominant image of the brand over the course of many years: see Dominican Republic's response to

(continued)

95. The use of a trademark to advertise and promote the trademarked product in the ways that Australia has just described is *not* a part of the distinguishing function of a trademark. For a trademark to identify the commercial source of the product and guarantee that all goods bearing that trademark have been manufactured under the control of a single undertaking, it is not necessary for the trademark to convey associations with particular "characteristics" or social attributes. As explained above, those are two different functions of a trademark, and are commonly recognised as such. The word "Marlboro", for example, is sufficient to identify the commercial source of the product and indicate that all products bearing that trademark have been manufactured under the control of a single enterprise without having to convey associations with masculinity and ruggedness. The former is distinguishing, the latter is advertising.

96. The "protectable subject matter" of Section 2 of the TRIPS Agreement relates to the function of trademarks in distinguishing the commercial source of the trademarked product from the commercial source of other similar products.¹²² Neither Section 2 of the TRIPS Agreement, nor Article 20 more particularly, concerns the use of trademarks to advertise and promote the trademarked product, such as by making the product more appealing to particular segments of consumers or prospective consumers.

(c) Trademarks do not distinguish products in terms of their "quality, characteristics, and reputation"

97. The complainants have been careful throughout this dispute not to acknowledge that trademarks are used to advertise and promote the trademarked product, even though that is a

Panel Question Nos. 41, paras. 183-184 and 102, paras. 95-97. Philip Morris knows perfectly well what "personality" the Longbeach brand conveys, who it appeals to, and how that appeal serves to advertise and promote the product.

¹²² The European Union notes, in addition, that:

Article 20 explicitly refers to "use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings". It does not refer to an "advertising function". At the core of the TRIPS Agreement is a trademark's capability to distinguish the goods or services of one undertaking from those of other undertakings.

The European Union's third party response to Panel Question No. 10, para. 42. See also New Zealand's third party response to Panel Question No. 10 ("The function of distinguishing the goods or services of one undertaking from those of another undertaking is the function that is protected under Article 15.1 of the TRIPS Agreement. Article 15.1 of the TRIPS Agreement does not protect the advertising function of trademarks.").

widely acknowledged function of trademarks.¹²³ The complainants do not want to admit that trademarks are used for this purpose, as this would contradict their position that the use of trademarks on retail tobacco packaging does not serve to advertise and promote tobacco products. The complainants must further understand that there is no interpretative basis to conclude that Article 20 of the TRIPS Agreement is concerned with disciplining measures that encumber the use of trademarks for advertising and promotional purposes.

98. The complainants have, instead, engaged in a strategy of euphemisms. The complainants repeatedly assert that trademarks serve to "distinguish goods and services in commerce in terms of the *quality, characteristics, and reputation* of the product".¹²⁴ This phrase – "quality, characteristics, and reputation" – is the foundation of the complainants' entire case as to why, in their view, the tobacco plain packaging measure "encumbers" the "use" of trademarks in the course of trade under Article 20.

99. All parties appear to agree that the relevant "use" of trademarks is defined by Article 15.1 of the TRIPS Agreement, yet the complainants have pointed to nothing in the text of Article 15.1 that refers to the use of trademarks to distinguish products in terms of their "quality, characteristics, and reputation", or that even implies such a use. Nor have the complainants provided any other authority for their assertion that this is a relevant use of trademarks under Article 20.

100. In point of fact, the complainants have taken these terms from a *different* section of the TRIPS Agreement. These concepts – quality, characteristics, and reputation – are relevant under Section 3 of the TRIPS Agreement, which pertains to GIs. Article 22.1 of the TRIPS Agreement provides that:

Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given *quality, reputation or other characteristic of the good* is essentially attributable to its geographical origin.

¹²³ Note that Cuba expressly acknowledges that trademarks can serve an advertising function in certain circumstances, but contends that this is not the function of branding on the package: see Cuba's response to Panel Question No. 102.

¹²⁴ Dominican Republic's first written submission, paras. 14, 240; response to Panel Question No. 87, para. 4; Honduras' first written submission, para. 144; Indonesia's response to Panel Question No. 87, para. 2.

101. Trademarks and GIs are different types of intellectual property, as evidenced, *inter alia*, by the fact that they are addressed in different sections of the TRIPS Agreement. Unlike a trademark, a GI does not serve to distinguish the goods of one commercial undertaking from those of another, as a trademark does, but instead serves to distinguish products of a specific *origin* from similar products of different origins.¹²⁵

102. The complainants have not acknowledged that they are borrowing concepts from Section 3 of the TRIPS Agreement in order to interpret Section 2 of the TRIPS Agreement, let alone explained the interpretative basis for doing so. The terms "quality", "characteristics", and "reputation" do not appear anywhere in Section 2 of the TRIPS Agreement. If the drafters of the TRIPS Agreement considered that "quality, characteristics, and reputation" were relevant to the function of a trademark under Article 15.1, they would have used these terms in that Article as they did in the case of Article 22.1. As context, the fact that these terms do *not* appear in Article 15.1 indicates that "quality, characteristics, and reputation" have no relevance to the distinguishing function of trademarks under Article 20 of the TRIPS Agreement.

103. In sum, the complainants' assertion that the relevant "use" of trademarks under Article 20 of the TRIPS Agreement is to distinguish products in terms of their "quality, characteristics, and reputation" has no interpretative foundation. This assertion finds no support in the text of Article 15.1, Article 20, or any other provision in Section 2 of the TRIPS Agreement. Moreover, the fact that these terms *are* used with respect to the function of a GI – a distinct type of intellectual property – indicates as context that these terms are *not* relevant to the distinguishing function of trademarks that is the concern of the TRIPS Agreement. The Panel should reject the complainants' argument which blurs the differences between trademarks and GIs.

¹²⁵ To illustrate the difference between trademarks and GIs, consider the example of *Prosciutto di Parma*. The phrase "Prosciutto di Parma" does not function as a trademark because it is purely descriptive – it describes prosciutto that comes from Parma. The phrase is inherently non-distinctive and therefore does not serve to distinguish the goods of one undertaking from those of other undertakings. *Prosciutto di Parma*, however, is protected because it indicates that the prosciutto originated in Parma, a region to which certain qualities and characteristics of prosciutto are attributable. Different commercial undertakings, each operating under its own distinguishing trademark, can sell prosciutto di parma using the *same* GI, provided that each meets the requirements for use of that GI. The trademark distinguishes one undertaking from another, while the GI distinguishes prosciutto from Parma from all other prosciutti based on its origin.

104. As Australia will discuss below, none of the complainants' assertions concerning the alleged "encumbrance" on the use of trademarks resulting from the tobacco plain packaging measure concerns the use of trademarks to distinguish the goods or services of one undertaking from those of other undertakings. Australia has outlined in detail why there is no interpretative basis to interpret "use" as distinguishing products in terms of their "quality, characteristics, and reputation". Nevertheless, given the importance of "quality, characteristics, and reputation" to the complainants' claims under Article 20, it is worth looking at each of these terms in more detail to examine why these terms do not relate to the distinguishing function of trademarks, but instead refer to the advertising and promotion function of trademarks.

i. "Quality"

105. It is unclear what the complainants mean when they refer to the function of trademarks as distinguishing products in terms of their *quality*. As Australia discussed above, the distinguishing function of trademarks pertains to quality insofar as a trademark indicates that all products bearing the same trademark were manufactured under the control of a single undertaking. However, this does not indicate that the trademarked goods have any *particular* "quality", or that they are necessarily "*high quality*". Rather, it indicates that the trademarked goods were manufactured in accordance with the quality control standards of a single undertaking, whatever those standards might be.

106. If by "quality", the complainants mean that a trademark can indicate that the trademarked product has some specific, objective attribute (e.g. that it contains menthol), this meaning of the term "quality" would seem to be indistinguishable from a "characteristic", which Australia will address below under that heading.

107. If by "quality" the complainants mean that a trademark can indicate that the trademarked product is "*high quality*", it is unclear to Australia how a trademark could indicate, in any real sense, that the trademarked product is "high quality". There is nothing to prevent a tobacco company from using highly elaborated trademarks – gold embossed cursive lettering, royal crests, lions rampant, etc. – in connection with a product that is physically

exactly the same as another product that is designed to appeal to a lower socioeconomic section of the market.¹²⁶ As Professor Tavassoli explains, these types of symbols create "artificial" perceptions of products rather than information about objective product characteristics.¹²⁷ The use of trademarks for this purpose is relevant to the advertising and promotion function of trademarks, *not* the distinguishing function of trademarks as defined in Article 15.1 of the TRIPS Agreement.

108. The tobacco plain packaging measure allows tobacco companies to use trademarked brand and variant names on retail tobacco packaging. This allows consumers to expect a consistency of experience with tobacco products bearing those trademarks. This is the only respect in which "quality" is relevant to the distinguishing function of trademarks under Article 15.1, and the complainants have presented no evidence that this function is encumbered by the tobacco plain packaging measure.

ii. "Characteristics"

109. The complainants are equally unclear in what they mean by "characteristics". This term could refer either to intrinsic characteristics of the trademarked product ("actual" or objectively verifiable characteristics) or to non-real "characteristics" that the tobacco manufacturer would like to have associated with its product, such as youthfulness, exclusivity, or masculinity. Neither one of these is relevant to the distinguishing function of trademarks.

110. If a sign conveys information about the intrinsic characteristics of a product (what the product "is"), it generally cannot be registered as a trademark.¹²⁸ This is because signs indicating what the product is are inherently non-distinctive. A picture of a cigarette, for example, is inherently non-distinctive when used in respect of cigarettes. To the extent that

¹²⁶ As Professor Tavassoli points out, "it is not just premium tobacco products that can be packaged in premium-looking packs. There is nothing preventing non-premium tobacco products from relying on visual and tactical cues that convey a premium positioning (e.g., gold colour, embossed features)." Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 129.

¹²⁷ Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 57: "Academics in marketing have long agreed that advertising creates perceived value that is extrinsic to (independent of) the underlying 'real' or 'objective' product characteristics."

¹²⁸ See, e.g. Expert Report of G. Dinwoodie (13 July 2014), Exhibit UKR-1, para. 12.

such signs can be registered as trademarks at all, it is only if the symbol acquires distinctiveness through use and thereby takes on a secondary meaning.¹²⁹

111. While descriptive terms cannot ordinarily be registered as trademarks, descriptive terms may form part of a registered trademark. For example, the phrase "Alpine Menthol" can be registered as a trademark for cigarettes because the term "Alpine" is inherently distinctive in respect of cigarettes. While the term "menthol" is descriptive (the product has menthol added to it) and therefore could not be registered as a trademark on its own, the words "Alpine Menthol" are inherently distinctive when used in combination. In this way, a trademark can convey information about an intrinsic characteristic of the product. However, this is not a part of the distinguishing function of trademarks, as it is not necessary to convey information about the intrinsic characteristics of the product in order to indicate that all similar products bearing that trademark derive from the same commercial source.

112. Even if the complainants are primarily concerned with the use of trademarks to convey information about the actual characteristics of tobacco products, the tobacco plain packaging measure does not impede the use of trademarks for this purpose. The TPP Act provides that the permissible variant name for a tobacco product is the name used to distinguish that variant of tobacco product from other tobacco products that are supplied under the same brand, business or company name, by reference to one or more of the following: (a) containing or not containing menthol; (b) being otherwise differently flavoured; (c) purporting to differ in strength; (d) having or not having filter tips or imitation cork tips; or (e) being of different length or mass.¹³⁰ Accordingly, when the complainants argue that the tobacco plain packaging measure encumbers the trademark's ability to convey information about the "characteristics" of the trademarked product, they are not talking about these "characteristics". Nor have the complainants identified any other objective characteristic of tobacco products that trademarks previously conveyed that can no longer be conveyed under the tobacco plain packaging measure.

¹²⁹ For example, the term "sudsy" could be merely descriptive of laundry detergent, or, through regular use, it could come to indicate the commercial origin of a particular brand of laundry detergent ("Sudsy"), in which case it might be eligible for registration as a trademark.

¹³⁰ TPP Act (Cth), Exhibit AUS-1, Subsection 4(1).

113. Australia suspects that in referring to "characteristics", what the complainants have in mind is the use of trademarks to convey *non-real* "characteristics" of tobacco products. That is, the complainants are referring to the respects in which the tobacco plain packaging measure reduces the opportunities for tobacco companies to use figurative elements, colours, stylised typefaces, and other design elements to associate their products with particular social or attitudinal "characteristics" (masculinity, femininity, etc.) or with other positive associations that are not actual characteristics of the product (such as purity, cleanliness, or healthiness). As Australia discussed above, the use of trademarks for this purpose is part of the advertising function of trademarks and is not a relevant "use" of trademarks under Article 20 of the TRIPS Agreement.

114. In short, "characteristics" play no role in the use of trademarks to distinguish the goods of one undertaking from those of other undertakings. In fact, to the extent that a sign expressly conveys information about the characteristics of a product, this would ordinarily be incompatible with the sign functioning as a trademark.

iii. "Reputation"

115. The last part of the complainants' three-part formula is the use of trademarks to "distinguish" a trademarked product in terms of its "reputation". The only apparent connection between reputation and the distinguishing function of trademarks relates to the "quality/guarantee" function. As Australia explained above, by indicating that the trademarked products originate from the same commercial source, a trademark allows a trademark owner to indicate that all products bearing that trademark were made according to the same standards, whatever those standards might be from time to time. This aspect of the distinguishing function of trademarks has at least some connection to the concept of "reputation", as it allows consumers to expect a consistency of experience (i.e. to develop a "reputation") across the trademarked products. However, trademarks do not by themselves convey information about the "reputation" of a product, or indicate that the product has a *good* reputation. It is only through repeated use of the trademarked product that consumers may come to expect a particular experience with products bearing that trademark.

116. Once again, Australia suspects that this understanding of the concept of "reputation" is not what the complainants have in mind. By "reputation", the complainants are likely

referring to the use of trademarks to impart a particular social or attitudinal "reputation" to tobacco products, as in "this cigarette has the reputation of being smoked by men", or "this cigarette has the reputation of being smoked by cool kids". Trademarks can have these "reputational" effects both through the design of the trademark itself (e.g. through the use of design elements that convey masculinity or "coolness"), and through associations with the trademark that are imparted through other forms of advertising and promotion. Over time, the association of a trademark with a particular "reputation" – whether it is the demographic of the people who consume the product, the lifestyle with which consumption of that product is associated, or any other social or attitudinal "reputation" – can become widely known among consumers and prospective consumers of the product, to the point that the reputational association becomes self-reinforcing (e.g. "Longbeach cigarettes are for working class smokers because that is what working class smokers have always smoked").

117. Seen in this light, "reputation" is just another word for "advertising". But whether the complainants call it "advertising", "reputation", or some other term, the bottom line is that the use of trademarks for this purpose is not part of the distinguishing function of trademarks. Any encumbrance upon the use of trademarks for this purpose is not within the scope of Article 20 of the TRIPS Agreement.

(d) Conclusion on the relevant "use" of trademarks under Article 20

118. It is apparent that "quality, characteristics, and reputation" is a euphemism that the complainants have seized upon in order to describe the use of trademarks to advertise and promote tobacco products. That is, the complainants are referring to the use of trademarks to convey social or attitudinal "qualities", "characteristics", and "reputations" that tobacco companies would like to have associated with their products in order to increase their appeal to consumers or to particular segments of consumers. This is not a relevant "use" of trademarks under Article 20 of the TRIPS Agreement.

119. Australia can imagine two principal reasons why the complainants have resorted to this interpretative sleight of hand. First, as Australia will discuss below, there is no evidence on the record that the tobacco plain packaging measure encumbers the relevant use of trademarks under Article 20 of the TRIPS Agreement, namely the use of trademarks to distinguish the goods of one undertaking from those of other undertakings. Second, the

complainants cannot concede that any special requirements imposed by the tobacco plain packaging measure encumber the use of trademarks to advertise and promote tobacco products, as this would amount to an acknowledgement that, to the extent that this "use" of trademarks is relevant under Article 20, there is a rational connection between this encumbrance and its objectives.

120. Whatever the complainants' motivations, however, the bottom line is that the use of trademarks to convey information about the "quality, characteristics, and reputation" of the trademarked product is not a relevant use of trademarks under the TRIPS Agreement. It is therefore irrelevant for the purposes of Article 20 whether the special requirements established by the tobacco plain packaging measure encumber this "use" of trademarks. In order to establish the threshold applicability of Article 20, the complainants must present a *prima facie* case that the special requirements at issue encumber the use of trademarks to distinguish the goods of one undertaking from those of other undertakings. As Australia will proceed to demonstrate, the complainants have not even attempted to demonstrate, let alone established a *prima facie* case that the tobacco plain packaging measure has this effect.

(e) The complainants have not even attempted to demonstrate that the tobacco plain packaging measure encumbers the use of trademarks in the course of trade to distinguish the products of one undertaking from those of other undertakings

121. The complainants have presented *no* evidence that any special requirements imposed by the tobacco plain packaging measure encumber the use of trademarks to distinguish the tobacco products of one undertaking from those of other undertakings. Rather, the tobacco plain packaging measure allows tobacco companies to use brand and variant names on retail tobacco packaging in order to distinguish their products from those of other undertakings.

122. For the purpose of the discussion that follows, Australia will assume for the sake of argument that Article 20 of the TRIPS Agreement encompasses both the permissive aspects of the tobacco plain packaging measure (i.e. the permission to use brand and variant names in a uniform format) as well as the prohibitive aspects of the measure (e.g. the prohibition on the use of trademarked figurative elements). The question under this *arguendo* analysis is whether the complainants have demonstrated that the permissive and prohibitive aspects of

the measure, taken together, encumber the ability of tobacco companies to use trademarks to distinguish their products in the course of trade.

123. Australia reiterates its arguments set out in its first written submission that the complainants have failed to establish that any special requirements encumber the use of a trademark *in the course of trade*.¹³¹ However, to refine the analysis further, Australia will assume – again, on an *arguendo* basis – that the phrase "in the course of trade" imposes no practical constraint upon the scope of Article 20. Under the complainants' interpretation of Article 20, the phrase "in the course of trade" is essentially an endless loop in which every "use" of a trademark is "in the course of trade", even after the trademarked product has been sold and the "course of trade" is complete under any effective interpretation of this phrase. Even accepting this erroneous interpretation of Article 20, the complainants have not meaningfully disputed the fact that tobacco products are not visible to consumers in the Australian market until after the consumer has selected which product he or she wishes to purchase.¹³² Thus, any encumbrance upon the use of trademarks in the course of trade must occur, if at all, after this point in time.

¹³¹ Australia's first written submission, paras. 346-359; see also Australia's response to Panel Question No. 103.

¹³² See Australia's first written submission, paras. 354-357. Victoria and Western Australia retain exceptions to the general ban on display of tobacco products for specialist tobacconists and (in Victoria only) duty free shops: see Australia's first written submission, Annexure C: Details of Restrictions on the Advertising and Promotion of Tobacco Products in Australia.

124. What this analysis comes down to, in practical terms, is whether the complainants have demonstrated that the use of trademarked brand and variant names in the uniform format prescribed by the measure is insufficient to permit companies to distinguish their products from those of other undertakings. This inquiry concerns the distinguishability, for example, of the following two packages:

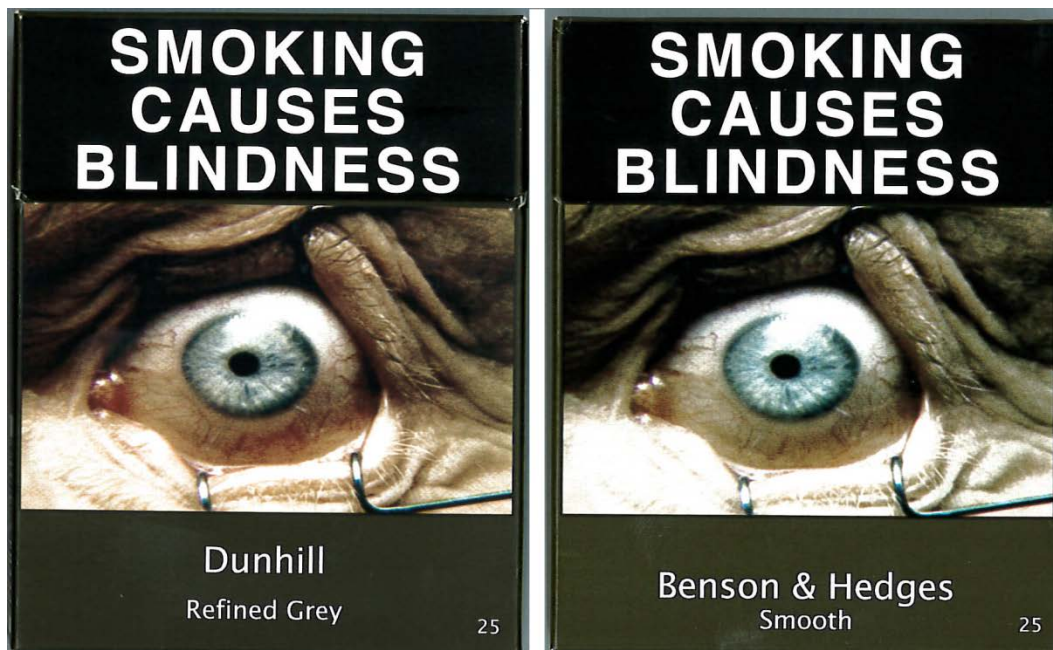


Figure 1: Example plain packs demonstrating distinguishability between products

125. The question is whether consumers are able to identify which of these products derives from the commercial source known as "Dunhill" as opposed to those products that derive from the commercial source known as "Benson & Hedges".

126. The complainants have placed massive quantities of expert evidence on the record of this dispute. They have commissioned numerous studies and empirical analyses specifically for the purpose of these proceedings. Not a single one of these pieces of evidence purports to undertake the type of analysis that Australia has just described, or anything even remotely resembling it. The complainants have offered no evidence at all that the special requirements established by the tobacco plain packaging measure encumber the use of trademarks to distinguish the tobacco products of one undertaking from those of other undertakings.

127. The only "evidence" to which any of the complainants has referred concerning the issue of distinguishability is a set of academic studies referenced by

the Dominican Republic.¹³³ These studies concern the effectiveness of "copycat" branding strategies, i.e. strategies in which a company brands its product to resemble the brand of a leading product in that market. The Dominican Republic cites these studies for the proposition that "consumers use design features such as colours, symbols, print style, and layout" in order to "distinguish goods and services in terms of quality, characteristics, and reputation".¹³⁴ For the reasons that Australia has explained, "quality, characteristics, and reputation" are not relevant to the use of trademarks under Article 20 of the TRIPS Agreement, so these studies are inapposite to what the Dominican Republic must demonstrate. Setting that problem aside, however, none of these studies analyses whether consumers are able to distinguish products of one undertaking from another based on the brand and variant name of the product.¹³⁵

128. These studies are also inapposite because in a world in which all other aspects of tobacco packages are standardised in appearance, it is even more apparent that the use of brand and variant names is sufficient to distinguish the tobacco products of one undertaking from those of another. With tobacco plain packaging, there is no opportunity for colours, typefaces, or other design elements to distract from the brand and variant names. Prior to plain packaging, there were examples of tobacco companies adopting a "copycat" trade dress to make their products appear similar to other products.¹³⁶ That is no longer an option under tobacco plain packaging. All tobacco products now look alike *except* for the brand and variant names. In this environment, the brand and variant names are easily identifiable on the package and permit consumers to distinguish the commercial source of one tobacco product from that of another. Moreover, since consumers in the Australian market must request tobacco products by reference to the brand and variant name of the product, the fact that these names are clearly presented on the package gives consumers the only information that they

¹³³ See Dominican Republic's response to Panel Question No. 87, para. 9, and Exhibits DR-260 to DR-263 cited therein.

¹³⁴ Dominican Republic's response to Panel Question No. 87, para. 9.

¹³⁵ The same is true in relation to the complainants' examples of the same product being sold in different markets using the same brand logo (colours, font, etc.), but different brand names. See, e.g. Dominican Republic's response to Panel Question No. 29, paras. 134-138. These examples have no bearing on whether consumers are able to distinguish products in a particular market based on the brand and variant name of the product.

¹³⁶ See Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 128.

need to distinguish the product of one undertaking from another when making a subsequent purchase decision.¹³⁷

129. In the absence of any evidence, the complainants have identified only one other basis on which to argue that the use of trademarked brand and variant names in a standardised format is insufficient to allow tobacco companies to distinguish their products from those of other undertakings. The complainants argue that because Article 15.1 of the TRIPS Agreement provides that "[a]ny sign, or any combination of signs", including "figurative elements and combinations of colours", shall be "eligible for registration as trademarks", it must be the case that colours, figurative elements, and other signs that are eligible for registration as trademarks are *necessary* to distinguish the goods of one undertaking from those of other undertakings.¹³⁸ Honduras, for example, points to the definition of a trademark in Article 15.1 and claims that "[t]he drafters of the TRIPS Agreement recognized that *more than the use of mere words would be necessary* in order for a trademark owner to be able to distinguish his/her products from the products of others."¹³⁹

130. The complainants are confusing what is *eligible for registration* as a trademark with what is necessary to distinguish the goods or services of one undertaking from those of other undertakings. The fact that a particular figurative element, for example, is a sign that is "*capable* of distinguishing the goods or services of one undertaking from those of other undertakings" does not mean that the figurative element is *necessary* for this purpose, i.e. that

¹³⁷ Justice Crennan of the High Court of Australia held in *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & Ors v The Commonwealth of Australia* (2012) 291 ALR 669, Exhibit AUS-500, at para. 292, "Distinctiveness' does not mean eye-catching – the test for distinctiveness is the function the get-up actually serves, rather than how well it is adapted to serve it. The 'reality of proprietorship' of the plaintiffs as registered owners of composite trademarks is that, used alone, albeit in the manner restricted by the Packaging Act, the brand names 'Winfield', 'Dunhill', 'Camel' and 'Old Holborn' are capable of discharging the core function of a trademark – distinguishing the registered owner's goods from those of another, thereby attracting and maintaining goodwill." (footnotes omitted). See also Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 126: "[b]rand name recognition has also been found to be the most important product attribute across cultures, more so than price or physical appearance, when consumers face uncertainty about products. Therefore, while TPP limits the ability to imbue the brand with 'artificial' meaning, the presence of the brand name on the tobacco pack preserves trademarks' core identification function." (Footnote omitted).

¹³⁸ Dominican Republic's first written submission, paras. 213, 233, 365-366; Honduras' response to Panel Question No. 87; Cuba's response to Panel Question No. 87; Indonesia's response to Panel Question No. 87.

¹³⁹ Honduras' response to Panel Question No. 87 (emphasis added).

the trademarked goods or services could not be distinguished in the absence of this figurative element. Many tobacco-related word marks are registered trademarks in Australia. These word marks have been registered as trademarks under Australian law because each one is a distinctive sign that is capable, *on its own*, of distinguishing the goods of one undertaking from those of other undertakings.¹⁴⁰ Honduras is simply incorrect in its assertion that "more than the use of mere words" is 'necessary' to distinguish the goods of one undertaking from those of other undertakings.

(f) Conclusion to Part II.C.2

131. For the reasons set forth in Part II.C.2, the complainants have failed to establish a *prima facie* case that the tobacco plain packaging measure "encumbers" the "use" of trademarks "in the course of trade". The complainants' claims are based on an erroneous understanding of the relevant use of trademarks under Article 20 of the TRIPS Agreement. In addition, the complainants have failed to present any evidence that the tobacco plain packaging measure encumbers the use of trademarks to distinguish the goods of one undertaking from those of other undertakings, which is the only relevant use of trademarks under Article 20. The Panel must therefore reject the complainants' claims under Article 20 of the TRIPS Agreement at the threshold.

3. Article 20 does not encompass the prohibitive elements of the tobacco plain packaging measure

132. For the reasons that Australia explained in its first written submission, Article 20 of the TRIPS Agreement does not encompass the respects in which the tobacco plain packaging measure prohibits the use of trademarks on tobacco packages and products. Properly interpreted in context, Article 20 concerns special requirements that encumber how a trademark may be used when municipal law otherwise permits the use of trademarks.¹⁴¹ Australia will not repeat those arguments here.

¹⁴⁰ For example, the word "Marlboro" is capable of distinguishing Marlboro cigarettes with or without the figurative element of the red Marlboro chevron. This is evidenced by the fact that "Marlboro" has been registered as a word mark in Australia since 1960 (trademark #161395).

¹⁴¹ Australia's first written submission, paras. 338-345.

133. Australia has further explained that a contrary interpretation of Article 20 has the potential to bring within its scope a variety of measures that, in Australia's view, were never intended to be covered by the TRIPS Agreement. Most importantly, if measures that prohibit the use of trademarks are covered by Article 20, and if the Panel were to find that Article 20 encompasses measures that encumber the use of trademarks on packaging to advertise and promote the trademarked product, contrary to the arguments set forth in Part II.C.2 above, then Australia does not see how Article 20 could be interpreted to exclude from its scope measures such as advertising restrictions and point-of-sale restrictions. The complainants appear to agree with Australia that Article 20 was not meant to cover these types of measures.¹⁴² At the same time, the complainants have offered no plausible interpretative or factual basis to distinguish these types of measures from the measure that is before the Panel.

134. The essence of the complainants' position concerning the scope of Article 20 is that the term "special requirements" does not encompass measures that only "incidentally" affect the use of trademarks.¹⁴³ The complainants have provided no interpretative basis for this assertion.¹⁴⁴ All third parties that address this issue agree that there is no basis for this distinction.¹⁴⁵

¹⁴² For example, Honduras states that "[a] general advertisement ban does not engage the TRIPS Agreement": Honduras' opening statement at the first substantive meeting of the Panel, para. 27. See also Dominican Republic's opening statement at the first substantive meeting of the Panel, para. 16.

¹⁴³ Dominican Republic's response to Panel Question No. 38: "None of the examples suggests that Article 20 is intended to discipline regulation of goods or services that has an incidental or consequential effect on trademark use." See also Indonesia's response to Panel Question No. 38; Honduras' response to Panel Question No. 38.

¹⁴⁴ At most, the complainants appear to rely on Article 19.1 to support their distinction between the tobacco plain packaging measure and measures that "incidentally" affect the use of trademarks. See, e.g. Dominican Republic's response to Panel Question No. 95; Dominican Republic's opening statement at the first substantive meeting of the Panel, paras. 15-17; Honduras' response to Panel Question No. 38; Honduras' opening statement at the first substantive meeting of the Panel, paras. 23-26; Indonesia's response to Panel Question Nos. 95, 96. However, as Australia has outlined in footnote 12, there is nothing in the text of Article 19.1 that limits its application to measures that "incidentally" prohibit the use of trademarks and measures that supposedly "directly" prohibit the use of trademarks. Australia recalls its argument that Article 19.1 supports *Australia's* interpretation that prohibitions on the use of trademarks do not constitute "special requirements" and therefore fall outside the scope of Article 20. See Australia's first written submission, para. 341; Australia's response to Panel Question No. 38.

¹⁴⁵ All third parties that address this issue agree that there is no basis for this distinction. See Norway's third party response to Panel Question No. 13; South Africa's third party response to Panel Question No. 13; Chinese Taipei's third party response to Panel Question No. 13; New Zealand's third party response to Panel Question No. 13; Canada's third party response to Panel Question No. 13.

135. Even if there were some interpretative basis to interpret Article 20 as only encompassing measures that "directly" affect the use of trademarks, the complainants cannot coherently articulate what this distinction means in practice. In particular, they cannot articulate why their understanding of the scope of Article 20 would encompass the tobacco plain packaging measure, but would not encompass other types of advertising restrictions, such as a ban on print media advertising, or restrictions on the display of tobacco products at the point of sale.

136. Honduras, for example, suggests that a measure is not encompassed by Article 20 if it "do[es] not address distinctive elements of a trademark" and if its application "is not limited to a particular aspect of trademarks."¹⁴⁶ In Australia's view, this amounts to a concession by Honduras that the prohibitive element of the tobacco plain packaging measure, at a minimum, is not within the scope of Article 20. The tobacco plain packaging measure prohibits *all* signs, including trademarks, from appearing on tobacco retail packaging, unless those signs are specifically permitted under the measure.¹⁴⁷ This requirement of the measure does not "address distinctive elements of a trademark" and its application is not "limited to a particular aspect of trademarks". It is a prohibition on the use of all signs. Honduras' formulation seems to be consistent with *Australia's* understanding that Article 20 relates only to measures that encumber the "use" of trademarks when trademarks can be "used", for example by imposing "special requirements" with respect to how a trademark can be used such as by regulating their "distinctive elements" or otherwise regulating "particular aspects" of their appearance.

137. Indonesia, for its part, suggests that a measure falls within the scope of Article 20 only if it "*expressly* prohibit[s]" the use of a trademark on an otherwise lawfully available good.¹⁴⁸ To similar effect, the Dominican Republic argues that Article 20 "appl[ies] to measures that *directly regulate* the use of a trademark", but does not apply to measures that have only "an incidental or consequential effect on trademark use."¹⁴⁹

¹⁴⁶ Honduras' response to Panel Question No. 38 (footnote omitted).

¹⁴⁷ See Australia's first written submission, para. 129.

¹⁴⁸ Indonesia's response to Panel Question No. 38, para. 43.

¹⁴⁹ Dominican Republic's response to Panel Question No. 38, paras. 151-152 (emphasis added). Dominican Republic endorses the statement by the European Union that "the notion of 'special requirement' does not cover requirements that affect the use of trademarks but that are otherwise unrelated to trademarks and

(continued)

138. In addition to having no identifiable interpretative basis, the problem with these formulations is that they lead to absurd, form-over-substance results. Consider the following hypothetical measures:

Measure A	Measure B
No tobacco advertisement may appear in print media.	No tobacco advertisement may appear in print media. The term "tobacco advertisement" is defined to mean any sign, including any trademarked sign, or other symbol or visual image that gives publicity to, otherwise promotes or is intended to promote the purchase or use of a tobacco product.
No tobacco advertisement may appear at the point of sale.	No tobacco advertisement may appear at the point of sale. The term "tobacco advertisement" is defined to mean any sign, including any trademarked sign, or other symbol or visual image that gives publicity to, otherwise promotes or is intended to promote the purchase or use of a tobacco product.

Table 1: Hypothetical advertising restrictions

139. The measures in the left-hand column do not "expressly prohibit" or "directly regulate" the use of a trademark. Their effect on the use of trademarks is only "incidental or consequential", insofar as the prohibition on tobacco advertising has the incidental or consequential effect of prohibiting the use of trademarks in these contexts. The measures in the right-hand column are identical in effect, but happen to use the term "trademark" in defining the term "tobacco advertisement". Does this mean that the measures in the right-

their function". See Dominican Republic's response to Panel Question No. 38, para. 153, citing the European Union's third party submission, para. 15.

hand column "expressly prohibit" or "directly regulate" the use of trademarks, while the measures in the left-hand column do not? If so, does this mean that the measures in the right-hand column fall within the scope of Article 20, while the measures in the left-hand column do not? This would be the effect of the complainants' attempted distinction – even though the measures are identical in their scope and effect.

140. The complainants have offered no way out of this conundrum. They have been unable to come forward with a viable interpretation of Article 20 that would encompass the prohibitive element of the tobacco plain packaging measure, but that would not simultaneously bring within its scope an array of measures that all parties appear to agree were not meant to be covered by this provision. If the Panel were to accept the complainants' attempt to cover over this problem with ill-defined distinctions that find no basis in the text of Article 20, Australia considers it is not inconceivable that a complainant would come before another WTO panel arguing that bans on print media advertising, for example, are "unjustifiable". After all, it is the complainants' position in the present dispute that advertising restrictions are ineffective and therefore "unjustifiable", so it is unclear why a complainant would not advance the same argument when the medium is a magazine as opposed to a package.

141. In Australia's view, there are two reasons why measures such as advertising restrictions and point-of-sale restrictions do not fall within the scope of Article 20. The first reason, as set forth in Part II.C.2 above, is that Article 20 relates only to measures that encumber the use of trademarks to distinguish the goods or services of one undertaking from those of other undertakings, and does not relate to measures that encumber the use of trademarks to advertise and promote goods or services. The second reason is that measures that prohibit the use of trademarks, as opposed to imposing special requirements on their use, do not fall within the scope of Article 20 for the reasons that Australia set forth in its first written submission. These are the only coherent ways to give effect to a proper understanding of the scope of Article 20, and unlike the complainants' flawed attempts to resolve this problem, they are well founded in principles of treaty interpretation.

142. In sum, the complainants have provided no credible interpretative basis for their contention that the prohibitive element of the tobacco plain packaging measure falls within the scope of Article 20. They have also provided no factual basis to distinguish tobacco plain

packaging from other measures that the complainants submit only incidentally affect the use of trademarks, such as advertising and promotion bans. Their attempts to articulate why prohibitions on the use of trademarks fall within the scope of Article 20 have only served to highlight the infirmities and illogical consequences of this position. The Panel should therefore find that the respect in which the tobacco plain packaging measure prohibits the use of trademarks is not within the scope of Article 20.¹⁵⁰

4. The complainants' interpretation of the term "unjustifiably" is unfounded

(a) Introduction to Part II.C.4

143. If the Panel were to find that the complainants have proven that the tobacco plain packaging measure encumbers by special requirements a relevant use of trademarks in the course of trade, notwithstanding the arguments set forth in the preceding section, the Panel would then need to determine whether the complainants have proven that Australia has imposed this encumbrance "unjustifiably". In this section, Australia will discuss the proper interpretation of the term "unjustifiably". In the next section, Part II.C.5, Australia will demonstrate that the complainants have failed to prove that any encumbrance resulting from the tobacco plain packaging measure, whatever that encumbrance might be, has been imposed "unjustifiably".

¹⁵⁰ Australia recalls the point made in its first written submission that any interpretation of the term "unjustifiably" in Article 20 must take into account the scope of "special requirements" that the Panel considers to fall within this provision. If the Panel considers that the term "special requirements" encompasses prohibitions on the use of a trademark (such as, potentially, a prohibition on tobacco advertising in print or broadcast media), the complainants' attempts to read a "necessity" or "least trade-restrictive" standard into Article 20, unfounded to begin with, become all the more problematic. See Australia's first written submission, para. 345.

144. In their submissions to the Panel, the parties and third parties have devoted a considerable amount of attention to the proper interpretation of the term "unjustifiably". Australia considers that it would be useful at this juncture to try to distil the main points of agreement and disagreement concerning the interpretation of this term. Australia believes that the following four points reflect the current state of the parties' positions on the interpretation of the term "unjustifiably":

- All parties appear to agree that, in order to be found not "unjustifiable", the encumbrance must be imposed in pursuit of a *legitimate objective*.¹⁵¹ The legitimacy of Australia's public health objectives has not been questioned in this dispute, and there are no points of interpretative disagreement to be discussed under this heading.
- All parties appear to agree that, in order to be found not "unjustifiable", there must be a *nexus* between the encumbrance imposed by the special requirements and its legitimate objective.¹⁵² The parties further appear to agree that, based on the ordinary meaning of the term "unjustifiably", this connection must be one that is rational or reasonable. As Australia will discuss in Part II.C.4(c), there is some disagreement among the parties and third parties concerning the appropriate test for a panel to apply under a rational connection standard.
- The Dominican Republic, Honduras, Cuba and a minority of the third parties believe that in order to be found not "unjustifiable", the encumbrance must be the *least-restrictive option available* to accomplish the Member's legitimate objective, in light of *reasonably available alternatives* that would make an equal or greater degree of contribution to the fulfilment of that objective while imposing a lesser degree of encumbrance upon the use of trademarks.¹⁵³ This element of the complainants'

¹⁵¹ Australia's first written submission, para. 366; Dominican Republic's first written submission, para. 743; Honduras' first written submission, para. 296; Cuba's first written submission, paras. 319-320; Indonesia's response to Panel Question No. 108.

¹⁵² Australia's first written submission, para. 383; Dominican Republic's first written submission, para. 388; Honduras' first written submission, para. 296; Cuba's first written submission, paras. 317-318; Indonesia's response to Panel Question No. 108.

¹⁵³ As in its first written submission, Australia will refer to this concept as a requirement of "least restrictiveness". It is now reasonably clear that the complainants consider their proposed requirement of "least restrictiveness" to refer to the least restrictive encumbrance upon the use of trademarks, rather than to the

(continued)

proposed test does *not* follow from the ordinary meaning of the term "unjustifiably", and the complainants do not seriously contend that it does. Rather, as Australia will discuss in Part II.C.4(c), the complainants' attempt to interpret the term "unjustifiably" as functionally equivalent to a standard of necessity is based on an erroneous "contextual" interpretation of Article 20.

- Finally, the complainants, and the Dominican Republic most extensively, argue that any interpretation of the term "unjustifiably" must take into account "the nature of trademarks and trademark protection". It is on this basis that the complainants argue that Australia was required to undertake an "individualised assessment" of the "specific features" of particular trademarks. Australia will demonstrate in Part II.C.4(d) that this argument has no interpretative basis. In any event, as Australia will discuss in detail in Part II.C.5(c)iv, this argument is now moot because it is clear that the Dominican Republic has either mischaracterised or misunderstood the objectives of the tobacco plain packaging measure and the manner in which it operates. By the Dominican Republic's own concession, its "individualised assessment" argument is inapplicable where, as in this case, the measure does not concern the "specific features" of individual trademarks.

145. It is apparent from these four points that the principal disagreement between Australia and the complainants concerning the interpretation of the term "unjustifiably" does not relate to the requirement of a nexus between the encumbrance and its objective. All parties agree that a nexus is required, and that it must be one that is rational or reasonable. The principal point of disagreement concerns the complainants' position that the term "unjustifiably" should be interpreted as functionally equivalent to a standard of "necessity". Australia and the complainants also disagree in respect of the "individualised assessment" argument, although, as noted, that argument is now moot.

146. In the discussion that follows, Australia will begin by making some observations concerning the requirement of a "rational connection" before turning to the main points of disagreement between Australia and the complainants concerning the interpretation of the

encumbrance that is least restrictive of international trade. See, e.g. Honduras' response to Panel Question No. 108; Dominican Republic's first written submission, para. 743; Cuba's first written submission, paras. 356-362.

term "unjustifiably". At the outset, however, Australia notes that the complainants have failed to demonstrate that the tobacco plain packaging measure is "unjustifiable" under *any* of the interpretations of that term that the parties and third parties have advanced before the Panel. The remaining points of interpretative disagreement concerning the meaning of the term "unjustifiably" are significant not because the Panel's resolution of those issues would affect the outcome of this dispute, but because of their systemic importance to the proper interpretation of Article 20 of the TRIPS Agreement.

(b) The term "unjustifiably" requires a rational connection between any encumbrance upon the use of trademarks resulting from the measure and the pursuit of a legitimate objective

147. All parties appear to agree that the term "unjustifiably", interpreted in accordance with its ordinary meaning, requires there to be a nexus between (i) the encumbrance, if any, upon the use of a trademark in the course of trade that results from the special requirements imposed by the measure; and (ii) the legitimate objective that the measure seeks to fulfil.

148. All parties appear to agree that the term "unjustifiably" can be interpreted by reference to its non-adverbial form, "unjustifiable", and by reference to the opposites of these two terms, i.e. "justifiably" and "justifiable". Numerous parties have referred to the ordinary meaning of the term "justifiable" as something that is "able to be legally or morally justified; able to be shown to be just, reasonable, or correct; defensible".¹⁵⁴ Parties have also noted the connection between the terms "justifiable" and "reasonable", a connection that is apparent in the definition of "justifiable" just quoted.¹⁵⁵ The ordinary meaning of the term "reasonable", as it pertains here, is "[w]ithin the limits of reason"; "in accordance with reason; not irrational or absurd".¹⁵⁶

¹⁵⁴ Australia's first written submission, paras. 364-365; Indonesia's first written submission, para. 287; Honduras' first written submission, para. 292; Dominican Republic's first written submission, para. 379; Cuba's first written submission, para. 316.

¹⁵⁵ Australia's first written submission, para. 365; Honduras' first written submission, para. 292; Dominican Republic's first written submission, paras. 379-380; Cuba's first written submission, para. 316.

¹⁵⁶ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-545, p. 2481.

149. The ordinary meaning of the term "unjustifiably" thus focuses on the rationality or reasonableness of the connection between the encumbrance imposed by a measure and the measure's legitimate public policy objective.¹⁵⁷ As the definitions noted above make clear, "unjustifiably" is not an absolute standard. There will ordinarily be more than one possible outcome that is "*able to be shown to be just, reasonable, or correct*", or that is "*within the limits of reason*". Under a rational connection standard, the relevant inquiry is whether the complainants have shown that the relationship between the encumbrance imposed by the measure and the measure's objective is not one that is within the range of rational or reasonable outcomes.

150. All parties appear to agree that an encumbrance that "goes against" or "cannot be reconciled with" its objective is one that is neither rational nor reasonable.¹⁵⁸ This implication of the term "unjustifiably" is no longer relevant to this dispute in light of the complainants' abandonment of their argument that the tobacco plain packaging measure will "backfire" by leading to an increase in tobacco consumption.¹⁵⁹ There is no credible evidence or argument before the Panel that the tobacco plain packaging measure will undermine its public health objectives.

151. This leaves the interpretative question of what it means for there to be no "rational" or "reasonable" connection between any encumbrance imposed under a measure and its objectives when a complainant has failed to demonstrate that any encumbrance "goes against" its objectives. Australia submits that in this case, a complainant must demonstrate that any encumbrance is incapable of contributing to its objectives in order to discharge its burden of proof.

152. Australia notes that, even under a legal standard of "necessity", panels and the Appellate Body have found that a measure is capable of contributing to its legitimate

¹⁵⁷ As explained in Australia's first written submission, this ordinary meaning is further reinforced by the term's context and object and purpose of the TRIPS Agreement. See Australia's first written submission, paras. 370-383.

¹⁵⁸ Dominican Republic's first written submission, para. 737; Honduras' first written submission, para. 297; Cuba's first written submission, para. 319; Indonesia's first written submission, para. 360.

¹⁵⁹ Professor List states that there is no compelling evidence that the tobacco plain packaging measure has "backfired": Expert Report of J. List, Exhibit DR/IND-1, para. 16. See also Expert Report of J. Klick, Exhibit HON-118, fn 24.

objectives where there is "a genuine relationship of ends and means between the objective pursued and the measure at issue".¹⁶⁰ The Appellate Body has indicated that the existence of a "genuine relationship of ends and means" can be evaluated either in quantitative or qualitative terms, and that the ultimate objective of the inquiry is to determine whether the measure is "capable of making a contribution" to its objective.¹⁶¹ The Appellate Body has further indicated that, even under a legal standard of "necessity", there is no "pre-determined threshold of contribution" that the measure must be capable of achieving in order to be found "necessary".¹⁶²

153. These considerations suggest that, under a legal standard of "unjustifiability", and bearing in mind that the complainant bears the burden of proof, a complainant would need to demonstrate that an encumbrance is incapable of contributing to its objectives in order to prove that it is "unjustifiable".

i. Burden of proof

154. The complainants – and, again, the Dominican Republic most extensively – continue to argue that the responding Member bears the burden of proving that the encumbrance at issue is not "unjustifiable". This argument has no basis.¹⁶³

155. Based on its answers to the Panel's questions, it appears that the Dominican Republic's argument concerning the allocation of the burden of proof is based on its theory that a "legitimate interest" or a "protected treaty interest" in the use of trademarks underpins the interpretation of Article 20.¹⁶⁴ The Dominican Republic asserts that "the crucial importance of use" to fulfilling the "basic function" of trademarks is "relevant in allocating the burden of proof".¹⁶⁵ As Australia will demonstrate in Parts II.C.4(c)ii to

¹⁶⁰ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145 (emphasis added). See also Panel Report, *US – Clove Cigarettes*, paras. 7.379, 7.417.

¹⁶¹ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 149.

¹⁶² Appellate Body Report, *EC – Seal Products*, para. 5.213.

¹⁶³ See Australia's first written submission, paras. 427-433; Canada's third party submission, paras. 74-75; the European Union's third party submission, para. 37; New Zealand's third party submission, para. 44; Norway's third party submission, paras. 67-73; Turkey's third party submission, paras. 20-27; Singapore's third party submission, para. 38. The complainants' argument has attracted no third party support.

¹⁶⁴ Dominican Republic's response to Panel Question No. 104, paras. 109-111.

¹⁶⁵ Dominican Republic's response to Panel Question No. 104, para. 110.

II.C.4(c)iv below, the Dominican Republic's theory that Article 20 must be interpreted in light of a "legitimate interest" or a "protected treaty interest" in the use of trademarks is baseless. This theory provides no support for the Dominican Republic's proposed interpretation with respect to the burden of proof.¹⁶⁶

156. Neither the Dominican Republic nor any of the other complainants has identified any genuine interpretative basis for the proposition that the responding Member bears the burden of proof under Article 20. All parties agree that Article 20 is not an exceptions provision. It is therefore not the obligation of the responding Member to prove its applicability.

157. Article 20 is, instead, an affirmative obligation. It provides that "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements". Contrary to the assertion that the Dominican Republic made in its first written submission, which it now appears to have backed away from, Article 20 is not a "prohibition" that is subject to an "exception" or "qualification".¹⁶⁷ What Members "shall not" do under Article 20 is "*unjustifiably* encumber" the use of a trademark in the course of trade through the imposition of special requirements. Thus, in order to prove a violation of Article 20, the complaining Member must demonstrate that the responding Member has "*unjustifiably* encumbered" the use of a trademark in the course of trade.¹⁶⁸ As with any affirmative obligation, it is the complaining Member that bears the burden of proving that the obligation has been violated.¹⁶⁹

¹⁶⁶ Dominican Republic's response to Panel Question No. 104, para. 112.

¹⁶⁷ See, e.g. Dominican Republic's first written submission, para. 343.

¹⁶⁸ In response to Question 104 from the Panel, the Dominican Republic appears to concede that the phrase "shall not" refers to "be *unjustifiably* encumbered", not to "be ... encumbered". Dominican Republic's response to Panel Question No. 104, para. 113.

¹⁶⁹ See Australia's first written submission, paras. 427-430. Australia notes that, even under Article 2.2 of the TBT Agreement, it is the complaining Member that bears the burden of proving that a technical regulation is "more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would make": Australia's first written submission, paras. 529-531. There is no interpretative basis for a different allocation of the burden of proof under Article 20 of the TRIPS Agreement as compared to Article 2.2 of the TBT Agreement. If the complaining Member bears the burden of proving that a measure is "more trade-restrictive than necessary", then it surely bears the burden of proving that a measure is "unjustifiable".

(c) The term "unjustifiably" is not functionally equivalent to a standard of "necessity"

158. The majority of the third parties have agreed with Australia that the term "unjustifiably" requires an evaluation of the rationality or reasonableness of the relationship between the encumbrance and its objective, and have further agreed with Australia that this term cannot be understood as equivalent to a standard of "necessity".¹⁷⁰ And yet, this is precisely what the complainants are essentially asserting. While some of the complainants have made half-hearted attempts to deny this, the fact is that the elements of the legal standard that the complainants advocate closely resemble the elements of the legal standard that panels and the Appellate Body have formulated in relation to the term "necessary".¹⁷¹ Moreover, in their submissions to the Panel, the complainants have treated their analysis of whether the tobacco plain packaging measure is "unjustifiable" under Article 20 of the TRIPS Agreement as essentially interchangeable with their analysis of whether the measure is "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement. Such an approach ignores the ordinary meaning of the term "unjustifiable" and represents an attempt by the complainants to rewrite Article 20 to say something that it does not say.

i. The term "unjustifiably" does not require a "weighing and balancing" analysis

159. As Australia discussed in response to Question 108 from the Panel, the complainants and several of the third parties, including Brazil, Canada, China, and Japan, have suggested that the term "unjustifiably" requires a panel to "weigh and balance" factors such as the extent to which the measure encumbers the use of a trademark, on the one hand, and the extent to which that encumbrance is capable of contributing to its objectives, on the other.¹⁷² Australia disagrees.

¹⁷⁰ See New Zealand's third party submission, paras. 61-63; Singapore's third party submission, paras. 52-53; Norway's third party submission, para. 59; Uruguay's third party submission, paras. 52-53; Argentina's third party submission, para. 10; European Union's third party submission, paras. 24-37; China's third party submission, para. 49; Japan's third party submission, para. 19.

¹⁷¹ See Australia's first written submission, paras. 385-388.

¹⁷² Brazil's third party submission, para. 51; Canada's third party submission, para. 88; China's third party submission, para. 55; Japan's third party submission, paras. 20-22

160. As Australia explained in response to Panel Question 105, the concept of "weighing and balancing" is the hallmark of a "necessity" analysis. The term "necessary" appears in a variety of places throughout the covered agreements, most notably in several of the subparagraphs of Article XX of the GATT 1994 and in Article 2.2 of the TBT Agreement. In interpreting these provisions, panels and the Appellate Body have found that in order to evaluate whether a measure is "necessary", a panel must "weigh and balance" a number of different factors, including the importance of the objective pursued, the degree of contribution that the measure makes to its objective, and the extent to which the measure restricts international trade.¹⁷³ This process of "weighing and balancing" is one that the panel itself undertakes, in the first instance, to determine if the measure at issue is "necessary".

161. As Australia outlined in its first written submission, however, the relevant inquiry under a proper interpretation of the term "unjustifiably" is whether there is a rational relationship between the encumbrance imposed by the measure and the pursuit of a legitimate public policy objective, rather than a relational analysis of various factors that are more appropriately considered within the context of a "necessity" analysis.¹⁷⁴

162. Australia's concern about "weighing and balancing" is not an abstract concern in the context of this dispute. As Australia will discuss in Part II.C.6 below, Australia's decision to adopt tobacco plain packaging is supported by decades of research into the effects of tobacco advertising and promotion on the use of tobacco products. In the face of this overwhelming evidence, the complainants have sought to use these proceedings as a forum for advancing arguments that the tobacco industry has relied upon unsuccessfully in multiple other forums to oppose limitations on the advertising and promotion of tobacco products. The complainants have advanced these arguments as if it were the Panel's task to "weigh and balance" this evidence and essentially conduct a *de novo* review. This would not be the Panel's task under *any* legal standard, and it is certainly not the Panel's task when called upon to determine whether Australia's tobacco plain packaging measure is "unjustifiable".

¹⁷³ See Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178; Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.227.

¹⁷⁴ Australia's first written submission, paras. 384-408.

163. The complainants' invitation to the Panel to "weigh and balance" the evidence is particularly inappropriate in the case of a measure that is designed to protect public health. The *Declaration on the TRIPS Agreement and Public Health* states that the TRIPS Agreement "does not and should not prevent members from taking measures to protect public health", and it "reaffirm[s] the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose." The *Declaration* serves to underscore that the term "unjustifiably" in Article 20 provides Members with a wide degree of latitude to implement measures to protect public health and, unlike the term "necessary", contemplates a range of possible outcomes that are "able to be shown to be just, reasonable, or correct" or that are "within the limits of reason". In this relevant context, it is not a panel's function to "weigh and balance" the considerations, including public health considerations, that the Member took into account when crafting the measure at issue in order to substitute the panel's own assessment for that of the implementing Member.¹⁷⁵ Rather, the panel's function is to evaluate whether the complaining Member has demonstrated that an encumbrance upon the use of trademarks resulting from the measure at issue is "unjustifiable".

164. Ultimately, however, as Australia will demonstrate in Part II.C.5 below, the complainants have failed to demonstrate that any encumbrance resulting from the tobacco plain packaging measure is "unjustifiable" even if it were appropriate for the Panel to "weigh and balance" these factors under the rational connection standard. Thus, while there may be some disagreement concerning the appropriate test under a rational connection standard, any such disagreement is a systemic concern and does not affect the outcome of this dispute.

¹⁷⁵ Panels have reached the same conclusion when applying the term "reasonable". For example, in *Thailand – Cigarettes*, the issue before the panel was whether it represented a reasonable administration of laws under Article X:3(a) of the GATT 1994 for Thailand to give certain customs administration responsibilities to officials who also held positions within the state tobacco monopoly. While the panel considered that there was a potential for a conflict of interest arising from the same officials holding these two roles simultaneously, the panel also considered that Thailand had offered reasonable explanations as to why it had chosen to administer its laws in this manner. The panel agreed with the Philippines that there might have been "other ways and means to achieve Thailand's stated administrative objectives", but reiterated that it was not the panel's function under Article X:3(a) to "second guess" the Member's decision or "find the best administrative means to achieve a Member's goal." Panel Report, *Thailand – Cigarettes*, paras. 7.924-7.925. The panel considered that its function was to assess whether Thailand's choice was a reasonable one, not whether it was the only choice available or the choice that the panel itself would have made.

ii. The term "unjustifiably" does not impose a standard of "least restrictiveness"

165. As Australia noted at the outset of this section, a principal disagreement between Australia and the complainants concerning the proper interpretation of the term "unjustifiably" concerns the complainants' contention that the term "unjustifiably" imposes a requirement of "least restrictiveness".¹⁷⁶ As Australia has explained, interpreting the term "unjustifiably" to include a requirement of "least restrictiveness" would render this term functionally equivalent to a standard of "necessity".¹⁷⁷

166. To appreciate why the term "unjustifiably" cannot be interpreted as functionally equivalent to a standard of "necessity", it is useful to begin with some general observations about standards of justification under the covered agreements. Under any standard of justification, there is always an element of the legal inquiry that focuses on the nexus between the measure and its objective. This is true whether the standard is "necessary", "relating to", "reasonable", "undue", "unjustifiable", or anything else. The requirement of a nexus, of whatever degree or nature, is not what distinguishes the term "necessary" from other standards of justification.

167. What does distinguish the term "necessary" from other standards of justification is the connotation that the measure at issue was the *only* way of achieving the Member's objective in a WTO compatible manner. Within the covered agreements, this standard is reserved for measures that intrude upon a core WTO interest, such as adherence to the covered agreements. As panels and the Appellate Body have held, the term "necessary" requires an evaluation of whether the measure at issue involved the least possible intrusion upon that core WTO interest. This evaluation is performed by examining whether the measure at issue was the least restrictive means of accomplishing the Member's legitimate objective in light of other reasonably-available alternative measures that would have made an equal or greater

¹⁷⁶ For example, the Dominican Republic argues that the term "unjustifiably" should be interpreted to require an assessment of "the availability of alternative measures that could have been adopted, which would make an equivalent (or greater) contribution to the objective while imposing a lesser encumbrance on trademark use". Dominican Republic's response to Panel Question No. 108, para. 120. See also Honduras' response to Panel Question No. 108.

¹⁷⁷ Australia's first written submission, paras. 396-408.

degree of contribution to that objective. It is this element of "least restrictiveness" that distinguishes the term "necessary" from other standards of justification.

168. Seen in this light, the short answer to the complainants' attempt to interpret the term "unjustifiably" as imposing a requirement of "least restrictiveness" is that if this had been the drafters' intention, they would have used the term "necessary". Australia has explained, and the complainants have not denied, that the term "necessary" had a well-established meaning in the GATT *acquis* prior to the Uruguay Round.¹⁷⁸ As Australia explained in its first written submission, Article 20 of the TRIPS Agreement could easily have been drafted to incorporate a standard of necessity.¹⁷⁹

169. The fact that Article 20 does not use the term "necessary" as the basis for its standard of justification must be given interpretative effect. Just as the use of the same term in different provisions of the covered agreements creates a presumption that the term should be interpreted to have the same meaning, the use of different terms for the same treaty function creates a presumption that the terms were intended to have different meanings.¹⁸⁰ The fact that Article 20 does not use the term "necessary" indicates that Article 20 does not impose a requirement of "least restrictiveness". The term "unjustifiably" requires only that the measure have a rational connection to its objective. It does not require the measure to be the "least restrictive" means of contributing to that objective.

170. The complainants have been vague concerning the interpretative basis for their argument that the term "unjustifiably" imposes a standard of least restrictiveness. The complainants simply "propose" an interpretation of the term "unjustifiably" that includes this element, without clearly identifying the basis for this "proposal". As the complainants are aware, however, the meaning of a treaty term is not determined on the basis of "proposals". It

¹⁷⁸ Australia's first written submission, para. 392

¹⁷⁹ Australia's first written submission, paras. 393-394.

¹⁸⁰ See Australia's first written submission, para. 394 and fn 575. The panel in *Canada – Pharmaceutical Patents*, p. 77 noted that "The Appellate Body, in *Japan – Taxes on Alcoholic Beverages*, had made it clear that due meaning had to be given to the distinction between different words and expressions. Obviously, if the framers of the TRIPS Agreement had intended Article 30 to bear the same meaning as Article 13, they would have used the same words in each provision. The fact that they did use the same language in Article 26.2, but not in Article 13 (or Article 17), was highly significant."

is determined on the basis of a proper application of the principles of treaty interpretation set out in the Vienna Convention.

171. At least one thing seems clear: the complainants do not seriously contend that a requirement of "least restrictiveness" follows from the ordinary meaning of the term "unjustifiably". The Dominican Republic, for example, readily concedes that based on the ordinary meaning of this term, "an encumbrance on the use of a trademark is 'unjustifiable' if it is not rational, reasonable, proper, defensible or warranted."¹⁸¹ This focus on the rationality or reasonableness of the encumbrance implies a range of possible outcomes that could be considered rational or reasonable. It does not imply that the measure at issue was the "least restrictive" means of contributing to the fulfilment of the Member's legitimate objective. The complainants have made no attempt to demonstrate that this conclusion follows from the ordinary meaning of the term "unjustifiably".

172. As far as Australia can discern, the complainants' argument that the term "unjustifiably" should be interpreted to impose a requirement of "least restrictiveness" is based on a contextual argument. The essence of the complainants' argument is that because trademark owners have a "legitimate interest" in using their trademarks under Article 17 of the TRIPS Agreement, the term "unjustifiably" in Article 20 must be interpreted to encompass a requirement of "least restrictiveness". A distinct but related variation of this argument, which is not contextual at all, is that because Article 20 reflects a concern for the use of trademarks, it follows that the use of trademarks is a "protected treaty interest" that deserves the highest levels of protection, including a requirement of "least restrictiveness".

173. The complainants have attached great significance to the concept of a "legitimate interest" or a "protected treaty interest" in the use of trademarks in relation to their interpretation of Article 20, despite the absence of these terms in the text of that provision. For example, as noted above, the Dominican Republic agrees with Australia that the ordinary meaning of the term "unjustifiably" supports the conclusion that "an encumbrance on the use of a trademark is 'unjustifiabl[e]' if it is not rational, reasonable, proper, defensible or

¹⁸¹ Dominican Republic's response to Panel Question No. 108, para. 119.

warranted."¹⁸² In its response to Question 99, however, the Dominican Republic explains that it relies on the concept of a "legitimate interest" in the use of a trademark to support its *further* interpretative conclusions that the term "unjustifiably": (1) requires an "individualised assessment" of encumbrances imposed upon the use of trademarks; (2) requires an evaluation of "whether alternative measures would make an equal or greater contribution to the objective but without encumbering the use of a trademark to the same extent" (i.e. "least restrictiveness"); and (3) means that the responding Member bears the burden of proof under Article 20 to demonstrate that an encumbrance is not "unjustifiable".¹⁸³

174. The difference between Australia and the complainants in respect of the interpretation of the term "unjustifiably" clearly hinges upon the relevance, if any, of the concept of a "legitimate interest" or a "protected treaty interest" in the use of a trademark. It is therefore worth examining in detail the basis on which the complainants seek to rely on these concepts to interpret the term "unjustifiably". Australia will begin with the complainants' contextual argument based on Article 17 of the TRIPS Agreement, and then turn to their reliance on the concept of a "protected treaty interest" in the use of trademarks. Australia will conclude with a brief discussion of the complainants' attempt to find a requirement of "least restrictiveness" in the jurisprudence under Article XX of the GATT 1994.

iii. The context of Article 17

175. Article 17, entitled "Exceptions", states that:

Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

176. It is undisputed that the reference in Article 17 to "the rights conferred by a trademark" refers to the rights conferred under Article 16. It is likewise undisputed that the rights that Members are required to confer under Article 16 are rights of exclusion and do not include a right to use a trademark. Article 17 therefore concerns "limited exceptions" to the

¹⁸² Dominican Republic's response to Panel Question No. 108, para. 119.

¹⁸³ Dominican Republic's response to Panel Question No. 99, para. 69.

rights of exclusion that a Member is required to confer under Article 16.¹⁸⁴ Article 17 permits a Member to establish "limited exceptions" to these rights of exclusion, "provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties". This is the context in which Members are required to "take account of" a trademark owner's "legitimate interest" in using its trademark to distinguish its goods or services from those of other undertakings in the course of trade.

177. Before turning to the contextual significance of this provision to the interpretation of Article 20, it is important to note the limited nature of the obligation that Article 17 establishes, even by its own terms. Article 17 requires Members merely to "take account of" the legitimate interests of trademark owners and third parties when establishing exceptions to the rights of exclusion conferred under Article 16. As the panel in *EC – Trademarks and GIs (Australia)* observed, the requirement to "take account of" these legitimate interests is a lesser requirement than to "protect" these interests.¹⁸⁵ The panel contrasted Article 17 with other exceptions provisions in the TRIPS Agreement, which require Members to ensure that exceptions to intellectual property rights do not "unreasonably prejudice" the legitimate interests of the owner of the intellectual property right.¹⁸⁶ The panel considered that this difference in terminology "suggests that a lesser standard of regard for the legitimate interests of the owner of the trademark is required".¹⁸⁷

178. The obligation in Article 17 to "take account of" the legitimate interests of trademark owners suggests that Members are simply required to take into consideration the legitimate interests of trademark owners when establishing exceptions to the rights of exclusion defined in Article 16.¹⁸⁸ This obligation does not require Members to protect or otherwise give

¹⁸⁴ See Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.647.

¹⁸⁵ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.662.

¹⁸⁶ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.671, citing TRIPS Agreement Article 13 (exceptions to copyrights may not "unreasonably prejudice the legitimate interests of the right holder"); Article 26.2 (exceptions to protections for industrial designs may not "unreasonably prejudice the legitimate interests of the owner of the protected design"); and Article 30 (exceptions to exclusive rights conferred by patent may not "unreasonably prejudice the legitimate interests of the patent owner").

¹⁸⁷ Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.671. Australia notes that this is yet another instance in which a panel has understood that differences in terminology must be given interpretative effect.

¹⁸⁸ The ordinary meaning of "take account of" is to "take into consideration": *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-539, p. 16.

special priority to those interests, or even to ensure that those interests are not "unreasonably prejudiced".¹⁸⁹ Nor does this obligation require Members to avoid any conflict or any unreasonable conflict with the normal exploitation of the trademark, unlike in relation to copyrights, designs and patents.¹⁹⁰ Yet it is on the basis of this limited obligation in a different provision of the TRIPS Agreement that the complainants seek to found their elaborate theories as to what the term "unjustifiably" means. It is evident that the complainants' "legitimate interests" argument rests on a weak foundation before Australia even begins to examine the contextual significance of Article 17 to the interpretation to Article 20.

179. Turning to that examination, the complainants have yet to offer any explanation for why the context provided by Article 17 would require the Panel to read the requirements of that provision into Article 20. Article 17 and Article 20 are two different provisions addressing two different topics. As discussed above, and in Australia's first written submission, Article 17 concerns exceptions to the rights conferred under Article 16, which all parties agree are rights of exclusion and do not include a right of use. Article 20, by contrast, is not an exceptions provision, but rather an affirmative obligation that Members undertake in respect of encumbrances imposed upon the use of trademarks in the course of trade. Thus, Article 20 concerns measures affecting the use of trademarks by trademark owners, whereas Article 17 does not.

180. For these reasons, as Australia explained in response to Panel Question 99, the contextual relevance of Article 17 to the interpretation of Article 20 is primarily by way of contrast. To begin with, it is contextually significant that the TRIPS Agreement does not address encumbrances upon the use of trademarks as "exceptions" to the "rights conferred" by a trademark. This confirms that the TRIPS Agreement does not confer upon trademark

¹⁸⁹ The panel in *US – Clove Cigarettes* also considered the meaning of the expression "take account of" in the context of Article 12.3 of the TBT Agreement. Citing *EC – Approval and Marketing of Biotech Products* (Panel Report, para. 7.1620) with approval, the panel found that "take account of" means "consider along with other factors before reaching a decision". The panel further found that "take account of" in the context of Article 12.3 does not mean that a Member must "agree with or accept" the other Member's position and desired outcome. Panel Report, *US – Clove Cigarettes*, paras. 7.632-7.633, 7.646.

¹⁹⁰ See Articles 13, 26 and 30 of the TRIPS Agreement.

owners a right to use their trademarks, as the parties have now agreed.¹⁹¹ An encumbrance upon the use of a trademark in the course of trade is not an exception to any right that a trademark owner possesses.

181. This is the first of several reasons why the obligation to "take account of the legitimate interests of the owner of the trademark" cannot be imported from Article 17 into Article 20, as the complainants suggest. This obligation, however limited in nature, makes sense in the context of Article 17 because any exception to the exclusive rights conferred by a trademark will necessarily intrude upon rights that trademark owners *actually possess*. This is why Article 17 requires the Member establishing the exception to "take account of" trademark owners' legitimate interests. By contrast, a measure imposing an encumbrance upon the use of a trademark in the course of trade does *not* intrude upon any right that trademark owners possess. There is no particular reason in this context why the Member imposing the encumbrance should be obligated to "take account of" the trademark owner's "legitimate interests".

182. The absence of comparable language in Article 20 confirms that no such obligation exists. The context provided by other provisions within the same agreement can be relevant both in their similarity and their dissimilarity to the provision to be interpreted.¹⁹² The fact that Article 20 does not require Members to "take into account the legitimate interests of the owner of the trademark", in contrast to Article 17, strongly suggests that the drafters of the TRIPS Agreement did not consider this to be a relevant or necessary requirement in the case of measures that impose an encumbrance upon the use of a trademark.¹⁹³ Having expressly imposed this requirement in the case of exceptions to the rights of exclusion conferred under Article 16, the drafters' decision not to repeat this requirement in Article 20 could not have been an oversight.

¹⁹¹ Cuba appears to be the outlier in this respect, and maintains that Article 16 and 20 of the TRIPS Agreement recognise the right to use a trademark. See Cuba's response to Panel Question No. 99.

¹⁹² See Australia's first written submission, paras. 391-394; Appellate Body Report, *US – Gasoline*, pp. 17-18.

¹⁹³ Several third parties expressly agree with Australia's interpretation: see, e.g. Singapore's third party submission, para. 49; New Zealand's third party response to Panel Question No. 14; Canada's third party response to Panel Question No. 14; Norway's third party response to Panel Question No. 14.

183. In fact, as Australia has previously noted, Article 20 expressly contemplates that a Member may require the use of a trademark "in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings", yet nothing in Article 20 suggests that such an effect would have any bearing upon the meaning of the term "unjustifiably". Nothing in the text or context of Article 20 suggests that this term requires a consideration of "less restrictive" alternatives merely because an encumbrance upon the use of a trademark in the course of trade might affect the "legitimate interests" of a trademark owner.¹⁹⁴

184. It should be apparent that the complainants are trying to engage in interpretative alchemy. They begin with an obligation contained in a provision of the TRIPS Agreement *other* than the provision under consideration. As explained, that obligation – to "take account of" the "legitimate interests" of trademark owners when establishing exceptions to the rights of exclusion conferred by a trademark – is a limited affirmative obligation and certainly does not mean that a Member must not prejudice those legitimate interests. From this weak foundation, the complainants argue that a trademark owner's "legitimate interest" in the use of a trademark, even though it is not a right conferred by the TRIPS Agreement, is an "interest" that must be "pervasive" in the interpretation of the Agreement's trademark provisions.¹⁹⁵ This is the basis on which the complainants' seek to interpret the term "unjustifiably" in Article 20 as functionally equivalent to a standard of necessity. Not only is this a baseless contextual argument on its face; it also ignores the fact that, if anything, it is the *absence* of a comparable obligation in Article 20 that provides the more relevant context for the interpretation of the term "unjustifiably".

185. In sum, the complainants' contextual argument based on Article 17 of the TRIPS Agreement provides no support for their contention that the term "unjustifiably" includes a requirement of "least restrictiveness".

¹⁹⁴ See the European Union's response to Panel Question No. 17.

¹⁹⁵ In support of this proposition, the complainants also rely on the fact that the word "use" appears in various provisions of the TRIPS Agreement, but fail to explain the interpretive relevance of this observation. See, e.g. Dominican Republic's opening statement at the first substantive meeting of the Panel, para. 10.

iv. "Protected Treaty Interest"

186. A second and closely related basis on which the complainants seek to interpret the term "unjustifiably" as equivalent to a standard of "necessity" is their argument that because Article 20 reflects a concern for the ability of trademark owners to use their trademarks, it must be the case that this concern is deserving of the highest levels of treaty protection. The complainants repeatedly refer to the use of trademarks as a "protected treaty interest" and suggest that because the drafters of the TRIPS Agreement chose to "protect" this "interest" in Article 20, this provision must be interpreted to require the least possible intrusion upon the use of trademarks.¹⁹⁶

187. This approach is not supported by a proper interpretation of Article 20 in accordance with the Vienna Convention. It is not a contextual argument because it is not based on the context of Article 20. The very existence of a provision does not provide "context" for its interpretation – that would amount to a circular form of interpretation. Nor is it clear that this argument is based on a consideration of the object and purpose of the TRIPS Agreement. The complainants do not appear to call it that, and in any event the object and purpose of the TRIPS Agreement is to promote the "effective and adequate protection of intellectual property *rights*". All parties agree that these rights do not include a "right" to use trademarks.

188. The complainants' argument about a "protected treaty interest" appears to be just another way of asserting that the TRIPS Agreement has the use of trademarks as one of its *paramount* concerns, even though there is nothing in the TRIPS Agreement to support this conclusion. The complainants seek to distinguish a "right of use", which they agree is not conferred by the TRIPS Agreement, from what they characterise as an "interest in use" and the "importance of use" in allowing trademarks to "fulfil their basic function". While the complainants accused Australia at the first substantive meeting of setting up and knocking down a straw man "right of use" argument,¹⁹⁷ the complainants' arguments about "interests in use" and the "importance of use" are essentially the "right of use" argument in a different

¹⁹⁶ See, e.g. Dominican Republic's response to Panel Question Nos. 108 and 89, para. 26. Other complainants refer to a "protected interest": Indonesia's response to Panel Question No. 99; Dominican Republic's response to Panel Question Nos. 89, 108.

¹⁹⁷ See, e.g. Dominican Republic's response to Panel Question No. 94; Dominican Republic's opening statement at the first substantive meeting of the Panel, para. 9.

guise. The complainants' argument in this respect is essentially teleological – because trademarks serve to "distinguish the goods or services of one undertaking from those of other undertakings" when they are used for this purpose, it must be the case that the TRIPS Agreement has the protection of this *telos* as one of its core objectives, and that the term "unjustifiably" must be interpreted in this light.

189. The first problem with this argument is that it begs the question of what "interests" the TRIPS Agreement seeks to "protect". This question is answered by examining the relevant provisions of the Agreement, not by engaging in teleological reasoning. As Australia explained in its first written submission, the principal concern of the TRIPS Agreement is to ensure that all Members recognise and enforce a certain minimum standard of intellectual property rights. In each instance, the TRIPS Agreement defines these rights in terms of rights of exclusion, and does not once refer to any "right of use" – as the complainants have now conceded in the case of trademarks and GIs. The complainants' teleological observations concerning an "interest in use" and the "importance of use" would apply to *all* forms of intellectual property covered by the TRIPS Agreement, yet it is clear from its terms that the Agreement does not grant rights with respect to the use of intellectual property.

190. The only provision in the TRIPS Agreement that imposes any limitation on measures that restrict the use of intellectual property is Article 20. The Dominican Republic tries to turn this fact to its advantage by arguing that "[t]he drafters' decision to protect the 'use' of trademarks, but not the 'use' of other forms of intellectual property, highlights the particular significance attached to protecting the use of a trademark, so as to enable a trademark to fulfil its basic function."¹⁹⁸ However, the use of other forms of intellectual property is at least equally important to allowing those forms of intellectual property to "fulfil their basic function". Moreover, the owners of other forms of intellectual property have at least an equally legitimate "interest" in the use of that intellectual property. Nevertheless, the TRIPS Agreement imposes no constraints on how Members may regulate the use of other forms of intellectual property. This confirms that the use of intellectual property, of any type, is not a primary concern of the TRIPS Agreement and is a matter that the Agreement leaves almost entirely unconstrained.

¹⁹⁸ Dominican Republic's response to Panel Question No. 99, para. 64.

191. It is worthwhile, in this respect, to compare the manner in which the TRIPS Agreement addresses the use of trademarks, on the one hand, and the use of GIs, on the other. As discussed above, trademarks and GIs are distinct but related forms of intellectual property. Both serve to indicate the origin of a good – its commercial origin in the case of trademarks, and its territorial origin in the case of GIs. Article 20 of the TRIPS Agreement imposes an affirmative obligation upon Members not to encumber the use of trademarks "unjustifiably", but there is nothing in Section 3 of the TRIPS Agreement that imposes a corresponding obligation in the case of GIs.

192. In the end, the complainants' ruminations about "interests in use" and "protected treaty interests" do nothing to advance the interpretation of the term "unjustifiably", even assuming that these ruminations are somehow relevant under the Vienna Convention. The complainants' arguments about "interests" amount to an assertion that because Article 20 imposes *some* constraint upon the ability of Members to encumber the use of trademarks, it must be the case that the use of trademarks is a paramount concern of the TRIPS Agreement that deserves the *highest* levels of treaty protection, including a requirement of "least restrictiveness". But this assertion simply assumes the conclusion of the interpretative analysis. *Every* affirmative obligation under the covered agreements could be said to reflect a "protected treaty interest", but it does not follow that each such "interest" is equally important or that the obligation must be interpreted to impose the highest levels of protection for that "interest".

193. The nature of the obligation that a treaty provision imposes can be determined only by interpreting the relevant treaty terms in accordance with their ordinary meaning, in their context and in light of the object and purpose of the agreement. The process of treaty interpretation does not begin by assuming the conclusion of the interpretative process and then interpreting the treaty terms to fit that conclusion. The obligation set forth in Article 20 of the TRIPS Agreement is that Members may not encumber by special requirements the use of trademarks in the course of trade "unjustifiably". For the reasons that Australia has explained, the term "unjustifiably", properly interpreted, is not equivalent to a standard of "necessity" and does not impose a requirement of "least restrictiveness". The complainants' arguments about "protected treaty interests", whatever their interpretative relevance, do not support a different conclusion.

v. The jurisprudence under the chapeau to Article XX

194. Finally, the complainants have made a number of arguments as to why, in their view, prior panel and Appellate Body reports interpreting the chapeau to Article XX of the GATT 1994 support their interpretation of the term "unjustifiably" and, in particular, their contention that this term should be interpreted as functionally equivalent to a standard of necessity. These arguments are based on misguided analogies between Article XX of the GATT 1994 and Article 20 of the TRIPS Agreement.

195. As Australia has explained previously, the jurisprudence concerning the interpretation of the term "unjustifiable" in the chapeau to Article XX is relevant because prior panels and the Appellate Body have interpreted and applied the same term (in its non-adverbial form) that the Panel has been called upon to interpret and apply in the context of Article 20 of the TRIPS Agreement. As Australia explained in its first written submission and in response to Panel Question 107, the significance of this jurisprudence is that it confirms that the term "unjustifiably" concerns the rationality or reasonableness of the connection between the encumbrance and its objective. Australia further explained in response to Question 107 that the jurisprudence concerning the phrase "arbitrary or unjustifiable discrimination" necessarily concerns the entirety of that phrase, as well as the immediate context in which that phrase is used. Australia does not contend that the entirety of the Article XX jurisprudence can or should be transposed to Article 20 of the TRIPS Agreement.

196. This is the fundamental problem with the complainants' attempts to invoke Article XX in support of their argument that the term "unjustifiably" should be interpreted as functionally equivalent to a standard of "necessity". The Dominican Republic, for example, observes that the "provisional justification" of a measure takes place in the subparagraphs of Article XX, and it implies that the term "unjustifiably" in Article 20 must have a different meaning because it "is the only word addressing the justification of a challenged measure" under this provision.¹⁹⁹ In essence, the Dominican Republic's argument seems to be that because the term "unjustifiably" in Article 20 of the TRIPS Agreement is the only term in this provision that defines the standard of justification, this term must be interpreted to serve *both*

¹⁹⁹ Dominican Republic's opening statement at the first substantive meeting of the Panel, paras. 49-50.

of the functions found in Article XX, i.e. the provisional justification under one of the subparagraphs and the anti-circumvention analysis under the chapeau.

197. The Dominican Republic's argument assumes that Article 20 of the TRIPS Agreement and Article XX of the GATT 1994 should be interpreted *in pari materia*. This assumption is incorrect. Article 20 of the TRIPS Agreement is not an exceptions provision, and there is no basis to transpose the structure and functions of Article XX into Article 20 of the TRIPS Agreement. The term "unjustifiably" in Article 20 of the TRIPS Agreement does not take on a different meaning merely because it stands by itself, whereas it is only one element of the legal inquiry under a different and unrelated provision of the covered agreements.

198. Several of the complainants also argue that the jurisprudence interpreting the chapeau to Article XX supports their contention that the term "unjustifiably" in Article 20 of the TRIPS Agreement requires an examination of whether the measure adopted was the least-restrictive option available to accomplish the Member's objective in light of other reasonably available alternatives. However, the examples that the complainants provide do not stand for that proposition. These examples reflect the application by panels and the Appellate Body of the *entire* standard set forth in the chapeau, i.e. "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". Moreover, these examples reflect the strong bias that the GATT 1994 has against discrimination, a bias that is reflected throughout its provisions and that goes to the heart of the multilateral trading system.²⁰⁰

²⁰⁰ In *US – Gasoline*, the Appellate Body found the discrimination at issue (allowing US refiners to calculate an individual baseline while imposing a statutory baseline on non-US refiners) to be "unjustifiable discrimination" and a "disguised restriction on international trade" in light of the failure by the United States to undertake efforts, such as entering into cooperative arrangements with the affected foreign governments, to permit non-US refiners to calculate an individual baseline and the failure to count the higher costs for foreign refiners of complying with the statutory baseline: Appellate Body Report, *US – Gasoline*, pp. 28-29. In *US – Shrimp*, the Appellate Body found the discrimination at issue to be "unjustifiable" for various reasons including because the United States had negotiated international agreements for the protection and conservation of sea turtles with some Member countries, but not with others. The Appellate Body noted that this was "plainly discriminatory and, in our view, unjustifiable": *US – Shrimp*, para. 172. In *China – Rare Earths*, the panel did not distinguish among the different elements of the chapeau to Article XX in concluding that discrimination is inconsistent with the chapeau "where alternative measures exist which would have avoided or at least diminished the *discriminatory* treatment". Panel Report, *China – Rare Earths*, para. 7.354 (emphasis added). In any event, this aspect of the panel's reasoning was not appealed and Australia considers that it is inconsistent with Appellate Body decisions interpreting the chapeau of Article XX, namely *Brazil-Retreaded Tyres* and the more recent Appellate Body decision in *EC-Seal Products*.

199. In sum, the jurisprudence concerning the meaning of the term "unjustifiable" in the chapeau to Article XX of the GATT 1994 is relevant to the Panel's interpretation of Article 20 of the TRIPS Agreement because that jurisprudence is consistent with the ordinary meaning of the term "unjustifiably". As Australia has explained, a measure is not "unjustifiable" within the ordinary meaning of that term if there is a rational connection between the encumbrance imposed by a measure and its objective. That is the only proposition for which Australia has referred to this jurisprudence. The complainants, on the other hand, have sought to find support in this jurisprudence for their contention that the ordinary meaning of the term "unjustifiably" is equivalent to a standard of "necessity". These arguments are based on analogies between Article XX of the GATT 1994 and Article 20 of the TRIPS Agreement that fail to account for important differences in their terminology and the function that these provisions serve within their respective agreements.

(d) The term "unjustifiably" does not require an "individualised assessment"

200. The complainants, and the Dominican Republic in particular, argue that any interpretation of the term "unjustifiably" must take into account "the nature of trademarks and trademark protection".²⁰¹ The Dominican Republic cites "the nature of trademarks and trademark protection" as the basis for its assertion that the term "unjustifiably" requires an "individualised assessment" of the "specific features" of individual trademarks, at least in some cases.²⁰²

201. The Dominican Republic's "individualised assessment" argument has no interpretative basis.²⁰³ To begin with, the Dominican Republic has made clear that the interpretative foundation for this argument is its theory of "legitimate interests", which Australia rebutted in Parts II.C.4(c)ii to II.C.4(c)iv above.²⁰⁴ The Dominican Republic does not contend that a requirement of an "individualised assessment" (at least in some cases) follows from the ordinary meaning of the term "unjustifiably", and it has not identified anything in the context

²⁰¹ Dominican Republic's response to Panel Question No. 89, para. 25; Dominican Republic's opening statement at the first substantive meeting of the Panel, paras. 27-29.

²⁰² Dominican Republic's response to Panel Question Nos. 99, para. 69, and 108, paras. 127-131.

²⁰³ Honduras also makes this argument: see Honduras' first written submission, paras. 289-291, 309.

²⁰⁴ Dominican Republic's response to Panel Question No. 99, para. 69.

of Article 20 or in the object and purpose of the TRIPS Agreement that would support this asserted requirement.

202. The Dominican Republic's "individualised assessment" argument appears to be based on the proposition that because trademarks are registered and enforced on an individual basis, it follows that any encumbrance upon the use of trademarks must be justified on an individual basis, at least if the rationale for the encumbrance relates to the "specific features" of trademarks. In *EC – Trademarks and Geographical Indications (US)* the panel rejected the United States' argument that Article 17 of the TRIPS Agreement requires a case-by-case analysis and that "a blanket exception *a priori* does not take into account the legitimate interests of trademark owners."²⁰⁵ The panel found that even though the regulation at issue required a case-by-case analysis of the GI at the time of registration, "nothing in the text of Article 17 indicates that a case-by-case analysis is a requirement under the TRIPS Agreement."²⁰⁶ The panel made this finding even though, like Article 20, Article 17 refers to "a trademark". This conclusion would apply *a fortiori* to Article 20.²⁰⁷

203. Further, even if a measure *were* concerned with the "specific features" of trademarks, it does not follow that the measure is "unjustifiable" in the absence of an "individualised assessment" of each trademark that is affected by the measure. The rationale for a measure that is subject to Article 20 could relate to an entire category of trademarks that possess some feature that relates to the objective of the measure. For example, if the objective of the measure were to improve the legibility of pharmaceutical product packaging for the benefit of the elderly or people with impaired vision, a measure might require trademarks for pharmaceutical products registered in a cursive typeface to be rendered in a non-cursive typeface on the product package. The rationale for this measure would relate to the entire category of trademarks that are registered in a cursive typeface. No "individualised

²⁰⁵ Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.672.

²⁰⁶ Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.672 (emphasis added).

²⁰⁷ The Dominican Republic insists that the panel report in *EC – Trademarks and Geographical Indications (US)* supports its "individualised assessment" argument. The Dominican Republic asserts that the panel's resolution of the United States' argument "turned on the fact that the European Union had required an individual assessment of the trademark *at the time of the GI's registration*, which obviated the need for further individual assessment later." Dominican Republic's response to Panel Question No. 108, para. 136. This assertion implies that the panel *accepted* the United States' argument that Article 17 requires a "case-by-case" analysis. In fact, the opposite is true.

assessment" of the "specific features" of each trademark within this category would be required.²⁰⁸

204. As Australia explained in its first written submission, nothing in Article 20 of the TRIPS Agreement implies that any sort of "individualised assessment" is required, under *any* circumstance. On the contrary, Article 20 is plainly concerned with public policy measures that are likely to affect an entire category of trademarks that implicate the public policy concern. Whether or not a measure covered by Article 20 is "unjustifiable" will depend upon the rationale of the measure as it relates to the affected category of trademarks as a whole. The Dominican Republic's "individualised assessment" argument is completely lacking in interpretative foundation.

(e) Conclusion to Part II.C.4

205. Taking into account the proper interpretation of the term "unjustifiably", as well as the considerations discussed in Part II.C above, Australia submits that the Panel's task under Article 20 of the TRIPS Agreement can be summarised as follows:

- First, the Panel must establish whether the measure imposes any "special requirements" on the use of trademarks "in the course of trade".
- Second, the Panel must determine whether the complainants have established that the special requirements imposed by the tobacco plain packaging measure "encumber" the "use" of trademarks in the course of trade. For this purpose, the relevant "use" of a trademark that the complainants must show to be "encumbered" is the use of a trademark to distinguish the products of one undertaking from those of other undertakings. For the reasons that Australia discussed in Part II.C.2, the complainants have failed to demonstrate that the tobacco plain packaging measure gives rise to any such encumbrance.

²⁰⁸ Applying the Dominican Republic's logic to this example, the Member adopting the measure would be required to convene a panel of elderly and vision-impaired people to review each trademark registered in a cursive typeface to determine whether it is sufficiently legible or not. Such an approach would only serve to illustrate the impracticality of the Dominican Republic's "individualised assessment" argument.

- Third, assuming *arguendo* that the complainants have demonstrated the threshold applicability of Article 20, the Panel must determine whether any encumbrance upon the use of trademarks resulting from the tobacco plain packaging measure pursues a legitimate objective. As Australia noted above, no party disputes the legitimacy of Australia's public health objectives, or that these objectives are of the utmost public importance.
- Fourth, assuming *arguendo* that the Panel is convinced that the complainants have demonstrated some respect in which the tobacco plain packaging measure encumbers the use of trademarks in the course of trade, the Panel must then evaluate whether the complainants have proven that this encumbrance is "unjustifiable". The complainants must demonstrate that there is no rational connection between the encumbrance and the legitimate public health objectives of the measure, because the encumbrance is not capable of making a contribution to those objectives.

206. Australia will demonstrate that the complainants have failed to show that any encumbrance resulting from the tobacco plain packaging measure is "unjustifiable" under this standard. This is true whether the Panel applies what Australia considers to be the appropriate test, as described in Part II.C.4(b), or whether it "weighs and balances" the extent of the encumbrance, the extent to which the measure is capable of contributing to its objectives, and the importance of the objectives that it seeks to fulfil. In either event, the complainants have failed to prove that any encumbrance upon the use of trademarks resulting from the tobacco plain packaging measure lacks a rational connection to Australia's legitimate public health objectives.

5. The complainants have failed to prove that any encumbrance resulting from the tobacco plain packaging measure is "unjustifiable"

207. Australia perceives two principal scenarios in which the Panel will need to evaluate whether the complainants have proven that any encumbrance upon the use of trademarks resulting from the tobacco plain packaging measure is "unjustifiable". First, the Panel may consider, contrary to Australia's arguments in Part II.C.2(b), that the use of trademarks to advertise and promote tobacco products is a relevant use of trademarks under Article 20 of the TRIPS Agreement, and that the complainants have successfully identified an

encumbrance upon this use.²⁰⁹ Second, the Panel may consider that the complainants have identified some marginal encumbrance upon the use of trademarks to distinguish the goods of one undertaking from those of other undertakings in the course of trade (i.e. what Australia considers to be the *relevant* use of trademarks under Article 20 of the TRIPS Agreement), notwithstanding the complainants' failure to provide any evidence or argument to support the existence of such an encumbrance.

208. Australia will demonstrate in this section that, regardless of any encumbrance that the Panel considers the complainants to have identified, the complainants have failed to discharge their burden of proving that Australia has imposed this encumbrance "unjustifiably".

209. In Part II.C.5(a) below, Australia will first review the objectives and operation of the tobacco plain packaging measure. In Part II.C.5(b), without prejudice to Australia's position on the burden of proof, and incorporating by reference the evidence outlined in Parts III.D.3 and III.D.4, Australia will then review the extensive body of evidence demonstrating that tobacco plain packaging is capable of making a contribution to the public health objectives of the measure. Finally, in Part II.C.5(c), Australia will demonstrate that the complainants' arguments as to why the encumbrance is *not* capable of contributing to its objectives and is therefore "unjustifiable" are unfounded, internally contradictory, and insufficient as a matter of law to sustain their burden of proof.

(a) By requiring a standardised, plain appearance for tobacco products and packaging, the tobacco plain packaging measure contributes to its objective of improving public health

210. In its first written submission, Australia described in detail the objectives of the tobacco plain packaging measure and the manner in which the measure is meant to contribute to those objectives. To recap, the tobacco plain packaging measure seeks to improve public health by: (i) discouraging people from taking up smoking or using tobacco products; (ii) encouraging people to give up smoking and to stop using tobacco products; (iii) discouraging

²⁰⁹ Assuming that it is somehow different to the advertising and promotion function of trademarks, the Panel may also consider that the use of trademarks to distinguish products "in terms of their quality, characteristics and reputation" is also a relevant use of trademarks under Article 20.

people who have given up smoking, or who have stopped using tobacco products, from relapsing; and (iv) reducing people's exposure to smoke from tobacco products; as well as to give effect to certain obligations of Australia under the FCTC. The measure contributes to these objectives by regulating the retail packaging and appearance of tobacco products, and in particular by specifying a standardised, plain appearance for packages and products in order to: (i) reduce the appeal of tobacco products to consumers; (ii) increase the effectiveness of GHWs; and (iii) reduce the ability of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.²¹⁰

211. The legitimacy of Australia's public health objectives is not in doubt. What the complainants are challenging is whether the standardised, plain appearance required by the measure is capable of contributing to those objectives in the three respects that the measure describes. Expressed in terms of the relevant legal standard under Article 20 of the TRIPS Agreement, the question is whether the complainants have demonstrated that any encumbrance upon the use of trademarks in the course of trade resulting from the special requirements imposed by the measure is "unjustifiable".

212. The tobacco plain packaging measure lays out detailed requirements that specify the standardised, plain appearance of tobacco products and packages including by prohibiting the use of *all* signs, whether or not any of those signs are also trademarks. The measure prohibits the use of trademarks (other than trademarked brand and variant names) not because they are trademarks, but because the use of these signs would re-introduce opportunities for advertising and promoting the product. At the same time, the measure permits the use of brand and variant names in a standardised format because these particular signs are necessary to distinguish the tobacco products of one undertaking from those of other undertakings. The tobacco plain packaging measure thus reduces the ability of tobacco companies to use retail tobacco packaging as a vehicle for advertising and promoting tobacco products, while preserving the ability of tobacco companies to use trademarks to distinguish their products from those of other undertakings.

²¹⁰ Australia's first written submission, paras. 135-141.

213. The "encumbrance" upon the use of trademarks, if any, that the Panel must evaluate in relation to a legal standard of "unjustifiability" is necessarily an "encumbrance" that results from the special requirements just described. For the reasons that Australia has previously explained, and will not reiterate here, Australia does not consider that the prohibitive aspects of the tobacco plain packaging measure are "special requirements" that are encompassed by Article 20 of the TRIPS Agreement. Assuming, *arguendo*, that the special requirements at issue include both the permissive and prohibitive aspects of the measure relating to the use of trademarks, the issue before the Panel is whether the complainants have demonstrated that any encumbrance resulting from these special requirements, when viewed as a whole, is "unjustifiable".²¹¹ Given the absence of any evidence or argument on the record that these special requirements encumber the use of trademarks to distinguish the goods of one undertaking from those of other undertakings, Australia considers that the principal issue before the Panel is whether the complainants have proven that it is "unjustifiable" for Australia to encumber the use of trademarks to advertise and promote tobacco products.

(b) The evidence on the record demonstrates that encumbering the use of trademarks to advertise and promote tobacco products is capable of making a contribution to the tobacco plain packaging measure's objectives

214. The conclusion that any encumbrance resulting from the tobacco plain packaging measure is capable of making a contribution to Australia's public health objectives relies upon the same evidence outlined in Australia's first written submission, as well as that outlined in this section and Parts III.D.3 below. In essence, this evidence shows that: (i) that there is a clear link between advertising and smoking-related behaviours; (ii) that retail

²¹¹ Where a measure contains both permissive and prohibitive elements, panels and the Appellate Body have examined the measure as an integrated whole, taking into account the combined effect of both the permissive and prohibitive elements. See, e.g. Appellate Body Report, *EC – Asbestos*, para. 64 ("the measure at issue is to be examined as an integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements that are part of it"); Appellate Body Report, *EC – Seal Products*, para. 5.193 ("what must be justified is ... both the prohibitive and permissive components of the EU Seal Regime, taken together."). While these decisions have concerned other provisions of the covered agreements, the same approach is warranted here. In any event, the complainants have not sought to prove that any encumbrance resulting from *individual* special requirements imposed by the tobacco plain packaging measure is "unjustifiable". In particular, the complainants have not distinguished between the permissive and prohibitive elements of the tobacco plain packaging measure, but have instead sought to demonstrate that the alleged encumbrance resulting from the special requirements is, as a whole, unjustifiable. It is therefore on this basis that the Panel must evaluate whether the complainants have discharged their burden of proof.

packaging is a recognised form of advertising and promotion, and also affects smoking-related behaviours; and (iii) that because retail tobacco packaging represents a medium for advertising and promoting tobacco products, the restriction of the advertising and promotional use of trademarks on tobacco packages is capable of affecting smoking-related behaviours, just as other restrictions on tobacco advertising and promotion have been shown to do.

215. In the following sections, Australia will outline the views of successive, eminent reports of United States Surgeons General, the WHO, the United States National Cancer Institute, and the United States Institute of Medicine. Professor Samet, who served as Senior Scientific Editor of several of the United States Surgeons General Reports discussed below, explains the significance of these and other similar reports as follows:

The reports discussed above – from the US Surgeon General, the US National Cancer Institute, the UK Royal College of Physicians, and the IARC – have had global impact and are widely and universally regarded as authoritative. In spite of efforts by the tobacco industry to undermine their findings, these reports have remained universally regarded as credible and as a sound basis for decision-making.²¹²

216. The evidence presented by these reports, dating back to the 1980s, demonstrates the scientific basis for the conclusion that tobacco plain packaging, and in particular the encumbrance upon the use of trademarks to advertise and promote, is capable of making a contribution to the public health objectives of the tobacco plain packaging measure.

i. There is a clear link between advertising and smoking-related behaviours

217. The link between advertising and smoking-related behaviours, including initiation, cessation and relapse of tobacco use, is supported by the clear weight of scientific evidence. As early as 1989, an authoritative review of the evidence by the United States Surgeon General found that:

The most comprehensive review of both the direct and indirect mechanisms concluded that the collective empirical, experiential, and

²¹² Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, para. 28.

logical evidence makes it more likely than not that advertising and promotional activities do stimulate cigarette consumption.²¹³

218. This finding has been confirmed and strengthened by successive United States Surgeons General,²¹⁴ as well as in reviews by the United States National Cancer Institute,²¹⁵ the United States Institute of Medicine,²¹⁶ and the WHO.²¹⁷ All of these reports reviewed substantial amounts of scientific evidence, from various fields, concerning the relationship between tobacco advertising and smoking-related behaviours. The overall conclusion to be drawn from this evidence was concisely described in a 2008 report from the United States National Cancer Institute:

The total weight of evidence from multiple types of studies, conducted by investigators from different disciplines, using data from many countries, demonstrates a causal relationship between tobacco advertising and promotion and increased tobacco use, as manifested by increased smoking initiation and increased per capita tobacco consumption in the population.²¹⁸

²¹³ United States Department of Health and Human Services, *Reducing the Health Consequences of Smoking: 25 Years of Progress: A Report of the Surgeon General* (1989), Chapter 7, Exhibit AUS-546, p. 517.

²¹⁴ United States Department of Health and Human Services, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (1994), Exhibit AUS-73; United States Department of Health and Human Services, *Tobacco Use Among U.S. Racial/Ethnic Minority Groups - African Americans, American Indians and Alaska Natives, Asian Americans and Pacific Islanders, and Hispanic: A Report of the Surgeon General* (1998), Exhibit AUS-74; United States Department of Health and Human Services, *Reducing Tobacco Use: A Report of the Surgeon General* (2000), Exhibit AUS-53; United States Department of Health and Human Services, *Women and Smoking: A Report of the Surgeon General* (2001), Exhibit AUS-75; United States Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* (2012), Exhibit AUS-76; United States Department of Health and Human Services, *The Health Consequences of Smoking - 50 Years of Progress: A Report of the Surgeon General* (2014), Exhibit AUS-37.

²¹⁵ National Cancer Institute (United States), *Tobacco Control Monograph No. 19: The Role of the Media in Promoting and Reducing Tobacco Use* (June 2008), Exhibit AUS-77.

²¹⁶ B.S. Lynch and R.J. Bonnie (eds), *Growing up Tobacco Free: Preventing Nicotine Addiction in Children and Youth* (Institute of Medicine Publication, National Academy Press, 1994), pp. 116-131 (extract), Exhibit AUS-78; R.J. Bonnie, K. Stralton and R.B. Wallace (eds), *Ending the Tobacco Problem: A Blueprint for the Nation* (Institute of Medicine Publication, National Academy Press, 2007), Exhibit AUS-79.

²¹⁷ World Health Organization, *WHO Report on the Global Tobacco Epidemic, 2011: Warning about the Dangers of Tobacco* (2011), Exhibit AUS-43; World Health Organization, *WHO Report on the Global Tobacco Epidemic, 2013: Enforcing Bans on Tobacco Advertising, Promotion and Sponsorship* (2013), Exhibit AUS-80.

²¹⁸ National Cancer Institute (United States), *Tobacco Control Monograph No. 19: The Role of the Media in Promoting and Reducing Tobacco Use* (June 2008), Exhibit AUS-77, p. 16.

219. Similarly, in her 2012 Report, United States Surgeon General Regina Benjamin reviewed over two decades of research and evidence, and determined that:

There is strong, consistent evidence that advertising and promotion influence the factors that lead directly to tobacco use by adolescents, including the initiation of cigarette smoking as well as its continuation.²¹⁹

220. The tobacco industry has long sought to assert that the sole purpose of advertising and promotion is merely to increase brand share among existing smokers. In doing so, the tobacco industry has sought to cast doubt on the evidence showing that there is a causal relationship between the advertising and promotion of tobacco products, on the one hand, and smoking-related behaviours, on the other. The tobacco industry has been particularly vociferous in its efforts to deny that there is any connection between tobacco advertising and youth initiation of tobacco use. These are familiar arguments, and ones that the complainants have sought to perpetuate in this dispute.²²⁰

221. There are, however, two fundamental problems with these claims. Firstly, the proposition that there is no connection between advertising and youth initiation has been called into question by leading authorities since at least 1994, when United States Surgeon General M. Joycelyn Elders effectively dismissed the tobacco industry claims to this effect, concluding:

Even though the tobacco industry asserts that the sole purpose of advertising and promotional activities is to maintain and potentially increase market shares of adult consumers, it appears that some young people are recruited to smoking by brand advertising.²²¹

²¹⁹ United States Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* (2012), Exhibit AUS-76, p. 508.

²²⁰ Dominican Republic's first written submission, paras. 83, 613, 683; Honduras' first written submission, paras. 404-425; Cuba's first written submission, paras. 197-198; Indonesia's first written submission, para. 412.

²²¹ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para. 62, citing United States Department of Health and Human Services, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (1994), p. 194.

222. Likewise, some twenty years later, the United States Surgeon General dismissed the arguments of the tobacco industry in their entirety:

Tobacco companies have long argued that their marketing efforts do not increase the overall demand for tobacco products and have no impact on the initiation of tobacco use among young people; rather, they argue, they are competing with other companies for market share. In contrast, the weight of the evidence from extensive and increasingly sophisticated research conducted over the past few decades shows that the industry's marketing activities have been a key factor in leading young people to take up tobacco, keeping some users from quitting, and achieving greater consumption among users.²²²

223. Secondly, and most vitally for this dispute, is the weight that must be placed on the evidence *as a whole*. The complainants have sought to discredit the scientific evidence supporting the link between advertising and smoking-related behaviours by reviewing each and every study at a micro level. However, as articulated in a 1994 report by the United States Institute of Medicine Report:

The question is not, 'Are advertising and promotion the causes of youth initiation?' but rather, "Does the preponderance of evidence suggest that features of advertising and promotion tend to encourage youths to smoke?'. The answer is yes, and this is a sufficient basis for action, even in the absence of a precise and definitive causal chain.²²³

224. Since 1994, this "preponderance of evidence" has continued to grow exponentially. Professor Chaloupka summarises the evolution of the evidence on the impact of tobacco marketing on tobacco use, and notes:

this evidence has evolved and strengthened over the past several decades and has led to increasingly stronger and stronger conclusions by the U.S. Surgeon General and others about the role of marketing in stimulating the demand for tobacco products and the effectiveness of comprehensive bans on tobacco marketing in reducing demand.²²⁴

225. Australia submits that the overwhelming weight of evidence shows that the advertising and promotion of tobacco products encourages smoking-related behaviours, and

²²² United States Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* (2012), Exhibit AUS-76, p. 487.

²²³ B.S. Lynch and R.J. Bonnie (eds), *Growing up Tobacco Free: Preventing Nicotine Addiction in Children and Youth* (Institute of Medicine Publication, National Academy Press, 1994), p. 116-131 (extract), Exhibit AUS-78, p. 131.

²²⁴ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para. 57

that this evidence is recognised at a global level. As the United States National Cancer Institute has found:

The findings are robust and consistent. In the overwhelming majority of studies, exposure to cigarette marketing was associated with smoking behaviour.²²⁵

226. This evidence is so compelling that the 180 Parties to the FCTC have specifically recognised in Article 13.1 of the FCTC "that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products".²²⁶ Australia has progressively restricted the marketing, advertising and promotion of tobacco products, as outlined comprehensively in Australia's first written submission, and the tobacco plain packaging measure is simply the next step toward achieving a truly comprehensive ban on tobacco advertising and promotion.²²⁷

ii. Tobacco packaging is an important medium for advertising and promotion and is capable of affecting smoking-related behaviours

227. As outlined in Australia's first written submission and the expert reports of Professors Dubé and Tavassoli, both Professors of Marketing, retail tobacco packaging is one of the forms of advertising and promotion used by the tobacco industry.²²⁸ Advertising and promotion are, as demonstrated above, recognised influences on smoking-related behaviours. As a matter of logic, the use of retail tobacco packaging to advertise and promote tobacco products must also have the capacity to influence smoking-related behaviours.

228. However, and contrary to the assertions of the complainants,²²⁹ Australia does not rely solely upon intuition to demonstrate this argument. As other countries have done, Australia relies upon evidence reviewed, collated and analysed by world-leading authorities which demonstrates that tobacco product packaging is a recognised form of advertising and

²²⁵ National Cancer Institute (United States), *Tobacco Control Monograph No. 19: The Role of the Media in Promoting and Reducing Tobacco Use* (June 2008), Exhibit AUS-77, p. 279.

²²⁶ *WHO Framework Convention on Tobacco Control*, done at Geneva, 21 May 2003, 2302 U.N.T.S.166; 42 International Legal Materials 518, Exhibit AUS-44, Article 13.

²²⁷ Australia's first written submission, paras. 54-59 and Annexure C: Details of Restrictions on the Advertising and Promotion of Tobacco Products in Australia.

²²⁸ Australia's first written submission, paras. 66-86; Expert Report of J-P. Dubé (9 March 2015), Exhibit AUS-11; Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10.

²²⁹ See Cuba's first written submission, para. 204; Indonesia's first written submission, para. 317.

promotion, and one which is capable of affecting smoking-related behaviours. This evidence was clearly highlighted by recent findings of the United States Surgeon General in the 2012 Report:

Tobacco packaging seeks to achieve the same general objective as other forms of marketing: to establish brand identity and to promote brand appeal. Research conducted by the tobacco industry consistently demonstrates that the brand imagery portrayed on packages is particularly influential during youth and young adulthood – the period in which smoking behaviour and brand preferences develop.²³⁰

229. The Report went on to highlight the tactics used by the tobacco industry, finding that:

In addition to advertising and promotions, the tobacco industry has invested heavily in packaging design to establish brand identity and promote brand appeal. Research conducted by the tobacco industry and cited in this chapter has consistently demonstrated that brand imagery on packages is especially influential during adolescence and young adulthood, when smoking behaviour and brand preferences are being developed.²³¹

230. These findings were echoed by the WHO in 2013, when it reported that:

Tobacco packaging itself is among the most prominent and important forms of tobacco advertising and promotion. The tobacco industry exploits all packaging elements, including pack construction, in addition to graphic design and use of colour, to increase the appeal of smoking. Brightly coloured cigarette packages are attractive to children, who are drawn to the images and associate them with positive attributes such as "fun" and "happiness", and tobacco packaging can be designed in a manner specifically intended to attract both male and female young adults.²³²

231. Indeed, only last year, a representative of British American Tobacco Australia acknowledged that branded packaging is one of the tools by which tobacco companies advertise and promote their products.²³³ This acknowledgement was made *in connection with a review of the evidentiary basis for tobacco plain packaging.*

²³⁰ United States Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* (2012), Exhibit AUS-76, p. 530.

²³¹ United States Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* (2012), Exhibit AUS-76, p. 599-600 (footnotes omitted).

²³² World Health Organization, *WHO Report on the Global Tobacco Epidemic, 2013: Enforcing Bans on Tobacco Advertising, Promotion and Sponsorship* (2013), Exhibit AUS-80, p. 31 (footnotes omitted).

²³³ C. Chantler, *Standardised packaging of tobacco: Report of the independent review undertaken by Sir Cyril Chantler* (2014), Exhibit AUS-81, para. 3.22.

232. In reviewing the extensive evidence base which shows that tobacco product packaging forms part of the tobacco industry's advertising and promotion campaigns, Australia enlisted the assistance of seven public health and marketing experts to review the evidence base and provide opinions drawn from their varying disciplines.²³⁴ Unsurprisingly, the findings of all of these experts, from a range of professional fields, accord with the international views of other leading authorities, adding further confirmation and weight to the evidence exhibited in this dispute.

233. Professor Slovic, a Professor of Psychology, highlights the key insights provided by internal tobacco industry documents on package design and branding, and the way in which the appearance of the package influences smoking behaviour:

Few details of a brand name, logo, or package design have not been tested using focus groups, experiments, or surveys to assess its manipulative appeal.²³⁵

The tobacco industry worldwide has spent many billions of dollars on advertising and promotion. It is not surprising that the industry also has invested heavily in market research to guide these massive expenditures. Market researchers used sophisticated methods to uncover consumer needs and motivations that could be addressed in targeted advertising and promotional campaigns. These methods included focus groups and large surveys, designed to measure smoking behaviour, people's attention to advertising materials, and their attitudes and emotional responses.²³⁶

234. A Professor of Marketing, Professor Tavassoli, notes that:

Packaging has also long been considered as a form of advertising by tobacco producers. Internal tobacco company documents show that tobacco executives view packaging as a vehicle for communicating brand image, and that they believe it to serve as an advertising medium.²³⁷

²³⁴ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9; Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10; Expert Report of J-P. Dubé (9 March 2015), Exhibit AUS-11; Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12; Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13; Expert Report of G. Fong (4 March 2015), Exhibit AUS-14; Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15.

²³⁵ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 101.

²³⁶ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 61.

²³⁷ Expert Report of Professor N. Tavassoli (10 March 2015), Exhibit AUS-10, para. 33 (footnotes omitted).

235. These conclusions are further confirmed by Dr Biglan (Senior Scientist specialising in adolescent behaviour),²³⁸ Professor Fong (a Professor of Psychology and Health Studies),²³⁹ Dr Brandon (Professor of Psychology and Director of Tobacco Research and Intervention),²⁴⁰ Professor Dubé (Professor of Marketing),²⁴¹ Professor Samet (clinical epidemiologist),²⁴² and Professor Chaloupka (Professor of Economics).²⁴³

236. These experts, like Australia, relied upon the successive, convincing findings of a number of authoritative public health organisations in their assessments of the evidence. This evidence clearly demonstrates that tobacco packaging is a vehicle by which tobacco companies advertise and promote tobacco products to consumers and prospective consumers, including young people.

iii. The appearance of tobacco packages and products is capable of affecting smoking-related behaviours

237. As with the connection between advertising and smoking-related behaviours generally, the evidence clearly demonstrates that limiting the ability of tobacco companies to use retail packaging, including figurative trademarks, to advertise and promote tobacco products is capable of affecting smoking-related behaviours. The connection between the standardised, plain appearance prescribed by the tobacco plain packaging measure and smoking-related behaviours is supported by extensive scientific evidence, clearly established over the course of decades of research and review.

²³⁸ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13.

²³⁹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14.

²⁴⁰ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15.

²⁴¹ Expert Report of J-P. Dubé (9 March 2015), Exhibit AUS-11.

²⁴² Expert Report of J. Samet (5 March 2015), Exhibit AUS-7.

²⁴³ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9.

238. As early as 1994, the United States Institute of Medicine found that:

'Plain packaging', in which the brand name is presented on a plain, standardized background and logos and identifying information other than the brand name are removed, was found to effectively destroy the positive images created by cigarette packaging.²⁴⁴

239. In 2000, United States Surgeon General David Satcher concluded:

There is evidence that young people find plain packaging less attractive and that plain packaging makes health messages more noticeable.²⁴⁵

240. In 2008, a Report by the United States National Cancer Institute was clear:

Plain packaging limits the ease with which consumers associate particular images with cigarette brands and significantly influences smoking behaviour. Thus, packaging not only plays a role in product branding but can also be used effectively in policy interventions designed to counter the desirability of smoking.²⁴⁶

241. In 2012, United States Surgeon General Regina Benjamin affirmed that tobacco plain packaging is capable of improving public health through the three specific mechanisms of reducing the appeal of tobacco products, increasing the effectiveness of health warnings, and reducing the ability of the pack to mislead consumers. She found that:

The efficacy of packaging design as an element of tobacco marketing has been supported by research into plain packaging, which removes colour and brand imagery from packaging. In addition to enhancing the effectiveness of health warnings by increasing their noticeability, plain packaging has been shown to make smoking less appealing and has the potential to reduce the level of false beliefs about the risks of different brands. Plain packaging, then, has the potential to reduce youth smoking.²⁴⁷

242. Over and above these independent reports, the FCTC – one of the most widely embraced treaties in the United Nations system – explicitly recommends the implementation of tobacco plain packaging in the FCTC Guidelines for Article 11 (concerning the packaging

²⁴⁴ B.S. Lynch and R.J. Bonnie (eds), *Growing up Tobacco Free: Preventing Nicotine Addiction in Children and Youth* (Institute of Medicine Publication, National Academy Press, 1994), Chapter 8, Exhibit AUS-547, p. 242.

²⁴⁵ US Department of Health and Human Services, *Reducing Tobacco Use: A Report of the Surgeon General* (2000) Chapter 5, Exhibit AUS-548, p. 169 (footnotes omitted).

²⁴⁶ National Cancer Institute (United States), *Tobacco Control Monograph No. 19: The Role of the Media in Promoting and Reducing Tobacco Use* (June 2008) Exhibit AUS-77, p. 108.

²⁴⁷ United States Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* (2012), Exhibit AUS-76, p. 600 (footnotes omitted).

and labelling of tobacco products) and Article 13 (concerning tobacco advertising, promotion, and sponsorship).²⁴⁸

243. The FCTC Guidelines for Articles 11 and 13 recommending tobacco plain packaging were adopted by the FCTC COP, and were based on "available scientific evidence and the experience of the Parties themselves in implementing tobacco control measures."²⁴⁹ Based on this evidence, the likely benefits of tobacco plain packaging identified in the FCTC Guidelines are consistent with the objectives identified in Australia's tobacco plain packaging legislation:

[Tobacco plain packaging] may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address the industry package design techniques that may suggest that some products are less harmful than others.²⁵⁰

244. In questioning the relevance of the recommendation by the FCTC COP to adopt tobacco plain packaging, the complainants have, in effect, invited the Panel to ignore the international consensus of 180 Parties that tobacco plain packaging represents an effective means of implementing Articles 11 and 13 of the FCTC, thereby contributing to the FCTC's overall objective of reducing tobacco use. The complainants have provided no basis for the Panel to accept this invitation.

245. Countries around the world are using the evidence reviewed and underlying the types of reports discussed above to make policy decisions to improve the public health of their citizens. Based on this evidence, countries including New Zealand,²⁵¹ Ireland,²⁵² the United

²⁴⁸ WHO *Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109, Articles 11, p. 63 and 13, pp. 99-100.

²⁴⁹ World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, para. 19. See also Australia's first written submission, paras. 103-113.

²⁵⁰ WHO *Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109, Article 11, p. 63.

²⁵¹ New Zealand Ministry of Health, Proposal to introduce plain packaging of tobacco products in New Zealand: Consultation Paper and Regulatory Impact Statement: Plain Packaging of Tobacco Products (2012), Exhibit AUS-549.

²⁵² House of the Oireachtas, Joint Committee on Health and Children, *Report on hearings in relation to the General Scheme of the Public Health (Standardised Packaging of Tobacco) Bill*, Volume 1 (April 2014), Exhibit AUS-550.

Kingdom,²⁵³ France,²⁵⁴ Norway,²⁵⁵ and Chile²⁵⁶ have started the process of introducing tobacco plain packaging. The available evidence therefore satisfies not only independent medical and public health authorities of international standing, but has also been deemed sufficient by multiple sovereign states to proceed with the introduction of tobacco plain packaging.

246. Ireland, in its review of the evidence supporting the effectiveness of tobacco plain packaging, states:

The evidence indicates that tobacco packaging is a critically important form of tobacco promotion, particularly in jurisdictions with comprehensive advertising and marketing restrictions, such as Ireland. The evidence indicates that plain packaging reduces false beliefs about the risks of smoking, increases the efficacy of health warnings, reduces consumer appeal among youth and young adults, and may promote smoking cessation among established smokers.²⁵⁷

247. Similarly, New Zealand's consultation paper on the introduction of tobacco plain packaging finds:

There is good evidence that plain packaging of tobacco products would be an effective measure to stop tobacco companies using powerful marketing tools on cigarette packs to promote their products... There is also substantial research evidence that tobacco products in plain packs are perceived as less appealing, less palatable, of lower quality and less socially desirable.²⁵⁸

²⁵³ United Kingdom Department of Health, Oral statement to Parliament: Chantler report on standardised packaging of tobacco products (Statement of Parliamentary Under-Secretary of State for Public Health, Jane Ellison MP) (3 April 2014), Exhibit AUS-551.

²⁵⁴ World Trade Organization, France's Notification to the Committee on Technical Barriers to Trade, G/TBT/N/FRA/163 (15 June 2015), Exhibit AUS-552.

²⁵⁵ Norwegian Ministry of Health and Care Services, *Consultation on the proposal for standardised tobacco packaging and the implementation of Article 5.3 of the Framework Convention on Tobacco Control* (consultation paper, 17 March 2015), Exhibit AUS-553.

²⁵⁶ Packaging Business Review, 'Chile proposes plain packaging for cigarettes' (19 August 2015), available at: <http://containers.packaging-business-review.com/news/chile-proposes-plain-packaging-for-cigarettes-190815-4650223> (last accessed 13 September 2015), Exhibit AUS-554.

²⁵⁷ D. Hammond, *Standardized packaging of tobacco products: Evidence review prepared on behalf of the Irish Department of Health* (March 2014), Exhibit AUS-555, p. i.

²⁵⁸ New Zealand Ministry of Health, *Proposal to introduce plain packaging of tobacco products in New Zealand: Consultation Paper and Regulatory Impact Statement: Plain Packaging of Tobacco Products* (2012), Exhibit AUS-549, p. 17.

248. In 2013, Sir Cyril Chantler was commissioned to review tobacco plain packaging for the United Kingdom. Sir Cyril Chantler considered the limitations and criticisms made of the literature supporting tobacco plain packaging and found:

Few research studies are without limitations, and undoubtedly many could be improved with insights from related fields, but this does not seem a reasonable basis on which completely to discount the findings of over 50 peer-reviewed, published studies.²⁵⁹

249. Sir Cyril Chantler went on to recommend the introduction of tobacco plain packaging in the United Kingdom, stating:

Having reviewed the evidence it is in my view highly likely that standardised packaging would serve to reduce the rate of children taking up smoking and implausible that it would increase the consumption of tobacco... I am satisfied that the body of evidence shows that standardised packaging, in conjunction with the current tobacco control regime, is very likely to lead to a modest but important reduction over time on the uptake and prevalence of smoking and thus have a positive impact on public health.²⁶⁰

250. Australia's long-term, comprehensive tobacco control strategy, including the implementation of tobacco plain packaging, is consistent with the FCTC and leading reports discussed above.²⁶¹

251. The Australian National Tobacco Strategy 2012-2018, for example, highlights the findings of the United States Surgeons General and the United States National Cancer Institute, as well as findings by the WHO, in concluding that:

There is overwhelming evidence documenting the influence of advertising and promotion by the tobacco industry...In countries like Australia where most advertising and promotion is banned, tobacco companies are able to promote their products through branding and packaging design...²⁶²

²⁵⁹ C. Chantler, *Standardised packaging of tobacco: Report of the independent review undertaken by Sir Cyril Chantler* (2014), Exhibit AUS-81, para. 4.14.

²⁶⁰ C. Chantler, *Standardised packaging of tobacco: Report of the independent review undertaken by Sir Cyril Chantler* (2014), Exhibit AUS-81, Letter to the Secretary of State for Health, para. 18.

²⁶¹ Australian Government National Preventative Health Taskforce, *Australia: The Healthiest Country by 2020, Technical Report 2 - Tobacco Control in Australia: Making Smoking History* (24 July 2009), Exhibit AUS-52.

²⁶² Intergovernmental Committee on Drugs, *National Tobacco Strategy 2012-2018 – A Strategy to Improve the Health of all Australians by Reducing the Prevalence of Smoking and its Associated Health, Social and Economic Costs, and the Inequalities it Causes* (2012), Exhibit AUS-129, pp. 27-28.

252. It was on the basis of "overwhelming evidence" that Australia decided to introduce tobacco plain packaging to improve public health, and give effect to certain obligations under the FCTC. The Report by the Australian Government National Preventative Health Taskforce in 2009 highlights the rationale behind the implementation of the tobacco plain packaging measure:

Requiring cigarettes to be sold in plain packaging would reinforce the idea that cigarettes are not an ordinary consumer item. It would also reduce the potential for cigarettes to be used to signify status. Plain packaging would increase the salience of health warnings: research subjects show an improved ability to recall health warnings on plain packs...²⁶³

253. This rationale is reflected in the objectives of the tobacco plain packaging measure, as explicitly set out in Section 3 of the TPP Act. The nature of the contribution of tobacco plain packaging to its objectives is highlighted by the University of Stirling, in successive reviews of a variety of tobacco plain packaging studies.²⁶⁴ The reviews found, overall, that:

[T]here is strong evidence to support all three of the FCTC propositions. Plain packaging has been shown to: reduce pack and product appeal, by making packs appear less attractive and of lower quality, and by weakening the positive smoker identity and personality attributes associated with branded packs; increase the salience of health warning, in terms of improving the recall and perceived seriousness and believability of warnings; and reduce the confusion about product harm that can result from branded packs.²⁶⁵

²⁶³ Australian Government National Preventative Health Taskforce, *Australia: The Healthiest Country by 2020, Technical Report 2 - Tobacco Control in Australia: Making Smoking History* (24 July 2009), Exhibit AUS-52, p. 20.

²⁶⁴ C. Moodie, M. Stead, L. Bauld, A. McNeill, K. Angus, K. Hinds, I. Kwan, J. Thomas, G. Hastings and A. O'Mara-Eves, "Plain tobacco packaging: A systematic review", *UK Centre for Tobacco Control Studies, University of Stirling* (2012), Exhibit AUS-140; C. Moodie, K. Angus, M. Stead and L. Bauld, "Plain tobacco packaging research: an update", *Centre for Tobacco Control Research, Institute for Social Marketing, University of Stirling* (2013), Exhibit AUS-216.

²⁶⁵ C. Moodie, M. Stead, L. Bauld, A. McNeill, K. Angus, K. Hinds, I. Kwan, J. Thomas, G. Hastings and A. O'Mara-Eves, "Plain tobacco packaging: A systematic review", *UK Centre for Tobacco Control Studies, University of Stirling* (2012), Exhibit AUS-140, p. 84.

254. In addressing some limitations to the studies as recognised by the reviewers, the University of Stirling's systematic review of the literature in 2012 emphasises the:

Remarkable consistency in study findings regarding the potential impact of plain packaging. Across studies using different designs, conducted in a range of countries, with young and older populations and with smokers and non-smokers the key findings are similar.²⁶⁶

255. Professor Chaloupka highlights the importance of assessing the totality of evidence, rather than critiquing each individual study, and notes that this approach is entirely consistent with the approach used by a number of entities in their assessments of the evidence on various aspects of tobacco use, including the United States Surgeon General, the United States Institute of Medicine, the International Agency for Research on Cancer, the United States National Cancer Institute, the United States Food and Drug Administration, and the WHO.²⁶⁷ It is this consistency across the entire body of evidence supporting tobacco plain packaging which is fundamental to the question of whether the measure is capable of contributing to Australia's public health objectives and is therefore not unjustifiable.

iv. Conclusion to Part II.C.5(b)

256. The evidence that Australia has summarised above and in Australia's first written submission, demonstrates overwhelmingly that tobacco plain packaging is capable of contributing to Australia's public health objectives, as one element of a comprehensive suite of tobacco control measures. This evidence has been evaluated at length and has been found persuasive by many of the world's leading medical and public health authorities, including the WHO, the United States Surgeon General, and the United States National Cancer Institute. The proposition that tobacco plain packaging is capable of contributing to a reduction in adverse smoking-related behaviours is so well founded that the Parties to the FCTC, now numbering 180, have adopted by consensus the specific recommendations to implement tobacco plain packaging as a measure that is capable of contributing to the FCTC's overarching objective of ending the global tobacco epidemic.

²⁶⁶ C. Moodie, M. Stead, L. Bauld, A. McNeill, K. Angus, K. Hinds, I. Kwan, J. Thomas, G. Hastings and A. O'Mara-Eves, "Plain tobacco packaging: A systematic review", *UK Centre for Tobacco Control Studies, University of Stirling* (2012), Exhibit AUS-140, p. 90.

²⁶⁷ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, para. 74; see also Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, paras. 138-152.

257. Without prejudice to the burden of proof, Australia has outlined significant evidence which clearly demonstrates that the tobacco plain packaging measure, and any encumbrance it imposes, *is* capable of contributing to its public health objectives. Therefore, there is clearly a rational connection between any encumbrance and its objectives. As Australia will now demonstrate, the complainants have failed to discharge their burden to demonstrate that the encumbrance is *not* capable of contributing to the measure's public health objectives and is therefore unjustifiable.

(c) The complainants have failed to show that any encumbrance upon the use of trademarks resulting from the tobacco plain packaging measure is not capable of making a contribution to its objectives

i. Overview of Part II.C.5(c)

258. For the reasons that Australia discussed in Part II.C.4(b)i, the complainants bear the burden of demonstrating that any encumbrance upon the use of trademarks in the course of trade resulting from the tobacco plain packaging measure is "unjustifiable". The complainants therefore bear the burden of demonstrating that any encumbrance upon the use of trademarks resulting from the tobacco plain packaging measure is not capable of contributing to its legitimate public health objectives.

259. Australia considers it useful to recall the path that the complainants have followed in trying to discharge this burden. In their first written submissions, the complainants took the position that the tobacco plain packaging measure would "backfire", i.e. that it would actually lead to an *increase* in tobacco prevalence and consumption.²⁶⁸ In other words, the complainants took the position that the tobacco plain packaging measure would "go against" its objectives. The complainants abandoned that argument in connection with the first substantive meeting of the Panel.²⁶⁹ Thus, the complainants no longer appear to take the position that the tobacco plain packaging measure will detract from Australia's public health objectives (i.e. that it will make a *negative* contribution to those objectives).

²⁶⁸ Professor List states that there is no compelling evidence that the tobacco plain packaging measure has "backfired": Expert Report of J. List, Exhibit DR/IND-1, para. 16. See also Expert Report of J. Klick, Exhibit HON-118, fn 24.

²⁶⁹ Expert Report of J. List, Exhibit DR/IND-1, para. 16

260. As far as Australia can discern, it now appears to be the complainants' position that the tobacco plain packaging measure will make precisely *no* contribution to Australia's public health objectives, that is, that the measure is incapable of ever making any contribution to its objectives.

261. There appear to be two bases for the complainants' position.

262. The first basis for the complainants' position that the tobacco plain packaging measure is incapable of contributing to its objectives is their contention that there is no demonstrated connection between attitudes and perceptions, on the one hand, and smoking-related behaviours, on the other. This argument begins by denying that retail tobacco packaging is a medium for advertising and promoting tobacco products.²⁷⁰ The complainants then argue, in essence, that even if retail tobacco packaging were a form of advertising and promotion, there is no qualitative evidence that advertising-induced perceptions and attitudes affect smoking-related behaviours, such as initiation, consumption, cessation, and relapse. Australia will address this argument in Part II.C.5(c)ii below.

263. The second basis for their position is their empirical contention that the measure has not, in fact, made a quantifiable contribution to its objectives in the period since its implementation. The complainants appear to believe that this empirical assertion, if proven, would provide a sufficient basis on which to conclude that the tobacco plain packaging measure is incapable of contributing to its objectives. Australia will address this argument in Part II.C.5(c)iii below.

²⁷⁰ See, e.g. Honduras' first written submission, paras. 443-447, 454; Dominican Republic's first written submission, paras. 671-682; Dominican Republic's response to Panel Question No. 102; Cuba's response to Panel Question No. 102; Honduras' response to Panel Question No. 102; Indonesia's response to Panel Question No. 102.

ii. The complainants' arguments concerning the linkage between attitudes and behaviour

- a. *The complainants have failed to demonstrate that the qualitative evidence supporting the tobacco plain packaging measure as affecting behavioural change is insufficient*

264. Australia agrees with the complainants that an evaluation of whether a measure is capable of making a contribution to its objectives can take into account "qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence".²⁷¹ In the context of the present dispute, this entails an evaluation of whether the tobacco plain packaging measure is capable of making a contribution to Australia's public health objectives "based on a set of hypotheses that are tested and supported by sufficient evidence".

265. Yet, and notwithstanding the significant amount of qualitative evidence supporting the effectiveness of the tobacco plain packaging measure outlined both in Australia's first written submission and at Part II.C.5(b) above, the complainants contend that there is an insufficient evidentiary basis to demonstrate that the tobacco plain packaging measure is capable of making a contribution to Australia's public health objectives. The complainants' arguments under this heading concern the sufficiency of the evidentiary basis for the conclusion that tobacco plain packaging would *ever* be capable of making a contribution to a reduction in tobacco prevalence and consumption. The complainants' attack on the evidentiary basis for tobacco plain packaging has two basic prongs.

266. First, the complainants contend that retail tobacco packaging is not a medium for advertising and promoting tobacco products. On this basis, the complainants seek to deny that retail tobacco packaging can be used to increase the appeal of tobacco products to consumers and prospective consumers (including particular segments of consumers, such as young people and women). This first prong of the complainants' argument need not detain us long. As Australia discussed in Part II.C.5(b)ii above, contrary to the complainants' claims, it is

²⁷¹ Dominican Republic's response to Panel Question No. 126, para. 280, quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

beyond any credible dispute that retail packaging is a medium for advertising and promoting tobacco products.²⁷²

267. The second prong of the complainants' argument is that even if retail tobacco packaging does serve to advertise and promote tobacco products, there is an insufficient evidentiary basis to conclude that advertising-induced perceptions and attitudes influence human behaviour. In this way, the complainants seek to sever any linkage between the appearance of retail tobacco packaging and relevant smoking-related behaviours. The complainants thus contend that an attractive and appealing tobacco package does not influence decisions concerning tobacco initiation, consumption, cessation, or relapse. Likewise, the complainants contend that a standardised, plain tobacco package will have no effect on initiation, consumption, cessation, or relapse.

268. The complainants' attempts to sever the connection between the appearance of a tobacco package and smoking-related behaviours – whether those behaviours are positive or negative – have evolved as this dispute has proceeded. In their first written submissions, the Dominican Republic and Honduras went to great lengths to argue that the entire body of scientific evidence that supports a connection between perceptions and smoking-related behaviours is essentially "junk science". The Dominican Republic argued that this research "does not meet the standards for methodological rigour applicable for social science research concerning consumer behaviour" and is therefore not "reliable" or "probative".²⁷³ Honduras likewise argued that the scientific literature supporting tobacco plain packaging "is not scientifically credible and does not provide a reliable basis for the plain packaging

²⁷² Panel Question No. 102 asked the complainants to explain whether, in their view, tobacco packaging fulfils an advertising function. Their answers reveal that the complainants realize that it is not credible to argue that branded tobacco packaging serves no advertising function. For example, Honduras did not even attempt to deny that packaging serves an advertising function, observing that "[p]ackaging is a product-related element that is sometimes considered to be part of the marketing mix, together with price, placement, and promotion." Honduras' response to Panel Question No. 102. Indonesia merely referred back to the view of Professor Steenkamp "that product packaging is *ineffective* in performing an advertising function", which, even if this statement were correct, is not the same as stating that it does *not* serve an advertising function. Indonesia's response to Panel Question No. 102 (emphasis added). The Dominican Republic argued that "the *prevailing view* in marketing is that packaging should be classified as part of the product, and not as an advertising instrument." Dominican Republic's response to Panel Question No. 102, para. 77 (emphasis added). To the same effect, the Dominican Republic stated that "product packaging is not *typically classified* in marketing as a form of advertising, and packaging and advertising are *often differentiated*". Dominican Republic's response to Panel Question No. 102, para. 80 (emphasis added).

²⁷³ Dominican Republic's first written submission, para. 551.

measures".²⁷⁴ The Dominican Republic and Honduras submitted numerous expert reports, most of which expressed the opinion that there is no connection between the appearance of a tobacco package and how people behave in practice.²⁷⁵

269. In their answers to the Panel's questions in advance of the first substantive meeting, the complainants began to place greater emphasis on the proposition that certain theories of human behaviour support the hypothesis that tobacco plain packaging is "*unlikely* to change smoking-related behavior".²⁷⁶ The gravamen of this line of criticism is that theories of human behaviour are only theories, and that Australia should have carried out "pre-implementation empirical testing of behavioural theories" to determine whether tobacco plain packaging will actually affect smoking-related behaviours.²⁷⁷ Australia will discuss the complainants' behavioural theories and the failings of the expert reports relied upon by the complainants, in more detail in Part III.D.3 of this submission. For present purposes, the relevant point is the complainants' apparent suggestion that an evaluation of whether Australia's tobacco plain packaging measure is "unjustifiable" under Article 20 of the TRIPS Agreement hinges upon whether certain theories of human behaviour support the conclusion that an effect on smoking-related behaviours is "likely" or "unlikely".

270. Australia has demonstrated in Parts II.C.5(c)ii and III.D.3 of this submission²⁷⁸ and in accompanying exhibits that the complainants' attacks on the scientific basis for tobacco plain packaging are completely unfounded. But even if the complainants' arguments had merit, they would be insufficient to conclude that Australia's tobacco plain packaging measure is "unjustifiable". The issue before the Panel under Article 20 of the TRIPS Agreement is whether the complainants have demonstrated that any encumbrance upon the use of trademarks resulting from the tobacco plain packaging measure is incapable of making a

²⁷⁴ Honduras' first written submission, para. 455 (heading).

²⁷⁵ Expert Report of I. Ajzen (1 June 2015), Exhibit DR/HON/IND-3; Expert Report of I. Ajzen (7 July 2014), Exhibit DR/HON/IND-4; Expert Report of L. Steinberg (3 July 2015), Exhibit DR/HON/IND-10; Second Expert Report of G. Fischer (7 July 2015), Exhibit DR/HON-11. See also Dominican Republic's response to Panel Question Nos. 2, 41 (both adopted by Indonesia); Honduras' response to Panel Question Nos. 2, 41.

²⁷⁶ Expert Report of I. Ajzen (1 June 2015), Exhibit DR/HON/IND-3, para. 16 (emphasis original).

²⁷⁷ See Expert Report of I. Ajzen (7 July 2014), Exhibit DR/HON/IND-4.

²⁷⁸ Which incorporates by reference Australia's arguments as set out in its first written submission and its responses to questions from the Panel.

contribution to Australia's public health objectives. The complainants' attacks on widely-accepted science and their assertion that the measure is "unlikely" to contribute to its objectives are insufficient to discharge this burden.

271. The complainants' arguments in this dispute are reminiscent of the arguments that Indonesia made in *US – Clove Cigarettes* to support its assertion that there is no evidence to support the conclusion that banning clove and other flavoured cigarettes is capable of contributing to a reduction in youth smoking. The panel in that dispute noted that Indonesia's assertion was "squarely contradict[ed]" by numerous studies undertaken by leading public health authorities and by other studies published in peer-reviewed journals.²⁷⁹ As in the case of tobacco plain packaging, the WHO had examined the relevant scientific evidence and had specifically recommended that countries ban flavoured cigarettes.²⁸⁰ The panel reviewed this evidence and concluded that "there is extensive scientific evidence supporting the conclusion that banning clove and other flavoured cigarettes could contribute to reducing youth smoking."²⁸¹ The panel observed that "[t]his is not a case in which a Member is seeking to base a public health measure on a minority view within the scientific community; this is a case in which the measure actually reflects at least the majority view, and potentially the unanimous view."²⁸²

272. As in the case of banning flavoured cigarettes, the conclusion that the perceptions and attitudes shaped by the appearance of retail tobacco packaging are capable of affecting smoking-related behaviours "reflects at least the majority view, and potentially the unanimous view" within the international scientific community. The evidence plainly demonstrates that the appearance of retail tobacco packaging can affect smoking-related behaviours both in the case of fully branded tobacco packaging (i.e. negative smoking-related

²⁷⁹ Panel Report, *US – Clove Cigarettes*, para. 7.401.

²⁸⁰ Panel Report, *US – Clove Cigarettes*, para. 7.414.

²⁸¹ Panel Report, *US – Clove Cigarettes*, para. 7.415.

²⁸² Panel Report, *US – Clove Cigarettes*, para. 7.401. The panel noted that in cases arising under Article 5.1 of the SPS Agreement, Members may adopt SPS measures on the basis of "divergent or minority views, as long as those views are from qualified and respected sources." Panel Report, *US – Clove Cigarettes*, fn 715, quoting Appellate Body Report, *US/Canada – Continued Suspension*, para. 591. The Appellate Body found in *US/Canada – Continued Suspension* that while a Member may base on SPS measure on a minority scientific view, "it must nevertheless have the necessary scientific and methodological rigour to be considered reputable science." Appellate Body Report, *US/Canada – Continued Suspension*, para. 591.

behaviours) and in the case of plain packaging (i.e. positive smoking-related behaviours). The complainants' assertions that this evidence is not "reliable", "probative", or "scientifically credible" are unfounded. As outlined in Part III.D.3(a) below, these assertions continue to be unfounded. Moreover, the complainants' contention that certain theories of human behaviour make it "unlikely" that tobacco plain packaging will contribute to Australia's public health objectives is simply insufficient to establish that the measure is incapable of making a contribution to those objectives, even accepting the complainants' contention at face value.²⁸³

b. The complainants' contention that perceptions do not affect behaviour is contradicted by their own arguments in this dispute

273. Even if it were appropriate for the Panel to accept the complainants' invitation to re-examine the evidence concerning the connection between smoking-related perceptions and behaviours (which it is not), the complainants would then face a different problem. The core premise of the complainants' argument – that there is no connection between the appearance of retail tobacco packaging and how people behave in practice – is also directly contradicted by the complainants' *own* arguments in this dispute.

274. In these proceedings, the complainants and their experts have taken the position that branded tobacco packaging has the ability:

- to cause people to pay a "price premium" for tobacco products;²⁸⁴
- to cause people to remain "loyal" to a particular brand, i.e. to prevent people from switching from one brand to another²⁸⁵; and, conversely,

²⁸³ Note that, in Part III.D.3(a) of this submission, Australia will address the failings of the expert evidence relied upon by the complainants when contending that certain theories of behaviour make it "unlikely" that the tobacco plain packaging measure will contribute to its objectives.

²⁸⁴ Relying on the Expert Report of J.B. Steenkamp, Exhibit DR-HON-5, paras. 61-65; Expert Report of R.S. Winer, Exhibit UKR-9 (adopted by the Dominican Republic), paras. 23-25, 53-55.

²⁸⁵ Dominican Republic's first written submissions, paras. 81-82; Honduras' first written submission, para. 866; Indonesia's first written submission, para. 261; Cuba's first written submissions, para. 26.

- to cause people to switch from one brand to another brand, i.e. to increase market share for one brand at the expense of other brands, without increasing overall category demand for tobacco products.²⁸⁶

275. As explained in Part III.D.3(a) below, all of these are human behaviours that the complainants attribute to the appearance of retail tobacco packaging. Clearly, the complainants believe that there is a mediational relationship between the appearance of retail tobacco packaging, including the use of trademarked figurative elements, and how people behave in practice. The complainants have failed to explain, however, how the appearance of retail tobacco packaging could affect certain human behaviours, such as inducing consumers to pay a "price premium", while having no effect whatsoever on *other* human behaviours, such as inducing young people to initiate smoking, or deterring existing smokers from quitting. For all of the elaborate theories of human behaviour expounded by their experts, the complainants have not offered a theory of human behaviour under which the appearance of retail tobacco packaging would have the ability to affect some human behaviours, but not others.²⁸⁷

276. Question 41 from the Panel asked the Dominican Republic and Honduras to explain this contradiction in their arguments. The Dominican Republic began its answer to this question with a long but irrelevant discussion of whether the aesthetic "appeal" of a *particular package* affects consumer loyalty and willingness to pay a price premium. The Panel's question did not concern the aesthetic appeal of particular packages. The Panel's question concerned how "branded packaging, in particular figurative elements of trademarks" could affect consumer loyalty and willingness to pay a price premium, while having no effect on the appeal of *tobacco products* to consumers and prospective consumers, including children and adolescents. The Dominican Republic never answered this question. Likewise, Honduras asserted that the appearance of tobacco packaging "aims to maintain product

²⁸⁶ Expert Report of J.B. Steenkamp, Exhibit DR-HON-5, para. 117.

²⁸⁷ Sir Cyril Chantler, in his report on Standardised Packaging for the UK, noted a similar concern, stating that: "Although the tobacco industry says that the purpose of branded packaging is to encourage brand switching only, they cannot explain how it would only ever attract switchers from one brand to another, and would never encourage initiation from non-smokers or increased overall consumption." C. Chantler, *Standardised packaging of tobacco: Report of the independent review undertaken by Sir Cyril Chantler* (2014), Exhibit AUS-81, para. 3.22.

differentiation and ensures the ability of brand owners to charge a price premium", but made no attempt to explain how the appearance of tobacco packaging could affect some human behaviours (such as willingness to pay a price premium) but not other human behaviours (such as the initiation or cessation of tobacco use).

277. The fact that both the Dominican Republic and Honduras provided non-answers to Panel Question 41 makes clear that they are incapable of providing a coherent explanation of how the appearance of tobacco packaging, including the use or non-use of trademarked figurative elements, can affect human behaviours that are important to the tobacco industry (such as willingness to pay a price premium) while having no effect on human behaviours that are important to public health officials (such as discouraging initiation or relapse). The complainants' inability to resolve this contradiction in their arguments is fatal to their attempt to sever the connection between the perceptions and attitudes created by the appearance of a tobacco package, on the one hand, and smoking-related behaviours and outcomes, on the other. Clearly, the complainants believe that such a connection exists. This should be the end of the line for the complainants' behavioural arguments.

iii. The complainants' arguments concerning post-implementation quantitative evidence

278. In addition to their unsuccessful attempts to discredit the significant body of empirical and expert evidence linking the tobacco plain packaging measure with behavioural changes, the complainants further contend that the measure has not, in fact, made a quantifiable contribution to a reduction in tobacco prevalence and consumption in the period since its implementation.

279. The complainants attach considerable importance to post-implementation empirical evidence in supporting their claim that the tobacco plain packaging measure is "unjustifiable". In their first written submissions, all four complainants placed this argument ahead of their arguments concerning the alleged inadequacies of the scientific basis for tobacco plain packaging.²⁸⁸ The Dominican Republic went so far as to suggest that any

²⁸⁸ Indeed, Indonesia did not even advance arguments concerning the scientific basis for tobacco plain packaging.

consideration of the scientific basis for tobacco plain packaging has been "superseded by empirical evidence of the actual operation" of the tobacco plain packaging measure in the period since its implementation.²⁸⁹ Clearly, the complainants consider that the principal test of whether the tobacco plain packaging measure is "unjustifiable" is whether it has made a quantifiable contribution to its objectives in the period since its implementation.

280. Before turning to their substance, it is important to place the complainants' empirical arguments in context. Two of the four complainants in this dispute (Honduras and the Dominican Republic) had filed their consultations and panel requests before Australia had even *implemented* the tobacco plain packaging measure.²⁹⁰ The other two complainants filed their consultations requests less than a year after Australia had implemented the measure.²⁹¹ For this reason, it is difficult to credit the complainants' contention that post-implementation empirical evidence is the litmus test of whether the tobacco plain packaging measure is "unjustifiable". Plainly, the complainants had already decided to challenge Australia's tobacco plain packaging measure as "unjustifiable" without *any* consideration of post-implementation empirical evidence, or at least any meaningful consideration of that evidence.

281. With respect to the post-implementation evidence that the complainants consider to have "superseded" any consideration of other evidence relating to whether the tobacco plain packaging measure is "unjustifiable", it is important to note that the complainants have so far relied upon only 18 months of post-implementation data to make their case. Whatever else might be said about their use of these data – and Australia will have more to say on this topic in Part III – it simply is not credible for the complainants to claim that they can prove that a complex public health measure is "unjustifiable" on the basis of 18 months of data.²⁹²

²⁸⁹ Dominican Republic's first written submission, para. 553 (heading).

²⁹⁰ The tobacco plain packaging measure took effect on 1 December 2012. Honduras filed its consultations request in DS435 on 10 April 2012, and its panel request on 17 October 2012. Dominican Republic filed its consultations request in DS441 on 23 July 2012, and its panel request on 14 November 2012.

²⁹¹ Cuba filed its consultations request in DS458 on 7 May 2013, while Indonesia filed its consultations request in DS467 on 25 September 2013.

²⁹² In this regard, Dr Chipty has pointed out that a 20 per cent reduction in youth initiation combined with a 20 per cent increase in youth cessation would only have a small impact on overall prevalence rates from one period to the next, and yet this would represent a significant public health accomplishment by any standard; see Expert Report of T. Chipty (9 March 2015), paras. 37-39. In any event, the application of the complainants' *own methodologies* to the post-implementation data that are currently available is fully consistent with the conclusion that the tobacco plain packaging measure is already contributing to its public health objectives (see

(continued)

282. For the purposes of Article 20 of the TRIPS Agreement, the relevant point is that even if the complainants *were* able to demonstrate that the tobacco plain packaging measure has not made a quantifiable contribution to a reduction in prevalence and consumption in the 18 months following its implementation, which they have not, this would not provide a basis for finding that the measure is "unjustifiable".

283. The Appellate Body's observations in *Brazil – Retreaded Tyres* concerning the complex nature of certain public health measures, made in the context of Article XX of the GATT 1994, apply equally in the context of evaluating whether a measure is "unjustifiable" under Article 20 of the TRIPS Agreement. As the Appellate Body observed, certain types of complex public health problems "may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures", making it "difficult to isolate the contribution to public health ... of one specific measure from those attributable to other measures that are part of the same comprehensive policy".²⁹³ The results obtained from these types of measures "may manifest themselves only after a certain period of time".²⁹⁴ These observations pertain with equal force to any evaluation of whether a measure subject to Article 20 of the TRIPS Agreement is "unjustifiable".

284. As Australia has discussed previously, measures to reduce the prevalence and consumption of tobacco are the paradigmatic example of complex, interacting measures whose individual effects are difficult to isolate and that are likely to manifest themselves only after a period of time. The 18 months in which the complainants have sought to assess whether tobacco plain packaging is capable of making a contribution to its public health objectives is not a necessary or even reasonable basis upon which to undertake this inquiry, even assuming that post-implementation empirical evidence could ever be relevant to an examination of whether a measure is "unjustifiable". The complainants' heavy reliance on post-implementation empirical evidence to demonstrate that the tobacco plain packaging measure is "unjustifiable" is therefore unfounded.

Part III.D of this submission.) Thus, even by the complainants' own standard, the tobacco plain packaging measure is not "unjustifiable" based on an examination of the post-implementation empirical evidence that is currently available.

²⁹³ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

²⁹⁴ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

iv. The complainants' "individualised assessment" argument is based on a misunderstanding or mischaracterisation of the manner in which the tobacco plain packaging measure operates

285. Australia has demonstrated in Parts II.C.5(b) and II.C.5(c) above that the complainants have failed to prove that the tobacco plain packaging measure is incapable of making a contribution to Australia's public health objectives. The evidence demonstrates overwhelmingly that tobacco plain packaging is capable of contributing to the tobacco plain packaging measure's public health objectives.

286. The weakness of the complainants' case on the issue of contribution likely explains why the complainants are placing increasing emphasis on their claim that the tobacco plain packaging measure is "unjustifiable" because Australia has not undertaken an "individualised assessment" of the "specific features" of particular trademarks. This "individualised assessment" argument appears to have become the cornerstone of the complainants' case that the tobacco plain packaging measure is "unjustifiable".

287. As Australia discussed in Part II.C.4(d), the complainants have not presented any interpretative basis for their assertion that the test for "unjustifiably" requires Members to perform an individualised assessment of trademarks. Whether or not the complainants' "individualised assessment" argument has any legal basis, the complainants' argument is premised on either a misunderstanding or a mischaracterisation of the tobacco plain packaging measure's objectives and the manner in which it operates. Once that error is corrected, it is clear that their "individualised assessment" argument is moot.

288. The premise of the complainants' "individualised assessment" argument is that the concern underlying the tobacco plain packaging measure is that there are "specific features" of particular trademarks that increase the appeal of tobacco products, detract from the effectiveness of GHWs, and mislead consumers as to the harms of tobacco use. The complainants repeatedly insist that Australia was required to evaluate, for example, whether Avenir Heavy or Palatino is likely to increase the appeal of tobacco products, or whether a pink background or a turquoise background is likely to mislead consumers as to the harms of tobacco use, or whether AbNormal CapiTalisation distracts from GHWs. The complainants appear to believe that the term "unjustifiably" requires Australia to identify every trademark

used in Australia in connection with tobacco products, and then evaluate each trademark against a set of criteria that would allow Australia to determine whether that particular trademark does or does not implicate Australia's public health concerns.

289. The premise of the complainants' argument is incorrect. The premise of the tobacco plain packaging measure is not that "specific features" of particular trademarks increase the appeal of tobacco products, detract from the effectiveness of GHWs, or mislead consumers as to the harms of tobacco use. Australia has no particular views or concerns in respect, for example, of whether a particular typeface, such as the sans-serif typeface of the Peter Jackson brand, is appealing, or whether a particular design feature such as the Marlboro "chevron" is likely to detract from GHWs, or whether a particular colour such as the colour white is likely to mislead consumers as to the risks of tobacco use. As Australia discussed in Part II.C.5(a) above, the premise of the tobacco plain packaging measure is that prescribing a standardised, plain appearance for tobacco packages and products will minimise the ability of tobacco packages and products to have *any* of these effects.

290. The FCTC Guidelines describe the concept of tobacco plain packaging as follows:

The effect of advertising or promotion on packaging can be eliminated by requiring plain packaging: black and white or two other contrasting colours, as prescribed by national authorities; nothing other than a brand name, a product name and/or manufacturer's name, contact details and the quantity of product in the packaging, without any logos or other features apart from health warnings, tax stamps and other government-mandated information or markings; prescribed font style and size; and standardized shape, size and materials. *There should be no advertising or promotion inside or attached to the package or on individual cigarettes or other tobacco products.*²⁹⁵

291. As this description makes clear, a standardised, plain appearance for tobacco packages is designed to eliminate the opportunity for tobacco companies to use the package as a medium for advertising and promoting the product. Allowing tobacco companies to use figurative elements and other non-standardised design elements on the package can only serve to increase the appeal of the package relative to a package design that does not permit

²⁹⁵ WHO Framework Convention on Tobacco Control: Guidelines for Implementation (2013 edition) Exhibit AUS-109, p. 99 (emphasis added).

the use of these elements.²⁹⁶ This conclusion is not affected by the "specific features" of particular trademarks.

292. Australia's plain package design, by contrast, is not meant to be appealing to *anyone*, and that is precisely the point. Unlike the Longbeach brand discussed above, Australia's plain package design does not have an ocean view, a sandy beach, or a warm sunrise promising a beautiful day ahead. It has *no* figurative or other design elements to increase the appeal of the packaged product. It does not convey *any* positive associations. In fact, the drab brown colour of the background was carefully chosen through market research to elicit no positive associations whatsoever.²⁹⁷ The package design *eliminates* the ability of tobacco companies to use figurative design elements to increase the appeal of the package or to create any sort of positive association with the product, whether it is one of masculinity, femininity, youthfulness, purity, value for money, or any other association that a tobacco company might want to attach to its product. The Longbeach package design, like any package design, is part of a marketing strategy. Australia's plain package design prevents tobacco companies from using the package to market the product at all.

293. In addition to preventing tobacco companies from using the package to increase the appeal of tobacco products, the standardised, plain appearance of the pack serves other important purposes:

- By standardising the appearance of all tobacco packages, the tobacco plain packaging requirements limit the ability of the pack to distract from and reduce the noticeability

²⁹⁶ Professor Fong explains that "[t]he Act standardises both the non-structural and the structural features. And in the same way that advertising bans must be comprehensive, otherwise allowing advertising to be channelled more intensely into the channels not covered, the standardisation of the package must be comprehensive – covering BOTH the non-structural and structural features of the package; otherwise this would allow the marketing efforts of the tobacco industry on the package to be continued...the industry has used BOTH the non-structural and structural features of the package to achieve its objectives of increasing appeal, reducing the effectiveness of warnings, and increasing the ability of the packaging to mislead consumers. They operate together and each contribute to the marketing objectives of the tobacco industry. As such, to achieve the objectives of the plain packaging measure, standardisation of the physical structure and standardisation of the graphic design elements are both critically important." See Expert Report of G. Fong (4 March 2015), Exhibit AUS-14. paras. 124-125 (emphasis original).

²⁹⁷ GfK Bluemoon "sought to identify one plain packaging design (colour, font type, font size) that would minimize appeal and attractiveness, whilst maximising perceived harm and the noticeability of the graphic health warnings". GfK Bluemoon, *Market Research to Determine Effective Plain Packaging of Tobacco Products* (August 2011), Exhibit AUS-117, p. 6.

of GHWs. The portion of the package that indicates the brand and variant name has a constant, uniform appearance, while the GHWs change over time. The GHWs no longer need to compete for attention with other design elements of the package.

- The uniform colour of the background prevents tobacco companies from continuing their long-running and well-documented strategy of using different colours to create misleading perceptions of the harmful effects of tobacco use (such as using white backgrounds to create the impression that a particular type of cigarette is "healthier"), or to exploit certain positive associations with particular colours (such as using pink and purple shades to exploit associations with femininity).
- More broadly, the standardised, plain appearance of the package serves to denormalise tobacco products in the eyes of consumers and prospective consumers, including young people, by indicating that tobacco is not a normal consumer product. The appearance of the package and the fact that it is not branded like other consumer products underline that tobacco is a uniquely hazardous product, i.e. that it is the only lawful consumer product that kills its users when used as intended. It is not a product that should be marketed in the same manner as other consumer products, including through the use of branded packaging.

294. As these considerations should make clear, the tobacco plain packaging measure is not concerned with the "specific features" of particular trademarks. The premise of the measure is not that some trademarks are more "appealing" than others, or more likely to detract from GHWs, or more likely to create misleading impressions as to the harms of tobacco use. The tobacco plain packaging measure, by requiring a standardised, plain appearance for retail tobacco packaging eliminates, or at least significantly curtails, the ability of tobacco companies to use the package as a vehicle for advertising and promoting the product, which in turn reduces the appeal of tobacco products, increases the effectiveness of GHWs and reduces the ability of the package to mislead. This goal has nothing to do with the "specific features" of trademarks and, instead, has "everything to do with features of the

product inside the packaging", namely that it is a consumer product that is uniquely hazardous to human health.²⁹⁸

295. The Dominican Republic concedes that no "individualised assessment" is required when the measure does not seek to address concerns about the "specific features" of trademarks, even under its erroneous interpretation of the term "unjustifiably".²⁹⁹ No purpose would be served by examining the "specific features" of particular trademarks, because those features are irrelevant to the policy decision to require all tobacco products to be sold in a standardised, plain package. Moreover, for the reasons explained above, *any* use of trademarked design elements other than the brand and variant name, whatever those other elements might be, would be inconsistent with the requirement of a standardised, plain package and the role that it plays in contributing to the measure's objectives. There is therefore no reason to examine "specific features" of particular trademarks that tobacco companies might want to re-introduce onto their product packages.³⁰⁰

296. The fallacy of the complainants' "individualised assessment" argument becomes apparent merely by scratching the surface of its implications. Most importantly, given that there is no evidence on the record that the use of brand and variant names is insufficient to fulfil the distinguishing function of trademarks, i.e. to distinguish the goods of one undertaking from those of other undertakings, the only purpose for which the tobacco

²⁹⁸ Dominican Republic's response to Panel Question No. 108, para. 134 (emphasis modified).

²⁹⁹ Dominican Republic's response to Panel Question No. 108, paras. 133-134.

³⁰⁰ By analogy, consider the situation faced by jurisdictions that have recently decriminalised the sale of marijuana (whether for medicinal purposes or otherwise). It would clearly be justifiable for these jurisdictions to require marijuana products to be sold in standardised, plain packages in order to avoid any opportunity for marijuana companies to use the package as a means of increasing the appeal of marijuana products, detracting from any required health warnings, or misleading consumers as to the risks of marijuana use. This policy choice would not depend upon the "specific features" of any particular trademark that a marijuana company proposes to place on the package. Rather, as in the case of tobacco products, this policy choice would be driven by the nature of the product itself.

Based on the complainants' mischaracterisation of the tobacco plain packaging measure, however, this *would* be a circumstance in which the Member would need to undertake an "individualised assessment" of the "specific features" of particular trademarks that marijuana companies propose to add to the standardised, plain package. This is because, in their view, the rationale for this encumbrance upon the use of trademarks would relate to whether the "specific features" of particular trademarks serve to advertise and promote marijuana products. For the reasons that Australia has explained, nothing in Article 20 requires this kind of "individualised assessment", in any circumstance. It makes no difference whether the product has been lawfully sold for a long period of time (as in the case of tobacco products) or whether it is a product whose sale has only recently become lawful (as in the case of marijuana products in some jurisdictions).

industry would want to re-introduce other design features onto the package is to make the product more appealing, i.e. to advertise and promote the product. Consider the following fictitious examples:

Choice Menthols

choice menthols

Imperial Golds

Imperial Golds

297. The examples in the top row, shown in Lucida Sans 14 point, clearly distinguish the different commercial sources of each product. The examples in the bottom row illustrate how each company might render the brand and variant names were it not for the formatting requirements of the tobacco plain packaging measure. It is certainly possible to speculate about each company's motives for wanting to render the brand and variant names in these ways. For example, the manufacturer of "Choice" tobacco products may have wanted to give the appearance of its "Choice Menthols" package a more casual look, while the manufacturer of "Imperial" tobacco products may have wanted to give the appearance of its "Imperial Golds" package a fancier, more "regal" look. But these motives are immaterial. Given that the examples in the top row were already sufficient to distinguish the commercial source of the product, the only plausible reason for why these manufacturers would prefer to use the examples in the bottom row is because they believe that rendering the brand and variant names in these ways would increase the appeal of the product to a particular segment of consumers or prospective consumers.³⁰¹

298. Moreover, let us accept the hypothesis that tobacco companies use trademarks to induce consumers to pay a "price premium" or to switch from one brand to another, and let us even accept that this promotional use of a trademark is a relevant "use" of a trademark under Article 20 of the TRIPS Agreement. Let us further assume that the manufacturers of the Choice and Imperial brands believe that the examples shown in the bottom row are more likely to have these desired effects. Already, this amounts to a concession that the differences between the top and bottom rows are capable of affecting human behaviour. On what basis

³⁰¹ To pose a question using the complainants' phraseology, what information about the "quality, characteristics, and reputation" of Choice Menthols and Imperial Golds would the examples in the bottom row convey that is not already conveyed by the examples in the top row? The examples in the bottom row provide no additional "information" about anything. The differences in colour, typeface and capitalization (in the case of Choice Menthols) serve only to increase the appeal of the product.

would the complainants contend that these differences are not also capable of affecting other human behaviours? For instance, if the example of "Choice Menthols" in the bottom row could be sufficiently appealing to induce an existing smoker to switch to Choice Menthols from some other brand, why could it not also induce a person to take up smoking Choice Menthols in the first instance?³⁰² As Australia discussed in Part II.C.5(c)ii.b above, the Panel posed this question to the Honduras and the Dominican Republic in Question 41, and they had no genuine or coherent answer to this question.

299. In conclusion, the complainants' "individualised assessment" argument is simply a diversionary tactic. The special requirements imposed by the tobacco plain packaging measure create a standardised, plain appearance for all retail tobacco packaging, thus minimising the opportunities for advertising and promoting the product, and thereby reducing the appeal of tobacco products, increasing the effectiveness of GHWs, and reducing the capacity of the pack to mislead. The complainants' contention that the measure is somehow concerned with the "specific features" of particular trademarks is based on either a misunderstanding or a mischaracterisation of the objectives of the tobacco plain packaging measure and the manner in which it is meant to operate. Once that error is corrected, the complainants' argument is moot even by its own terms. Whether or not the complainants' "individualised assessment" argument has any legal foundation, it provides no basis for finding that the tobacco plain packaging measure is "unjustifiable".

6. Conclusion to Part II.C

300. For the reasons set forth in this Part II.C, Australia has demonstrated that the complainants have failed to demonstrate that any encumbrance upon the use of trademarks in the course of trade resulting from the special requirements at issue has been imposed "unjustifiably". Specifically, the complainants have failed to demonstrate that the encumbrance goes against or is otherwise not capable of contributing to its objectives and therefore that there is no rational connection between the encumbrance and the objective. There is, in fact, an overwhelming basis in the evidence to demonstrate that tobacco plain packaging *is* capable of contributing to the legitimate public health objectives set forth in the

³⁰² See C. Chantler, *Standardised packaging of tobacco: Report of the independent review undertaken by Sir Cyril Chantler* (2014), Exhibit AUS-81, para. 3.22.

TPP Act. In particular, by requiring the standardisation of the appearance of packaging, there is a clear rational connection between the encumbrance and the public health objectives of the measure, and the complainants have failed to demonstrate otherwise.

301. For the sake of completeness, Australia notes that the Panel would need to reach the same conclusion even if it were to accept the position of some parties that the term "unjustifiably" requires the Panel to "weigh and balance" the extent to which the tobacco plain packaging measure encumbers a relevant use of trademarks, the extent to which it is capable of making a contribution to its public health objectives, and the importance of the public health objectives that the measure seeks to fulfil. Australia expressed its disagreement with this position in Part II.C.4(c)i above not because it believes that this potential difference of opinion concerning the interpretation and application of Article 20 affects the outcome of this dispute, but because of its systemic concerns relating to the proper interpretation of this provision.

302. Beginning with the extent of the encumbrance upon the use of trademarks in the course of trade, Australia reiterates that, in its view, the complainants have failed to identify any relevant encumbrance upon the use of trademarks in the course of trade, because they have failed to identify any respect in which the tobacco plain packaging measure, when viewed as a whole, encumbers the use of trademarks to distinguish the tobacco products of one undertaking from those of other undertakings in the course of trade. Even if it were permissible to hypothesize such an encumbrance, it would necessarily be a minimal encumbrance because the use of brand and variant names is plainly *adequate*, at a minimum, to fulfil the distinguishing function of trademarks. As Australia has explained, the "encumbrance" that the complainants are actually complaining about in this dispute is an encumbrance upon the use of trademarks to advertise and promote tobacco products. Even if this were a relevant use of trademarks under Article 20 of the TRIPS Agreement, the extent to which the tobacco plain packaging measure encumbers the use of trademarks to advertise and promote tobacco products is directly related to an important objective of the measure, namely, to reduce the ability of tobacco companies to advertise and promote tobacco products.

303. With regard to the extent to which the tobacco plain packaging measure is capable of contributing to its objectives, the evidence that Australia set forth in Part II.C.5(b)

demonstrates that the overwhelming weight of international scientific opinion, drawn from fields as diverse as medicine, public health, human psychology, marketing, and economics, supports the conclusion that tobacco plain packaging is an important and effective addition to a comprehensive suite of tobacco control measures. As Australia has explained from the outset of this dispute, tobacco plain packaging is a logical extension of pre-existing restrictions on other forms of tobacco advertising and promotion, all of which have been shown to be effective. In countries like Australia that maintain comprehensive bans on other forms of tobacco advertising and promotion, it is particularly important to restrict the ability of tobacco companies to use the product package as a medium for advertising and promotion, as this is one of the last vehicles available to the tobacco industry to make tobacco products more appealing to young people.

304. Finally, there can be no doubt that the public health objectives that the tobacco plain packaging measure seeks to accomplish are of the utmost importance. As many as two out of three Australian smokers will die prematurely from smoking-related diseases, representing an annual death toll of anywhere between 15,000 and 20,000 Australian citizens. Australia's comprehensive suite of tobacco control measures has significantly reduced the prevalence of tobacco consumption in Australia over the course of several decades, but Australia still has a long way to go in combatting the tobacco epidemic. Every step that Australia can take to reduce the prevalence of tobacco use – especially by discouraging the initiation of tobacco use by young people – is a step that is worth taking.

305. The tobacco plain packaging measure preserves the ability of tobacco companies to use trademarks to distinguish their products from those of other undertakings, while curtailing the use of retail tobacco packaging to advertise and promote tobacco products, detract from the effectiveness of GHWs, and mislead consumers as to the harms of tobacco use in order to achieve a vital public policy objective. If the Panel were to "weigh and balance" these factors – the extent of the encumbrance, the extent to which the measure is capable of contributing to its objectives, and the importance of the objectives that the measure seeks to accomplish – there is no question that Australia's tobacco plain packaging measure is not unjustifiable.

306. Thus, under any conceivable interpretation of the term "unjustifiably", the complainants have failed to sustain their burden of proving that any encumbrance upon the

use of trademarks in the course of trade resulting from the special requirements imposed by the tobacco plain packaging measure is "unjustifiable". The Panel must therefore reject the complainants' claims under Article 20 of the TRIPS Agreement.³⁰³

³⁰³ Australia will not separately address the complainants' arguments concerning "less restrictive alternatives" under Article 20 of the TRIPS Agreement because this is clearly not required under a legal standard of "unjustifiability". See Part II.C.4(c) above. Australia notes, however, that the "less restrictive alternatives" that the complainants purport to identify in this context are the same that they identify in connection with their TBT claims. Australia discusses those "alternatives" in Part III.F below.

III. THE COMPLAINANTS HAVE FAILED TO MAKE A *PRIMA FACIE* CASE THAT THE TOBACCO PLAIN PACKAGING MEASURE IS INCONSISTENT WITH ARTICLE 2.2 OF THE TBT AGREEMENT

A. INTRODUCTION TO PART III

307. In this Part of its second written submission, Australia will address the complainants' arguments that the tobacco plain packaging measure is inconsistent with Article 2.2 of the TBT Agreement.

308. There is no dispute between the parties that, in order to give proper effect to the presumption reflected in Article 2.5 of the TBT Agreement, the Panel must begin its analysis of the complainants' arguments under Article 2.2 by determining, first, whether the tobacco plain packaging measure meets the requirements of Article 2.5. Australia explains in Part III.B below that the tobacco plain packaging measure has been adopted in accordance with the FCTC Guidelines for Articles 11 and 13, which set out the relevant international standard for the plain packaging of tobacco products, and therefore must benefit from the presumption in Article 2.5 that it does not constitute an "unnecessary obstacle to international trade" within the meaning of Article 2.2. Australia explains further that the complainants have failed to adduce any evidence of the type that would be required to rebut the presumption in Article 2.5, and therefore the Panel need not proceed further in its analysis.

309. Notwithstanding their failure to rebut the presumption established by Article 2.5, the complainants' claims under Article 2.2 would fail in any event because they have not established a *prima facie* case that the tobacco plain packaging measure is "trade-restrictive" under a proper interpretation of that provision. As Australia explains in Part III.C below, the complainants have failed to adduce any qualitative or quantitative evidence sufficient to demonstrate that the tobacco plain packaging measure has a limiting effect on international trade in tobacco products. Thus, the complainants have failed to establish the threshold applicability of Article 2.2 of the TBT Agreement to the facts of this dispute, and their claims under that provision must fail at the threshold.

310. In the unlikely event that the Panel were to consider that the complainants have made a *prima facie* case that the tobacco plain packaging measure is "trade-restrictive" under a proper interpretation of that term, the "weighing and balancing" of the relevant factors under Article 2.2 demonstrates that the complainants nonetheless have failed to establish that the tobacco plain packaging measure is "more trade-restrictive than necessary" to fulfil Australia's legitimate public health objectives. Australia explains in Part III.D below that the complainants have failed in their attempt to establish that the tobacco plain packaging measure is not capable of contributing to Australia's legitimate objectives of reducing the use of and exposure to tobacco products in Australia. To the contrary, the overwhelming weight of the qualitative evidence unequivocally establishes that the tobacco plain packaging measure is capable of contributing to those objectives by reducing the appeal of tobacco products, increasing the effectiveness of GHWs, and reducing the ability of the pack to mislead. Australia will establish further that quantitative evidence corroborates this, because it is consistent with the tobacco plain packaging measure operating synergistically with other elements of Australia's comprehensive tobacco control policy to further reduce the use of and exposure to tobacco products in Australia.

311. Turning to the factor of the risks that non-fulfilment would create, in Part III.E Australia will reiterate its view that this factor overwhelmingly weighs in favour of a finding that the tobacco plain packaging measure is "no more trade-restrictive than necessary" under Article 2.2. Australia will explain that the nature of the risks at issue are great, in light of the nature of the serious harm to public health caused by the use of and exposure to tobacco products, and the gravity of the consequences that would arise from non-fulfilment of the tobacco plain packaging measure's objectives, in the form of increased tobacco-related deaths and disease in Australia.

312. Finally, in Part III.F below, Australia will demonstrate that the complainants have failed to put forward any alternatives that would establish that the tobacco plain packaging measure is more trade-restrictive than necessary to fulfil Australia's legitimate public health objectives. The purported "alternatives" proposed by the complainants are not true "alternatives" to the tobacco plain packaging measure because they are existing elements of Australia's comprehensive suite of tobacco control measures. Even if they were proper

"alternatives" they are either more trade-restrictive, do not achieve an equivalent degree of contribution, or are not reasonably available to Australia.

B. THE COMPLAINANTS HAVE FAILED TO REBUT THE PRESUMPTION IN ARTICLE 2.5 OF THE TBT AGREEMENT THAT THE TOBACCO PLAIN PACKAGING MEASURE IS NOT AN UNNECESSARY OBSTACLE TO INTERNATIONAL TRADE

1. Introduction to Part III.B

313. The parties to this dispute and many of the third parties³⁰⁴ are largely in agreement that the Panel should begin its analysis of the complainants' claims under Article 2.2 of the TBT Agreement by determining, first, whether the tobacco plain packaging measure satisfies the requirements of Article 2.5 of the TBT Agreement.³⁰⁵ Accordingly, Australia will begin by establishing why the tobacco plain packaging measure should be entitled to the presumption under Article 2.5 that it does *not* create "unnecessary obstacles to international trade", and why the complainants have not been able to rebut this presumption. To recall, the second sentence of Article 2.5 of the TBT Agreement provides:

Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

314. The complainants do not dispute that the tobacco plain packaging measure has been prepared, adopted and applied for the protection of human health, which is one of the legitimate objectives explicitly mentioned in Article 2.2 of the TBT Agreement. The only point of contention between the parties refers to the second requirement in Article 2.5, namely, whether the tobacco plain packaging measure is "in accordance with relevant international standards".

³⁰⁴ See third party responses to Panel Question No. 7 of Brazil, Canada, the European Union and Norway.

³⁰⁵ Dominican Republic's response to Panel Question No. 66, para. 288; Indonesia's response to Panel Question No. 66, para. 73. Although Honduras has stated that "there is no pre-determined order of analysis" between Articles 2.2 and 2.5 of the TBT Agreement, it seems to implicitly acknowledge that the Panel should determine, first, whether the tobacco plain packaging measure is entitled to the presumption in Article 2.5, prior to determining whether this presumption has been successfully rebutted by the complainants. (Honduras' response to Panel Question No. 66, p. 26).

315. To meet the second requirement of Article 2.5 the parties are largely in agreement that the following four cumulative conditions must be satisfied: (i) the document must meet the definition of a "standard"; (ii) it must be "international" in character, in that it has been approved by an "international standardizing body"; (iii) the international standard must be "relevant" to the technical regulation at issue; and (iv) the technical regulation must be "in accordance with" the relevant international standard.³⁰⁶

316. In its first written submission, Australia explained that the tobacco plain packaging measure meets this requirement because it has been adopted in accordance with the FCTC Guidelines for Articles 11 and 13, which set out the relevant international standard for the plain packaging of tobacco products. More specifically, Australia demonstrated that the FCTC Guidelines are "standards", because they provide "guidelines" for "common and repeated use" by the FCTC Parties, concerning the characteristics of a "product" (tobacco), and related "processes and production methods" (manufacture and sale of tobacco products).³⁰⁷ Australia further demonstrated that the FCTC COP is an "international standardizing body", because it has "recognized activities in standardization" and it is open to membership of all Members.³⁰⁸ Finally, Australia explained that the FCTC Guidelines are "relevant" to the tobacco plain packaging measure,³⁰⁹ which in turn has been adopted "in accordance with" those Guidelines.³¹⁰

317. The WHO and a large number of third parties agree with Australia that the FCTC Guidelines are "relevant international standards", and that the tobacco plain packaging measure has been adopted "in accordance with" such standards. Indeed, Canada, New Zealand, Norway, South Africa and Uruguay have each expressed the view that the tobacco plain packaging measure has been adopted "in accordance with relevant international

³⁰⁶ Dominican Republic's response to Panel Question No. 66, para. 291; Honduras' response to Panel Question No. 66, p. 26; Indonesia's response to Panel Question No. 66, paras. 74-77.

³⁰⁷ Australia's first written submission, para. 573.

³⁰⁸ Australia's first written submission, paras. 575-579.

³⁰⁹ Australia's first written submission, para. 581.

³¹⁰ Australia's first written submission, para. 582.

standards" consisting of the FCTC Guidelines, and therefore should be presumed *not* to constitute an "unnecessary obstacle to international trade".³¹¹

318. In contrast, the complainants and two third parties – Moldova and Nicaragua – have taken the position that the FCTC Guidelines are not "relevant international standards" under Article 2.5. The complainants essentially argue that the FCTC Guidelines are not "standards" because they are insufficiently precise and operate to restrict rather than facilitate trade.³¹² The complainants posit further that the FCTC COP does not have "recognized activities in standardization" because it is a treaty-governance mechanism that is neither "open and impartial", nor "effective and relevant".³¹³ The complainants do not dispute that the FCTC COP's membership is open to all Members, and that the FCTC Guidelines are "relevant" to the tobacco plain packaging measure.

319. If the Panel were to agree with Australia that the FCTC Guidelines are a "relevant international standard" under Article 2.5, the Dominican Republic and Indonesia argue that the tobacco plain packaging measure is not "in accordance with" the FCTC Guidelines because it does not "conform to" the Guidelines.³¹⁴

320. In the sections that follow, Australia will rebut each of these contentions in turn. Having demonstrated that the FCTC Guidelines are a "relevant international standard" and that the tobacco plain packaging measure has been adopted "in accordance with those standards", Australia will then demonstrate in Part III.B.5 that the complainants have failed to adduce any evidence to rebut the presumption in Article 2.5 that the tobacco plain packaging measure does not create "unnecessary obstacles to international trade" under Article 2.2 of the TBT Agreement. For this reason, the Panel does not need to address further the

³¹¹ Canada's third party response to Panel Question No. 8; New Zealand's third party submission, paras. 93-94; Norway's third party response to Panel Question No. 8, para. 21; South Africa's third party response to Panel Question No. 8; Uruguay's third party submission, para. 70.

³¹² Dominican Republic's response to Panel Question No. 66, paras. 297, 305-308; Honduras' response to Panel Question No. 70, p. 33.

³¹³ Dominican Republic's response to Panel Question No. 66, paras. 296, 300-304; Honduras' response to Panel Question No. 70, p. 32.

³¹⁴ Dominican Republic's response to Panel Question No. 66, paras. 309-320; Indonesia's response to Panel Question No. 66, para. 86.

complainants' claims that the tobacco plain packaging measure is inconsistent with Article 2.2 of the TBT Agreement.

2. The complainants have failed to establish that the FCTC Guidelines are not a "standard" under the TBT Agreement

321. The Dominican Republic and Honduras argue that the FCTC Guidelines are not a "standard" under Annex 1.2 of the TBT Agreement because they are not sufficiently "precise" or "prescriptive".³¹⁵ According to these complainants, such purported lack of precision renders the FCTC Guidelines unsuitable for "common and repeated use" by the FCTC parties.

322. The proposed "precision" requirement does not find a basis in the text of Annex 1.2 of the TBT Agreement, which defines a "standard" as follows:

Document approved by a recognized body, that provides, for common and repeated use, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.

323. Contrary to the complainants' suggestion, the reference to "common and repeated use" in the definition of a standard does not set forth any minimum threshold of specificity or prescriptiveness. Rather, by its express terms, Annex 1.2 establishes that standards are "documents" that provide mere "guidelines" for products or related processes and production methods. Inherent in the ordinary meaning of the term "guideline" (a "standardizing principle")³¹⁶ is the notion that a standard may allow for a certain degree of flexibility in the relevant product characteristic or related processes and production methods. In this respect, Honduras' position that a standard needs to be "*prescriptive*" in order to allow for "common and repeated use" is directly contradicted by the fact that, by definition, compliance with a standard is not mandatory.

324. Moreover, even if "precision" were a relevant requirement, it is evident on the face of the FCTC Guidelines that they are sufficiently precise to allow "common and repeated use"

³¹⁵ Dominican Republic's response to Panel Question No. 66, paras. 305-308; Honduras' response to Panel Question No. 129, p. 42.

³¹⁶ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-539, p. 1174.

by the FCTC Parties. The FCTC Guidelines for Article 11, for example, establish that FCTC Parties should consider "adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging)." The FCTC Guidelines for Article 13 further specify that tobacco plain packaging requires:

... black and white or two other contrasting colours, as prescribed by national authorities; nothing other than a brand name, a product name and/or manufacturer's name, contact details and the quantity of product in the packaging, without any logos or other features apart from health warnings, tax stamps and other government-mandated information or markings; prescribed font style and size; and standardized shape, size and materials. There should be no advertising or promotion inside or attached to the package or on individual cigarettes or other tobacco products.

325. Thus, the FCTC Guidelines identify what elements of the pack are to be restricted or prohibited, and specify in detail:

- the *colours*: ("black and white or two other contrasting colours");
- the *content* of a pack: ("nothing other than a brand name, a product name and/or manufacturer's name, contact details and the quantity of product in the packaging, without any logos other features apart from health warnings, tax stamps and other government-mandated information or markings");
- the *font*: (a "prescribed font style and size"); and
- the *format*: ("standardized shape, size and materials").

326. The Dominican Republic itself acknowledges that the FCTC Guidelines recommend that FCTC Parties "use two contrasting colours on packaging []; prescribe font size and style of the brand name; standardize the shape, size and materials."³¹⁷ However, the Dominican Republic argues that the FCTC Guidelines are not suitable for "common and repeated use" because "detailed choices for the content of plain packaging measures is not specified."³¹⁸

³¹⁷ Dominican Republic's response to Panel Question No. 66, para. 318.

³¹⁸ Dominican Republic's response to Panel Question No. 66, para. 318.

327. Australia disagrees. The fact that details such as the exact colour or font style and size are to be prescribed by national authorities does not establish that the FCTC Guidelines are ill suited for "common and repeated use" by FCTC Parties. To the contrary, the number of Parties currently considering tobacco plain packaging measures that fall within the parameters specified by the FCTC Guidelines clearly indicates that such guidelines are provided "for common and repeated use" by the 180 Parties to the FCTC.³¹⁹

328. The complainants argue further that in order to be suitable "for common and repeated use", the standard must be trade-facilitating rather than trade-restrictive.³²⁰ Setting aside the fact that the definition of a standard in Annex 1.2 does not contain such a trade-facilitating requirement, this line of argument is inconsistent with the context of Articles 2.2 and 2.5 of the TBT Agreement.

329. In order to meet the requirements of Article 2.5, the technical regulation at issue must be both "in accordance with relevant international standards" *and* "adopted for one of the legitimate objectives explicitly mentioned" in Article 2.2. This suggests that international standards under Article 2.5 may pursue the legitimate objectives specified in Article 2.2. These legitimate objectives are "national security requirements", "the prevention of deceptive practices", "protection of human health or safety", "animal or plant life or health, or the environment". Nothing in Article 2.2 suggests that these objectives may only be pursued in a manner that facilitates trade. To the contrary, the Appellate Body expressly recognised, on the basis of the fifth and sixth recitals to the TBT Agreement, that its disciplines do not prevent a WTO Member from pursuing legitimate objectives in a manner that restricts trade.³²¹

330. For these reasons, the complainants have failed to rebut Australia's demonstration that the FCTC Guidelines meet the definition of a "standard" under Annex 1.2 of the TBT Agreement. The FCTC Guidelines are a document approved by a recognised body that

³¹⁹ Norway, New Zealand, the United Kingdom, France, Chile and Ireland have either legislated for or are currently considering tobacco plain packaging measures.

³²⁰ Dominican Republic's response to Panel Question No. 66, para. 305; Honduras' response to Panel Question No. 70, p. 33.

³²¹ Appellate Body Report, *US – Clove Cigarettes*, para. 95. See also Australia's response to Panel Question No. 128, paras. 192-194.

provide guidelines or characteristics for tobacco products and related process and production methods, with which compliance is not mandatory.

3. The complainants have failed to establish that the FCTC COP is not a body with "recognized activities in standardization"

331. The complainants argue that the FCTC Guidelines are not an "international standard" because the FCTC COP is not an "international standardizing body". According to the complainants, this is because the FCTC COP is a treaty-governance mechanism rather than a standard-setting body.³²² Referring to the *Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement* ("TBT Committee Decision"), the complainants argue further that the FCTC COP is not an "international standardizing body" because it does not comply with the principles of "openness and impartiality", and the principles of "effectiveness and relevance".³²³

332. As Australia will proceed to demonstrate, none of these arguments is persuasive.

(a) The FCTC COP has "recognized activities in standardization"

333. In *US – Tuna II (Mexico)*, the Appellate Body found that international standardising bodies are those with "recognized activities in standardization, whose membership is open to the relevant bodies of at least all Members".³²⁴ As Australia noted earlier, the complainants do not appear to dispute that the FCTC COP is open to membership of at least all WTO Members. The fulcrum of their disagreement with Australia is whether the FCTC COP has "recognized activities in standardization".

334. As Australia noted in its response to Panel Question 128, the fact that the FCTC COP may also serve as a treaty governance mechanism is not dispositive of whether it has "recognized activities in standardization". In *US – Tuna II (Mexico)*, the Appellate Body held

³²² Dominican Republic's response to Panel Question No. 66, para. 295; Honduras' response to Panel Question No. 70, p. 32; Indonesia's response to Panel Question No. 70, para. 100.

³²³ Dominican Republic's response to Panel Question No. 66, paras. 300-304; Honduras' response to Panel Question No. 70, pp. 32-33.

³²⁴ Appellate Body Report, *US – Tuna II (Mexico)*, para. 359.

that both the normative and factual dimensions are relevant in determining whether a body has "recognized activities in standardization". The former refers to whether by statute the relevant body has standardisation activities as one of its functions, albeit not a "principal" or "even one of its principal" functions. The latter refers to whether WTO Members "are aware, or have reason to expect" that the international body in question is engaged in standardisation activities.³²⁵ Australia has demonstrated that the FCTC COP meets both the normative and the factual dimensions of the term "recognized".

335. As Australia explained in its first written submission, pursuant to Article 23 of the FCTC, the COP is tasked with developing guidelines for implementation of the Convention and methodologies for research and the collection of data. Moreover, under Article 9 of the FCTC, the COP is tasked with developing guidelines for testing and measuring contents and emissions of tobacco products, and for the regulation of those contents and emissions.³²⁶ Thus, from a normative standpoint, the Parties to the FCTC recognise the legality or validity of the guidelines for implementation of the Convention developed by the COP.

336. From a factual standpoint, WTO Members are unquestionably aware and have reason to expect that the FCTC COP will engage in standardisation activities. In *US – Tuna II (Mexico)*, the Appellate Body observed that "the larger the number of countries that participate in the development of the standard, the more likely it can be said that the respective body's activities in standardization are 'recognized'".³²⁷ As Australia noted in its response to Panel Question 128, currently 180 Parties to the FCTC (148 of which are also WTO Members) participate in the elaboration of the FCTC Guidelines, which are approved by consensus of all FCTC Parties. Moreover, all 180 Parties to the FCTC have committed to implementing the FCTC and, pursuant to Article 21 of the FCTC, must regularly report to the COP on their progress in implementing the FCTC. These elements further buttress Australia's case that the standardisation activities of the COP are widely "recognized".

³²⁵ Appellate Body Report, *US – Tuna II (Mexico)*, para. 362.

³²⁶ *WHO Framework Convention on Tobacco Control*, done at Geneva, 21 May 2003, 2302 U.N.T.S.166; 42 International Legal Materials 518, Exhibit AUS-44, Article 9.

³²⁷ Appellate Body Report, *US – Tuna II (Mexico)*, para. 390.

(b) The FCTC COP follows the principles of the TBT Committee Decision

337. In *US – Tuna II (Mexico)*, the Appellate Body also held that a body is more likely to have its standardisation activities "recognized" when it adheres to the principles contained in the TBT Committee Decision, which it deemed to constitute a "subsequent agreement" within the meaning of Article 31(3)(a) of the Vienna Convention.³²⁸

338. The Dominican Republic argues, implausibly, that the FCTC COP does not follow the principles of "openness and impartiality", because to adhere to the FCTC (and consequently to participate in the COP's standardisation activities), Members have to undertake "pre-determined policy choices" that underlie the development and formulation of the Guidelines. As Australia noted in its answer to Panel Question 128, the fact that there is a negotiating process for accession to any treaty does not suggest that any standardising body created by such treaty is neither "open" nor "impartial".³²⁹ Such a view would be overly narrow and would be contrary to the flexibility the drafters of the TBT Agreement afforded in deliberately not prescribing a closed list of international standard-setting bodies for the purposes of the Agreement. In Australia's view, the relevant inquiry, as confirmed by the Appellate Body in *US – Tuna II (Mexico)*, is whether the body is open to all Members "at every stage of standards development".³³⁰

339. In this regard, in its response to Panel Question 128 Honduras helpfully compares the ISO and CODEX standard-setting processes with those of the FCTC COP. In both the ISO and CODEX processes, the elaboration of the relevant standard is initially entrusted to either a "technical committee" or a "commission", and only after the standard has been elaborated does the Membership at large have an opportunity to comment. In contrast, in setting the Guidelines, the FCTC COP elicits participation of all Parties to the FCTC at all stages of their development.

³²⁸ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 372, 376, 394.

³²⁹ By the same token, the Dominican Republic's argument would of necessity imply that CODEX is not "open and impartial" because it reflects certain "policy choices" with respect to food safety standards. This is obviously not a tenable reading of the TBT Committee Decision as it applies to the interpretation of Article 2.5 of the TBT Agreement.

³³⁰ Appellate Body Report, *US – Tuna II (Mexico)*, para. 374.

340. As the joint *amicus curiae* brief of the WHO and the FCTC Secretariat clarifies, FCTC Guidelines are a result of an open and transparent process. The COP establishes working groups comprised of representatives of the Parties and assigns them specific mandates to draft guidelines. These working groups rely on available scientific evidence and the experience of the Parties to prepare draft guidelines. The drafts are the subject of consultations with all Parties and are submitted to the COP for consideration and adoption by consensus.³³¹

341. The Dominican Republic and Honduras also consider that the FCTC COP does not observe the principles of "effectiveness and relevance" because the FCTC Guidelines are not based on sufficient scientific evidence. As Australia noted in Part II.C.5(b) above and in its first written submission, tobacco plain packaging reflects the overwhelming evidence concerning the ability of fully branded packaging of tobacco products to affect smoking behaviour by increasing the appeal of tobacco products, undermining the effectiveness of GHWs, and misleading consumers about the health risks associated with smoking. Accordingly, the complainants' protestations that the FCTC Guidelines are not based on sufficient scientific evidence are baseless.

4. The tobacco plain packaging measure is adopted "in accordance with" the FCTC Guidelines

342. Finally, the Dominican Republic and Indonesia argue, in the alternative, that the tobacco plain packaging measure was not prepared, adopted and implemented "in accordance with" the FCTC Guidelines. These complainants draw an analogy between the terms "in accordance with" in Article 2.5 of the TBT Agreement and "conform to" in Article 3.2 of the SPS Agreement to argue that Article 2.5 requires that the technical regulation "embody completely" the relevant international standards, thus in effect converting it into municipal law. In their view, the tobacco plain packaging measure fails to meet this test because the

³³¹ World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat, *Information for Submission to the Panel by a Non-Party* (16 February 2015), Exhibit AUS-42, para. 19.

FCTC Guidelines are not sufficiently specific and leaves the detailed manner of implementing the policy choices to the domestic regulator.³³²

343. Setting aside the fact that this is a re-run of the complainants' misguided argument that standards in Annex 1.2 are subject to a "precision" requirement, Australia considers that the analogy with Article 3.2 of the SPS Agreement is inapposite. Whilst Article 3.2 reflects a standard of "conformity" ("correspondence in form or manner")³³³, Article 2.5 encompasses a standard of "accordance" ("agreement; conformity; harmony").³³⁴ Although "conformity" is one of the ordinary meanings of the term "accordance", the other meanings ("agreement, harmony"), indicate a lower degree of correspondence between the technical regulation and the international standard.

344. In any event, Australia considers that the complainants' argument in this respect is merely semantic, and the tobacco plain packaging measure is adopted "in accordance with" the FCTC Guidelines under *any* reading of that standard. As expressly stated in Subsection 3(1)(b) of the TPP Act, the tobacco plain packaging measure gives effect to certain obligations that Australia has under the FCTC, the Implementing Guidelines of which include recommending that Parties "restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging)."

345. For the foregoing reasons, the complainants have failed to rebut Australia's demonstration that the tobacco plain packaging measure was adopted "in accordance with" the FCTC Guidelines, which are the relevant international standard on tobacco plain packaging under Article 2.5 of the TBT Agreement. Accordingly, the tobacco plain packaging measure must therefore be presumed *not* to constitute an "unnecessary obstacle to international trade".

³³² Dominican Republic's response to Panel Question No. 66, paras. 309-320; Indonesia's response to Panel Question No. 66, paras. 86-92.

³³³ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-539, p. 488.

³³⁴ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-539, p. 15.

346. Before turning to its alternative arguments under Article 2.2, Australia considers it useful to comment upon the implications of the Article 2.5 presumption for the Panel's analysis under Article 2.2.

5. The complainants have failed to adduce any evidence of the type that would be required to rebut the presumption in Article 2.5

347. If the Panel agrees with Australia that the tobacco plain packaging measure should be entitled to the presumption under Article 2.5 that it does *not* create an "unnecessary obstacle to international trade", the question then becomes what analytical framework should the Panel adopt for purposes of giving proper effect to that presumption, and how should it apply that framework in the circumstances of any given case. The Panel touched on these issues in Panel Question 67.

348. In Australia's view, there is general agreement among the parties and third parties that for the rebuttable presumption provided in the second sentence of Article 2.5 to be given effect, it must mean that the complainants face some type of "enhanced" burden in order to demonstrate that a technical regulation constitutes an unnecessary obstacle to international trade under Article 2.2. The relevant task then becomes to identify the nature of that enhanced burden, and how to apply it in practice.

349. The Dominican Republic and a number of third parties have taken the position that the Panel should hold the complainants to a more exacting *evidentiary* burden when examining the particular elements required to make out their claim that the tobacco plain packaging measure is an "obstacle to international trade" under Article 2.2 of the TBT Agreement.³³⁵

350. While this proposal has some superficial appeal, its limitations quickly become apparent on closer inspection. In Australia's view, the clear purpose of the presumption in Article 2.5 is to render the "weighing and balancing" that typically features prominently in an

³³⁵ Dominican Republic's response to Panel Question No. 67, paras. 326-327; the European Union's third party submission, paras. 49-53; Canada's third party oral statement at the first substantive meeting of the Panel, paras. 11-12; Norway's third party response to Panel Question No. 8; Oman's third party oral statement at the first substantive meeting of the Panel, para. 13.

Article 2.2 analysis unnecessary. This is evident in the fact that the presumption does not merely address one or more of the individual factors relevant to a claim under Article 2.2, but rather to the overall legal conclusion that follows from the collective assessment of all of those individual factors, i.e. technical regulations that meet the conditions of Article 2.5 presumptively do *not* constitute "unnecessary obstacles to international trade".

351. As Australia explained in its response to Panel Question 67, the fact that Article 2.5, when properly invoked, presumptively renders unnecessary all of the weighing and balancing typically necessary to evaluate a claim under Article 2.2 plainly furthers one of the central purposes of the TBT Agreement, particularly as reflected in Articles 2.4 and 2.6, to incentivise WTO Members to adopt and use relevant international standards, in order to harmonise technical regulations, "on as wide a basis as possible."

352. It would seem directly counter to this objective if the presumption established under Article 2.5 could be rebutted simply by reference to evidence on factors such as the technical regulation's trade-restrictiveness, its contribution to legitimate objectives, the risks that non-fulfilment would create, or less trade-restrictive alternatives, all of which typically must be evaluated under Article 2.2. Furthermore, to apply such a notion in practice, WTO panels seemingly would have to identify what a complainant would need to demonstrate – either in terms of the quantum or quality of evidence adduced with respect to each of the Article 2.2 factors – *above and beyond* that which is required to establish a *prima facie* case under Article 2.2 in the absence of the presumption. None of the parties advocating this approach have presented a coherent basis for making such an assessment.

353. For all of these reasons, as Australia noted in its response to Panel Question 67, the nature of evidence required to rebut the presumption in Article 2.5 is unlikely to consist of the type of evidence on which a complainant normally would rely in attempting to make out a *prima facie* case under Article 2.2. Rather, the evidence must be *exogenous* to the holistic "weighing and balancing" of the individual factors underlying the typical analysis under Article 2.2. Such circumstances would include, for example, situations such as those identified in Articles 2.3 or 2.4, where a complainant adduced evidence demonstrating that the relevant international standard would not be appropriate in the particular circumstances of the regulating Member, or where a significant change in circumstances or technological developments rendered the international standard obsolete or ineffective. In Australia's view,

only in these types of extraordinary circumstances should a complainant be able to succeed in rebutting the presumption reflected in Article 2.5.

354. In the end, the debate over the proper analytical framework to employ when applying the presumption under Article 2.5 is largely an academic one in the circumstances of this case. That is because the complainants have failed to adduce sufficient evidence to overcome the presumption however it is applied. If the Panel agrees with Australia's approach, its work under Article 2.2 is complete because none of the complainants has asserted the existence of any of the types of circumstances that in Australia's view would be necessary to rebut the presumption under Article 2.5 that the tobacco plain packaging measure does not create an "unnecessary obstacle to international trade".

355. Similarly, as Australia will discuss in the next section, the same conclusion would follow even if the Panel were to disagree with Australia's approach as to the proper application of the presumption in Article 2.5. In that circumstance, the complainants would have to adduce evidence above and beyond what normally would be required to establish a *prima facie* case under Article 2.2. However, as Australia demonstrates below, the complainants have failed to establish a *prima facie* case of an Article 2.2 violation even *without* taking into account the higher evidentiary burden that would apply as a result of the presumption in Article 2.5.

356. Accordingly, under either scenario, having demonstrated that the tobacco plain packaging measure is adopted for legitimate public health objectives identified in Article 2.2, and that it is "in accordance with the relevant international standard" as set forth in the FCTC Guidelines, Australia considers that the Panel would be required to reject all of the complainants' claims under Article 2.2 on the grounds that they had not rebutted the presumption established under Article 2.5.

C. THE COMPLAINANTS HAVE FAILED TO MAKE A *PRIMA FACIE* CASE THAT THE TOBACCO PLAIN PACKAGING MEASURE IS TRADE-RESTRICTIVE UNDER ARTICLE 2.2 OF THE TBT AGREEMENT

1. Introduction to Part III.C

357. For the reasons set out in the preceding section, Australia has explained that the tobacco plain packaging measure is entitled to the presumption in Article 2.5 that it does not constitute an unnecessary obstacle to international trade. Australia has further demonstrated that the complainants have not rebutted that presumption with the type of evidence that, in Australia's view, would be necessary to overcome that presumption. Accordingly, in Australia's view, the Panel need not proceed further with its analysis of the complainants' claims under Article 2.2.

358. The discussion that follows would be relevant to the Panel's analysis only if: (1) the Panel were to disagree with Australia that the FCTC Guidelines are relevant international standards that the tobacco plain packaging measure has been adopted "in accordance with"; or (2) the Panel agrees with Australia that the FCTC Guidelines do qualify as a relevant international standard that the tobacco plain packaging measure has been adopted "in accordance with", but disagrees with Australia concerning the nature of the evidence to be considered in addressing whether the complainants have rebutted the presumption set out in Article 2.5. Under either scenario, the complainants' claims under Article 2.2 must be rejected at the threshold because they have failed to establish a *prima facie* case that the tobacco plain packaging measure is trade-restrictive at all, much less meet the higher evidentiary burden that would apply as a result of the presumption in Article 2.5.

359. In the course of these proceedings, the complainants seem to have distanced themselves from a number of allegations made in their first written submissions with respect to trade-restrictiveness. The Dominican Republic, for example, no longer claims that technical regulations are inherently trade-restrictive, or that the tobacco plain packaging measure is trade-restrictive because it operates as a condition on the importation of tobacco

products in Australia.³³⁶ The complainants have also distanced themselves from the argument that the tobacco plain packaging measure is trade-restrictive because it raises barriers to entry for new market entrants.³³⁷ And even though Honduras continues to argue that the tobacco plain packaging measure is trade-restrictive because it entails "additional" compliance costs, those allegations remain undeveloped and unsubstantiated.³³⁸

360. Therefore, the complainants' case that the tobacco plain packaging measure is trade-restrictive under Article 2.2 of the TBT Agreement rests on essentially two arguments. First, the complainants allege that the tobacco plain packaging measure is trade-restrictive because it "limits competitive opportunities" for imported tobacco products. Second, to the extent that Article 2.2 requires a demonstration of actual trade effects in the circumstances of this case, the complainants posit that the tobacco plain packaging measure is trade-restrictive because it allegedly has caused consumers in Australia to switch from higher-priced- to lower-priced brands of tobacco products ("downtrading").

361. As Australia will demonstrate, neither of these allegations is sufficient, as a matter of law or evidence, to establish that the tobacco plain packaging measure is "trade-restrictive" under a proper interpretation of Article 2.2 of the TBT Agreement. In Part III.C.2 below, Australia will establish that there is no textual basis in Article 2.2 for concluding that any technical regulation that limits "competitive opportunities" is "trade-restrictive", as the complainants contend. Properly interpreted in accordance with customary rules of interpretation under the Vienna Convention, the phrase "trade-restrictive" under Article 2.2 requires the complainants to demonstrate a "limiting effect on trade" in imported tobacco products. In arguing that the Appellate Body in *US – COOL* "relied on the legal standard of limitations on competitive opportunities,"³³⁹ the complainants conflate the relevant legal standard with one of the ways in which, as a matter of *evidence*, a limiting effect on international trade may be demonstrated in the particular circumstances of a case. In Parts III.C.3(a) and III.C.3(b), Australia will demonstrate that the complainants have failed to meet

³³⁶ Dominican Republic's first written submission, paras. 973, 975.

³³⁷ Indonesia's first written submission, para. 401.

³³⁸ Honduras' first written submission, paras. 878-886; Honduras' response to Panel Question No. 117, p. 29.

³³⁹ Dominican Republic's response to Panel Question No. 117, para. 208.

the requisite evidentiary threshold to demonstrate, even in qualitative terms, that the tobacco plain packaging measure has a "limiting effect on trade" in imported tobacco products.

362. In Part III.C.3(c), Australia will further demonstrate that the alleged downtrading effects of the tobacco plain packaging measure are insufficient, as a matter of law, to establish that it is trade-restrictive under a proper interpretation of Article 2.2. Even assuming, for the sake of argument, that the complainants have established that any downtrading effects are attributable to the tobacco plain packaging measure (which they have not), these effects are insufficient, without more, to meet the required standard of a limiting effect on trade in imported tobacco products. The dearth of evidence of actual trade effects presented by the complainants stands in stark contrast to evidence demonstrating that imports of tobacco products have increased both in volume and in value since the introduction of tobacco plain packaging.³⁴⁰ In these circumstances, the Panel must conclude that the complainants have failed to demonstrate a limiting effect on international trade in tobacco products, and their claim under Article 2.2 must fail at the threshold.

2. The relevant legal standard of trade-restrictiveness

363. The complainants argue that, in its report in *US – COOL*, the Appellate Body applied a legal standard of limitations on "competitive opportunities" when concluding that the technical regulation at issue was trade-restrictive under Article 2.2 of the TBT Agreement. To this end, the Dominican Republic argues that the Appellate Body "relied on the legal standard of limitations on competitive opportunities"³⁴¹ in assessing trade-restrictiveness in that dispute. Honduras, similarly, argues that the term trade-restrictive "focuses on competitive opportunities available to imported products."³⁴²

³⁴⁰ This is despite a consistent decline in demand for and consumption of tobacco products, and reflects the decisions of Australia's tobacco manufacturers to relocate their production offshore and supply the domestic market via imports.

³⁴¹ Dominican Republic's response to Panel Question No. 117, para. 208.

³⁴² Honduras' response to Panel Question No. 117, p. 25.

364. The complainants' re-articulation of the legal standard of trade-restrictiveness is entirely divorced from the text of Article 2.2, interpreted in its context and in light of the object and purpose of the TBT Agreement. Article 2.2 provides, in relevant part:

Members shall ensure that technical regulations are not prepared, adopted or 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 fulfill a legitimate objective, taking account of the risks non-fulfillment would create.

365. The ordinary meaning of the term "trade" is "buying and selling or exchange of commodities for profit, specifically between nations; commerce".³⁴³ The term "restrictive" means "implying, conveying, or expressing restriction or limitation".³⁴⁴ In *US – Tuna II (Mexico)*, the Appellate Body noted that the ordinary meaning of the term restriction "refers generally to something that has a limiting effect".³⁴⁵ The Appellate Body then found that this term, when used in conjunction with the term "trade" in Article 2.2, required a demonstration that the technical regulation at issue has a "limiting effect on trade".³⁴⁶

366. When viewed in the context of the first sentence of Article 2.2, a technical regulation will have a "limiting effect on trade" when it constitutes an "obstacle" ("a hindrance, an obstruction")³⁴⁷ to *international* trade. The ordinary meaning of the term "international" is "existing, occurring, or carried on between nations",³⁴⁸ thus confirming that Article 2.2 focuses on any limiting effects that technical regulations may have on international commerce in the products subject to regulation.

367. The preamble of the TBT Agreement also forms part of the context of Article 2.2 and sheds light on the object and purpose of the agreement.³⁴⁹ The fifth recital reflects the

³⁴³ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 3312

³⁴⁴ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-545, p. 2553.

³⁴⁵ Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

³⁴⁶ Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

³⁴⁷ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 2, Exhibit AUS-245, p. 1974.

³⁴⁸ *The Shorter Oxford English Dictionary*, 6th ed., L. Brown (ed.) (Oxford University Press, 2007), Vol. 1, Exhibit AUS-243, p. 1412.

³⁴⁹ Appellate Body Report, *US – Clove Cigarettes*, para. 89.

trade-liberalisation objectives of the TBT Agreement by expressing the "desire" that technical regulations "do not create unnecessary obstacles to international trade".³⁵⁰ These trade-liberalisation objectives are qualified by the sixth recital, which "recognizes" WTO Members' rights to regulate trade in furtherance of legitimate policy objectives, subject to the condition that their measures are not "applied in a manner that would constitute ... a disguised restriction on international trade".³⁵¹ Article 2.2 of the TBT Agreement gives effect to this balance between trade-liberalisation and a WTO 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".³⁵²

368. Accordingly, properly interpreted in accordance with the Vienna Convention, the term "trade-restrictive" in Article 2.2 reflects a legal standard of a "limiting effect on trade" in the imported products subject to the technical regulation at issue. This is the *only* relevant legal standard of "trade-restrictive", and one that has been consistently applied by the Appellate Body in all cases arising under Article 2.2 of the TBT Agreement to date.³⁵³

369. A limiting effect on international trade is also the legal standard that the Appellate Body has applied to assess trade-restrictiveness in other contexts. For example, in assessing trade-restrictiveness for purposes of the weighing and balancing of factors under Article XX of the GATT 1994, the Appellate Body examined the extent to which the measure at issue "produces restrictive effects on international commerce".³⁵⁴ Similarly, in the context of Article XIV of the GATS, the Appellate Body noted that an assessment of trade-restrictiveness calls for an examination of "the restrictive impact of the measure on international commerce."³⁵⁵

370. The complainants are thus incorrect in arguing that the Appellate Body in *US – COOL* applied a "legal standard" of "limitations on competitive opportunities" for imported products

³⁵⁰ Appellate Body Report, *US – Clove Cigarettes*, para. 92.

³⁵¹ Appellate Body Report, *US – Clove Cigarettes*, paras. 94-95.

³⁵² Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

³⁵³ Appellate Body Report, *US – Tuna II (Mexico)*, para. 319. Appellate Body Report, *US – COOL*, para. 375.

³⁵⁴ Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

³⁵⁵ Appellate Body Report, *US – Gambling*, para. 306. See also Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

in assessing trade-restrictiveness under Article 2.2.³⁵⁶ The complainants try to convert an isolated reference to a "limiting effect on competitive opportunities for imported livestock", which was made by the Appellate Body when applying the legal standard of a limiting effect on international trade, into a vehicle for completely re-articulating the relevant legal standard. However, neither the panel nor the Appellate Body's analysis in *US – COOL* re-articulates the legal standard of trade-restrictiveness under Article 2.2 to mean something other than a limiting effect on international trade in the imported products subject to the technical regulation at issue.

371. To recall, the complainants in *US – COOL* argued that the COOL measure was trade-restrictive under Article 2.2 because it reduced competitive opportunities for imported products *compared with like domestic products* and because it *reduced trade flows*.³⁵⁷ Although the panel did not find it necessary to express a view about the scope of the term "trade-restrictive" in Article 2.2,³⁵⁸ it referred to its earlier finding under Article 2.1 of the TBT Agreement that the COOL measure "negatively affect[ed] imported livestock's conditions of competition in the US market *in relation to like domestic livestock* by imposing higher segregation costs on imported livestock".³⁵⁹ On this basis, the panel concluded that the COOL measure was trade-restrictive within the meaning of Article 2.2 because it "affect[ed] the competitive conditions of imported livestock."³⁶⁰

372. On appeal, the Appellate Body reiterated that the relevant legal standard of trade-restrictiveness is a "limiting effect on trade".³⁶¹ When completing the legal analysis under Article 2.2, the Appellate Body concluded that the panel's factual findings under Article 2.1 were sufficient to meet this standard, because they demonstrated that the introduction of the COOL measure "negatively affect[ed] the conditions of competition of imported livestock vis-à-vis like domestic livestock in the US market"³⁶² by imposing higher segregation costs on imported livestock. The Appellate Body emphasised further that the

³⁵⁶ See, e.g. Dominican Republic's response to Panel Question No. 117, para. 208.

³⁵⁷ Panel Report, *US – COOL*, para. 7.565.

³⁵⁸ Panel Report, *US – COOL*, para. 7.573.

³⁵⁹ Panel Report, *US – COOL*, para. 7.574 (emphasis added).

³⁶⁰ Panel Report, *US – COOL*, para. 7.575.

³⁶¹ Appellate Body Report, *US – COOL*, para. 375.

³⁶² Appellate Body Report, *US – COOL*, para. 477.

panel's analysis of actual trade effects corroborated its finding that the COOL measure was trade-restrictive.³⁶³

373. Contrary to the complainants' suggestion, therefore, the Appellate Body in *US – COOL* did not re-articulate the relevant legal standard as one of limits on "competitive opportunities" for imported products as compared to the situation prior to the enactment of the technical regulation at issue.³⁶⁴ Rather, the Appellate Body in *US – COOL* found that in the particular circumstances of that dispute, the panel's factual findings that the COOL measure was *de facto* discriminatory were sufficient to establish that it had a limiting effect on trade in imported livestock, because it disproportionately affected imported livestock as compared to domestic livestock. As Honduras recognises, in *US – COOL* and *US – COOL (Article 21.5 – Canada and Mexico)* "the trade restrictiveness of the COOL measure and the amended COOL measure was based on the same rationale that underlay the finding of violation of Article 2.1, namely the modification of the conditions of competition to the detriment of imported livestock vis-à-vis like domestic livestock."³⁶⁵

374. In arguing that the Appellate Body in *US – COOL* applied a legal standard of "limitation of competitive opportunities" for imported products, the complainants conflate the relevant legal standard of trade-restrictiveness with one of the ways in which that standard may be met *as an evidentiary matter*, depending on the factual circumstances of the case. It may be possible for a complainant to establish, in qualitative terms, that a non-discriminatory technical regulation has a limiting effect on trade because it detrimentally affects competitive opportunities for imported products, but that depends on the facts of the case. However, in instances where the design, structure and operation of the technical regulation do not

³⁶³ Appellate Body Report, *US – COOL*, para. 477 (referring to Panel Report, *US – COOL*, paras. 7.542, 7.546).

³⁶⁴ Dominican Republic argues that, in applying the alleged "legal standard of limitations on competitive opportunities", the Appellate Body "used the situation of the affected imports before the adoption of the measure as a benchmark": Dominican Republic's response to Panel Question No. 117, paras. 208, 214. This is incorrect. A mere "before versus after" comparison of the situation for imported products prior to and subsequent to the adoption of a technical regulation reveals nothing about the *substance* of the legal standard being applied, which is whether the technical regulation results in a limiting effect on international trade. It is clear from the context of *US – COOL* that the Appellate Body in fact compared the situation that imported products faced *relative to domestic products* before and after the measure's adoption – the critical difference following the measure's adoption was that imported livestock suffered a competitive disadvantage relative to domestic livestock.

³⁶⁵ Honduras' response to Panel Question No. 117, fn 97.

establish a limiting effect on international trade, evidence of actual trade effects may be required to establish that the measure is trade-restrictive.³⁶⁶

375. This is borne out by the Appellate Body's analysis in *US – COOL (Article 21.5 – Canada and Mexico)*. In that dispute, the Appellate Body explained that, depending on the "the nature, quantity and quality of evidence existing at the time the analysis is made, and the characteristics of the technical regulation at issue as revealed by its design and structure,"³⁶⁷ it may not always be possible to quantify a particular factor in the relational analysis. The Appellate Body stated that, in respect of the assessment of trade-restrictiveness, the "demonstration of a limiting effect on competitive opportunities in qualitative terms might suffice in the particular circumstances of a case."³⁶⁸ The Appellate Body then proceeded to identify two instances in which the design, structure and operation of a technical regulation may suffice to establish a limiting effect on international trade.

376. The first instance is where the technical regulation at issue is *de jure* discriminatory. In those instances, the design and structure of the technical regulation at issue will suffice to establish a limiting effect on international trade, because it is evident on its face that the technical regulation at issue detrimentally affects competitive opportunities for imported products relative to like domestic products.³⁶⁹

377. The second instance is where the technical regulation at issue *de facto* discriminates against imported products.³⁷⁰ In those circumstances, the design, structure and operation of the technical regulation will suffice to establish a limiting effect on international trade, because the technical regulation at issue modifies the conditions of competition to the detriment of the group of imported products relative to the group of domestic like products, thus inevitably leading to a limiting effect on international trade in imported products.³⁷¹

³⁶⁶ Australia's response to Panel Question No. 117.

³⁶⁷ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208.

³⁶⁸ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208.

³⁶⁹ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208, fn 643.

³⁷⁰ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208, fn 643 (referring to Appellate Body Report, *US – COOL*, para. 477).

³⁷¹ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208, fn 643 (referring to Appellate Body Report, *US – COOL*, para. 477).

378. At the same time, however, the Appellate Body expressly identified one instance in which qualitative evidence may *not* be sufficient to establish that a technical regulation has a limiting effect on international trade. The Appellate Body reasoned that, in the case of non-discriminatory measures, "supporting evidence and argumentation of actual trade effects might be required to demonstrate the existence and extent of trade-restrictiveness".³⁷² Thus, where the design, structure and operation of the technical regulation at issue do not indicate a detrimental effect on competitive opportunities for imported products relative to domestic like products, additional evidence of actual trade effects may be required to demonstrate a limiting effect on international trade.

379. This is not to suggest that evidence of actual trade effects is *always* required to demonstrate that non-discriminatory technical regulations are trade-restrictive. Depending on the particular facts of the case, it may be possible to demonstrate, on the basis of the design, structure and operation of the measure, that a non-discriminatory technical regulation has a limiting effect on international trade.

380. One circumstance in which it may be possible to establish *exclusively in qualitative terms* that a non-discriminatory technical regulation has a limiting effect on international trade is the example that Australia identified in its opening statement at the first substantive panel meeting, to which the Panel referred in Panel Questions 119 and 121. As Australia explained in its response to Panel Question 119, a non-discriminatory technical regulation may have a limiting effect on international trade if it is evident from its design, structure and operation that it will result in a reduction in overall demand for the product at issue. This necessarily would limit overall trade in the imported product, whether, as in this case, domestic production is being phased out, or in the circumstance where the reduction in demand affects both domestic production and imports even-handedly. In both of these circumstances, evidence of actual trade effects may not be necessary, because the expected reduction in demand for the product at issue may suffice to establish a limiting effect on international trade.

³⁷² Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208, fn 643.

381. This is not, however, the case that the complainants have presented in this dispute. In fact, the complainants are forced to argue that the legal standard of trade-restrictiveness is one of limits on "competitive opportunities" for imported products (i.e. *regardless* of any limiting effect on international trade) precisely because of their assertion that the tobacco plain packaging measure is *not* capable of reducing demand for tobacco products in Australia. In this manner, the complainants seek to dispense with the requirement of demonstrating, either qualitatively or quantitatively, that the tobacco plain packaging measure has a limiting effect on international trade in tobacco products, without having to concede that any such limiting effects would constitute evidence that the tobacco plain packaging measure is apt to contribute to a reduction in demand for tobacco products in Australia.

382. In effect, the "limitations on competitive opportunities" standard advocated by the complainants replaces the concept of trade-restrictiveness set out in the text of Article 2.2 with an altogether different construct – limitations on the alleged "competitive freedom"³⁷³ of market participants. If "competitive freedom" were the relevant legal standard, virtually any technical regulation would be "trade-restrictive". Indeed, it is hard to conceive of any technical regulation that would not impose, with respect to at least one market segment or one market participant, a limiting condition on "competitive freedom" that did not exist prior to its enactment.

383. As a corollary of their "competitive freedom" of market participants standard, the complainants argue that limitations on competitive opportunities in particular market segments are sufficient, *as a matter of law*, to establish that a technical regulation is trade-restrictive under Article 2.2 even in the absence of any demonstration of a limiting effect on international trade.³⁷⁴ This overly broad interpretation would read the "trade-restrictive" requirement out of the text of Article 2.2, and would render "trade-restrictive" even those technical regulations that *increase* rather than restrict international trade.

384. Moreover, the complainants argue that limits on "competitive opportunities" could be assessed "individually or collectively", such that detrimental effects on competitive conditions for specific Members would be sufficient to establish that a technical regulation is

³⁷³ Honduras' response to Panel Question No. 117, p. 28.

³⁷⁴ Dominican Republic's response to Panel Question No. 117, paras. 215, 220.

trade-restrictive without any need to establish that it had a limiting effect on overall trade in the imported product at issue for all affected Members collectively.³⁷⁵ This interpretation would not only read the terms "obstacle to international trade" out of Article 2.2, but would also render redundant the most-favoured-nation obligation set forth in Article 2.1 of the TBT Agreement, which focuses on the detrimental effects on competitive opportunities for specific Members relative to other Members.

385. A practical example may help illustrate these and other absurd results that would stem from the overly broad legal standard of limits on "competitive opportunities" espoused by the complainants in this dispute. Consider the following example: a Member produces passenger cars in the compact, mid-size and full-size segments of the market. Its market is also supplied by three other Members: Country A, which exports to all segments of the market; Country B, which exports into the compact and mid-size segments, but not in the full-size segment; and Country C, which only exports in the full-size segment of the passenger car market.

386. The regulating Member adopts a technical regulation that requires all passenger cars sold in its market to meet stringent standards for CO₂ emissions. Given the intrinsic characteristics of passenger cars, such as size, weight, and motor performance, it is not possible at current technological levels to manufacture *full-size* cars that emit less than the maximum CO₂ levels established under that standard. Cars in the compact and mid-size segments, which are smaller, lighter and less potent, meet the maximum emission requirement of the new technical regulation.

387. In Australia's view, the design, structure and operation of this hypothetical technical regulation alone do not establish a limiting effect on overall international trade in passenger cars. The technical regulation is non-discriminatory – it applies to *all* passenger cars, both foreign and domestic, and across all market segments – and it addresses a legitimate objective – the protection of the environment.³⁷⁶ While the technical regulation affects "competitive opportunities" for the *full-size* car segment, this alone does not establish that the technical regulation has modified the conditions of competition in the market of the regulating Member

³⁷⁵ Dominican Republic's response to Panel Question No. 117, para. 220.

³⁷⁶ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208, fn 643 (referring to Appellate Body Report, *US – COOL*, para. 477).

to the detriment of the group of imported passenger cars; nor does it otherwise establish a limiting effect on international trade in imported passenger cars. Accordingly, in Australia's view, evidence of actual trade effects would be required to establish that the technical regulation is, in fact, trade-restrictive.³⁷⁷

388. On the complainants' view, however, the fact that the technical regulation affected "competitive opportunities" for the full-size car segment would be a sufficient basis for concluding that the measure was trade-restrictive within the meaning of Article 2.2. This is so even though the design, structure and operation of the technical regulation have not modified the conditions of competition to the detriment of imported passenger cars as a whole; and do not otherwise establish a limiting effect on overall trade in imported passenger cars.

389. To further illustrate the absurd implications of the complainants' overly broad legal standard of trade-restrictiveness, it is useful also to examine the implications of this standard for an analysis of actual trade effects.³⁷⁸ Consider that prior to the enactment of a technical regulation, domestic production in the regulating Member and imports of passenger cars from countries A, B and C in any given year, by volume and value, were as follows:

Market Segment	Domestic Production		Imports from Country A		Imports From Country B		Imports from Country C		Total Imports (A, B & C)	
	Volume	Value	Volume	Value	Volume	Value	Volume	Value	Volume	Value
Compact (\$1,000/car)	50	50,000	100	100,000	60	60,000	None	Zero	160	160,000
Mid-Size (\$1,200/car)	100	120,000	20	24,000	40	48,000	None	Zero	60	72,000
Full-Size (\$1,500/car)	150	225,000	30	45,000	None	Zero	50	75,000	80	120,000
Total	300	395,000	150	169,000	100	108,000	50	75,000	300	352,000

Table 2: Practical example: production and imports of passenger cars pre-technical regulation

390. For the sake of simplicity, assume that, following the adoption of the technical regulation, total demand for passenger cars in the regulating Member remains stable, at 600 cars per year, and prices for passenger cars in the compact, mid-size and full-size categories

³⁷⁷ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208, fn 643. See Australia's response to Panel Question No. 117, paras. 116-119.

remain stable as well. As a result of the adoption of the technical regulations, domestic production and imports into the regulating Member are as follows:

Market Segment	Domestic Production		Imports from Country A		Imports from Country B		Imports from Country C		Total Imports (A, B & C)	
	Volume	Value	Volume	Value	Volume	Value	Volume	Value	Volume	Value
Compact (\$1,000/car)	80	80,000	150	150,000	120	120,000	None	Zero	270	270,000
Mid-Size (\$1,200/car)	120	144,000	100	120,000	30	36,000	None	Zero	130	156,000
Full-Size (\$1,500/car)	None	Zero	None	Zero	None	Zero	None	Zero	None	Zero
Total	200	224,000	250	270,000	150	156,000	None	Zero	400	426,000

Table 3: Practical example: production and imports of passenger cars post-technical regulation

391. Note that under the complainants' "competitive opportunities" construct, the technical regulation in this example would be deemed trade-restrictive, despite the fact that it results in an *increase* of total imports of passenger cars into the regulating Member by any measure. In the example above, total imports of passenger cars increased when measured by volume, from 300 to 400 passenger cars per year. Total imports also increased when measured by value, from \$352,000 to \$426,000 per year.

392. Note also that under the complainants' "competitive opportunities" approach, each of Countries A, B, and C could claim that the technical regulation is "trade-restrictive" exclusively on the basis of its effects on their own exports in *particular market segments*, without any consideration whatsoever of its effects on the imported product category as a whole (or even for their own exports as a whole), and furthermore without any consideration of its effects on international trade in the imported product category as a whole for all Members affected by the technical regulation.

³⁷⁸ While Australia presents this example to illustrate the absurd results that flow from the complainants' interpretation of the term "trade-restrictive", it wishes to emphasise that the illustration that follows bears no factual resemblance to the case the complainants have presented in this dispute. In fact, as discussed below, the complainants have neither alleged nor established that their own exports of tobacco products, even with respect to particular market segments, have been negatively affected *at all* by the tobacco plain packaging measure, let alone demonstrated that the measure has had a limiting effect on *overall* imports of tobacco products into Australia, under any metric.

393. Country A could claim that the technical regulation is trade-restrictive, despite the fact that its overall exports of passenger cars increased in both volume and value terms subsequent to the adoption of the technical regulation. In this example, exports of passenger cars from Country A increased from 150 to 250 passenger cars per year, generating an increase in export values from \$169,000 to \$270,000 per year. Yet, under the complainants' "competitive freedom" construct, Country A could claim that the technical regulation is trade-restrictive exclusively on the basis of a reduction in its exports in the full-size segment.

394. Similarly, Country B could claim that the technical regulation is somehow "trade-restrictive", despite the fact that its overall exports of passenger cars also increased in both volume and value terms subsequent to the adoption of the technical regulation. Total exports of passenger cars when measured in volume increased from 100 to 150 passenger cars per year. Total exports measured in value also increased from \$108,000 to \$156,000 per year. Nonetheless, under the complainants' "competitive freedom" construct, Country B could claim that the measure is trade-restrictive exclusively on the basis of a marginal reduction in its exports to the mid-size market segment.

395. Finally, Country C could claim that the measure is trade-restrictive on the basis of its effects on its own exports in the full-size market segment, regardless of the substantial increase in overall imports of passenger cars into the market of the regulating Member. The complainants' "competitive opportunities" construct would thus transform a technical regulation that clearly increases overall trade in passenger cars into a "trade-restrictive" measure under Article 2.2 exclusively on the basis of its effects on Country C, when the question of whether passenger cars of Country C are treated less favourably than like domestic passenger cars or passenger cars from Countries A and B should fall within the purview of Article 2.1.³⁷⁹

396. In Australia's view, this example illustrates how the complainants' "competitive opportunities" construct is simply not a credible reading of Article 2.2. Rather, in order to demonstrate that the technical regulation in this example is trade-restrictive, a complainant

³⁷⁹ See Australia's response to Panel Question No. 68, para. 175 (agreeing with the European Union that the focus of Article 2.2 is on determining whether a measure imposes restrictive conditions that limit international trade for the entire group of products that it regulates from all WTO Members, rather than trade solely with respect to a single Member).

would need to demonstrate that it has a limiting effect on international trade *in passenger cars*, the product that is the subject of the technical regulation. The technical regulation in the example above does *not* meet this test in either qualitative terms, because its design, structure and operation do not result in a limiting effect on overall trade in passenger cars, or in quantitative terms, because it is clearly trade-enhancing rather than trade-restrictive.

397. In sum, the "competitive opportunities" standard of trade-restrictiveness espoused by the complainants finds no basis in either the text of Article 2.2, properly interpreted, or in the Appellate Body's findings in *US – COOL*. This overly broad legal standard would read the terms "trade-restrictive" and "obstacles to international trade" out of the text of Article 2.2, and would render the most-favoured-nation obligation in Article 2.1 redundant. It would also upset the carefully crafted balance between trade-liberalisation and WTO Members' right to adopt technical regulations that address legitimate objectives, as reflected in both Article 2.2 and the preamble to the TBT Agreement. This erroneous interpretation would bring within the purview of the TBT Agreement technical regulations that have *no* adverse effect on international trade, merely because they have *some* market effects.³⁸⁰

398. For all of the foregoing reasons, there is no basis for the complainants' claim that the term "trade-restrictive" reflects a legal standard of "limitation of competitive opportunities" for imported products, tantamount to a standard of "competitive freedom" for market participants. As the Dominican Republic states, "there is nothing in the text, context, or object and purpose of Article 2.2 to support the view that there are two different legal standards of trade-restrictiveness".³⁸¹ Australia agrees. The legal standard set out in Article 2.2 requires the complainants to demonstrate that the tobacco plain packaging

³⁸⁰ Other than its misguided reliance on the Appellate Body's finding in *US – COOL*, the Dominican Republic purports to find support for its "limits on competitive opportunities" standard by citing a Note by the WTO Secretariat on the procedures for notification and information exchange under the auspices of the TBT Agreement, which it characterises as relevant "context" to the interpretation of Article 2.2: Dominican Republic's response to Panel Question No. 117, paras. 215-217, 220. In addition to the observations Australia made in its response to Panel Question No. 127, Australia considers that the Secretariat Note is of no interpretative significance and is irrelevant to the Panel's analysis of trade-restrictiveness under Article 2.2. The Note merely reflects "discussions" held during the 21 April 1995 meeting of the Committee, and incorporates "further suggestions addressed by *interested Members* to the Secretariat" (emphasis added). As such, it does not qualify either as "context" or as a "subsequent agreement" under Articles 31(2) and 31(3)(a), respectively, of the Vienna Convention, and neither the Dominican Republic nor any of the other complainants even attempt to argue otherwise.

³⁸¹ Dominican Republic's response to Panel Question No. 117, para. 211.

measure has a limiting effect on international trade in tobacco products. In the following section, Australia will demonstrate why the evidence and arguments adduced by the complainants in this dispute are insufficient to meet that standard, in either qualitative or quantitative terms.

3. The complainants have failed to demonstrate that the tobacco plain packaging measure has a limiting effect on international trade in tobacco products

399. For all the aforementioned reasons, in order to establish that the tobacco plain packaging measure is "trade-restrictive" within the meaning of Article 2.2, the complainants must establish that it has a limiting effect on international trade in tobacco products. Although Article 2.2 does not necessarily require quantification of a limiting effect on international trade in tobacco products, whether a qualitative assessment suffices in the particular circumstances of this dispute depends, *inter alia*, on "the nature, quantity and quality of evidence existing at the time the analysis is made, and the characteristics of the technical regulation at issue as revealed by its design and structure".³⁸²

400. The complainants in this dispute purport to establish that the tobacco plain packaging measure is trade-restrictive for two reasons. First, the complainants argue that the design, structure and expected operation of the tobacco plain packaging measure limits competitive opportunities for imported products because it eliminates tobacco producers' ability to compete on the basis of brand differentiation.³⁸³ Second, to the extent that evidence of actual trade effects is required, the complainants argue that the tobacco plain packaging measure has allegedly caused consumers in Australia to downtrade from higher- to lower-priced brands.³⁸⁴

401. As Australia will demonstrate, neither of these allegations is sufficient to demonstrate, in qualitative or quantitative terms, that the tobacco plain packaging measure has a limiting effect on international trade in tobacco products. Australia begins with the complainants' principal "qualitative" argument that the design, structure and expected operation of the

³⁸² Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.208.

³⁸³ Dominican Republic's response to Panel Question No. 117, paras. 227-229; Honduras' response to Panel Question No. 117, p. 28; Indonesia's response to Panel Question No. 117, paras. 50, 57.

³⁸⁴ Dominican Republic's response to Panel Question No. 117, paras. 232, 235; Honduras' response to Panel Question No. 117, pp. 28-29; Indonesia's response to Panel Question No. 117, paras. 60-61.

tobacco plain packaging measure is sufficient to establish that this measure is trade-restrictive under Article 2.2.

(a) The complainants have failed to make a *prima facie* case that the tobacco plain packaging measure is trade-restrictive in qualitative terms

402. According to the Dominican Republic, a "limitation on competitive opportunities is already evident in the design, structure, and expected operation" of the tobacco plain packaging measure, because it "eliminate[s] the opportunity for producers to differentiate their products using design features, such as trademarks".³⁸⁵ Honduras similarly argues that the tobacco plain packaging measure "affects the competitive opportunities of tobacco producers" because it limits "the producer's ability to rely on brand packaging to distinguish their products from those of their competitors."³⁸⁶ Indonesia argues that the tobacco plain packaging measure "diminish[es] competitive opportunities that ... arise from the distinguishing features of packaging ... and prevent[s] producers of tobacco products from benefitting from those competitive opportunities."³⁸⁷

403. For the reasons discussed in Part III.C.2 above, the complainants' qualitative argument is insufficient, *as a matter of law*, to establish that the tobacco plain packaging is trade-restrictive, because it does not demonstrate a limiting effect on international trade in tobacco products. The complainants incorrectly equate the legal standard of trade-restrictiveness with one of "competitive freedom" of market participants, such that a limitation on any "competitive opportunity" in the marketplace would suffice to establish that a technical regulation is trade-restrictive, regardless of whether it results in any limiting effect on international trade in imported products.

404. In effect, the complainants' "competitive freedom" construct would convert "trade-restrictiveness" into a *per se* standard. Virtually every technical regulation will impose, with respect to at least one market participant, a limiting condition that did not exist prior to its adoption. As discussed above, this absurd interpretation would render the terms

³⁸⁵ Dominican Republic's response to Panel Question No. 117, para. 227.

³⁸⁶ Honduras' response to Panel Question No. 117, p. 28.

³⁸⁷ Indonesia's response to Panel Question No. 117, para. 57.

"trade-restrictive" and "obstacle to international trade" in Article 2.2 entirely meaningless, by dispensing with the requirement to demonstrate any limiting effect whatsoever on trade in imported products. As the example in Tables 2 and 3 above illustrates, under the complainants' legal standard, technical regulations that increase, rather than restrict, international trade would nonetheless be deemed "trade-restrictive" and would be subject to the disciplines of the TBT Agreement regardless of whether they constitute any "obstacle to international trade". This is simply not a tenable reading of Article 2.2.

405. When assessed against the correct legal standard, the complainants' "qualitative" argument fails to establish that the tobacco plain packaging measure is trade-restrictive under Article 2.2. Even assuming that the tobacco plain packaging measure limits a producer's ability to *distinguish* its tobacco products from those of other producers (which it does not), this is insufficient to demonstrate, without more, that it has a limiting effect on international *trade* in tobacco products.

406. As the complainants acknowledge, the requirements of the tobacco plain packaging measure apply equally to *all* tobacco producers, domestic and foreign, across all market segments, and for all tobacco products. Accordingly, the design, structure and expected operation of the tobacco plain packaging measure are insufficient, *on their own*, to establish that the measure has changed the conditions of competition in the Australian tobacco market in a manner that results in a limiting effect on international trade in tobacco products.³⁸⁸ Consequently, in the absence of additional evidence and arguments demonstrating, for example, that the design, structure and operation of the tobacco plain packaging measure will result in a decrease in overall demand for tobacco products in Australia (which the complainants deny will ever occur as a result of the measure), it is not evident from a purely qualitative assessment that it is trade-restrictive in the sense that the Appellate Body found in *US – COOL*.

407. Indeed, at this late stage in the proceedings, the complainants have failed to articulate any viable basis for their argument that any purported limitations on a tobacco producer's ability to distinguish its products from those of other producers would necessarily result in a

³⁸⁸ See Australia's response to Panel Question No. 117, para. 119.

limiting effect on international trade in tobacco products. Aside from their argument that tobacco producers in the "premium" segment are "disproportionately" affected by the tobacco plain packaging measure,³⁸⁹ which is insufficient by itself to establish trade-restrictiveness under a correct reading of Article 2.2, the complainants have not presented any argument or evidence explaining why the design, structure and operation of the tobacco plain packaging measure and its alleged effects on brand differentiation are likely to result in a reduction in overall imports of tobacco products from all Members (again, bearing in mind the complainants' refusal to admit that the tobacco plain packaging measure will result in a decline in overall demand for tobacco products).

408. In these circumstances,³⁹⁰ evidence of *actual* trade effects is required to demonstrate whether and to what extent the tobacco plain packaging measure has a limiting effect on international trade in tobacco products. In the following section, Australia will explain why the only alleged actual trade effect identified by the complainants is insufficient to establish that the tobacco plain packaging measure is trade-restrictive within the meaning of Article 2.2.

(b) The complainants have failed to make a *prima facie* case that the tobacco plain packaging measure is trade-restrictive in quantitative terms

409. To date, the *only* evidence of "actual trade effects" that the complainants have been able to identify in this case is the alleged "downtrading" that they attribute to the tobacco plain packaging measure. Referring to the econometric analysis contained in the IPE Report, the complainants argue that the tobacco plain packaging measure has caused Australian consumers to switch from higher- to lower-priced brands.³⁹¹ According to the complainants,

³⁸⁹ See Dominican Republic's first written submission, paras. 978, 1022; response to Panel Question No. 117, para. 215; Honduras' first written submission, paras. 870-875; response to Panel Question Nos. 63, 126; Indonesia's first written submission, paras. 397-402; response to Panel Question Nos. 63, 117; Cuba's first written submission, para. 403; response to Panel Question No. 117.

³⁹⁰ See Australia's response to Panel Question No. 117.

³⁹¹ Dominican Republic's first written submission, paras. 494-520 (referring to *Empirical Assessment of Australia's Plain Packaging Regime*, prepared by the Institute for Policy Evaluation (Dr. David Afshartous, Ph.D; Professor Marcus Hagedorn; Professor Ashok Kaul; and Professor Michael Wolf) (7 October 2014), Exhibit DR-100 ('IPE Report')); Honduras' first written submission, paras. 372-379 (referring to IPE Report, Exhibit DR-100); Indonesia's first written submission, paras. 323-327 (referring to IPE Report, Exhibit DR-100).

to the extent that evidence of actual trade effects is required, these alleged "downtrading" effects corroborate their qualitative case that the tobacco plain packaging measure has a limiting effect on competitive opportunities for brand differentiation in the Australian market.

410. It is undisputed that the "downtrading" phenomenon to which the complainants refer pre-dates the adoption of tobacco plain packaging, not only in Australia, but in numerous other markets around the world. Even if the complainants had established that these effects are attributable to the tobacco plain packaging measure (which, as discussed below, they have not), this would be legally insufficient to establish trade-restrictiveness in *quantitative* terms, because it does not demonstrate a reduction in either the volume or the value of imported tobacco products. At this late stage in these panel proceedings, it is remarkable that the complainants have not even attempted to link the "downtrading" effects in the Australian market to any discernible limitation on international trade in imported tobacco products for either individual Members (including their own exports) or for the entire category of imported tobacco products from all Members.

411. It is easy to understand why the complainants have to date been unwilling to attempt to discharge this evidentiary burden. As the statistical data submitted by the parties in response to Panel Question 5 unequivocally establish, imports of tobacco products in Australia have increased in both volume and value terms since the introduction of the tobacco plain packaging measure, despite consistent decline in demand for and consumption of tobacco products.³⁹² The statistical data submitted by the complainants themselves likewise demonstrate that there has been no decrease in the volume or value of their own imports of tobacco products, which were a negligible share of total imports in the Australian market prior to the introduction of the tobacco plain packaging measure and have remained so thereafter.³⁹³ Given the enormous increase in the volume of tobacco imports in the Australian market since the introduction of the tobacco plain packaging measure, and the critical importance to the complainants' case that the measure has not led to a decline in the rates of

³⁹² The increase in both volume and value of tobacco products reflects the decisions of Australia's tobacco manufacturers to relocate their production offshore and supply the domestic market through imports. See Australia's response to Panel Question No. 5, para. 29 (referring to Supplementary Graphs, Import volumes, value and share of the market, Exhibit AUS-512); Dominican Republic's response to Panel Question No. 5, paras. 36-38 (incorporated by Honduras and Indonesia in their responses to Panel Question No. 5).

³⁹³ Dominican Republic's response to Panel Question No. 5, paras. 36-38.

tobacco use in Australia, their claim of trade-restrictiveness can only be based on a decline in value. However, they have offered no evidence at all that the value of the trade has declined or would have been higher in the absence of the tobacco plain packaging measure.

412. Moreover, the Dominican Republic's own expert, Professor List, agrees with Australia's experts that there has been a significant *increase* in the real weighted price of a cigarette since the introduction of the tobacco plain packaging measure.³⁹⁴ Consistent with these higher prices, the complainants' own data strongly suggest that the total retail value of the Australian cigarette market (excluding taxes) *increased* by approximately 200 million Australian dollars in the 12 months following the introduction of the tobacco plain packaging measure, notwithstanding a decline in the total volume of cigarettes sold over the same period.³⁹⁵

413. In light of this unrebutted evidence, and in the absence of any qualitative or quantitative evidence demonstrating that the tobacco plain packaging measure has in any other way had a limiting effect on international trade in tobacco products, the complainants' claim under Article 2.2 must fail.

(c) The complainants have failed to establish that the alleged "downtrading" effects are attributable to the tobacco plain packaging measure

414. Another key problem with the complainants' "downtrading" allegation is that they have failed to discharge their burden of demonstrating that any such effects are attributable to the tobacco plain packaging measure, rather than to the enlarged GHWs that were introduced simultaneously. The IPE report upon which the complainants' downtrading allegation rests simply ignored this issue, and did not examine enlarged GHWs as a confounding factor in its analysis.

³⁹⁴ Powerpoint presentation of J. List displayed during Dominican Republic's opening statement at the first substantive meeting of the Panel, slide 58. See also J.A. List, *A Consideration of the Empirical Evidence on the Effects of Australia's Tobacco Plain Packaging Legislation* (1 June 2015), Exhibit DR/IND-1; Expert Report of M. Katz (9 March 2015), Exhibit AUS-18, paras. 64-74; Expert Report of Houston Kemp (9 March 2015), Exhibit AUS-19, Section 3.3 and Figure 3.8 [contains SCI].

³⁹⁵ Supplementary graphs, Import volumes, value and share of the market, Exhibit AUS-512, Figure 15.

415. Professor List expressly admitted that it was not possible to separate and distinguish the effects of tobacco plain packaging from the effects of the enlarged GHWs. Professor List unequivocally states that: "I know of no empirical technique that would allow the analyst to tease apart the GHW from the plain packaging effect without making an assumption on the size of one of the effects."³⁹⁶

416. Having had the deficiencies in the IPE report confirmed by their own expert, the complainants try artificially to address this issue by using much smaller GHWs introduced by Australia in 2006 as a proxy for the enlarged and updated GHWs adopted in 2012. In response to questioning by the Panel, the complainants essentially argue that, because the smaller GHWs introduced in 2006 did not have any downtrading effects, this Panel should presume that the enlarged and updated GHWs adopted in 2012 did not have any downtrading effects either.³⁹⁷ Australia considers that this is not an adequate response to the critique by the complainants' own expert for two reasons.

417. First, the response requires the Panel to accept that a graph, which to this point has not been the subject of any expert evidence, shows an absence of an effect which can be discerned simply by looking at it. Second, even if the evidence were not so deficient and the complainants did establish that there was no downtrading in response to the introduction of the 2006 GHWs, in Australia's submission, the smaller GHWs introduced in 2006 are not an appropriate counterfactual, and cannot be presumed to have had the same effects as the enlarged and updated GHWs adopted in 2012.

³⁹⁶ J.A. List, *A Consideration of the Empirical Evidence on the Effects of Australia's Tobacco Plain Packaging Legislation* (1 June 2015), Exhibit DR/IND-1, para. 64.

³⁹⁷ Dominican Republic's response to Panel Question No. 8.

418. Australia has also submitted evidence demonstrating that downtrading is an industry trend that is occurring in a number of markets globally, and is attributable to factors such as excise taxes or the industry's own marketing and pricing strategies.³⁹⁸ Recent statements by tobacco industry executives confirm this. For example, in a recent earnings call with investors, the Chief Executive Officer of British American Tobacco explained that:

[W]e have a low price segment that was occupied for the last five, six years by one of our competitors, and we decided not to go there. Neither us, neither the other competitor as well, because we didn't want the segment to grow. But because of substantial excise driven price increase that we saw in Australia in the last three or four years, this segment has started growing, *and because of these price increases you saw some widening of the price gaps in the market. . . .* So we have an excise increase, the third one of the four ad-hoc excise increases in Australia, at 12.5% per annum. That's going to happen I think, in September. Usually when you have an excise increase, you have a price increase. We will have to wait and see how things are going to move. *But we saw some down trading, but the down trading was caused by the industry to be honest, by launches in the low price segment,* so we had to react. We launched Rothmans there. Needless to say, with the capabilities that we have in the market – and this is a very strong brand – the brand did extremely well.³⁹⁹

419. The above statement by British American Tobacco's Chief Executive Officer not only confirms the link between increases in excise taxes and "widening gaps" in market prices, but also expressly concedes that the alleged "downtrading" effect occurring in the Australian market was "caused by the industry ... by launches in the low price segment". These are unequivocal statements by tobacco industry executives recognising the link between excise taxes and the tobacco industry's pricing strategies on the one hand, and downtrading in Australia on the other.

420. It follows from the foregoing that the complainants have not established that the "downtrading" effects that form the basis for their claim of trade-restrictiveness under Article 2.2 are attributable to the tobacco plain packaging measure rather than to the enlarged and updated GHWs that were introduced simultaneously in 2012, or to other market factors

³⁹⁸ Australia's first written submission, paras. 544-545 (referring to British American Tobacco Australia, "BAT forced to close Australian Factory" (Media Release, 31 October 2014), Exhibit AUS-255).

³⁹⁹ British American Tobacco, *British American Tobacco Half-Year Results 2015* (transcript, 29 July 2015), available at: [http://www.bat.com/group/sites/uk__9d9kcy.nsf/vwPagesWebLive/DO72TJQU/\\$FILE/medMD9Z3HKK.pdf?openelement](http://www.bat.com/group/sites/uk__9d9kcy.nsf/vwPagesWebLive/DO72TJQU/$FILE/medMD9Z3HKK.pdf?openelement) (last accessed 9 September 2015), Exhibit AUS-556, pp. 18-19 (emphasis added).

unrelated to its introduction. This provides a separate and independent basis for rejecting the complainants' claim that the tobacco plain packaging measure is trade-restrictive under Article 2.2.⁴⁰⁰

4. Conclusion to Part III.C

421. For all of the foregoing reasons, the complainants have failed to make a *prima facie* case, in either qualitative or quantitative terms, that the tobacco plain packaging measure is "trade-restrictive" under a proper interpretation of Article 2.2 of the TBT Agreement. In these circumstances, the Panel must conclude that their claim under Article 2.2 fails at the threshold, and it is not required to proceed with the "weighing and balancing" analysis under Article 2.2.

D. THE COMPLAINANTS HAVE FAILED TO ESTABLISH THAT THE TOBACCO PLAIN PACKAGING MEASURE IS NOT CAPABLE OF CONTRIBUTING TO ITS PUBLIC HEALTH OBJECTIVES

1. Introduction to Part III.D

422. In the previous section, Australia has demonstrated that the complainants have failed to establish the threshold applicability of Article 2.2 of the TBT Agreement, because they have failed to make a *prima facie* case that the tobacco plain packaging measure is "trade-restrictive" at all, as that term is properly interpreted. The remaining sections of Australia's second written submission are therefore relevant only if the Panel were to conclude that the complainants have discharged their *prima facie* burden of demonstrating that the tobacco plain packaging measure has a limiting effect on international trade in tobacco products.

⁴⁰⁰ The same problem of attribution applies to Honduras' claim that the tobacco plain packaging measure is trade-restrictive because it entails compliance costs on tobacco producers: see Honduras' first written submission, paras. 878-886; response to Panel Question No. 117, p. 29. As Australia has underscored previously, Honduras has not introduced any actual evidence in support of this allegation. Leaving aside the lack of any evidence quantifying these alleged costs, Honduras has not even attempted to isolate the costs of complying with the tobacco plain packaging measure from the costs that would have arisen in any event from compliance with the enlarged GHW requirements.

423. In this event, the Panel would then need to consider whether the complainants have discharged their *prima facie* burden of establishing that the tobacco plain packaging measure restricts international trade in tobacco products *beyond* what is necessary to achieve the degree of contribution the measure makes to the achievement of Australia's public health objectives, taking account of the risks that non-fulfilment of these objectives would create.⁴⁰¹ This inquiry involves a "holistic weighing and balancing"⁴⁰² of: (i) the trade-restrictiveness of the technical regulation at issue; (ii) the degree of contribution that the technical regulation at issue makes to its objectives; and (iii) the nature of the risks at issue as well as the gravity of the consequences that would arise from non-fulfilment of the objectives of the technical regulation at issue. In most cases, the inquiry should also compare the challenged technical regulation with proposed alternative measures.⁴⁰³

424. In relation to the factor of the "degree of contribution", the complainants' case under Article 2.2 rests entirely on the proposition that the tobacco plain packaging measure is not capable of making *any* contribution to its public health objectives of reducing the use of and exposure to tobacco products in Australia.⁴⁰⁴ That is, the complainants have undertaken to demonstrate that removing one of the last key avenues for imbuing tobacco products with positive associations,⁴⁰⁵ and enhancing the perceived gravity of the harmful effects of tobacco products,⁴⁰⁶ will not discourage *any* potential smokers from taking up smoking, will not discourage *any* former smokers from relapsing, and will not encourage *any* current smokers to give up smoking or reduce their smoking around others.

⁴⁰¹ Appellate Body Report, *US – COOL*, para. 471, citing *US – Tuna II (Mexico)*, para. 322.

⁴⁰² Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.198 (emphasis omitted).

⁴⁰³ Appellate Body Report, *US – Tuna II (Mexico)*, para. 322; Appellate Body Report, *US – COOL*, para. 377; Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.200.

⁴⁰⁴ In their first written submissions, the complainants argued that the tobacco plain packaging measure not only would not contribute to reducing smoking rates, but would also undermine these objectives by leading to an increase in demand for tobacco products in Australia: Dominican Republic's first written submission, paras. 486, 521-528; Honduras' first written submission, para. 888; Indonesia's first written submission, paras. 116 and 119. Subsequently, however, this line of argument has been disavowed by the complainants' own expert, Professor List, who could not find any compelling evidence that the tobacco plain packaging measure would "backfire": Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, para. 16.

⁴⁰⁵ Australia's first written submission, paras. 87-96.

⁴⁰⁶ Australia's first written submission, paras. 176-181.

425. The complainants essentially advance two lines of argument in support of this untenable proposition. First, the complainants argue that *quantitative* post-implementation evidence should be dispositive of the Panel's analysis of contribution under Article 2.2.⁴⁰⁷ According to the complainants, the limited quantitative post-implementation evidence available suggests that the tobacco plain packaging measure has not contributed to a measurable reduction in smoking rates in Australia in the two-year period since its introduction, and this is a sufficient basis for concluding that the measure is not capable of ever making any such contribution.⁴⁰⁸

426. Second, the complainants argue that the *qualitative* evidence establishing that the tobacco plain packaging measure will have an effect on smoking behaviour is flawed, and therefore does not provide a sufficient basis for concluding that the measure is apt to contribute to reducing the use of and exposure to tobacco products in Australia.⁴⁰⁹

427. For the reasons set out below, both lines of argument fail entirely.

428. In Part III.D.2, Australia will explain that *as a matter of law* the complainants' contentions that the contribution of the tobacco plain packaging measure to its public health objectives must be demonstrated in quantitative terms on the basis of (less than)⁴¹⁰ two years of quantitative post-implementation data find no support in Article 2.2, as interpreted by the Appellate Body.⁴¹¹

⁴⁰⁷ See, e.g. Dominican Republic's first written submission, paras. 553-558; Dominican Republic's response to Panel Question No. 2, para. 20 (also adopted by Indonesia); Dominican Republic's opening statement at the first substantive meeting of the Panel, para. 64; Honduras' first written submission, paras. 342-345, 402; Honduras' response to Panel Question No. 2; Honduras' opening statement at the first substantive meeting of the Panel, para. 12; Cuba's first written submission, para. 94.

⁴⁰⁸ Dominican Republic's response to Panel Question No. 71, paras. 346-347; Honduras' response to Panel Question No. 71; Indonesia's first written submission, para. 420; Indonesia's response to Panel Question No. 71.

⁴⁰⁹ See, e.g. Dominican Republic's first written submission, paras. 554-558; Dominican Republic's response to Panel Question Nos. 2, para. 21, Panel Question No. 71 and Panel Question No. 126, para. 287; Indonesia's response to Panel Question No. 71; Honduras' first written submission, para. 484; Honduras' response to Panel Question Nos. 2, 71; Cuba's first written submission, para. 178. Cf. Australia's response to Panel Question No. 126.

⁴¹⁰ Indeed, *not one* of the complainants' experts has actually examined two years of post-implementation data: see para. 500 and fn 539.

⁴¹¹ See, e.g. Dominican Republic's first written submission, paras. 554-558; Dominican Republic's response to Panel Question No. 2, para. 21, Panel Question Nos. 71 and 126, para. 287; Indonesia's response to

(continued)

429. Rather, as the complainants themselves acknowledge,⁴¹² and as Australia has already demonstrated,⁴¹³ the Appellate Body has consistently indicated that *qualitative* methods are an appropriate means of assessing contribution, depending on the nature of the objective of the technical regulation at issue, its characteristics as revealed by its design and structure, as well as the nature, quality and quantity of the evidence available at the time of the Panel's assessment.⁴¹⁴

430. Subsequently, in Part III.D.3, Australia will establish that *as a matter of evidence* the complainants have failed to demonstrate that the tobacco plain packaging measure is incapable of making *any* contribution to its public health objectives of reducing the use of and exposure to tobacco products in Australia.

431. To the contrary, from a *qualitative* standpoint, the overwhelming weight of the evidence demonstrates that the tobacco plain packaging measure is capable of making a contribution to reducing the use of and exposure to tobacco products, by working to change consumer perceptions and beliefs regarding tobacco products, including in adolescents.⁴¹⁵ The specific mechanisms through which the measure operates reduce the appeal of tobacco products to consumers by severing the link between tobacco products and positive perceptions of both tobacco products and the act of smoking itself. Simultaneously, these mechanisms enhance the perceived gravity of the harmful effects of tobacco use.⁴¹⁶ The evidence clearly establishes that such changes in consumer perceptions and beliefs are capable of affecting smoking-related behaviour.

432. By targeting consumer perceptions and beliefs regarding tobacco products in this way, the tobacco plain packaging measure complements Australia's existing suite of tobacco control measures to improve public health by reducing the use of and exposure to tobacco

Panel Question No. 71; Honduras' first written submission, para. 484; Honduras' response to Panel Question Nos. 2, 71; Cuba's first written submission, para. 178. Cf. Australia's response to Panel Question No. 126.

⁴¹² Dominican Republic's response to Panel Question No. 126, para. 280 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151).

⁴¹³ Australia's response to Panel Question No. 126.

⁴¹⁴ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.211.

⁴¹⁵ Australia's first written submission, Part II.I.3.

⁴¹⁶ This is achieved both by increasing the effectiveness of health warnings on tobacco packaging and by reducing the ability of the packaging to mislead consumers about such harms, including with respect to the relative harmfulness of different tobacco products.

products.⁴¹⁷ The tobacco plain packaging measure thus operates in a synergistic manner with other elements of Australia's tobacco control measures to enhance Australia's comprehensive strategy for improving public health by reducing the use of and exposure to tobacco products in the long term.⁴¹⁸

433. Finally, in Part III.D.4, Australia will explain that the *quantitative* post-implementation evidence corroborates the qualitative evidence establishing that the tobacco plain packaging measure is capable of contributing to reducing the use of and exposure to tobacco products in Australia, because smoking rates have declined in Australia subsequent to the adoption of the tobacco plain packaging measure, and the complainants have failed in their attempts to establish that the measure has made no contribution to this decline.

2. The complainants are incorrect that quantitative evidence outweighs or supersedes qualitative evidence

434. Before turning to the complainants' factual arguments, Australia notes that the complainants' contention that short-term post-implementation quantitative evidence outweighs or "supersedes" any evidence of a qualitative nature finds no legal basis within Article 2.2, as interpreted by the Appellate Body.⁴¹⁹ Rather, the complainants' insistence that the contribution of the tobacco plain packaging measure to its public health objectives must be demonstrated quantitatively, on the basis of (less than) two years of post-implementation data, and without due regard for the nature of the measure's objectives, the measure's design and structure, or any of the available qualitative evidence, is in direct conflict with the relevant legal and evidentiary standards for assessing contribution under Article 2.2.

⁴¹⁷ Australia's first written submission, paras. 54-59, 605-606; Australia's response to Panel Question No. 64.

⁴¹⁸ Australia's first written submission, paras. 54-59, 605-606; Australia's response to Panel Question No. 64.

⁴¹⁹ See, e.g. Dominican Republic's first written submission, paras. 554-558; Dominican Republic's response to Panel Question No. 2, para. 21, Panel Question Nos. 71 and 126, para. 287; Indonesia's response to Panel Question No. 71; Honduras' first written submission, para. 484; Honduras' response to Panel Question Nos. 2, 71; Cuba's first written submission, para. 178. But see Australia's response to Panel Question No. 126.

435. First, there is no requirement to *quantify* the degree of contribution of a challenged technical regulation to its objectives.⁴²⁰ Rather, depending on the circumstances of the case, it is sufficient to demonstrate contribution through "*qualitative* reasoning based on a set of hypotheses that are tested and supported by scientific evidence".⁴²¹ Thus, in the specific circumstances of *Brazil – Retreaded Tyres*, the Appellate Body considered sufficient a demonstration, in qualitative terms, that "the measure was 'apt to produce a material contribution' to its objective."⁴²² Similarly, in *EC – Seal Products*, the Appellate Body found that, where evidence of the actual operation of the measure was "limited and uneven", contribution could be demonstrated by qualitative evidence indicating that the measure is "*capable* of making and does make *some* contribution to its objective, or that it did so to a *certain extent*."⁴²³

436. Second, the contribution of a technical regulation to its objectives, particularly in the case of a public health measure, need not be "immediately observable".⁴²⁴ The Appellate Body has expressly acknowledged that "certain complex public health ... problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures."⁴²⁵ In this context, it may prove difficult, in the short term, to isolate the contribution of one specific public health measure from those attributable to other measures forming part of the same comprehensive policy.⁴²⁶ Moreover, the effects of such public health measures "can only be evaluated with the benefit of time."⁴²⁷ Accordingly, the

⁴²⁰ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.209.

⁴²¹ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151 (emphasis added). See also Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.209 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151). The complainants themselves acknowledge these findings: see Dominican Republic's and Honduras' responses to Panel Question No. 126.

⁴²² Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151, cited in Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.209.

⁴²³ Appellate Body Report, *EC – Seal Products*, para. 5.228, cited in Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.209.

⁴²⁴ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

⁴²⁵ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

⁴²⁶ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

⁴²⁷ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

Appellate Body has considered it sufficient to demonstrate that a technical regulation is apt to contribute to its objectives "*at some point in time*".⁴²⁸

437. Third, a panel must adopt a methodology that is suited to yielding a *correct* assessment of contribution in the *circumstances* of a given case.⁴²⁹ A panel must therefore have regard to the nature of the measure's objective, the characteristics of the measure as revealed by its design and structure, and the nature, quantity and quality of the available evidence.⁴³⁰

438. Thus, in undertaking its contribution analysis, the focus of the Panel is *not*, as the complainants contend, on quantitative evidence of immediately observable effects of the tobacco plain packaging measure in the limited period of time since its introduction. While such evidence is relevant to the Panel's inquiry, the Panel must give due regard to the nature of the measure's public health objectives; the specific mechanisms through which the measure is designed to make its contribution to these objectives; and the nature, quantity and quality of all the available evidence across a range of relevant fields including adolescent behaviour, psychology, epidemiology, marketing, consumer behaviour, and economics.⁴³¹

439. Applying the relevant legal and evidentiary standards to Australia's measure, the Panel's contribution inquiry must determine whether "qualitative reasoning ... supported by scientific evidence"⁴³² demonstrates that the tobacco plain packaging measure is capable of contributing to its objectives of reducing the use of and exposure to tobacco products in Australia over time.⁴³³ In light of this inquiry, and consistent with the burden that the complainants have assumed in their submissions, the complainants bear the burden of

⁴²⁸ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.209, citing Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

⁴²⁹ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.210-5.211.

⁴³⁰ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.210-5.211.

⁴³¹ Australia's first written submission, paras. 60-102, 142-205.

⁴³² Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

⁴³³ This inquiry is also consistent with the burden the complainants have assumed in seeking to demonstrate that the tobacco plain packaging measure is not capable of making any contribution to its public health objectives.

establishing that the tobacco plain packaging measure is incapable of ever making *any* contribution to its public health objectives.⁴³⁴

3. The complainants have failed to establish that the qualitative evidence does not demonstrate that the tobacco plain packaging measure is capable of contributing to its objectives

440. In seeking to discharge their burden, the complainants have attempted to discredit the extensive qualitative evidence submitted by Australia that establishes that the tobacco plain packaging measure is capable of contributing to its objectives of reducing the use of and exposure to tobacco products in the long-term.

441. This attempt is made in a context where the complainants not only accept that packaging in general can change consumer behaviour; they positively assert that the tobacco plain packaging measure in particular has already changed consumer behaviour in certain respects.⁴³⁵ Consequently, they are left making the implausible claim that consumer behaviour will be changed by the measure, but not in the ways predicted by the empirical and expert evidence across a range of disciplines.

442. The complainants seek to make out this proposition in two ways.⁴³⁶ First, they deny any link between the tobacco plain packaging measure and smoking-related behaviours – i.e. the complainants contend that even if one accepts that the empirical evidence establishes that packaging changes people's attitudes and beliefs, it will not change their smoking behaviour.⁴³⁷ Second, the complainants attempt to argue that the evidence base underlying

⁴³⁴ That the complainants must establish that the tobacco plain packaging measure is incapable of ever making *any* contribution to its public health objectives is further reinforced by the relational nature of the Panel's "weighing and balancing" analysis – i.e. in the unlikely event that the Panel were to find the alleged effects on "competitive opportunities" identified by the complainants sufficient to meet the test of trade-restrictiveness, the degree of trade-restrictiveness that these alleged effects entail are so minimal that *any* degree of contribution would suffice to establish that the tobacco plain packaging measure is no more trade-restrictive than necessary to fulfil Australia's public health objectives, in light of the nature and gravity of the risks that non-fulfilment would create: Australia's first written submission, para. 592.

⁴³⁵ Australia will expand on this discussion in Part III.D.3(a)iii.

⁴³⁶ In their first written submissions the complainants also advanced the proposition that tobacco plain packaging was likely to backfire and cause increased smoking, but that proposition has been disavowed by their experts Professor List and Professor Klick.

⁴³⁷ Dominican Republic's response to Panel Question Nos. 2, 41; Honduras' response to Panel Question Nos. 2, 41.

the tobacco plain packaging measure is unsound and should be rejected *in toto* – either because it is flawed⁴³⁸ or because it is superseded by more informative post-implementation data analysis.⁴³⁹

443. For the reasons set out in the following sections, the complainants' arguments must be rejected.

(a) The complainants have failed to establish that there is no link between the tobacco plain packaging measure and changes in smoking behaviour

444. Australia has already presented a significant volume of qualitative evidence which clearly establishes that the tobacco plain packaging measure is apt to influence smoking behaviour, including public health evidence that confirms that restricting tobacco advertising changes smoking behaviour;⁴⁴⁰ evidence from experts in human behaviour;⁴⁴¹ and empirical studies that have sought to measure behavioural changes.⁴⁴²

445. Notwithstanding this extensive body of evidence, the complainants continue to contend that there is no link between the tobacco plain packaging measure and smoking-related behaviours. This contention is untenable, for the following reasons:

- first, there is a well-established link between advertising and promotion (including through tobacco packaging) and smoking-related behaviour;
- second, there is empirical and expert evidence demonstrating the effect of tobacco plain packaging on smoking-related behaviour; and

⁴³⁸ Dominican Republic's first written submission, paras. 563-659; Honduras' first written submission, paras. 455-517; Expert Report of I. Ajzen (Behavioural Theory) (1 June 2015), Exhibit DR/HON/IND-3; Expert Report of I. Ajzen (Supplemental Report) (7 July 2015), Exhibit DR/HON/IND-4; Cuba's first written submission, paras. 167-238.

⁴³⁹ Dominican Republic's first written submission, paras. 428-531; Dominican Republic's response to Panel Question No. 2, paras. 20-23 (adopted by Indonesia in its response to Panel Question No. 2); Honduras' first written submission, paras. 342-402; Honduras' response to Panel Question No. 2; Cuba's first written submission, paras. 94-166.

⁴⁴⁰ Australia's first written submission, paras. 60-86.

⁴⁴¹ Australia's first written submission, paras. 87-102, 142-200.

⁴⁴² Australia's first written submission, paras. 201-205.

- finally, the complainants themselves concede that the tobacco plain packaging measure has affected consumer behaviour.

i. The link between tobacco advertising and promotion (including tobacco packaging) and smoking-related behaviours is well-established

446. The tobacco industry has long sought to deny any link between the advertising and promotion of tobacco products on the one hand, and smoking-related behaviours such as initiation, cessation, and relapse, on the other. However, the link between tobacco advertising and promotion (including tobacco packaging) and smoking-related behaviours is well established.

447. Indeed, this link is unequivocally demonstrated by the evidence described in detail in Part II.C.5(b) above, which Australia incorporates by reference here. To recall, Australia presented the views of successive, eminent reports of the United States Surgeons General, the WHO, the United States National Cancer Institute, and the United States Institute of Medicine. These reports, and evidence presented in Australia's first written submission, demonstrate the clear link between advertising and smoking-related behaviour,⁴⁴³ and that tobacco packaging is an important medium for advertising and promotion and is capable of affecting smoking-related behaviours.⁴⁴⁴

448. The reports also found that there is a scientific basis for the conclusion that tobacco plain packaging is capable of making a contribution to the public health objectives of the tobacco plain packaging measure.⁴⁴⁵ This proposition is one which Australia outlined extensively in its first written submission, and in Part II.C.5(b) above.⁴⁴⁶ Australia presented a broad range of evidence that demonstrated that, by standardising packaging and removing one of the last remaining avenues for tobacco advertising and promotion in Australia, the tobacco plain packaging measure will reduce the appeal of tobacco products, increase the effectiveness of GHWs, and reduce the ability of tobacco packaging to mislead consumers

⁴⁴³ See Part II.C.5(b)i; Australia's first written submission, paras. 60-65.

⁴⁴⁴ See Part II.C.5(b)ii; Australia's first written submission, paras. 66-102, 615-645.

⁴⁴⁵ See Part II.C.5(b)iii; Australia's first written submission, paras. 103-113, 142-205.

⁴⁴⁶ Australia's first written submission, paras. 66-102, 142-205, 615-645; see also Australia's response to Panel Question No. 126, paras. 171-176.

about the harmfulness of tobacco products.⁴⁴⁷ Australia also demonstrated that, by influencing intentions, attitudes and beliefs, the tobacco plain packaging measure would lead to a reduction in the use of and exposure to tobacco products.⁴⁴⁸

449. This evidence, and the evidence outlined in Australia's first written submission has been complemented by evidence from eminent experts from a range of fields including adolescent behaviour, psychology, epidemiology, marketing, consumer behaviour, and economics, all of whom conclude that the tobacco plain packaging measure is apt to contribute to its objective of changing smoking-related behaviour.

450. The complainants' denial that tobacco product packaging is a form of advertising and promotion, and one that is capable of affecting smoking-related behaviours, is therefore untenable.

ii. Empirical and expert evidence demonstrates the effect of tobacco plain packaging on smoking-related behaviour

451. Australia has also produced significant expert evidence, from the field of behavioural science, that confirms tobacco plain packaging can, and does, affect smoking-related behaviour in a manner that will contribute to reducing the use of and exposure to tobacco products, as outlined in section (a) below. As outlined in section (b), the complainants' attempts to undermine this conclusion are baseless.

a. *Behavioural experts from a broad range of perspectives all conclude that the measure will affect smoking-related behaviour*

452. Australia has engaged a number of independent behavioural experts who have arrived at their conclusion that tobacco plain packaging is likely to affect smoking-related behaviour from a range of different perspectives. The opinions of these experts are outlined in detail in Australia's first written submission, and may be summarised as follows.

⁴⁴⁷ Australia's first written submission, paras. 148-205, 607-614.

⁴⁴⁸ Australia's first written submission, paras. 87-102, 142-147, 615-645.

453. Professor Fong, Professor of Psychology and Health Studies at the University of Waterloo and Chief Principal Investigator of the International Tobacco Control Policy Evaluation Project, conducted an extensive review of the empirical studies assessing the likely impact of tobacco plain packaging and, on the basis of this evidence, concluded that changing the appeal of tobacco products will result in behavioural changes – specifically, reduced smoking initiation and relapse and increased quitting.⁴⁴⁹

454. Professor Slovic, Professor of Psychology at the University of Oregon and President of Decision Research, relies upon the behavioural theory of the affect heuristic to establish a direct link between the changes in product appeal, and subsequent consumer behaviour.⁴⁵⁰ The affect heuristic posits that a key motivator of many forms of behaviour, including consumer behaviour is "affect" (positive or negative feelings of which individuals may not necessarily be consciously aware). Affective reactions are often first reactions, which occur automatically and guide behaviour.⁴⁵¹ A chief proponent of affective science, Professor Daniel Kahneman, won a Nobel Prize for his work in this area. Professor Kahneman concludes that fast, intuitive thinking, based on often unconscious positive or negative associations, is the default mode of human cognition.⁴⁵²

455. Professor Slovic establishes that appealing tobacco packaging associates the act of smoking with positive affect. These positive perceptions exert powerful influences on behaviour, including leading many youths to take up smoking.⁴⁵³ Thus by reducing the appeal associated with tobacco products, tobacco plain packaging will reduce youth initiation.

456. Dr Biglan, Senior Scientist at the Oregon Research Institute, establishes that tobacco industry marketing influences adolescents to believe that smoking will achieve social

⁴⁴⁹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 72-74, 248-298.

⁴⁵⁰ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, paras. 27-83; Second Expert Report of P. Slovic (11 September 2015), Exhibit AUS-532.

⁴⁵¹ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 27; Second Expert Report of P. Slovic (11 September 2015), Exhibit AUS-532, para. 14.

⁴⁵² Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, para. 29 and Second Expert Report of P. Slovic (11 September 2015), Exhibit AUS-532, para. 20.

⁴⁵³ Expert Report of P. Slovic (4 March 2015), Exhibit AUS-12, paras. 83, 102.

acceptance.⁴⁵⁴ In his assessment, because tobacco plain packaging substantially reduces the ability of the industry to appeal to young people in this manner, it will reduce youth smoking initiation.⁴⁵⁵

457. Dr Brandon, Director of the Tobacco Research and Intervention Program at the H. Lee Moffitt Cancer Center and Research Institute and an expert on addiction behaviour, focuses on the ability of tobacco packaging to act as a conditioned cue, prompting former smokers to relapse and existing smokers to continue to smoke. He contends that advertising, including through fully-branded tobacco packaging, is likely to be a conditioned cue to smoke and that tobacco plain packaging reduces the degree to which packaging serves as a personalised conditioned cue.⁴⁵⁶ He concludes that tobacco plain packaging will be less likely than fully-branded packaging to impede quit attempts and to contribute to relapse. On this basis, Professor Brandon considers it reasonable to expect that removing branding elements on packaging will lead to a population-based reduction in smoking prevalence.⁴⁵⁷

458. The fact that each of these independent behavioural experts concludes that tobacco plain packaging will influence smoking behaviour is not an unexpected outcome of the application of behavioural science to this issue. The United States Surgeon General refers to a "meta-theory", based upon the elements of *fourteen different theories* of human behaviour, which supports a relationship between tobacco marketing, attitudes, intentions and smoking behaviour.⁴⁵⁸ Further, consumer behaviour theory relies upon the premise that attitudes about the characteristics of a product influence purchasing behaviour.⁴⁵⁹ This explains the significant resources and time the tobacco industry invests in researching consumer beliefs and attitudes towards particular packaging designs.⁴⁶⁰

⁴⁵⁴ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, paras. 7, 31-42, 83-98; Second Expert Report of A. Biglan (10 September 2015), Exhibit AUS-533, paras. 6-11, 15.

⁴⁵⁵ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, paras. 7, 125; Second Expert Report of A. Biglan (10 September 2015), Exhibit AUS-533, paras. 18-20.

⁴⁵⁶ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, paras. 20, 24-25, 69, 93-96.

⁴⁵⁷ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, paras. 25-26.

⁴⁵⁸ United States Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* (2012), Exhibit AUS-76, pp. 509-510. The "meta-theory" relied upon is called the "Theory of Triadic Influence" and is outlined at p. 429.

⁴⁵⁹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 94-97.

⁴⁶⁰ Australia's first written submission, paras. 80-83; Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 115-117.

459. Thus, the aptness of tobacco plain packaging to change smoking behaviour is well established in the field of behavioural science.

b. The complainants have failed to undermine the link between changing the appeal of the packaging and changing smoking-related behaviour

460. As outlined in Part II.C.5(c)ii, the complainants have gone to great lengths to try to demonstrate that there is no connection between the appearance of the tobacco packaging, and changed smoking-related behaviour. In seeking to contest this well-established connection, the complainants rely on three experts – Professor Ajzen, Professor Steinberg and Professor Fischer.

c. Professor Ajzen

461. Professor Ajzen attempts to undermine Australia's conclusion and the body of scientific opinion that changing the appeal of tobacco products will lead to changes in smoking behaviour. He criticises Australia for purportedly relying exclusively on behavioural theories, rather than empirical evidence.⁴⁶¹ Professor Ajzen also claims that Australia relies upon his particular theories, namely the Theory of Reasoned Action and the Theory of Planned Behaviour, to support its conclusions, even though his theories raise "serious doubts about the ability of plain packaging to affect smoking-related behavior".⁴⁶² Finally, Professor Ajzen attempts to discredit the application of the theory of the affect heuristic to tobacco plain packaging.

462. For the reasons that follow, Professor Ajzen's attempts to undermine the conclusions that Australia and its experts reach relating to the efficacy of tobacco plain packaging do not withstand scrutiny.

⁴⁶¹ See, e.g. Expert Report of I. Ajzen (1 June 2015), Exhibit DR/HON/IND-3, paras. 10, 34-40. In addition, although Professor Ajzen states (at paras. 20, 53) that the 2012 Report of the US Surgeon General inaccurately relies on his theories to conclude that there is a strong link between intentions and behaviour, in fact it is the Theory of Triadic Influence that the Surgeon General relies on, with Professor Ajzen's theories mentioned only in passing: see United States Department of Health and Human Services, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* (2012), Exhibit AUS-76, pp. 429, 509.

⁴⁶² Expert Report of I. Ajzen (1 June 2015), Exhibit DR/HON/IND-3, para. 92.

463. First, it is wholly inaccurate for Professor Ajzen to assert that the Theory of Reasoned Action and the Theory of Planned Behaviour "lie at the heart of Australia's arguments".⁴⁶³ In Australia's entire case as presented at the time Professor Ajzen filed his report there was only a *single* reference to Professor Ajzen's theories found in a *single paragraph* in Professor Fong's 160 page report.⁴⁶⁴ As explained by Professor Fong in his supplementary report, he did not "rely" on Professor Ajzen's theories in reaching his conclusions.⁴⁶⁵ Professor Fong reviewed a wide range of empirical evidence on the link between the appeal of tobacco products and smoking initiation, consumption, demand, and cessation, including several studies that specifically evaluated tobacco plain packaging's potential impact on behaviour. In this context, Professor Ajzen was mentioned only in passing, to note that research arising from his Theory of Reasoned Action, as well as from other behavioural theories, is consistent with a link between attitudes and behaviour.⁴⁶⁶ Further, Australia did not base its tobacco plain packaging measure on Professor Ajzen's particular theories. No part of either the research underlying tobacco plain packaging or the design of the measure depends upon Professor Ajzen's theories to link tobacco plain packaging with changes in smoking behaviour. Consequently, Professor Ajzen's criticism that "Australia has not applied [the Theory of Planned Behaviour] correctly"⁴⁶⁷ and his argument that the tobacco plain packaging research was not conducted in accordance with his particular theory⁴⁶⁸ are irrelevant.

⁴⁶³ Expert Report of I. Ajzen (1 June 2015), Exhibit DR/HON/IND-3, para. 18.

⁴⁶⁴ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 252.

⁴⁶⁵ Second Expert Report of G. Fong (8 September 2015), Exhibit AUS-531, paras. 10-11, 42-48.

⁴⁶⁶ Second Expert Report of G. Fong (8 September 2015), Exhibit AUS-531, paras. 42-43.

⁴⁶⁷ See, e.g. Expert Report of I. Ajzen (1 June 2015), Exhibit DR/HON/IND-3, paras. 20, 40, 55.

⁴⁶⁸ Expert Report of I. Ajzen (1 June 2015), Exhibit DR/HON/IND-3, paras. 20, 106-135.

464. Second, Professor Ajzen's contention that Australia relies exclusively on behavioural theories, to the exclusion of empirical evidence, in support of its conclusions regarding smoking behaviour is wrong. In fact, there is an extensive body of empirical evidence supporting the conclusion that changing attitudes and intentions towards tobacco products, through changing their appeal, changes smoking behaviour:

- Australia and its experts, including Professor Fong, rely upon the vast array of empirical studies that assess the efficacy of tobacco plain packaging.⁴⁶⁹ A significant number of pre- and post-implementation studies conclude that tobacco plain packaging results in specific effects on *smoking behaviour*. These effects include *inter alia* that tobacco plain packaging reduces demand for cigarettes;⁴⁷⁰ decreases willingness to pay for cigarettes;⁴⁷¹ increases avoidant behaviours, such as hiding or covering packs;⁴⁷² increases cessation behaviours, such as forgoing cigarettes, smoking less around others, stubbing out cigarettes early and reducing

⁴⁶⁹ Australia's first written submission, paras. 142-147, 163-168, 182-186, 196-200 and the extensive body of research cited therein; Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 103-114; Second Expert Report of G. Fong (8 September 2015), Exhibit AUS-531, paras. 125-136.

⁴⁷⁰ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 267-270; Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, paras. 102-103; J.F. Thrasher, M.C. Rousu, D. Hammond, A. Navarro, J.R. Corrigan, "Estimating the impact of pictorial health warnings and 'plain' cigarette packaging: evidence from experimental auctions among adult smokers in the US", *Health Policy*, Vol. 102, No. 1, (2011), 41, Exhibit AUS-229; M.C. Rousu, J.F. Thrasher, "Demand reduction from plain and pictorial cigarette warning labels: Evidence from experimental auctions", *Applied Economic Perspective and Policy*, Vol. 35, No. 1, (2013), 171, Exhibit AUS-228.

⁴⁷¹ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 271. J.R. d'Avernas, D. Northrup, M.K. Foster, D. Burton, R. Ferrence, J. Pollard, I. Rootman, B.R. Flay, *Cigarette packaging and event marketing increases the attractiveness of smoking: A study of youth*, Working Papers Series No. 28 (1997), Exhibit AUS-144; D. Hammond, J. Doxey, S. Daniel, M. Bansal-Travers, "Impact of Female-Oriented Cigarette Packaging in the United States", *Nicotine & Tobacco Research*, Vol. 13, No. 7 (2011), Exhibit AUS-157; J. Hoek, C. Wong, P. Gendall, J. Louviere, K. Cong, "Effects of Dissuasive Packaging on Young Adult Smokers", *Tobacco Control*, Vol. 20 (2011), 183, Exhibit AUS-148; I. Rootman, B. Flay, "A Study on Youth Smoking: Plain Packaging, Health Warnings, Event Marketing and Price Reductions", *University of Toronto, Centre for Health Promotion*, (1995), Exhibit AUS-145.

⁴⁷² Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 284-285, 434-435; Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, paras. 107-110. See, e.g. C Moodie, A.M. Mackintosh, "Young adult women smokers' response to using plain cigarette packaging: a naturalistic approach" *BMJ Open*, Vol. 3, No. e002402, (2013), 1, Exhibit AUS-185; M. Zacher, M. Bayly, E. Brennan, J. Dono, C. Miller, S. Durkin, M. Scollo, M. Wakefield, "Personal tobacco pack display before and after the introduction of plain packaging with larger pictorial health warnings in Australia: an observational study of outdoor café strips" *Addiction*, Vol. 109, (2014), 653, Exhibit AUS-222; M. Zacher, M. Bayly, E. Brennan, J. Dono, C. Miller, S. Durkin, M. Scollo, M. Wakefield, "Personal pack display and active smoking at outdoor café strips: Assessing the impact of plain packaging 1 year post implementation." *Tobacco Control* Vol. 24 (2015) ii94-ii97, Exhibit AUS-223.

consumption;⁴⁷³ increases calls to Quitline;⁴⁷⁴ increases the number of quit attempts;⁴⁷⁵ decreases active smoking at outdoor public venues, particularly when children are present;⁴⁷⁶ and decreases the likelihood that study participants will accept a gift pack of cigarettes.⁴⁷⁷ Although tobacco plain packaging has been in place for only a short period of time, a number of these behavioural changes demonstrate that the objectives in Section 3(1) of the TPP Act are already being achieved. In particular, by reducing active smoking in outdoor venues, the measure is "reducing people's exposure to smoke from tobacco products"⁴⁷⁸ and by increasing quit attempts, it is evident that the measure is "encouraging people to give up smoking".⁴⁷⁹

- Aside from the studies assessing the impact of tobacco plain packaging, the empirical evidence supporting the link between reducing the appeal of tobacco products and

⁴⁷³ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 284-285, 287, 437. See, e.g. C. Moodie, A.M. Mackintosh, "Young adult women smokers' response to using plain cigarette packaging: a naturalistic approach" *BMJ Open*, Vol. 3, No. e002402, (2013), 1, Exhibit AUS-185; Durkin et al, "Short-term changes in quitting-related cognitions and behaviours after the implementation of plain packaging with larger health warnings: Findings from a national cohort study with Australian adult smokers" *Tobacco Control* Vol. 24 (2015), ii26-ii32, Exhibit AUS-215.

⁴⁷⁴ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 287, 436; J.M. Young, I. Stacey, T.A. Dobbins, S. Dunlop, A.L. Dessaix, D.C. Currow, "Association between tobacco plain packaging and Quitline calls: a population-based, interrupted time-series analysis", *Medical Journal of Australia*, Vol. 200, No. 1 (2014), 29, Exhibit AUS-214.

⁴⁷⁵ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 287, 437. Durkin et al, "Short-term changes in quitting-related cognitions and behaviours after the implementation of plain packaging with larger health warnings: Findings from a national cohort study with Australian adult smokers" *Tobacco Control* Vol. 24 (2015), ii26-ii32, Exhibit AUS-215.

⁴⁷⁶ Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 434-435; Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, paras. 109-110. See M. Zacher, M. Bayly, E. Brennan, J. Dono, C. Miller, S. Durkin, M. Scollo, M. Wakefield, "Personal tobacco pack display before and after the introduction of plain packaging with larger pictorial health warnings in Australia: an observational study of outdoor café strips" *Addiction*, Vol. 109, (2014), 653, Exhibit AUS-222; M. Zacher, M. Bayly, E. Brennan, J. Dono, C. Miller, S. Durkin, M. Scollo, M. Wakefield, "Personal pack display and active smoking at outdoor café strips: Assessing the impact of plain packaging 1 year post implementation." *Tobacco Control* Vol. 24 (2015) ii94-ii97, Exhibit AUS-223.

⁴⁷⁷ Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, para. 105; D. Hammond, S. Daniel, C.M. White, "The effect of cigarette branding and plain packaging on female youth in the United Kingdom", *Journal of Adolescent Health*, Vol. 52, (2013), 151, Exhibit AUS-158.

⁴⁷⁸ TPP Act, Exhibit AUS-1, Subsection 3(1)(a)(iv).

⁴⁷⁹ TPP Act, Exhibit AUS-1, Subsection 3(1)(a)(ii). While Professor Ajzen's report appears to proceed on the understanding that a quit attempt, if unsuccessful, is not "relevant behaviour" under Section 3(1) of the TPP Act, it is clear that if the measure has prompted quitting, regardless of the outcome, it has been successful in "encouraging" people to give up smoking. The fact that the majority of smokers require multiple quit attempts before they are successful is a function of the highly addictive nature of tobacco products, rather an indication that the tobacco plain packaging measure is ineffective. See also Second Expert Report of G. Fong (8 September 2015), Exhibit AUS-531, paras. 107-120.

changed smoking behaviour includes the large body of longitudinal research establishing that individuals who are exposed to tobacco advertising and find tobacco advertising appealing are more likely to commence smoking.⁴⁸⁰

- While Professor Ajzen attempts to present evidence to suggest that there is a weak correlation between attitudes and behaviour, this evidence actually supports Australia's position that there is a proven empirical relationship between these variables. Professor Ajzen cites a meta-analysis on the attitude-behaviour correlation. In Professor Ajzen's view, the correlation found in this analysis (0.361) is "quite low".⁴⁸¹ However, as noted by Professor Fong, this correlation represents an *average* correlation over different studies across a broad range of behavioural domains.⁴⁸² In the specific domain of *consumer behaviour*, in which tobacco plain packaging squarely belongs, the correlation between attitude and behaviour is much higher (0.546).⁴⁸³
- In relation to the link between quit intentions and smoking behaviour,⁴⁸⁴ the empirical evidence demonstrates that there is a strong level of predictability between intentions to quit smoking and quitting behaviour.⁴⁸⁵ While Professor Azjen acknowledges a correlation of 0.3 between intentions and behaviour, he attempts to characterise this as "weak" and inconsequential.⁴⁸⁶ However, Professor Fong demonstrates that a correlation even lower than this indicates that those with an intention to quit are more than three times more likely to both make a quit attempt, and to successfully quit, than

⁴⁸⁰ Second Expert Report of G. Fong (8 September 2015), Exhibit AUS-531, paras. 130-132.

⁴⁸¹ Expert Report of I. Ajzen (1 June 2015), Exhibit DR/HON/IND-3, para. 48 and Second Expert Report of G. Fong (8 September 2015), Exhibit AUS-531, paras. 72-73.

⁴⁸² Second Expert Report of G. Fong (8 September 2015), Exhibit AUS-531, para. 73.

⁴⁸³ Second Expert Report of G. Fong (8 September 2015), Exhibit AUS-531, paras. 73-74.

⁴⁸⁴ Certain tobacco plain packaging studies demonstrate that plain packaging increases intentions to quit smoking. See, e.g. M. Wakefield, D. Germain, S. Durkin, D. Hammond, R. Goldberg, R. Borland, "Do larger pictorial health warnings diminish the need for plain packaging of cigarettes?" *Addiction*, Vol. 6 (2012), 1159, Exhibit AUS-557. In this study, individuals were asked about their intent to purchase, and individuals shown plain packs were less likely to state that they would purchase the pack as opposed to not purchasing any pack.

⁴⁸⁵ Second Expert Report of G. Fong (8 September 2015), Exhibit AUS-531, paras. 83-89.

⁴⁸⁶ Expert Report of I. Ajzen (1 June 2015), Exhibit DR/HON/IND-3, para. 96.

those with no such intention.⁴⁸⁷ At the population level, this results in a sizeable difference in the number of people successfully quitting smoking, depending on whether or not they had formed an intention to do so.⁴⁸⁸ Therefore, it is clear that there is strong empirical evidence to support the conclusion that by influencing quit intentions, the tobacco plain packaging measure is apt to influence behaviour.

465. Third, it is in fact Professor Ajzen's view regarding the likely efficacy of tobacco plain packaging that relies upon theory rather than empirical evidence. Professor Ajzen's particular theories start from the premise that a change to the appeal of a product is a "background factor" that is likely to "have little or no effect on behaviour" because any such change must move through a "chain of effects" before behaviour is influenced.⁴⁸⁹ On this basis, Professor Ajzen raises "serious doubts about the ability of plain packaging to affect smoking behaviour".⁴⁹⁰ However, an examination of evidence drawn from the smoking domain indicates that no such concern is warranted. As outlined above, the capacity of a change in tobacco product appeal, through advertising bans, to influence behaviour is a well-established proposition.⁴⁹¹ Indeed, on the complainants' own case, tobacco plain packaging itself produces changes in appeal that are large enough to move through Ajzen's "chain of effects" and impact behaviour, in the form of willingness to pay. Therefore, Ajzen's concerns about the ability of a "background factor" to work through the "chain of effects" and influence behaviour are not warranted in the smoking domain or in the particular context of tobacco plain packaging.

466. Finally, Professor Ajzen's criticisms of the theory of the affect heuristic, which establishes a direct link between tobacco product appeal and smoking behaviour, are incorrect. Professor Ajzen asserts that the affect heuristic is not a theory of behaviour and

⁴⁸⁷ Second Expert Report of G. Fong (8 September 2015), Exhibit AUS-531, paras. 93-116.

⁴⁸⁸ Expert Report of G. Fong (8 September 2015), Exhibit AUS-531, paras. 117-120.

⁴⁸⁹ Expert Report of I. Ajzen (1 June 2015), Exhibit DR/HON/IND-3, para. 79. His theory "posits a chain of effects, starting with background factors, moving through behavioral/normative/control beliefs, then attitude toward the behavior/subjective norm/perceived behavioural control, leading to behavioral intentions, and culminating in manifest behavior, as moderated by actual behavioral control. The impact of a change in one part of the chain on actual behavior depends on how all parts of the chain interact." Expert Report of I. Ajzen (1 June 2015), Exhibit DR/HON/IND-3, para. 81.

⁴⁹⁰ Expert Report of I. Ajzen (1 June 2015), Exhibit DR/HON/IND-3, para. 92.

⁴⁹¹ See Part II.C.5(b).

criticises its application to tobacco plain packaging.⁴⁹² Professor Ajzen's attempt to undermine the direct link between tobacco product appeal and smoking behaviour on this basis is unconvincing for the following reasons:

- First, and as explained by Professor Slovic, Professor Ajzen fundamentally misunderstands the theory of the affect heuristic.⁴⁹³ The affect heuristic *is* a theory of behaviour. It has been widely adapted and applied as a general theory of motivation and behaviour, including in the field of public health.⁴⁹⁴ Therefore, Professor Ajzen's attempts to suggest that the theory is not suited to predicting *behavioural change* is inaccurate.⁴⁹⁵
- Second, in the context of the Australian market, there is a wide range of techniques used by the tobacco industry to imbue their products with positive affect, including through the use of appealing packaging, which undermines the salience of GHWs.⁴⁹⁶ Tobacco plain packaging removes the ability of the industry to use the pack for this purpose. As explained by Professor Slovic, for certain vulnerable youth at risk of smoking, positive affect created by branding may "tip the balance in favour of initiating smoking".⁴⁹⁷

467. Consequently, Professor Ajzen's attempts to undermine the well-established empirical relationship between changing the appeal of tobacco products and changing behaviour do not withstand scrutiny.

d. Professor Steinberg

468. Similarly, Professor Steinberg attempts to argue that tobacco plain packaging will have no effect on the initiation of smoking for adolescents. While Australia and the

⁴⁹² Expert Report of I. Ajzen (1 June 2015), Exhibit DR/HON/IND-3, para. 155.

⁴⁹³ Second Expert Report of P. Slovic (11 September 2015), Exhibit AUS-532, paras. 12-20.

⁴⁹⁴ Expert Report of P. Slovic (March 2015), Exhibit AUS-12, para. 28.

⁴⁹⁵ Second Expert Report of P. Slovic (11 September 2015), Exhibit AUS-532, paras. 20, 29, 31-32.

⁴⁹⁶ Australia provided illustrations of some of these techniques in its opening statement at the first substantive meeting of the Panel (at paras. 25-49), and in the accompanying Powerpoint Presentation displayed during Australia's Oral Statement (1 June 2015, Geneva), Exhibit AUS-514. See also Second Expert Report of P. Slovic (11 September 2015), Exhibit AUS-532, paras. 34-46, 49-50.

⁴⁹⁷ Second Expert Report of P. Slovic (11 September 2015), Exhibit AUS-532, para. 50.

complainants' respective experts agree on key aspects of the process of uptake of smoking, Professor Steinberg continues to claim that tobacco plain packaging will not affect adolescent smoking. He appears to do this on two bases, both of which are flawed.

469. First, Professor Steinberg claims that tobacco packaging has no role in reducing appeal and influencing peer approval and social status (the very factors he agrees influence youth smoking behaviour)⁴⁹⁸ and that, even if it did, adolescents are not exposed to cigarette packs during the period of initiation.⁴⁹⁹ Australia has submitted extensive evidence demonstrating the way in which tobacco product marketing influences adolescents to believe that smoking will achieve social acceptance, and increases adolescents' positive perceptions of smokers and particular brands.⁵⁰⁰ As Dr Biglan notes:

An attractive brand can function to enhance the sense that social acceptance will come from smoking the brand. A youth with a branded pack is more likely to expect that by smoking the brand, he will seem to have these attributes and other youth will perceive youths who are smoking the brand as having positive social attributes. Similarly a youth who is offered a cigarette from a branded pack is more likely to perceive that the person offering it is popular, exciting, attractive, etc, and that the cigarette will taste good.⁵⁰¹

470. The importance of tobacco packaging is amplified in a dark market like Australia's, where the packaging was one of the last remaining forms of tobacco advertising and promotion. Not only does Professor Steinberg appear to ignore the Australian regulatory environment in assessing the importance of the pack as a promotional vehicle, but he also makes a fundamental error when claiming that youth in Australia are seldom exposed to cigarette packaging. The two studies upon which Professor Steinberg relies to make this argument are US studies, and are divorced from the reality of the Australian market, where all cigarettes must be sold in a pack of a minimum of 20 cigarettes, and cannot be purchased individually.⁵⁰²

⁴⁹⁸ Expert Report of L. Steinberg (15 September 2014), Exhibit DR/HON-6, paras. 52-58.

⁴⁹⁹ Expert Report of L. Steinberg (15 September 2014), Exhibit DR/HON-6, para. 59.

⁵⁰⁰ Australia's first written submission, paras. 92-96, 161; Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, paras. 32-51, 177-178; Second Expert Report of A. Biglan (10 September 2015), Exhibit AUS-533, paras. 6-15; Second Expert Report of P. Slovic (11 September 2015), Exhibit AUS-532, paras. 77-80, and 85-93.

⁵⁰¹ Second Expert Report of A. Biglan (10 September 2015), Exhibit AUS-533, para. 15.

⁵⁰² Second Expert Report of A. Biglan (10 September 2015), Exhibit AUS-533, paras. 16-17.

471. Second, Professor Steinberg asserts that adolescents are aware of and understand the risks of smoking, and therefore concludes that tobacco plain packaging does not impact upon adolescents' perceptions of risks or their willingness to experiment with tobacco.⁵⁰³ Even if the majority of youth *do* appreciate the dangers of smoking, Professor Slovic notes that there nonetheless still remains:

... a smaller, but still significant proportion [of adolescents] who are thinking of experimenting with smoking, are now experimenting, or have begun regular smoking.⁵⁰⁴

472. By reducing positive imagery and the appeal of tobacco products, tobacco plain packaging increases the likelihood that this vulnerable sub-group of adolescents will attend to the GHWs, which serve as frequent and powerful prompts of the very real dangers of tobacco use.⁵⁰⁵ In doing so, tobacco plain packaging serves to discourage uptake of tobacco products by those adolescents who do not fully appreciate the severity of smoking-related disease, and who – by Professor Steinberg's own account⁵⁰⁶ – engage in higher levels of risk behaviour than adults.

e. Professor Fischer

473. Finally, Professor Fischer also attempts to undermine Australia's conclusion that tobacco plain packaging will lead to changes in smoking-related behaviour, such as cessation and relapse. She does this by seeking to minimise the role that cue-reactivity (here, cigarette packs) plays in smoking behaviour, suggesting that because smoking has many contributory causes, any policy directed at cue-provoked smoking is likely to have minimal impact.

474. Despite Professor Fischer's criticisms, tobacco product packaging has been demonstrated to improve the salience of cigarette packs,⁵⁰⁷ which act as a conditioned cue for tobacco use. While it is agreed that smoking is a complex behaviour, Professor Fischer's claim that cue-reactivity either plays a minor role or is non-existent is contradicted by nearly every theory of addiction over the past 30 years.⁵⁰⁸ Even if Professor Fischer were correct in

⁵⁰³ Expert Report of L. Steinberg (15 September 2014), Exhibit DR/HON-6, paras. 34-35, 43-47.

⁵⁰⁴ Second Expert Report of P. Slovic (11 September 2015), Exhibit AUS-532, para. 80.

⁵⁰⁵ Second Expert Report of P. Slovic (11 September 2015), Exhibit AUS-532, para. 84.

⁵⁰⁶ Expert Report of L. Steinberg (15 September 2014), Exhibit DR/HON-6, paras. 14-17.

stating that cue-reactivity plays only a minor role in influencing smoking behaviour, it is nonetheless still a recognised contributory cause for tobacco use. The proposition that a recognised factor influencing smoking behaviour should not be dealt with as part of a comprehensive approach to tobacco control on the basis that it is "minor" is untenable. Indeed, as Dr Brandon notes:

Because smoking is influenced in part by a great number of contributory causes, public health policy must target as many of these causes as possible in order to achieve a cumulative effect on smoking.⁵⁰⁹

475. Having reviewed Professor Fischer's supplemental report, Dr Brandon confirms his conclusions that, on the basis of addiction theory and relevant research, there is sufficient reason to conclude that branded cigarette packaging elicits conditioned cue-reactivity, which plays a contributory causal role in nicotine addiction, including smoking maintenance, cessation, and relapse.⁵¹⁰ The effect of tobacco plain packaging is to remove this contributory causal role, thereby influencing smoking behaviour in Australia.

iii. The complainants themselves concede that the tobacco plain packaging measure affects consumer behaviour

476. Finally, the complainants' own arguments acknowledge that packaging can and does influence consumer behaviour. In addressing the trade-restrictiveness factor of the "weighing and balancing" analysis under Article 2.2, the complainants positively contend that the tobacco plain packaging measure has caused consumers to become less brand-loyal and less willing to pay for (at least) some brands of cigarettes.⁵¹¹

477. In advancing this proposition, the complainants directly contradict their arguments that there is no link between tobacco packaging and behavioural change; and, in particular, that the tobacco plain packaging measure is not capable of influencing consumer behaviour.

⁵⁰⁷ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para. 59; Second Expert Report of T. Brandon (4 September 2015), Exhibit AUS-534, paras. 20-25.

⁵⁰⁸ Second Expert Report of T. Brandon (4 September 2015), Exhibit AUS-534, para. 26.

⁵⁰⁹ Second Expert Report of T. Brandon (4 September 2015), Exhibit AUS-534, para. 8.

⁵¹⁰ Second Expert Report of T. Brandon (4 September 2015), Exhibit AUS-534, para. 17, citing Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, para. 95.

⁵¹¹ The complainants' downtrading arguments positively assert this. See Dominican Republic's first written submission, paras. 509-518; IPE Expert Report (7 October 2014), Exhibit DR-100, Chapter 5.2.5; Honduras' first written submission, para. 372; See Part II.C.5(c)ii

Rather, the complainants themselves *accept* that changing the appearance of tobacco products to comply with the requirements of the tobacco plain packaging measure is, in and of itself, sufficient to influence consumer behaviour (namely, spending behaviour and brand preference). Such arguments carry with them a rejection of the proposition put forward by their own expert, Professor Ajzen, that "any impact of PP will decrease as it progresses through the 'chain of effects' to behaviour such that its impact may never reach behaviour".⁵¹²

478. The Panel can therefore accept as common ground between the parties that the tobacco plain packaging measure is capable of changing consumer behaviour. The only dispute concerns the complainants' disingenuous attempt to argue that the tobacco plain packaging measure affects only some consumer behaviours, but not smoking-related behaviour.

479. However, once the complainants assert that tobacco plain packaging has already reduced consumers' willingness to pay for certain tobacco products they must accept that the measure is apt to contribute to its objective of reduced smoking. This is because it is a fundamental and uncontroversial principle of economics that, holding prices constant, lowering willingness to pay for a product leads to lower consumption of that product.⁵¹³ In the case of tobacco products, this means *a reduction in smoking*. It is therefore puzzling that the complainants positively assert that the measure will reduce a consumer's willingness to pay for tobacco products while simultaneously denying that the measure will contribute to Australia's public health objectives.

⁵¹² Expert Report of I. Ajzen (1 June 2015), Exhibit DR/HON/IND-3, para. 86.

⁵¹³ Expert Report of M. Katz (9 March 2015), Exhibit AUS-18, para. 16.

480. The complainants seek to avoid the economic implications of their concession that tobacco plain packaging reduces consumers' willingness to pay by arguing that these effects are limited to the premium segment of the market. However, as Professor Katz explains, whether the reduced willingness to pay occurs in all or only part of the market, the same economic outcome is produced – lower demand for tobacco products:

A clear prediction of economics is that, when some or all products within a product category become less attractive and no members of the category become more attractive, *overall consumption of that product category will fall if prices are held fixed.*⁵¹⁴

481. As such, despite the complainants' strenuous attempts to establish otherwise, their own arguments concede the link between tobacco packaging and behaviour; the effect of the tobacco plain packaging measure on consumer behaviour; and, moreover, the effect of the tobacco plain packaging measure on reducing demand for, and thus consumption of, tobacco products.

(b) The complainants' criticism of the tobacco plain packaging literature is misplaced

482. Notwithstanding the significant evidence outlined above, including the complainants' own concession that the tobacco plain packaging measure is capable of affecting consumer behaviour, the complainants continue to attack the evidence base supporting tobacco plain packaging as unsound. In asking the Panel to reject this evidence *in toto*, the complainants rely on reports by several experts⁵¹⁵ that attempt to undermine individual studies, methodologies or experimental designs.

483. In Australia's first written submission, Australia set out extensive theoretical, behavioural, and empirical evidence, which together form part of the evidence supporting the tobacco plain packaging measure,⁵¹⁶ and outlined the fundamental failures of the attempts by the complainants' literature experts to discredit the body of scientific evidence supporting the

⁵¹⁴ Expert Report of M. Katz (9 March 2015), Exhibit AUS-18, para. 24 (emphasis added) (footnote omitted); see generally paras. 18-26, and technical explanation at paras. 97-103.

⁵¹⁵ Expert Report of J. Inman (3 October 2014), Exhibit DR/HON-003; Expert Report of Kleijnen Systematic Reviews Ltd (7 October 2014), Exhibit DR/HON-004; Expert Report of J. Klick (Methodology Report) (2 October 2014), Exhibit UKR-6.

⁵¹⁶ Australia's first written submission, paras. 60-102, 142-205.

measure.⁵¹⁷ Australia will not reproduce those submissions here, but confirms that the criticisms made by the complainants' literature experts remain unpersuasive. Professor Samet and Professor Fong each reviewed the complainants' expert literature reviews⁵¹⁸ and independently concluded that these reviews are fundamentally flawed and contain basic errors.

484. In what appears to be an attempt to rehabilitate the criticisms made in those flawed reviews, the complainants subsequently commissioned yet another critique of the tobacco plain packaging literature, relying on two reports from Professor Ajzen.⁵¹⁹ Professor Ajzen takes the view that, notwithstanding the number of studies and the consistency of the results, the studies should be rejected on the basis that they have been conducted in ways which result in "systematic bias".⁵²⁰ Australia does not consider Professor Ajzen's hypothesis to warrant a lengthy response. In short, Professor Ajzen's reports suffer from the same flaws as the literature reviews previously submitted by the complainants.

- First, the claim of "social desirability bias" is unsubstantiated: Professor Ajzen has not provided evidence that social desirability bias exists or, if it does, how it influences the results of so many studies so strongly as to render the results totally unreliable.⁵²¹
- Second, in proposing alternative methodologies to address this asserted social desirability bias, Professor Ajzen ignores the fact that, to the extent that it is practically possible to do so, many of the studies he critiques already address the issues which he claims infect them all. In fact, many of the studies employed a "between-subjects" study design, which is the very method endorsed by Professor Ajzen to reduce the possibility of bias.⁵²²

⁵¹⁷ Australia's first written submission, paras. 206-216, Annexure E: Flaws in the Complainants' Evidence.

⁵¹⁸ Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, paras. 138-149; Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, paras. 446-578.

⁵¹⁹ Expert Report of I. Ajzen (Behavioural Theory) (1 June 2015), Exhibit DR/HON/IND-3; Expert Report of I. Ajzen (Supplemental Report) (7 July 2015), Exhibit DR/HON/IND-4.

⁵²⁰ Expert Report of I. Ajzen (Behavioural Theory) (1 June 2015), Exhibit DR/HON/IND-3, para. 186.

⁵²¹ Second Expert Report of G. Fong (8 September 2015), Exhibit AUS-531, paras. 144-151.

⁵²² Second Expert Report of G. Fong (8 September 2015), Exhibit AUS-531, paras. 148-150, 158-166.

485. These failures highlight that Professor Ajzen lacks a full appreciation of the evidence base he purports to review, and render implausible his claim that "bias" is the reason that the studies demonstrate that tobacco plain packaging is effective. As with the complainants' other literature experts, Professor Ajzen's attacks fail to discredit the weight, quality and consistency of the body of evidence supporting tobacco plain packaging when viewed as a whole.

(c) Conclusion on qualitative evidence

486. For the foregoing reasons, the complainants' attempt to discredit the qualitative evidence that establishes that the tobacco plain packaging measure is capable of reducing the use of and exposure to tobacco products in Australia is unpersuasive. To the contrary, the extensive qualitative evidence outlined above establishes that the tobacco plain packaging measure is capable of contributing to those objectives. It does so by standardising packaging and removing one of the last remaining avenues for tobacco advertising and promotion in Australia, consequently reducing the appeal of tobacco products, increasing the effectiveness of GHWs, and reducing the ability of tobacco packaging to mislead consumers about the harmfulness of tobacco products.⁵²³ The evidence also confirms that, by influencing intentions, attitudes and beliefs, the tobacco plain packaging measure will lead to a reduction in the use of and exposure to tobacco products.⁵²⁴

4. Contrary to the complainants' contention, the quantitative evidence corroborates the qualitative evidence demonstrating that the tobacco plain packaging measure is capable of contributing to its objectives

487. As discussed above in Part II.C.5(c)ii, the principal basis on which the complainants argue that the tobacco plain packaging measure is not capable of contributing to its objectives is their contention that the quantitative evidence does not indicate discernible reductions in smoking prevalence and tobacco consumption in Australia. As part of this, the complainants argue that tobacco plain packaging was predicted to have discernible effects on smoking

⁵²³ Australia's first written submission, paras. 142-205.

⁵²⁴ Australia's first written submission, paras. 142-147, 603.

prevalence in the short-term, and if no effects are discernible now, there will never be an effect because the impact of the measure will "wear off" over time.

488. Setting aside the complainants' erroneous focus on short-term quantitative post-implementation evidence, there are two principal problems with the complainants' arguments.

489. First, the assumptions underlying the complainants' approach to the post-implementation quantitative evidence are simply wrong. As discussed in Part III.D.4(a) below, there is no basis to assume (as the complainants and their experts do) that any effects of the tobacco plain packaging measure on prevalence and consumption would necessarily be discernible in the near-term, nor that the measure's effects would "wear off" over time.

490. Second, leaving the conceptual failings of the complainants' arguments to one side, Australia will demonstrate in Part III.D.4(b) below that the complainants' factual contentions are also wrong. Based on empirical approaches adopted by the complainants' own experts, the post-implementation data does in fact show discernible reductions in smoking prevalence and tobacco consumption attributable to the tobacco packaging changes introduced in late 2012.

491. Accordingly, even if the Panel were to adopt the complainants' absurdly narrow approach of evaluating only the "immediately observable" evidence, the post-implementation data on smoking prevalence and tobacco consumption corroborates the other evidence which clearly establishes that the tobacco plain packaging measure is capable of contributing to its legitimate public health objectives.

(a) The complainants' approach to the post-implementation quantitative evidence is conceptually flawed

492. As Australia has explained in its first written submission, it has always been its expectation that the tobacco plain packaging measure will have its greatest effects over time.⁵²⁵ Accordingly, any inability on the part of the complainants' experts to isolate a statistically significant plain packaging effect in short-term prevalence and consumption

⁵²⁵ Australia's first written submission, para. 670; Annexure E, paras. 11-17.

datasets at this point in time does not prove that the tobacco plain packaging measure is not capable of contributing to its legitimate public health objectives.

493. Notwithstanding this, the complainants have sought to elevate the significance of their failure to find a plain packaging effect in the post-implementation data by claiming it as proof that the measure is "not working".⁵²⁶ They do this by arguing, first, that "Australia's PP literature predicted that plain packaging would generate measurable prevalence effects within two years";⁵²⁷ and that "the post-implementation data now covers more than two years"⁵²⁸ and there is still no evidence that tobacco plain packaging has reduced smoking prevalence; and second, that the effects of the tobacco plain packaging measure will "wear-off" over time, such that if an effect cannot be found now, it never will be.⁵²⁹

494. However, both of the contextual propositions underlying the complainants' approach to the post-implementation quantitative evidence are wrong.

i. Australia did not predict that there would be quantifiable effects within two years following introduction of the tobacco plain packaging measure

495. First, there is no foundation for the complainants' claims that if tobacco plain packaging was going to reduce smoking rates, then this would be evident in prevalence data within two years. As previously noted, it has always been Australia's expectation that the tobacco plain packaging measure will have its greatest effects in the long term. This was explicitly acknowledged in the Explanatory Memorandum which accompanied the introduction of the TPP Bill into the Australian Parliament.⁵³⁰

⁵²⁶ Expert Report of J. List (1 June 2015), Exhibit DR-IND-1, para. 145. See also Dominican Republic's response to Panel Question No. 126, para. 273; Honduras' response to Panel Question No. 124, p. 35.

⁵²⁷ See, e.g. Dominican Republic's response to Panel Question No. 126, paras. 282-288; Honduras' response to Panel Question No. 126; Indonesia's response to Panel Question No. 126, paras. 77-78.

⁵²⁸ Dominican Republic's response to Panel Question No. 126, paras. 282-283; Honduras' response to Panel Question No. 126; Indonesia's response to Panel Question No. 126, para. 78.

⁵²⁹ Dominican Republic's response to Panel Question No. 126, paras. 289-299; Dominican Republic's first written submission, para. 605; Honduras' response to Panel Question No. 126, pp. 37-38; Expert Report of I. Ajzen (1 June 2015), Exhibit DR/HON/IND-3, paras. 171-172.

⁵³⁰ Explanatory Memorandum to the TPP Bill 2011 (Cth), Exhibit AUS-2, p. 1.

496. That the tobacco plain packaging measure will have its greatest effects over time also follows from the nature of tobacco addiction and the way in which the measure is expected to work. For example, as Australia explained in its first written submission regarding the impact of tobacco plain packaging on youth initiation (one of the key targets of the measure), it will take time for the cohort of children who have not been exposed to fully-branded tobacco packaging to reach adolescence and be included in national health surveys.⁵³¹ Similarly, the addictive power of nicotine necessitates multiple quit attempts before success.⁵³² As Dr Brandon states in his expert report, for many addicted smokers, multiple tobacco control measures over a period of time are required to provide them with the additional motivation to quit.⁵³³

497. Professor Chaloupka also provided the example of the introduction of GHWs in Canada. Professor Chaloupka demonstrated that, following the introduction of GHWs in Canada, a statistically significant reduction in smoking prevalence was only discernible after a number of years.⁵³⁴

498. It follows from the above that, contrary to the claims made by the complainants, there are good reasons to expect that the tobacco plain packaging measure will have its greatest effects on smoking behaviour over time and the absence of any effect at this point in the post-implementation period does not prove that the measure is not capable of contributing to Australia's public health objectives.

499. To support their claim that effects on prevalence would be discernible by now the complainants cite a study by Pechey *et al.*⁵³⁵ However, the Pechey *et al.* study does not provide a foundation for the complainants' claims that two years is a sufficient period within which to detect such effects. The study explicitly stated that almost half of the experts consulted "felt that the two year time frame for which estimates were requested *did not allow*

⁵³¹ Australia's first written submission, para. 670, Annexure E, para. 12.

⁵³² Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, paras. 45-49.

⁵³³ Expert Report of T. Brandon (9 March 2015), Exhibit AUS-15, paras. 35-37.

⁵³⁴ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, paras. 89-96.

⁵³⁵ Pechey *et al.* (2013), Exhibit JE-24(51), cited, *inter alia*, in the Dominican Republic's response to Panel Question No. 126, para. 283; Honduras' response to Panel Question No. 126, p. 37; Indonesia's Response to Panel Question No. 126, para. 77.

for the full impact of plain packaging to be seen in prevalence rates".⁵³⁶ The authors noted that this suggested "a greater impact would be seen longer-term, as the impact on young people starting smoking fed through into adult smoking prevalence".⁵³⁷ This is consistent with Australia's position that the greatest effects of the tobacco plain packaging measure will be discernible over time, and that it would be inappropriate to pre-judge the effectiveness of a measure like tobacco plain packaging on the basis of short-term datasets.

500. Regardless of the appropriateness of using quantitative evidence derived in a limited two-year time period as a benchmark for assessing whether the tobacco plain packaging measure is capable of contributing to its public health objectives, Australia notes that, contrary to the complainants' repeated claims,⁵³⁸ *not one* of the complainants' experts has actually examined two years of post-implementation data.⁵³⁹

ii. The complainants are incorrect that the effects of the tobacco plain packaging measure will "wear off" over time

501. The complainants also claim that the effects of the tobacco plain packaging measure will "wear off" over time such that if there are no discernible effects now, there will never be any in the future. This claim is contrary to the available evidence and without merit.

502. The complainants draw an analogy, which is entirely inapposite, between the impact of GHWs and tobacco plain packaging. Australia acknowledges that the effects of *particular* GHWs may wear off over time. Indeed, this is why regular rotation of the GHWs on tobacco products is required under Australian law, consistent with Australia's obligations under the

⁵³⁶ Pechey et al (2013), Exhibit JE-24(51), p. 4 (emphasis added).

⁵³⁷ Pechey et al (2013), Exhibit JE-24(51), p. 6.

⁵³⁸ See, e.g. Indonesia's response to Panel Question Nos. 71 and 126, para. 78; Dominican Republic's response to Panel Question No. 126, paras. 277, 282, 287; Dominican Republic's opening statement at the first substantive meeting of the Panel, para. 64; Honduras' response to Panel Question No. 125; Honduras' opening statement at the first substantive meeting of the Panel, para. 12.

⁵³⁹ The final wave of Professor Klick's survey of Australian and New Zealand smokers was run in February 2014, only *15 months* after the introduction of tobacco plain packaging: Expert Report of J. Klick (26 July 2014), Exhibit UKR-5, p. 7. The IPE report only examined prevalence and consumption data through to March and April 2014 (respectively), which is less than *18 months* of post-implementation data: IPE Expert Report (7 October 2014), Exhibit DR-100, paras. 29, 31. Finally, Professor List, who filed his report in June 2015, only examined prevalence and consumption data through to March and June 2014 (respectively): Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, paras. 131, 139.

FCTC.⁵⁴⁰ However, potential "wear out" of GHWs does not support the inference that the impact of tobacco plain packaging will be short-term.

503. In contrast to GHWs, tobacco plain packaging does not constitute a communication or a stimulus⁵⁴¹ – quite the opposite. Tobacco plain packaging itself constitutes an *advertising ban*, which *removes* branding stimuli and the ability of the pack to link positive associations with tobacco products. Unlike a GHW, which is designed to inform consumers of the health effects of smoking, including through graphic images to which people may become desensitised over time, the *absence* of features designed to appeal to consumers and potential consumers does not "wear out". That is, tobacco packaging will not become more appealing in the continued absence of such features. As Professor Slovic explains, there is simply nothing to wear out.⁵⁴²

504. This is the very conclusion reached by Professor Dubé, who notes that tobacco plain packaging acts as a ban on advertising, year-in/year-out, and will affect consumption each year the measure is in place.⁵⁴³

505. The Dominican Republic and Honduras attempt to rely on various tobacco plain packaging studies to support their argument that the effect of the measure will "wear out".⁵⁴⁴

⁵⁴⁰ *Competition and Consumer (Tobacco) Information Standard 2011* (Cth), Exhibit AUS-128, Sections 9.5-9.7; *WHO Framework Convention on Tobacco Control*, done at Geneva, 21 May 2003, 2302 U.N.T.S.166; 42 International Legal Materials 518., Exhibit AUS-44, Article 11(1)(b)(ii).

⁵⁴¹ The Dominican Republic notes that GHWs may wane over time on the basis that "attention to a *specific object* or *stimuli* will reduce with repeated exposure" (Dominican Republic's response to Panel Question No. 126, para. 291, citing discussion of wear out of *graphic health warnings* in White, V; Williams, T; Faulkner, A; Wakefield, M. Do larger graphic health warnings on standardised cigarette packs increase adolescents' cognitive processing of consumer health information and beliefs about smoking-related harms? *Tobacco Control*; 2015; 24:ii50-ii57, Exhibit DR-236). This is "consistent with the basic principles of advertising and health communications, which suggest that the salience of a *communication* is greatest upon initial exposure" (Dominican Republic's response to Panel Question No. 126, para. 290, citing D. Hammond, "Health warning messages on tobacco products: a review", *Tobacco Control* (2011), Exhibit DR-283).

⁵⁴² Second Expert Report of P. Slovic (11 September 2015), Exhibit AUS-532, para. 51.

⁵⁴³ Expert Report of J-P. Dubé (9 March 2015), Exhibit AUS-11, para. 78. Professor Dubé makes this point in response to Professor Steenkamp's argument that tobacco advertising may not have a long-lasting impact. As noted by Professor Dubé, the relevance of Professor Steenkamp's observation to tobacco plain packaging is unclear. In any event, it does not prove that an advertising *ban* will have only a short-run effect.

⁵⁴⁴ Dominican Republic's first written submission, paras. 604-605; Dominican Republic's response to Panel Question No. 126, paras. 290-297; Honduras' response to Panel Question No. 126, pp. 37-38. The studies cited include D. Hammond, "Health warning messages on tobacco products: a review", *Tobacco Control* (2011), Exhibit DR-283; C. Ratneswaran, B. Chisnall, P. Drakatos, et al, "A cross-sectional survey investigating the desensitisation of graphic health warning labels and their impact on smokers, non-smokers and patients with

(continued)

However, they misrepresent the findings of these studies.⁵⁴⁵ Thus the attempts by the complainants to cast tobacco plain packaging as a short-term measure whose effects would "wear off" over time amount to no more than mere assertion and are contradicted by the available evidence.

(b) The post-implementation data on prevalence and consumption is consistent with the tobacco plain packaging measure contributing to its objectives

506. The conceptual failings discussed above underline the complainants' misplaced emphasis on short-term quantitative post-implementation evidence. However, the short-term quantitative data available to the Panel is not entirely uninformative. Based on empirical approaches adopted by the complainants' own experts, the post-implementation data in fact

COPD in London cohort", *BMJ Open* (2014) 4:e004782, Exhibit DR-284; C. Moodie, L. Bauld, A. Ford, A.M. Mackintosh, "Young women smokers' response to using plain cigarette packaging: qualitative findings from a naturalistic study", *BMC Public Health* (2014) 14:812, Exhibit DR-282; J. Young, I. Stacey, S. Dobbins, A. Dessaix, D. Currow, "Association between tobacco plain packaging and Quitline calls: a population based, interrupted time-series analysis", *Medical Journal of Australia* 200(1) (2014) 29, Exhibit DR-285; M. Zacher, M. Bayly, E. Brennan, J. Dono, C. Miller, S. Durkin, M. Scollo, M. Wakefield, "Personal tobacco pack display before and after the introduction of plain packaging with larger pictorial health warnings in Australia: an observational study of outdoor cafe strips", *Addiction* 109 (2014) 653-662, Exhibit DR-286; M. Zacher, M. Bayly, E. Brennan, J. Dono, C. Miller, S. Durkin, M. Scollo, M. Wakefield, "Personal tobacco pack display and active smoking at outdoor café strips: assessing the impact of plain packaging 1 year post-implementation", *Tobacco Control* 24 (2015) ii94, Exhibit DR-287.

⁵⁴⁵ While Moodie and Mackintosh acknowledge that the plain packs used in the study, at a time when all other packs on the market were branded, may have had a "novelty effect", the study explicitly states that *if all packages on the market were plain*, any possible novelty effect would be *eliminated*: C. Moodie, L. Bauld, A. Ford, A.M. Mackintosh, "Young women smokers' response to using plain cigarette packaging: qualitative findings from a naturalistic study", *BMC Public Health* (2014) 14:812, Exhibit DR-282, p. 7. Further, the fact that Moodie et al. acknowledge that long-term conclusions cannot be drawn from a two-week study is hardly supportive of the argument that the impact of tobacco plain packaging will "wear out" over time.

Contrary to the Dominican Republic's assertions, Young et al did *not* conclude that the impact of tobacco plain packaging on calls to Quitline had vanished by the end of the study. In fact, after controlling for a range of relevant variables, the authors concluded that there was a *sustained* increase in calls to Quitline following the introduction of tobacco plain packaging: J.M. Young, I. Stacey, T.A. Dobbins, S. Dunlop, A.L. Dessaix, D.C. Currow, "Association between tobacco plain packaging and Quitline calls: a population-based, interrupted time-series analysis", *Medical Journal of Australia*, Vol. 200, No. 1 (2014), 29, Exhibit DR-285, pp. 29, 31.

Finally, the studies by Zacher et al relied upon by the complainants to their "wear-out" argument found that the "declines in personal pack display and active smoking at outdoor public venues were *maintained* 1 year after the introduction of plain tobacco packaging". In addition, compared to the initial impact of the measure, one year post-implementation of tobacco plain packaging there were "*greater declines...in active smoking at venues where children were present*", suggesting an "*enhancement of social pressure to forego smoking*": M. Zacher, M. Bayly, E. Brennan, J. Dono, C. Miller, S. Durkin, M. Scollo, M. Wakefield, "Personal pack display and active smoking at outdoor café strips: Assessing the impact of plain packaging 1 year post implementation." *Tobacco Control* Vol. 24 (2015) Exhibit DR-287, p. ii96.

shows discernible reductions in smoking prevalence and tobacco consumption attributable to the tobacco packaging changes introduced in late 2012. These results are consistent with the measure already contributing to its intended effects.

507. It is common ground among the parties that both smoking prevalence and tobacco consumption in Australia declined in the period following the introduction of tobacco plain packaging. The parties also now appear to agree that there is no evidence that the tobacco plain packaging measure has "backfired" in the sense that it has increased smoking rates in Australia.⁵⁴⁶ On its face, therefore, the quantitative post-implementation evidence is consistent with the tobacco plain packaging measure being capable of contributing to its objectives.

508. In its first written submission, Australia identified a number of significant flaws with the empirical evidence put forward by the complainants.⁵⁴⁷ In particular, Australia demonstrated how the respective analyses of smoking behaviour undertaken by IPE and Professor Klick suffered from serious and fundamental defects that rendered their conclusions wholly unreliable.⁵⁴⁸

509. Moreover, Australia described how a more appropriate analysis of the complainants' wholesale sales data undertaken by Dr Chifty shows a *statistically significant reduction* in tobacco consumption attributable to the packaging changes introduced in late 2012.⁵⁴⁹ This decline was over and above the general downward trend in tobacco consumption in Australia. The complainants have not attempted to rebut this aspect of Dr Chifty's evidence, which directly contradicts their central claim that tobacco plain packaging has had no discernible effect on tobacco consumption.⁵⁵⁰ Australia's first written submission also set out how, by using Professor Klick's Roy Morgan survey, Dr Chifty could demonstrate that the incidence

⁵⁴⁶ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, para. 16. See also Second Expert Report of J. Klick (8 July 2015), Exhibit HON-118, fn 24.

⁵⁴⁷ Australia's first written submission, paras. 670-681; Annexure E, paras. 18-86.

⁵⁴⁸ Australia's first written submission, Annexure E, paras. 18-86.

⁵⁴⁹ Australia's first written submission, Annexure E, para. 73. See also Expert Report of T. Chifty (9 March 2015), Exhibit AUS-17, paras. 67-69.

⁵⁵⁰ Third Expert Report of T. Chifty (14 September 2015), Exhibit AUS-535, para. 10. Further, as Australia explains in more detail in Annexure A, Professor List ignored this important evidence in Dr Chifty's report.

of daily smoking in Australia has been falling at a faster rate than in New Zealand following the introduction of tobacco plain packaging.⁵⁵¹

510. These findings, together with the fact that both smoking prevalence and tobacco consumption have continued to decline following the introduction of the tobacco plain packaging measure, are entirely consistent with the predictions of the empirical studies and Australia's experts that the measure is capable of contributing to its legitimate public health objectives.

511. In response to the flaws identified by Australia's experts, the complainants have submitted two further expert reports – a rebuttal report from Professor Klick,⁵⁵² and a report from a new expert, Professor List.⁵⁵³ Both of these further reports suffer from significant flaws.

512. Australia asked Dr Chipty to evaluate Professor Klick's rebuttal report. As Dr Chipty explains in her report, Professor Klick's rebuttal analyses fail to address the fundamental flaws that Dr Chipty described in her original report.⁵⁵⁴ Instead, Professor Klick's rebuttal report "contains several misleading statements and irrelevant analyses, some of which contradict and undermine his own analyses and conclusions".⁵⁵⁵ The various issues with Professor Klick's rebuttal report are described in detail in Annexure A. However, leaving aside all debate about technical matters, what Professor Klick's evidence demonstrates is that the effect of the packaging changes in 2012 on smoking incidence and intensity in Australia is statistically indistinguishable from the effect of a 10 per cent tax increase on smoking incidence and intensity in New Zealand.⁵⁵⁶ That is a finding which is consistent with tobacco plain packaging having its intended effect.

513. That said, the significant flaws in Professor Klick's analyses, which to date he has not been able adequately to address, confirm that his evidence is of little probative value to the

⁵⁵¹ Australia's first written submission, paras. 675-679.

⁵⁵² Second Expert Report of J. Klick (8 July 2015), Exhibit HON-118.

⁵⁵³ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1.

⁵⁵⁴ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 4(d).

⁵⁵⁵ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 4(d).

⁵⁵⁶ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 48.

Panel in assessing whether the tobacco plain packaging measure is capable of contributing to its objectives.

514. Professor List's report also suffers from a number of significant concerns. In its response to Panel Question 122, Australia noted a specific concern with respect to the apparent lack of rigour with which Professor List has undertaken the task of assessing the reports prepared by other experts.⁵⁵⁷ The apparent lack of rigour Professor List applied to his review of the evidence is of significant consequence to his overall conclusion that the tobacco plain packaging measure "is not working", as he explicitly stated that this review formed the basis for his conclusion.⁵⁵⁸ In Annexure A Australia describes in detail its concerns with Professor List's review of the evidence, including that Professor List ignored highly relevant evidence, mischaracterised (or misunderstood) the evidence of Australia's experts and made basic errors. In light of the issues discussed in Annexure A, it is difficult to give any weight to Professor List's review of the evidence, and the conclusions he draws from that review.

515. In his report, Professor List purports to take a "fresh look" at the data by conducting two analyses.⁵⁵⁹ The first analysis is a study of tobacco consumption in Australia. As Dr Chipty explains in her report, Professor List's analysis is fundamentally flawed and unreliable.⁵⁶⁰ According to Dr Chipty:

Professor List's event study analysis suffers from several fundamental flaws and cannot be used to reliably estimate the effects of tobacco control policies. His analysis of the 2010 excise tax increase does not, as he suggests, bolster confidence in his conclusion that there is no Plain Packaging effect. Rather the findings there (which I describe below) cast doubt on the reliability of his work.⁵⁶¹

516. Dr Chipty describes in her report how Professor List's consumption analysis predicts a nonsensical 30 per cent *increase* in per capita consumption as a result of an increase in excise tax.⁵⁶² In Australia's view, Professor's List's first analysis should be disregarded in its entirety.

⁵⁵⁷ Australia's response to Panel Question No. 122, paras. 147-150.

⁵⁵⁸ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, para. 144.

⁵⁵⁹ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, paras. 123-124.

⁵⁶⁰ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, paras. 4(c), 33-44.

⁵⁶¹ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 34.

⁵⁶² Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, paras. 37-39.

517. Professor List's second analysis is a micro-econometric study of smoking prevalence.⁵⁶³ Following the approach adopted by IPE, but with two modifications to correct for criticisms of the IPE report identified by both Professor Scharfstein and Professor List,⁵⁶⁴ Professor List finds a negative effect for tobacco plain packaging on prevalence.⁵⁶⁵ This effect is not statistically significant in Professor List's model, leading him to conclude that tobacco plain packaging is "not having its desired effects".⁵⁶⁶

518. However, as Dr Chipty describes in her report, Professor List's analysis is very sensitive to minor modifications which, once implemented, convert Professor List's results from a negative but statistically insignificant plain packaging effect, to a *statistically significant reduction* in smoking prevalence.⁵⁶⁷ That is, by making minor, reasoned corrections, Professor List's *own model* suggests that smoking prevalence in Australia has declined as a result of what Professor List describes as the "plain packaging effect".⁵⁶⁸

519. For example, in her report, Dr Chipty demonstrates that varying the start date of the tobacco plain packaging measure in Professor List's model from December 2012 to either October or November 2012, produces a *negative* and *statistically significant* plain packaging effect.⁵⁶⁹ Such a modification is not controversial – indeed it is a step that the complainants' other experts undertook in their own analyses, as did Professor List in his consumption analysis – and is consistent with the date of entry into the Australian market of plain packaged tobacco products.⁵⁷⁰

⁵⁶³ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, paras. 139-142.

⁵⁶⁴ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, paras. 73-82; Expert Report of J. List (1 June 2015), Exhibit DR/HON-1, para. 139, where Professor List states that he takes a fresh look at the data with Professor Scharfstein's criticisms of the "constant term" (as described by Professor List) in mind.

⁵⁶⁵ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, para. 141 and Table 5.

⁵⁶⁶ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, para. 142.

⁵⁶⁷ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, paras. 20-32.

⁵⁶⁸ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, paras. 4(b), 20-32. In his report, Professor List reports a negative "plain packaging effect". However, as Professor List himself notes, he has not sought to isolate the effects of tobacco plain packaging from any effects of the enlarged GHWs, which were introduced at the same time. Nevertheless, Professor List states that he will "err on the side of finding a plain packaging effect by attributing the entire measured effect size to plain packaging". Expert Report of J. List (1 June 2015), Exhibit DR/HON-1, para. 65.

⁵⁶⁹ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, paras. 21-24.

⁵⁷⁰ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 22.

520. Dr Chipty also corrects the method for calculating standard errors in Professor List's model to align his model with the approach endorsed by the complainants' other experts – IPE and Professor Klick. As Dr Chipty describes in her report, correcting Professor List's model in this way also produces a *statistically significant reduction* in smoking prevalence attributable to the plain packaging effect in Professor List's model.⁵⁷¹ Dr Chipty summarises her analysis in the following way:

[W]hen I calculate the standard errors as IPE recommended in their report but otherwise adopt Professor List's two-step, microeconomic study of smoking prevalence using the RMSS data, I find that Plain Packaging had a negative and statistically significant impact on smoking prevalence. Professor List's inference is reversed.⁵⁷²

521. The results of Professor List's analysis, as well as Dr Chipty's re-analysis are reproduced below.

	Professor List	Dr Chipty corrections of standard error
Controlling for Lagged Prices	-0.0296 (0.018)	-0.0296*** (0.010)
Controlling for Time Trend	-0.0140 (0.010)	-0.0140*** (0.005)

Table 4: Results of analysis of Professor List and re-analysis of Dr Chipty⁵⁷³

522. As can be seen from the table above, Professor List's own analysis shows a reduction in smoking prevalence in Australia attributable to tobacco plain packaging which, by making minor corrections to the standard error calculations (which are consistent with methods endorsed by the complainants' other experts), becomes statistically significant at the 1 per cent level in both alternative specifications. To put this in simple terms, the finding in column three (-0.296, statistically significant to 1 per cent), indicates a decline in prevalence in the

⁵⁷¹ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, paras. 28-31.

⁵⁷² Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 31.

⁵⁷³ Notes: Standard errors are reported in parentheses and ***, ** and * indicate statistical significance at the 1, 5 and 10 per cent level, respectively

order of 1 percentage point (or a 6 per cent reduction in smoking prevalence) attributable to the 2012 packaging changes.⁵⁷⁴

523. Accordingly, there is no foundation for the complainants and Professor List's claim that the post-implementation data shows that the tobacco plain packaging measure is "not working". On the contrary, the post-implementation data are entirely consistent with the predictions of the empirical studies and Australia's experts that the tobacco plain packaging measure is capable of contributing to its legitimate public health objectives.

5. Conclusion to Part III.D

524. For the foregoing reasons, the complainants have failed to demonstrate that the tobacco plain packaging measure is *not* capable of contributing to Australia's legitimate public health objectives. To the contrary, the overwhelming weight of the qualitative evidence supports the conclusion that the tobacco plain packaging measure is capable of contributing to those objectives, by reducing the appeal of tobacco products, increasing the effectiveness of GHWs, and reducing the ability of the packaging to mislead consumers about the harmful effects of tobacco use. Acting synergistically with other elements of Australia's comprehensive tobacco control measures, tobacco plain packaging is an effective means of reducing the use of and exposure to tobacco products in Australia. This is corroborated by empirical post-implementation quantitative evidence, which unequivocally demonstrates a decline in both smoking prevalence and consumption in Australia subsequent to the introduction of the tobacco plain packaging measure.

525. Accordingly, in the unlikely event that the Panel were to engage in a "weighing and balancing" analysis under Article 2.2, the factor of contribution weighs heavily in favour of the conclusion that the tobacco plain packaging measure is no more trade-restrictive than necessary to fulfil Australia's public health objectives.

⁵⁷⁴ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 14.

E. THE COMPLAINANTS HAVE FAILED TO ESTABLISH THAT THE RISKS ARISING FROM NON-FULFILMENT OF THE PUBLIC HEALTH OBJECTIVES ARE NOT GRAVE

1. Introduction to Part III.E

526. Australia's first written submission set out the considerations that are relevant to assessing the "risks non-fulfilment would create" if the Panel were to decide to undertake a full "weighing and balancing" under Article 2.2 of the TBT Agreement.⁵⁷⁵ Australia demonstrated that the risks that would arise from the non-fulfilment of the tobacco plain packaging measure's objectives were great, in light of the nature of the serious harm to public health caused by the use of and exposure to tobacco products, and the gravity of the consequences that would arise from non-fulfilment of the tobacco plain packaging measure's objectives, in the form of increased tobacco-related deaths and disease in Australia. For these reasons, as with the separate analyses under trade-restrictiveness and contribution, this factor of the analysis also weighs strongly in favour of the conclusion that the measure is not "more trade-restrictive than necessary" within the meaning of Article 2.2.⁵⁷⁶

527. The complainants nevertheless continue to misconstrue this element of the weighing and balancing analysis in an attempt to persuade the Panel of the counter-intuitive proposition that, notwithstanding the vital importance of Australia's public health objectives and the serious public health risks posed by the use of and exposure to tobacco products, the risks that would arise from the non-fulfilment of the objectives of the tobacco plain packaging measure are, somehow, insignificant.⁵⁷⁷

528. Thus, in the discussion that follows, in Part III.E.2 Australia will recall the *proper* focus of the obligation to take account of the "risks non-fulfilment would create" – namely,

⁵⁷⁵ Australia's first written submission, paras. 683-694.

⁵⁷⁶ Australia's first written submission, paras. 695-698.

⁵⁷⁷ See Dominican Republic's first written submission, paras. 1025-1031; Dominican Republic's response to Panel Question No. 65; Honduras' first written submission, paras. 890-906; Honduras' response to Panel Question No. 65; Indonesia's first written submission, paras. 422-427; Indonesia's response to Panel Question No. 65; Cuba's first written submission, paras. 416-417.

the consideration of the nature of the risks at issue and the gravity of the consequences that would arise from the non-fulfilment of a technical regulation's legitimate objectives.

529. In Part III.E.3(a) Australia will demonstrate that the Dominican Republic and Indonesia have both misunderstood the Panel's task of assessing the nature of the risks at issue. This is because both complainants misinterpret the "risks non-fulfilment would create" – i.e. the risks that would arise *from* non-fulfilment of a technical regulation's objectives – to mean the risk *of* non-fulfilment – i.e. the *likelihood* of a technical regulation not fulfilling its objectives.

530. Finally, in Part III.E.3(b) Australia will further demonstrate that Honduras has misunderstood the Panel's task of assessing the gravity of the consequences that would arise from the non-fulfilment of a technical regulation's objectives. This is because Honduras seeks to evade entirely consideration of this factor by referring to the effectiveness of *other elements* of a comprehensive policy, rather than the technical regulation at issue in this dispute.

2. Legal standard

531. The relevant text of Article 2.2 provides that:

... technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. ... 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.

532. The text itself thus clearly establishes that the "risks" to be assessed under this element of the relational analysis are those that "*non-fulfilment* would create" – i.e. those risks that would arise assuming a technical regulation's objective were *not* fulfilled. The text also makes clear that the risks to be assessed are those that would be created by the non-fulfilment of "a legitimate *objective*" – i.e. those risks that relate to the *objective* that the technical regulation pursues, rather than the technical regulation itself.⁵⁷⁸ The text further establishes that "relevant elements of consideration" to inform the assessment of the risks

⁵⁷⁸ Australia's first written submission, para. 688.

non-fulfilment would create include available scientific and technical information, related processing technology and intended end-uses of products.

533. These aspects of the proper assessment of "risks non-fulfilment would create" have also been confirmed by the Appellate Body,⁵⁷⁹ including most recently in its clarification that:

... textually, the "risks" to be "tak[en] account of" under Article 2.2 are those that would be created by the "non-fulfilment" of the "legitimate objective" of the technical regulation at issue.⁵⁸⁰

534. While Article 2.2 itself does not prescribe a particular methodology for assessing or taking account of such risks,⁵⁸¹ the Appellate Body has explained that this assessment requires consideration of "the *nature* of the risks at issue and the *gravity* of the consequences that would arise from non-fulfilment of the legitimate objective".⁵⁸² These considerations may be assessed in quantitative or qualitative terms⁵⁸³ and constitute the "components of the overall analysis of 'the risks non-fulfilment would create'".⁵⁸⁴ This overall analysis in turn comprises a "further element of weighing and balancing in the determination of whether the trade-restrictiveness of a technical regulation is 'necessary'".⁵⁸⁵

3. The risks that non-fulfilment of the public health objectives of the tobacco plain packaging measure would create

535. Turning now to the risks that would arise from the non-fulfilment of the tobacco plain packaging measure's objectives, it is useful to recall that the Dominican Republic, Honduras, and Indonesia all agree that the relevant objectives of the measure for the purposes of the

⁵⁷⁹ See, e.g. Appellate Body Report, *US – Tuna II (Mexico)*, para. 321.

⁵⁸⁰ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.277.

⁵⁸¹ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.218.

⁵⁸² Appellate Body Report, *US – Tuna II (Mexico)*, para. 321 (emphasis added). See also Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.295. Both the Dominican Republic and Honduras accept these considerations as the required assessment of "risks non-fulfilment would create" under this factor of the relational analysis: Honduras' first written submission, para. 814; Dominican Republic's first written submission, paras. 967, 1025; Dominican Republic's response to Panel Question No. 65, para. 265.

⁵⁸³ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.218.

⁵⁸⁴ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.295.

⁵⁸⁵ Appellate Body Report, *US – Tuna II (Mexico)*, para. 321.

analysis under Article 2.2 are those set out in Subsection 3(1) of the TPP Act.⁵⁸⁶ These objectives are: to improve public health by discouraging uptake of tobacco products, encouraging cessation, discouraging relapse, and reducing people's exposure to smoke.⁵⁸⁷ The tobacco plain packaging measure seeks to achieve these objectives by reducing the appeal of tobacco products, increasing the effectiveness of GHWs, and reducing the ability of the retail packaging to mislead consumers about the harmful effects of tobacco use.

536. The proper focus of the Panel's assessment under this factor of the analysis is, therefore, the consideration of "the nature of the risks at issue and the gravity of the consequences that would arise from the non-fulfilment"⁵⁸⁸ of the objectives of improving public health by discouraging uptake of tobacco products, encouraging cessation, discouraging relapse, and reducing people's exposure to smoke.

(a) Nature of the risks at issue

537. Australia agrees with Honduras that an assessment of the "*nature* of the risks at issue" requires consideration of "the general importance and the type of risk that the WTO Member seeks to address through the challenged measure".⁵⁸⁹ As is clear from the objectives of the tobacco plain packaging measure, the nature or "type" of risk that the measure seeks to address is the serious harm to public health caused by the use of and exposure to tobacco products and which has resulted in a global tobacco epidemic and the significant and ongoing burden of preventable death and disease in Australia.⁵⁹⁰

538. Having regard to the Dominican Republic's argument that the relevant elements of consideration listed in Article 2.2 "suggest an objective inquiry" of the relevant risks "bearing

⁵⁸⁶ See, e.g. Dominican Republic's response to Panel Question No. 64; Honduras' response to Panel Question No. 64; Indonesia's response to Panel Question No. 64. However, Australia notes that Indonesia's new argument that the nature of the risks at issue in this dispute is the risk to public health "from those elements of the packaging that Australia has prohibited or regulated" attempts to improperly substitute the *objectives* of the TPP Act with particular *regulations* that the measure adopted in pursuit of those objectives: Indonesia's response to Panel Question No. 65, para. 70.

⁵⁸⁷ TPP Act, Exhibit AUS-1, Subsection 3(1).

⁵⁸⁸ Appellate Body Report, *US – Tuna II (Mexico)*, para. 321.

⁵⁸⁹ Honduras' first written submission, para. 815 (emphasis added).

⁵⁹⁰ Australia's first written submission, paras. 34-37, 685-686.

the mark of science and scientific method",⁵⁹¹ Australia notes that the public health risks that the tobacco plain packaging measure seeks to address are fully substantiated by "available scientific information".⁵⁹² Scientific evidence establishes that tobacco use is the world's leading cause of preventable morbidity and mortality, harms nearly every organ in the body, and is responsible for the deaths of nearly 6,000,000 people annually; and concludes that all tobacco products are harmful and there is no safe level of tobacco use or exposure to tobacco smoke.⁵⁹³ As Cuba has acknowledged in its submissions to the Panel, "scientific evidence has unequivocally established that tobacco consumption, and exposure to tobacco smoke, cause death, disease and disability".⁵⁹⁴

539. Within this context, Australia considers the public health interests that are addressed through the tobacco plain packaging measure's objectives to be "both vital and important in the highest degree".⁵⁹⁵

540. Australia notes that Honduras agrees that the nature of the risks at issue "concern the serious health consequences that arise from tobacco smoking"⁵⁹⁶ and that "anti-tobacco measures that seek to improve public health address a concern which is paramount to any society".⁵⁹⁷

541. By contrast, the Dominican Republic and Indonesia seek to persuade the Panel that its assessment of the *nature* of the risks that would arise from the non-fulfilment of Australia's objectives requires an assessment of the *likelihood* of those risks occurring.⁵⁹⁸ In this way, both complainants misconstrue the assessment of the nature of the "risks *non-fulfilment* would create" – i.e. the risks that would arise assuming a measure's objectives are *not*

⁵⁹¹ Dominican Republic's response to Panel Question No. 65, para. 265.

⁵⁹² TBT Agreement, Article 2.2.

⁵⁹³ See Australia's first written submission, para. 23.

⁵⁹⁴ Cuba's first written submission, para. 3.

⁵⁹⁵ Australia's first written submission, paras. 685-686. See also Appellate Body Report, *EC – Asbestos*, para. 172, which addresses the vitality and importance of measures that seek to preserve human life and health through reducing well-known and life-threatening health risks.

⁵⁹⁶ Honduras' response to Panel Question No. 65. See also Honduras' first written submission, paras. 891-892.

⁵⁹⁷ Honduras' first written submission, para. 891.

⁵⁹⁸ Dominican Republic's first written submission, para. 1027; Dominican Republic's response to Panel Question No. 65, paras. 267-268. See also Indonesia's first written submission, para. 422.

fulfilled – to mean the risk *of* non-fulfilment – i.e. the *likelihood* of a measure not fulfilling its objectives. The Dominican Republic and Indonesia attempt to use this misinterpretation to rerun their arguments relating to the *contribution* the measure makes to its objectives.⁵⁹⁹

542. This is plainly contrary to the text of Article 2.2 and finds no support in the jurisprudence of the Appellate Body. Nor does the Dominican Republic or Indonesia attempt to explain how, on their reading of the relevant inquiry, the "risks non-fulfilment would create" could constitute a "*further* element of weighing and balancing"⁶⁰⁰ within the relational analysis if it essentially repeats the assessment of the degree of contribution a technical regulation makes towards the achievement of its objectives.

(b) Gravity of the consequences that would arise from non-fulfilment of the legitimate objective

543. With respect to the *gravity* of the consequences that would arise from non-fulfilment of the tobacco plain packaging measure's objectives, Australia agrees with the Dominican Republic that this consideration "relates to the seriousness of the consequences that would flow from non-fulfilment".⁶⁰¹ Australia also agrees with the Dominican Republic that the consequences of non-fulfilment of the tobacco plain packaging measure's objectives "would be serious and grave"⁶⁰² on the basis that "more Australian citizens would suffer from the adverse health impacts of smoking".⁶⁰³

544. As explained in Australia's first written submission, the consequences that would arise from the non-fulfilment of the legitimate public health objectives of the tobacco plain packaging measure are grave, given the enormous and well-substantiated harm caused by tobacco use.⁶⁰⁴ These consequences include more tobacco-related premature deaths and serious disease in Australia than would otherwise be the case.⁶⁰⁵

⁵⁹⁹ Australia's first written submission, para. 688. See, e.g. Dominican Republic's response to Panel Question No. 65, paras. 269-270; Indonesia's first written submission, paras. 426-427.

⁶⁰⁰ Appellate Body Report, *US – Tuna II (Mexico)*, para. 321.

⁶⁰¹ Dominican Republic's first written submission, para. 1029.

⁶⁰² Dominican Republic's first written submission, para. 1029.

⁶⁰³ Dominican Republic's first written submission, para. 1029.

⁶⁰⁴ Australia's first written submission, paras. 689-691.

⁶⁰⁵ Australia's first written submission, para. 691.

545. This time it is Honduras that misconstrues the consideration of the gravity of the consequences that would arise from non-fulfilment of Australia's legitimate public health objectives. Honduras argues that "the consequences of not fulfilling Australia's objective through the plain packaging measure are not grave" because "smoking rates in Australia have been in decline for years as a result of numerous anti-tobacco measures".⁶⁰⁶ According to Honduras, because measures such as tax increases, smoking bans in certain areas, restrictions on advertising, retail display bans, and GHWs have already been effective in reducing smoking rates in Australia,⁶⁰⁷ and will continue to be effective even in the absence of the tobacco plain packaging measure, the consequences of non-fulfilment of Australia's objectives "through the plain packaging measure" would not be grave.⁶⁰⁸

546. In making this argument, Honduras seeks to evade entirely the central inquiry under this factor. The relevant question is *not* how much progress a Member is making towards achieving its particular objectives through measures *other than* the technical regulation at issue. The relevant question is how grave will the consequences be if the specific objectives of the technical regulation at issue are not fulfilled. In the case of the tobacco plain packaging measure, those objectives are to *further* reduce tobacco-related premature deaths and serious disease in Australia beyond what would otherwise be the case in its absence.⁶⁰⁹ In essence, Honduras is asking the Panel to write off as inconsequential those additional individuals in Australia whom will benefit from the positive contribution that the tobacco plain packaging measure will have on reducing tobacco-related premature deaths and serious disease, on the grounds that other individuals in Australia will obtain these benefits as a consequence of Australia's existing measures.

547. Aside from its obvious callousness in the context of tobacco control measures, Honduras' approach would lead to the absurd result that the risks arising from non-fulfilment of a technical regulation's objective will *never* be meaningful where the technical regulation at issue is adopted as part of a comprehensive policy that already contributes to a legitimate

⁶⁰⁶ Honduras' first written submission, para. 894.

⁶⁰⁷ Honduras' first written submission, para. 895.

⁶⁰⁸ Honduras' first written submission, para. 906, citing Expert Report by J. Klick, "The Effect of Australia's Plain Packaging Law on Smoking: Evidence from Survey and Market Data", Exhibit UKR-5.

⁶⁰⁹ Australia's first written submission, para. 691.

objective. As the Appellate Body has recognised, complex public health problems can only be tackled through a comprehensive policy consisting of a multiplicity of interacting measures.⁶¹⁰ Accordingly, Members should not be prevented from adopting technical regulations that complement the effects of other elements of a comprehensive policy, even in situations where those other elements already make a contribution to the same overarching objective.

4. Conclusion to Part III.E

548. Properly interpreted, the risks that non-fulfilment of the objectives of the tobacco plain packaging measure would create are great. This is because the nature of the risks that the measure's objectives address is the serious harm to public health caused by the use of and exposure to tobacco products – an interest that is both vital and important in the highest degree. Similarly, the consequences that would arise from the non-fulfilment of the measure's objectives are grave and include more tobacco-related premature deaths and serious disease in Australia than would otherwise be the case. This element of the analysis thus unequivocally weighs in favour of the conclusion that the tobacco plain packaging measure is not "more trade-restrictive than necessary" within the meaning of Article 2.2.

F. ALTERNATIVE MEASURES

549. Finally, in the event that the Panel were to undertake a "weighing and balancing" analysis under Article 2.2, an assessment of the purported "alternatives" put forward by the complainants corroborates the conclusion that the tobacco plain packaging measure is not "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement.

550. To recall, the complainants have proposed four "alternatives" to the tobacco plain packaging measure: (i) an increase in excise tax; (ii) an increase in the minimum legal age of purchase for tobacco products to 21 years; (iii) improved social marketing campaigns; and (iv) a pre-vetting scheme. Australia demonstrated in its first written submission that these measures are not true alternatives; will not make an equivalent contribution to the objectives

⁶¹⁰ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

of the tobacco plain packaging measure; are not less trade-restrictive even under the complainants' own interpretation of the term; or are not reasonably available.⁶¹¹

1. The measures proposed by the complainants are not true "alternatives" and cannot make an equivalent degree of contribution to Australia's public health objectives because they are existing elements of Australia's comprehensive suite of tobacco control measures

551. Apart from the proposed "pre-vetting" scheme, the complainants' proposed alternative measures fail at the threshold because they are not alternatives. It is telling that in their discussion of alternative measures, not one of the complainants refers to *Brazil – Retreaded Tyres*, a case which is directly on point. In that case, both the panel and the Appellate Body agreed that measures that have already been implemented, in whole or in part, or are in the process of being implemented, as part of a comprehensive strategy to address a complex public health problem, are not "alternatives" to be taken into account in the "weighing and balancing" exercise. Rather, such measures are *complementary* to the measure at issue.⁶¹²

552. Australia has explained that excise tax increases are already a central component of its tobacco control strategy and that its excise taxes and tobacco prices are among the highest in the world.⁶¹³ Further, Australia has implemented *three* excise increases since the introduction of tobacco plain packaging, with a further increase scheduled for 2017.⁶¹⁴ Australia has also explained that it is a world leader in the use of social marketing campaigns as a tobacco control strategy and that the complainants' attempts to suggest otherwise are simply not credible.⁶¹⁵ Finally, Australia has outlined the broad range of policies it has in place to

⁶¹¹ Australia's first written submission, paras. 700-742.

⁶¹² Panel Report, *Brazil – Retreaded Tyres*, paras. 7.169, 7.171-7.172 and Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172.

⁶¹³ Australia's first written submission, paras. 707-708.

⁶¹⁴ Australia's first written submission, para. 707. At the time of filing Australia's first written submission two of the four scheduled 12.5 per cent tobacco excise increases had been implemented. The third came into effect on 1 September 2015 (Commonwealth of Australia, *Economic Statement*, Statement by the Honourable Chris Bowen MP and Senator the Honourable Penny Wong, August 2013, Exhibit AUS-265, p. 33). These increases are in addition to the change to bi-annual indexation of tobacco products (from Consumer Price Index to Average Weekly Ordinary Time Earnings), which commenced on 1 March 2014.

⁶¹⁵ Australia's first written submission, paras. 713-717.

restrict youth access to tobacco.⁶¹⁶ In these circumstances, the complainants' proposed "alternatives" are in fact *complementary* measures that Australia has already implemented, in whole or in part.

553. Australia notes that while it is possible for an alternative measure to achieve an equivalent degree of contribution in ways different from the technical regulation at issue,⁶¹⁷ the Appellate Body's reasoning in *Brazil – Retreaded Tyres* establishes that this may not necessarily be the case where the challenged measure is one component of a comprehensive policy to address a complex public health problem. Where a proposed alternative measure contributes to the public health objective by means different from the technical regulation at issue, but in the same way as existing elements within the comprehensive strategy, it will not make an *equivalent* degree of contribution. Rather, as the Appellate Body has underscored, substituting one element of a comprehensive policy for another existing and complementary element of the same policy *weakens* it by "*reducing* the synergies between the components, as well as its total effect".⁶¹⁸

554. This reasoning is directly applicable to the circumstances of this case. Substituting the tobacco plain packaging measure with a measure that Australia has already implemented would narrow the range of mechanisms deployed in Australia's tobacco control strategy and therefore reduce its effectiveness. For these reasons, existing elements of Australia's tobacco control strategy are not "alternative" measures to tobacco plain packaging and cannot make an equivalent degree of contribution to Australia's public health objectives.

2. The purported alternative measures will not make an equivalent contribution to the objectives of the tobacco plain packaging measure; are more trade-restrictive; or are not reasonably available

555. For the reasons set out in Australia's first written submission, the complainants have failed to propose reasonably available alternative measures that are less trade-restrictive than the tobacco plain packaging measure and capable of making an equivalent degree of

⁶¹⁶ Australia's first written submission, paras. 709-711.

⁶¹⁷ Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.269.

⁶¹⁸ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172 (emphasis added).

contribution to Australia's public health objectives.⁶¹⁹ Following its first written submission, the Dominican Republic has made additional arguments in relation to its proposals for Australia to (a) increase the minimum legal purchase age to 21 years; and (b) introduce a "pre-vetting" scheme.⁶²⁰ As Australia will detail below, these additional arguments are ineffective in establishing that the proposed measures are equally effective, less trade-restrictive and reasonably available alternatives that Australia should have adopted in place of tobacco plain packaging.

(a) Increase in the minimum legal purchase age to 21 years

i. This measure will not make an equivalent contribution to the objectives of the tobacco plain packaging measure

556. Increasing the minimum legal purchase age to 21 years is a variation on Australia's existing measures to restrict youth access to tobacco products.⁶²¹ Even if it could be characterised as an alternative (which it cannot), it would not make an equivalent contribution to the objectives of the tobacco plain packaging measure.

557. At the time of filing Australia's first written submission, both Professor Chaloupka and Dr Biglan concluded that the evidence in support of an increase in the minimum legal purchase age was "mixed".⁶²² Further, the studies reviewed by the complainants' expert, Professor Steinberg, related almost exclusively to increasing the minimum legal purchase age to 18 years, a step that Australia took many years ago.⁶²³

558. The Dominican Republic now relies on a new study released by the US Institute of Medicine, which concludes that increasing the minimum legal purchase age "will likely

⁶¹⁹ Australia's first written submission, paras. 700-742.

⁶²⁰ Dominican Republic's responses to Panel Question No. 41, paras. 192-201, Panel Question No. 65, paras. 274-278 and Panel Question No. 124, para. 264.

⁶²¹ Australia's first written submission, paras. 709-711.

⁶²² Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, paras. 51-53; Expert Report of A. Biglan (6 March 2015), Exhibit AUS-13, paras. 190-193.

⁶²³ Expert Report of L. Steinberg (15 September 2014), DR/HON-006, paras. 69-70. Australian states and territories implemented this change over the period 1990 to 1998, with the exception of WA, where the legal age of purchase has been 18 years since 1916: Australia's first written submission, Annexure B: Tobacco Control in Australia, p. 397.

prevent or delay initiation of tobacco use by adolescents and young adults".⁶²⁴ Contrary to the Dominican Republic's contentions, the study does not conclude with "*certainty*" that the measure will immediately reduce smoking.⁶²⁵

559. In the United States Institute of Medicine's assessment, prior to the release of its report, there was a "dearth of direct evidence" and no "pertinent studies" on the effect of raising the minimum legal purchase age for tobacco products.⁶²⁶ In these circumstances, the Dominican Republic's reliance on a single study in support of its proposed alternative measure contrasts with the size of the evidence base in favour of tobacco plain packaging, which includes the conclusions of the United States Surgeons General, the United States National Cancer Institute, the United Kingdom Chantler Review, the Parties to the FCTC and the hundreds of studies addressing this issue that have been published in peer-reviewed journals over the course of the past two decades.⁶²⁷

560. However, in the light of the conclusion reached by the United States Institute of Medicine, and in conformity with Australia's evidence-based approach to policy development, an increase in the minimum legal purchase age is a policy that Australia may consider implementing in the future, alongside tobacco plain packaging, particularly if the evidence base in support of it continues to grow. Indeed, new policies to restrict access to tobacco products to Australia's youth are currently under consideration; the state of Tasmania is debating the introduction of legislation that would permanently ban the sale of tobacco products to anyone born on or after 1 January 2000.⁶²⁸ The Tasmanian proposal has met with significant resistance from the tobacco industry.⁶²⁹

⁶²⁴ Institute of Medicine, *Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products*, (2015), Exhibit DR-232, p. S-3.

⁶²⁵ Dominican Republic's response to Panel Question No. 65, paras. 272, 274-278, 281.

⁶²⁶ Institute of Medicine, *Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products*, (2015), Exhibit DR-232, pp. 1-6, 6-22. See also pp. 1-6, 6-1, 6-6, 6-22, where the Institute of Medicine notes that there was "no direct empirical evidence" and a "dearth of literature" for it to consider when preparing its report.

⁶²⁷ See Part II.C.5(b)iii

⁶²⁸ *Public Health Amendment (Tobacco-Free Generation) Bill 2014* (Tasmania), Exhibit AUS-558.

⁶²⁹ The tobacco industry contends that "this type of prohibition does not work" and that the policy will simply push consumers to the illicit market. See, e.g. Philip Morris Ltd, *Submission to the Legislative Council Government Administration Committee 'A' inquiring into the: Public Health Amendment (Tobacco Free Generation) Bill 2014*, June 2015, Exhibit AUS-559, p. 1.

561. While an increase in the minimum legal purchase age is a policy that Australia may consider introducing, the measure is *not* a substitute for tobacco plain packaging and cannot achieve an equivalent degree of contribution to Australia's public health objectives. The only stated aim of increasing the minimum legal purchase age is to discourage youth smoking initiation. The measure would have *no* impact on those over 21 years and would not have any effect on cessation or relapse. Therefore, it is clear that the measure could *not* achieve a degree of contribution which is equivalent to that of the tobacco plain packaging measure.

562. Further, if tobacco plain packaging were replaced with an adjustment to Australia's approach to restricting youth access to tobacco products, Australia's means of influencing the behaviour of consumers who are affected by advertising on packs or GHWs would be compromised, reducing the comprehensiveness and effectiveness of Australia's tobacco control policy. A tobacco control strategy that restricts access to tobacco products *and* reduces their appeal, increases the effectiveness of GHWs, and reduces the ability of the packaging to mislead consumers about the harmful effects of tobacco use (which is the case under Australia's current tobacco control strategy) is more effective than either measure operating alone.⁶³⁰ As long as tobacco products remain appealing, the motivation to attempt to obtain them, particularly among youth, will remain.

ii. On the complainants' own definition, the measure is more trade-restrictive than tobacco plain packaging

563. The complainants contend that the tobacco plain packaging measure is trade-restrictive because it "limits competitive opportunities" in the Australian tobacco market. By contrast, the complainants do not refer to any trade-restrictiveness in relation to increasing the minimum legal purchase age. However, *according to the complainants' own case*, the effect of increasing the minimum legal purchase age, would, by its design, structure and intended operation, eliminate a "competitive opportunity" currently available to tobacco companies in Australia, namely the opportunity to compete legally for sales of tobacco products to

⁶³⁰ Expert Report of F. Chaloupka (Public Health) (7 March 2015), Exhibit AUS-9, paras. 11, 15-16, 53, 55; Expert Report of J. Samet (5 March 2015), Exhibit AUS-7, paras. 106-107. See also P. Jha and F.J. Chaloupka, *Curbing the epidemic: Governments and the economics of tobacco control* (World Bank, 1999), Exhibit AUS-51, in which the need for both demand and supply-side policies in a tobacco control programme is highlighted.

consumers between the ages of 18 to 21. Accordingly, under the complainants' own misguided standard of "competitive opportunities", an increase in the minimum legal purchase age would be "trade-restrictive".

(b) Pre-vetting scheme

564. Australia explained in its first written submission that the "pre-vetting" scheme proposed by the complainants would not make an equivalent contribution to the objectives of the tobacco plain packaging measure. The effectiveness of tobacco plain packaging is premised on restraining the use of tobacco packaging as an advertising vehicle through *standardising* its appearance, in accordance with the recommendations in the Guidelines for implementation of Article 13 of the FCTC. Australia also demonstrated that the measure is not reasonably available and, on the complainants' own terms, is highly trade-restrictive.⁶³¹

565. In addition to contemplating the release of non-standardised tobacco packages onto the Australian market, there is a fundamental problem with the complainants' proposal such that it cannot make an equivalent contribution to Australia's public health objectives. If the pre-vetting scheme were implemented and a package submitted to the ACCC for pre-vetting, the ACCC would need to conduct some form of study or testing to determine whether there were "credible evidence" that the pack would be likely to induce consumption if released onto the market.⁶³² However, we know from the circumstances of this case, that no study the ACCC could ever conduct, prior to the release of the package onto the market, would satisfy the tobacco industry. Although hundreds of pre-implementation studies assessing the likely impact of a particular pack design (namely, plain packaging) were conducted over the course of two decades, the complainants have purported to find fault with every study.⁶³³

⁶³¹ Australia's first written submission, paras. 725-728, 736, 740.

⁶³² See Expert Report of D. Shavin (4 October 2014), Exhibit DR/HON-009, para. 25, in which Mr Shavin states that the ACCC must collect "credible evidence" to establish that particular branding elements increase consumption before the ACCC is able to restrain the release of packs onto the market.

⁶³³ See, Expert Report of J. Inman (3 October 2014), Exhibit DR/HON-003; Expert Report of Kleijnen Systematic Reviews Ltd, (7 October 2014), Exhibit DR/HON-004.

Although the complainants propose one pre-implementation study methodology that they consider would have been acceptable to conduct prior to the implementation of tobacco plain packaging, Professor Fong establishes that the study methodology is both unrealistic and unworkable (see Expert Report of I. Ajzen (Supplementary Report) (7 July 2015), Exhibit DR/HON/IND-4 and Second Expert Report of G. Fong (8 September 2015), Exhibit AUS-531, paras. 167-168). Further, the methodology proposed by the complainants requires a study period of *12 months*. The suggestion that the ACCC would need to conduct a 12-month study

(continued)

566. In these circumstances, if the ACCC reached a conclusion that a particular package were likely to induce consumption, any attempt to restrain the use of the particular package would almost certainly result in the ACCC becoming mired in a spate of litigation, due to alleged deficiencies in the evidence in support of its conclusion.⁶³⁴ In the absence of sufficient funding for this course of action to be reasonably available, the ACCC would have no option but to approve the release of the branded packaging onto the market, and wait for evidence to emerge that particular features of the pack had actually induced consumption before restraining its further use.⁶³⁵ In relation to the latter option, waiting until new consumers have been induced to consume an addictive product before taking action is not acceptable to Australia and would not achieve its public health objectives – indeed, it would actively undermine those objectives.

567. The Dominican Republic contends that Australia is being unreasonable in suggesting that the tobacco industry would be anything less than cooperative if a pre-vetting scheme were introduced.⁶³⁶ However, Australia's view that the tobacco industry would respond in a litigious manner to such a scheme is based on evidence, rather than speculation. In March 2015, the United States Food and Drug Administration ("FDA") issued a directive, effectively requiring pre-market approval of changes in the *appearance of tobacco product*

for each and every package submitted for pre-vetting highlights that the complainants' proposed measure would be unworkable and highly trade-restrictive because of the extreme costs that the scheme would entail (and which, under the proposal, the tobacco industry would be required to meet). The voluntary ABAC scheme, to which the complainants compare their proposal, contemplates *four days* for the pre-vetter to reach a decision on whether to approve the advertisement. It is clear that any study relating to a particular tobacco package that were conducted within four days would not be considered "credible evidence" by the tobacco industry: ABAC, "Pre-vetting services contract specifications", available at: <http://www.abac.org.au/wp-content/uploads/2013/10/Pre-vetting-Services-Contract-Specification.pdf> (last accessed 9 September 2015), Exhibit AUS-560.

⁶³⁴ See Expert Report of R. Finkelstein (11 March 2015), Exhibit AUS-21, paras. 136-147, which notes that the pre-vetting scheme proposed by the complainants includes the possibility of appeal to the Australian Competition Tribunal, whose decisions are susceptible to review in the Federal Court of Australia (decisions of which can be appealed to the Full Federal Court and then the High Court of Australia).

The complainants assert that their proposed scheme will be "user-pays". Even if this were the case, the ACCC would still be faced with prohibitive costs in defending its decisions through the courts.

⁶³⁵ See Expert Report of D. Shavin (4 October 2014), Exhibit DR/HON-009, para. 43, in which Mr Shavin proposes that the ACCC could restrain the use of packaging that has been released onto the market where it can be proven that the packaging has in fact induced consumption.

⁶³⁶ Dominican Republic's response to Panel Question No. 41, paras. 198-199.

labels.⁶³⁷ The tobacco industry responded by commencing litigation in the United States District Court, District of Columbia, challenging the validity of the scheme.⁶³⁸

568. The Dominican Republic's reliance on the ACCC's investigation into the use of "light" and "mild" descriptors as an example of the tobacco industry's willingness to cooperate in the regulation of tobacco packaging is misplaced.⁶³⁹ The very press release relied upon by the Dominican Republic to establish this cooperation states: "Imperial Tobacco Australia Limited, the third largest tobacco company in Australia with a market share of 20 per cent, has refused to cooperate with the ACCC".⁶⁴⁰ Further, in his Expert Report, the Chairman of the ACCC, Mr Sims, outlined the long and difficult nature of this investigation.⁶⁴¹

569. In short, the proposed "pre-vetting" scheme would not make an equivalent contribution to the objectives of the tobacco plain packaging measure. The scheme would not result in *standardised* packaging, in accordance with the recommendations of the FCTC Guidelines, and would result in the release of packaging that induces consumption

⁶³⁷ Prior to March 2015, the FDA already required (with some exceptions) tobacco manufacturers to submit a pre-market application, and obtain a marketing authorization order, before introducing a "new" product into the market. Under the *Federal Food, Drug, and Cosmetic Act*, a pre-market application can be denied if the marketing of the product would not be "appropriate for the protection of the public health". This requires consideration of any change in the likelihood of existing smokers quitting and non-smokers initiating smoking: *Federal Food, Drug, and Cosmetic Act*, 21 USC Subsections 387j(c)(2) and (4), Exhibit AUS-561. The directive issued by the FDA on 4 March 2015 established that certain *changes in the appearance of a tobacco product label* (such as a change in background colour from red to green, or a change in the logo image used) may create a "new" product, requiring a pre-market application: Food and Drug Administration, *Guidance for Industry: Demonstrating the Substantial Equivalence of a New Tobacco Product: Responses to Frequently Asked Questions* (4 March 2015), Exhibit AUS-562, pp. 3-4.

⁶³⁸ *Philip Morris USA Inc et al v. FDA et al*, US District Court, District of Columbia, No. 15-00544.

The tobacco industry ultimately dropped this lawsuit, following an announcement by the FDA that it would not enforce the requirement for pre-market applications for label changes to tobacco packages, pending a review of whether such applications should continue to be required: T. Mickle, "Tobacco Companies Drop Suit Against FDA Over Labeling", *The Wall Street Journal* (2 June 2015), available at <http://www.wsj.com/articles/tobacco-companies-drop-suit-against-fda-over-labeling-1433264233> (last accessed 9 September 2015), Exhibit AUS-563, p. 1.

⁶³⁹ Dominican Republic's response to Panel Question No. 41, para. 199.

⁶⁴⁰ Australian Competition and Consumer Commission, "Australia Resolves 'light' and 'mild' Issue with BAT and Philip Morris" (Media Release, 12 May 2005), Exhibit DR-229.

⁶⁴¹ Australia's first written submission, para. 733 and Expert Report of R. Sims (24 February 2015), Exhibit AUS-22, paras. 4.7-4.15.

onto the market.⁶⁴² Further, Australia has demonstrated that, on the complainants' own terms, the scheme would be highly trade-restrictive and is not reasonably available.⁶⁴³

G. CONCLUSION TO PART III

570. For all of the foregoing reasons, the complainants' claim under Article 2.2 of the TBT Agreement must fail at the threshold, either because they have failed to rebut the presumption in Article 2.5 that the tobacco plain packaging measure does not create an "unnecessary obstacles to international trade", or because they have failed to establish that this measure is "trade-restrictive" under a proper interpretation of Article 2.2.

571. In the unlikely event that the Panel were to find that the complainants have established the threshold applicability of Article 2.2, then the complainants have failed to make a *prima facie* case that the tobacco plain packaging measure is more trade-restrictive than necessary to fulfil Australia's legitimate public health objectives. If the Panel were to consider that the effects on "competitive opportunities" identified by the complainants are sufficient to demonstrate a limiting effect on trade in tobacco products, such minimally trade-distortive effects are vastly outweighed by the degree to which the tobacco plain packaging measure is capable of contributing to reducing the use of and exposure to tobacco products in Australia, taking into account the nature of the risks at issue and the gravity of the consequences that would arise if those objectives were not fulfilled. Moreover, the complainants have failed to put forward any less trade-restrictive alternatives that are reasonably available to Australia and would achieve an equivalent degree of contribution to the tobacco plain packaging measure, taking account of the risks that non-fulfilment would create.

⁶⁴² See Australia's first written submission, para. 727, which provides examples of the packaging that is released onto the market in Turkey, where a scheme exists to which the complainants compare their proposal. Further, as discussed at para. 566 above, the ACCC will have no choice but to allow this in the absence of funds to defend each of its decisions in litigation brought by the tobacco industry.

⁶⁴³ Australia's first written submission, paras. 736, 740. In addition to the arguments advanced by Australia in its first written submission about the reasonable availability of this scheme, as Australia has noted above, the litigation costs that this scheme would entail would make it "prohibitively costly" for the ACCC.

572. In these circumstances, the complainants' claim that the tobacco plain packaging measure is inconsistent with Article 2.2 of the TBT Agreement must be rejected in its entirety.

IV. CUBA HAS FAILED TO MAKE A *PRIMA FACIE* CASE UNDER ARTICLE IX:4 OF THE GATT 1994

573. Cuba's claim that the tobacco plain packaging measure is inconsistent with Article IX:4 of the GATT 1994 is without merit. Cuba alleges that the inconsistency arises because the prohibition on the use of the mark "Habanos" on the packaging of its large hand-made cigars ("LHM") reduces their value.⁶⁴⁴ However, Cuba has failed to establish that Article IX of the GATT 1994 applies to non-country of origin markings or to prohibitions on the use of such markings. Cuba has also failed to adduce any evidence to demonstrate that the value of LHM Cuban cigars has been materially reduced since the introduction of tobacco plain packaging.

A. THE PROHIBITION ON THE USE OF THE MARK "HABANOS" IS NOT DISCIPLINED BY ARTICLE IX:4 OF THE GATT 1994

1. Article IX:4 of the GATT 1994 applies only to country of origin markings

574. Cuba's claim under Article IX:4 of the GATT 1994 fails at the first hurdle: Article IX disciplines only *country of origin marking* requirements. Article IX does not apply in relation to measures affecting any other marks, including the mark "*Habanos*".

575. As detailed in Australia's first written submission, this interpretation is supported by the text of Article IX of the GATT 1994⁶⁴⁵ and the "subsequent agreement" regarding its interpretation reached by the CONTRACTING PARTIES in 1958.⁶⁴⁶ It is also confirmed by the report of the Economic Committee of the League of Nations, which constitutes a

⁶⁴⁴ The mark "Habanos" is prohibited from use on tobacco packaging if it is not part of the brand, business or company name, or variant name of the product: TPP Act, Exhibit AUS-1, Section 20.

⁶⁴⁵ Australia's first written submission, para. 750.

⁶⁴⁶ Australia's first written submission, para. 751. See also Australia's response to Panel Question No. 83. The subsequent agreement expresses a clear understanding among Members that the "marks of origin" disciplined by Article IX of the GATT are *country of origin* marks. The only deviation from the full country name that Members were prepared to agree to accept were abbreviations (such as US or UK) which *unmistakably indicate the country of origin*. There is absolutely no support for a marking such as "Habanos" being a relevant mark under Article IX. See GATT Secretariat, *Marks of Origin: Report by Working Party as Adopted by the Contracting Parties at their Meeting of 21 November*, L/912/Rev.1 (22 November 1958), Exhibit AUS-294.

"supplementary means of interpretation".⁶⁴⁷ Australia observes that it is also the position expressed by the GATT Secretariat in its Note prepared in 1956.⁶⁴⁸ Finally it is the only interpretation that has received support from third parties to the dispute.⁶⁴⁹

576. Cuba has made no attempt to rebut Australia's interpretation of "marks of origin", as relating only to *country of origin markings*, under Article IX. In Australia's view, Cuba's interpretation is not tenable and the Panel's analysis of Cuba's claim should conclude at this point.

2. Article IX:4 of the GATT 1994 disciplines measures that *require* country of origin markings

577. Even if Cuba were correct (it is not) and the mark "Habanos" falls within the scope of Article IX of the GATT 1994, Australia has explained that Article IX only disciplines measures that *require* marks of origin. It does not discipline measures that prohibit such markings.

578. Australia demonstrated that this is the correct interpretation of Article IX:4 in its first written submission.⁶⁵⁰ Since this time, the release of the Appellate Body's Report in *US – COOL (Article 21.5 – Canada and Mexico)* has unambiguously confirmed Australia's position.⁶⁵¹

⁶⁴⁷ Australia's first written submission, para. 752, fn 1004; Australia's response to Panel Question No. 84. See, League of Nations Economic Committee, *Report to the Council on the Work of the Thirty-Fifth Session*, C.427.M.177 (1931), Exhibit AUS-296, Appendix III (VIII).

⁶⁴⁸ GATT Secretariat, *Marks of Origin: Note by the Secretariat concerning the ICC Proposal*, L/556 (19 October 1956), Exhibit AUS-295, p. 3, fn 1 (referred to in Panel Question No. 80, to which Cuba has provided no response).

⁶⁴⁹ Canada's third party submission, para. 104.

⁶⁵⁰ Australia's first written submission, paras. 745-749. Australia demonstrated this by reference to the text of Article IX:4 of the GATT; the subsequent agreement reached by the parties in 1958 (GATT Secretariat, *Marks of Origin: Report by Working Party as Adopted by the Contracting Parties at their Meeting of 21 November*, L/912/Rev. 1 (22 November 1958), Exhibit AUS-294); and through "supplementary means of interpretation" (League of Nations, Economic Committee, *Report to the Council on the Work of the Thirty-Fifth Session*, C.427.M.177 (1931), Exhibit AUS-296, Appendix III (III)).

⁶⁵¹ Australia's response to Panel Question No. 133; Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.356.

B. CUBA HAS NOT DEMONSTRATED THAT THE PROHIBITION ON THE USE OF THE MARK "HABANOS" HAS MATERIALLY REDUCED THE VALUE OF LHM CIGARS

579. Even if Australia were incorrect (it is not) and the Panel were to find that prohibitions on the application of non-country of origin marks on product packaging fall within the scope of Article IX:4, Cuba has not demonstrated that the prohibition on the use of the mark "Habanos" has materially reduced the value of LHM Cuban cigars.

580. Cuba argues that the value of Cuban cigars has been reduced because: (i) GIs confer a price premium, which Cuba can no longer exploit in relation to its LHM cigars; and (ii) the prohibition gives rise to consumer uncertainty about the authenticity and quality of the product. This constrains the ability of Cuban exporters to charge premium prices.⁶⁵²

581. Neither of these assertions is sufficient to establish that the prohibition on the use of the "Habanos" label has materially reduced the value of Cuban cigars. Cuba equates a reduction in the value of a product with a reduction in price. Even assuming this were the correct interpretation of Article IX:4, Cuba presents absolutely no evidence to demonstrate that the prices of LHM Cuban cigars have declined since the introduction of tobacco plain packaging. Rather, Cuba relies on a number of studies, which largely relate to European products or to foodstuffs (and contain no references to tobacco products), to assert that a GI always confers a price premium.⁶⁵³ In Australia's view, the evidence Cuba has relied upon is not sufficient to demonstrate that the prices or the value of Cuban LHM cigars have been materially reduced since the prohibition on the use of the mark "Habanos".

582. Moreover, Cuba's argument, if accepted, would result in Article IX:4 of the GATT 1994 creating a "right of use" for GIs. In particular, if all GIs confer a price premium, as

⁶⁵² Cuba's first written submission, paras. 422-425.

⁶⁵³ Cuba's first written submission, para. 423, fn 444-446, referring to *Value of production of agricultural products and foodstuffs, wines, aromatised wines and spirits protected by a geographical indication (GI)*, European Commission, Final Report, October 2012, Exhibit CU-36; Deselnicu OC et al, "A Meta-Analysis of Geographical Indication Food Valuation Studies: What Drives the Premium for Origin-Based Labels?", *Journal of Agricultural and Resource Economics*, Vol. 38, No. 2, pp. 204-219 (2013), Exhibit CU-34; Gangjee D, *Relocating the Law of Geographical Indications* (Cambridge University Press 2012), Extract (pp. 281-283), Exhibit CU-10; Food and Agriculture Organization of the United Nations and SINER GI, *Linking People, Places and Products: A guide for promoting quality linked to geographical origin and sustainable Geographical Indications*, 2nd edn. (2009); Extract (Chapter 1.2), Exhibit CU-31.

Cuba contends, then any prohibition on the use of a GI would, according to Cuba, reduce the value of the product and fall afoul of Article IX:4. In circumstances where the TRIPS Agreement does not confer such a "right of use" it is untenable that Article IX:4, which does not even mention GIs, creates such a right. However, that is the implication of Cuba's argument.

583. Cuba's second argument, namely that consumers will be uncertain about the authenticity and quality of the product in the absence of the label "Habanos", is based on findings in the GfK Bluemoon report, a report which Cuba otherwise states is "inadequate and should not be relied on" on the basis that "qualitative research, with small sample sizes, should not be used to make generalisations about an entire population of interest".⁶⁵⁴

584. Cuba's reliance on the GfK Bluemoon report to support the proposition that the absence of the mark "Habanos" creates uncertainty about the authenticity of Cuban LHM cigars is entirely misplaced. For the purposes of the study, cigar smokers were shown a "plain packaged" cigar band *which did not display any information at all*.⁶⁵⁵ In reaction to a completely plain band, some frequent cigar smokers expressed concern about being able to make informed purchases, because such smokers assess the authenticity of the product by reference to the *brand name* of the product.⁶⁵⁶ The reactions of cigar smokers to a completely plain band is not an accurate reflection of the impact of the tobacco plain packaging measure, which permits cigar bands to be marked with the brand, company or business name and variant name, as well as the name of the country in which the cigar was produced.⁶⁵⁷ The report relied upon by Cuba does not support the contention that consumers would be uncertain about the authenticity of the product in circumstances when cigar packaging, including cigar bands, may still be labelled with brand and variant names and "Made in Cuba". In addition, the report does not include any statements to the effect that the removal of a mark such as "Habanos" results in any uncertainty about the product, much less a level of uncertainty that would result in a material reduction in the value of Cuban LHM cigars.

⁶⁵⁴ Cuba's first written submission, paras. 263-265.

⁶⁵⁵ GfK Bluemoon, *Market research to determine impact of plain packaging on other tobacco products* (December 2011), Exhibit JE-24(50), pp. 10, 42.

⁶⁵⁶ GfK Bluemoon, *Market research to determine impact of plain packaging on other tobacco products* (December 2011), Exhibit JE-24(50), p. 10.

⁶⁵⁷ TPP Regulations, Exhibit AUS-3, Regulation 3.2.1(3).

585. Therefore, in Australia's view, Cuba has failed to substantiate its assertions that there has been a reduction in the value of Cuban LHM cigars since the introduction of tobacco plain packaging, far less that there has been a "material" reduction in the value caused by the removal of the mark "Habanos".

C. IN ANY EVENT, THE ARTICLE XX EXCEPTION UNDER GATT 1994 APPLIES

586. Australia demonstrated in its first written submission that even if the tobacco plain packaging measure were inconsistent with Article IX:4 of the GATT 1994 (it is not), the exception under Article XX(b) of the GATT applies.⁶⁵⁸

587. Australia notes that the premise of the tobacco plain packaging measure is that prescribing a standardised, plain appearance for tobacco packages and products will eliminate the opportunity for tobacco companies to use the package as a medium for advertising and promoting the products. A standardised appearance for tobacco packaging is in accordance with the recommendations of the Guidelines for implementation of Article 13 of the FCTC. This standardisation involves removing all variability between packages (with limited exceptions for brand and variant names, for example), including removing marks such as "Habanos". The standardised appearance of the packages reduces the ability of the tobacco industry to use the pack as an advertising vehicle.

588. Australia has demonstrated in the context of Article 2.2 of the TBT Agreement that the introduction of tobacco plain packaging, which entails a plain, standardised appearance for tobacco packages, is *necessary* for Australia to achieve its public health objectives. Therefore, in the context of Article XX of the GATT 1994, Australia reiterates that this plain standardised appearance, *including the prohibition on the use of the mark "Habanos"*, is *necessary* for Australia to achieve its public health objectives.

589. Specifically, Australia recalls that Australia's tobacco plain packaging measure (including the prohibitions on the use of certain markings) is directed towards a legitimate

⁶⁵⁸ Australia's first written submission, paras. 754-761.

objective, namely the protection of human life and health and that this objective is "both vital and important in the highest degree".⁶⁵⁹ The complainants do not dispute this.

590. Secondly, Australia has demonstrated under Article 2.2 of the TBT Agreement that the tobacco plain packaging measure is both apt to contribute to its public health objectives and is in fact already contributing to them. Given that the success of the measure is premised on a plain, standardised appearance for tobacco packaging, which includes the prohibition on all but certain prescribed markings, Australia considers that this evidence is sufficient to establish that the measure, including the prohibition on the use of the mark "Habanos", is both apt to contribute, and is already contributing, to its objectives.

591. For the avoidance of doubt, and in response to Cuba's request that Australia specify the evidence on which it is relying in relation to its conditional defence under Article XX(b) of the GATT 1994, Australia relies upon *all* of the evidence and arguments it has led under Article 2.2 of the TBT Agreement to demonstrate that the measure is both apt to contribute to its objectives and is already contributing to them.

592. While under Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement, Australia does not have the burden of positively establishing that the measure is apt to contribute to its objectives, Australia's Article XX(b) defence is reliant upon the fact that the arguments and evidence it has led under these provisions do in fact positively establish this. In Australia's view, the evidence on the record is overwhelmingly in favour of this conclusion.

593. In relation to the remaining elements of the necessity analysis, Australia recalls that Cuba has not established that the measure is trade-restrictive in any sense or that its proposed alternative measures are in fact "alternatives" that are less trade-restrictive, capable of making an equivalent contribution to the objectives of the measure or are reasonably available.⁶⁶⁰

594. Therefore, the tobacco plain packaging measure, including the prohibition on the use of the mark "Habanos" is provisionally justified under Article XX(b). As outlined in

⁶⁵⁹ Appellate Body Report, *EC – Asbestos*, para. 172; see also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 144.

⁶⁶⁰ Australia's first written submission, paras. 514-566, 700-742 and Part III.F.2.

Australia's first written submission, the measure also satisfies the requirements of the chapeau and no complainant, Cuba or otherwise, has advanced any arguments in relation to any claim that would suggest otherwise.⁶⁶¹

595. In Australia's view, Cuba's claim under Article IX:4 of the GATT 1994 clearly falls outside the scope of that provision. Therefore, the Panel should not need to consider Australia's conditional defence under Article XX(b). Even if the Panel were to do so, all aspects of the measure which standardise the appearance of tobacco packaging and restrain its use as an advertising vehicle are necessary for the protection of human life and health. Further, all aspects of the measure are applied in an even-handed manner and are not a disguised restriction on international trade. Therefore, the Article XX(b) exception applies.

⁶⁶¹ Australia's first written submission, para. 760.

V. CONCLUSION

596. For the foregoing reasons, Australia respectfully requests that the Panel reject the complainants' claims under Articles 2.1 (incorporating Article 6*quinquies* A(1) and Article 10*bis* of the Paris Convention), 15.4, 16.1, 16.3, 20, 22.2(b), and 24.3 of the TRIPS Agreement, Article 2.2 of the TBT Agreement, and Article IX:4 of the GATT 1994 in their entirety.

ANNEXURE A: FLAWS IN THE COMPLAINANTS' ECONOMIC EVIDENCE

597. As discussed in the body of Australia's submissions, in an attempt to address some of the flaws raised by Australia's experts with respect to the post-implementation quantitative evidence, the complainants have submitted two further expert reports – a rebuttal report from Professor Klick,⁶⁶² and a report from a new expert, Professor List.⁶⁶³ Professor List purported to undertake a review of the economic evidence submitted by all parties in this dispute as well as taking a "fresh look" at the data. Professor Klick attempted to address the various flaws in his initial report which had been identified by Dr Chipty.

598. Both of these reports suffer from a number of serious defects. This annexure addresses them in more detail. These defects, together with flaws in the complainants' evidence identified in Australia's first written submission and in expert reports submitted by Australia, raise serious questions about the weight, if any, that the Panel should accord to the complainants' post-implementation quantitative evidence.

A. FLAWS IN PROFESSOR LIST'S ANALYSIS

599. In its response to Panel Question 122, Australia noted a specific concern with respect to the apparent lack of rigour with which Professor List has undertaken the task of assessing the reports prepared by other experts.⁶⁶⁴ The apparent lack of rigour Professor List applied to his review of the evidence is of significant consequence to his overall conclusion that the tobacco plain packaging measure "is not working", as he explicitly stated that this review formed the basis for his conclusion.⁶⁶⁵

600. Briefly, Australia's concerns with Professor List's review include that he has (i) ignored highly relevant evidence, (ii) mischaracterised (or misunderstood) the evidence of Australia's experts, (iii) unfairly attributed errors by the complainants' experts to Australia's

⁶⁶² Second Expert Report of J. Klick (8 July 2015), Exhibit HON-118.

⁶⁶³ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1.

⁶⁶⁴ Australia's response to Panel Question No. 122, paras. 147-150.

⁶⁶⁵ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, para. 17.

experts, (vi) readily accepted evidence of the complainants' other experts, notwithstanding inconsistencies with his own evidence, and (v) made basic errors. These concerns are discussed below. In light of these concerns, it is difficult to give any weight to Professor List's review of the evidence, and the conclusions he draws from that review.

601. Australia also describes below a number of issues with Professor List's "fresh look" at the data and explains how Professor List's analyses of the data do not support his conclusion that the tobacco plain packaging measure is "not working".

1. Professor List ignored highly relevant evidence

602. Professor List, in describing the IPE expert report, refers to a "third approach" adopted by IPE, whereby "IPE applies a simple time-series analysis based on total consumption and wholesale sales data over time".⁶⁶⁶ In the footnote immediately following that description Professor List states that:

Given that neither Australia's submission, nor the Chipty or the Scharfstein reports criticize IPE for this third approach (in chapter 4 of the IPE Report), I will not deal with it extensively. I simply note that the results have helped me draw my own conclusions about the reliability of IPE's work.⁶⁶⁷

603. With respect to Professor List, the above statement is completely inaccurate. Contrary to Professor List's statement, Dr Chipty *does address* in some detail IPE's "third approach" (as described by Professor List).⁶⁶⁸ In particular, Dr Chipty identifies flaws with IPE's wholesale data analysis, and undertakes her own re-analysis of that data (within IPE's own framework, but correcting for the fact that IPE appeared to be unaware that retailers stocked up on cigarettes in late 2013 ahead of an excise increase in December 2013), and finds a *statistically significant reduction* in tobacco consumption (of about five to six per cent) following the introduction of tobacco plain packaging.⁶⁶⁹ This reduction in consumption is

⁶⁶⁶ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, para. 73.

⁶⁶⁷ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, fn 3.

⁶⁶⁸ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 62-69. Dr Chipty also identifies flaws with IPE's retail sales data analysis, which also appears in Chapter 4 of the IPE report: Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 55-61. See also Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, paras. 8(a), 9-10.

⁶⁶⁹ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 67-69.

over and above the general downward trend in consumption in Australia over the study period.

604. Australia addressed this aspect of IPE's report, and Dr Chipty's evidence, in its first written submission.⁶⁷⁰ Professor List's claim that neither Australia nor its experts criticised this aspect of IPE's report is therefore completely inaccurate.

605. Professor List's failure to consider this important aspect of Dr Chipty's report is also evident in the section of his report dealing with Dr Chipty's evidence. Although Professor List correctly identifies Dr Chipty's concern regarding the impact of strategic inventory management on wholesale sales data, he is silent on Dr Chipty's re-analysis of this data which finds a statistically significant reduction in tobacco consumption.⁶⁷¹ Not only is this an unfair and misleading representation of Dr Chipty's evidence, but Professor List's failure to consider this important evidence undermines his purported review of the evidence, and the conclusions he draws from that review.

2. Professor List mischaracterised the evidence of Australia's experts

606. Professor List also mischaracterises Professor Scharfstein's evidence. Among other things, Professor Scharfstein's report includes a critique of IPE's micro-econometric analysis of smoking prevalence data.⁶⁷² According to Professor Scharfstein, the fundamental flaw in IPE's analysis is that they only examined the effects of tobacco plain packaging on smoking for a specific nonsensical subgroup of individuals ("rich, uneducated, newborn males").⁶⁷³ To demonstrate the implications of this error, Professor Scharfstein provides illustrative examples of how, had IPE looked at different (more relevant) subgroups of the population, their conclusions would have been different. Professor Scharfstein first presents the example

⁶⁷⁰ Australia's first written submission, Annexure E, paras. 67-73.

⁶⁷¹ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, paras. 92-106. Professor List does refer to Dr Chipty's descriptive calculation that examining data from 12 months beginning October before and after tobacco plain packaging suggests a 2 per cent decline in sales volume, but he does not say anything about the more important regression analysis: Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 10.

⁶⁷² Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, paras. 73-84. See also Australia's first written submission, Annexure E, paras. 46-51.

⁶⁷³ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 75.

of a subgroup of females, aged 23, with 18 years of education and positioned in the top 20 per cent of the income distribution.⁶⁷⁴ Professor Scharfstein shows that:

[H]ad IPE focused their analysis on this much more sensible demographic subgroup, they would have had to declare that plain packaging reduced smoking prevalence.⁶⁷⁵

607. To illustrate that he was not "cherry picking" this example, Professor Scharfstein repeats his illustrative exercise for a range of different subgroups. He bases these subgroups on demographic information from the Roy Morgan survey sample.⁶⁷⁶

608. Importantly, at no stage does Professor Scharfstein either explicitly or implicitly endorse the approach adopted by IPE, or suggest that the illustrative exercises prove anything about the efficacy of tobacco plain packaging. Indeed, the reality is quite the opposite. Professor Scharfstein clearly states that in undertaking the illustrative exercise, "each time, I use IPE's approach to evaluate *whether IPE would conclude an effect of plain packaging*"⁶⁷⁷ (emphasis added). Similarly, in summarising his critique of the IPE approach (a critique which included the illustrative examples discussed above), Professor Scharfstein explicitly states that "[t]he above exercises highlight the flaws in IPE's 'microeconomic' approach and the conclusions they draw".⁶⁷⁸

609. Notwithstanding the clear language of Professor Scharfstein's report (that he is not drawing conclusions about the efficacy of tobacco plain packaging, but merely noting what IPE would have found if they had applied their methodology more competently), in his own report, Professor List seeks to re-cast Professor Scharfstein's critique of the IPE methodology as purporting to be positive evidence of a tobacco plain packaging effect, and suggests that Professor Scharfstein "advocates" IPE's approach and "explicitly argues" for a policy effect.⁶⁷⁹ Professor List even goes as far as to suggest that Professor Scharfstein's evidence somehow demonstrates an "important disagreement" between Australia's own experts

⁶⁷⁴ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, paras. 78-80.

⁶⁷⁵ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 80.

⁶⁷⁶ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, paras. 81-84.

⁶⁷⁷ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 81.

⁶⁷⁸ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 84.

⁶⁷⁹ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, paras. 105, 114, 120-122, 142.

(referring to Dr Chipty's evidence).⁶⁸⁰ With respect to Professor List, this represents a gross mischaracterisation of both Professor Scharfstein's and Dr Chipty's evidence.⁶⁸¹

3. Professor List wrongly attributes errors by the complainants' experts to Australia's experts

610. Another concern with Professor List's report is the wrongful attribution of errors by the complainants' experts to Australia's experts. For example, in discussing Professor Scharfstein's report, Professor List refers to Professor Scharfstein's supposed "reanalysis of the trend" as reported in the IPE report.⁶⁸² Professor List states that Professor Scharfstein "assumes that the downward smoking prevalence trend pre-plain packaging period extends into the post-plain packaging period",⁶⁸³ and that:

110. ...This is a problem for Scharfstein's analysis, because the time trend is not estimated using changes in prices or implemented taxes. Since several increases in the excise tax, and therefore price, have been added since 2001, the downward trend might be mis-stated, and it lowers the ability to detect changes in prevalence as they relate to the plain packaging policy.

111. This means that the justification for Scharfstein's linear and quadratic time trends starting in 2001 and 2006, respectively, are unsubstantiated.⁶⁸⁴

611. Professor List appears to have misunderstood completely Professor Scharfstein's report. In particular, Professor Scharfstein never undertook the supposed "reanalysis" of IPE's time trend that Professor List criticises. Rather, to demonstrate the limitations of the IPE report, Professor Scharfstein merely reproduced the time trends *from the IPE report*.⁶⁸⁵ In doing so, Professor Scharfstein himself explicitly noted that IPE's trends were unsupported.⁶⁸⁶ Similarly, in her report Dr Chipty raised concerns about IPE's use of time trends.⁶⁸⁷ Notwithstanding this, Professor List has attempted to attribute the shortcomings in

⁶⁸⁰ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, para. 105.

⁶⁸¹ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 8(d).

⁶⁸² Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, para. 110.

⁶⁸³ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, para. 110.

⁶⁸⁴ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, paras. 110-111.

⁶⁸⁵ See, e.g. Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 41. Professor Scharfstein clearly identified the "IPE trend line" in his various graphs: see, e.g. Figures 3, 4, 6 and 8.

⁶⁸⁶ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 39.

⁶⁸⁷ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 40-43.

IPE's analysis to Professor Scharfstein. This is misleading and unfair to Professor Scharfstein, and demonstrates a lack of understanding on Professor List's behalf of the evidence filed by both the complainants and Australia. In fact, the criticisms made by Professor List in his report should be read as criticisms of the IPE analysis.

4. Professor List readily accepts the evidence of the complainants' other experts notwithstanding inconsistencies with his own evidence

612. Professor List also appears to readily accept the complainants' expert evidence, notwithstanding apparent inconsistencies with his own evidence. For example, referring to Dr Chipty's criticism of Professor Klick's use of New Zealand as a proper counterfactual, Professor List states that, "while inevitably not a perfect counterfactual because of tax changes post 2012, New Zealand is still a useful counterfactual".⁶⁸⁸ However, in other sections of his report, Professor List identifies tax increases as "important" policy changes that must be accounted for in any analysis of tobacco plain packaging. For example, in the context of studying smoking prevalence in Australia, Professor List states that "[i]f there are important changes after December 2012 – such as new taxes – these might masquerade as plain packaging effects".⁶⁸⁹ It must follow then, that an "important change" in a counterfactual country (New Zealand), such as a new tax, might *mask* plain packaging effects in the control country (Australia). Indeed, this is precisely the point Dr Chipty made in her report.⁶⁹⁰ Professor List however readily accepts Professor Klick's evidence as "useful", notwithstanding the potential masking effect from the excise tax increase in New Zealand in January 2013.

5. Professor List made basic errors

613. In his expert report filed in March 2015, Professor Scharfstein explained how the methodology adopted by IPE lacked power to detect important declines in smoking prevalence, meaning that the results of the IPE analysis were of no probative value.⁶⁹¹ To recall, Professor Scharfstein observed that the methodology adopted by the complainants'

⁶⁸⁸ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, para. 99.

⁶⁸⁹ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, para. 122.

⁶⁹⁰ See, e.g. Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 17, 22-23.

⁶⁹¹ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, paras. 51-64.

experts would only be capable of detecting declines in prevalence of 1.26 percentage points below trend.⁶⁹² Given the large size of the effects which the IPE analysis could miss, Australia submitted that the analysis was unhelpful in determining whether tobacco plain packaging had already contributed to reducing smoking prevalence.⁶⁹³ In response to this criticism, Professor List argues, relying on an article by an Australian public health expert, Professor Borland, that the methodology IPE adopted was in fact capable of detecting what Professor Borland classifies as "small effects", being effect sizes less than 0.5 standard deviations.⁶⁹⁴ Based on this analysis, Professor List concludes that "the data in hand have power to detect small effects".⁶⁹⁵

614. However, in reaching this conclusion, Professor List made a basic calculation error. As Dr Chipty explains in her report, the 1.26 percentage point decline the IPE model was capable of picking up represents an effect size of *1.6 standard deviations*, not the much smaller *0.14 standard deviations* calculated by Professor List.⁶⁹⁶ Correcting for this basic error reveals that, adopting Professor List's *own reasoning*, IPE's analysis of the Roy Morgan data does not have sufficient power to detect "small" effects. Indeed, it does not have power to detect "medium" effects (between 0.5 and 1.0 standard deviations), nor certain "large" effects (between 1.0 and 1.5 standard deviations).⁶⁹⁷ Ultimately, Professor List's report simply serves to reinforce Professor Scharfstein's evidence that the IPE methodology is not capable of detecting important declines in smoking prevalence attributable to the tobacco plain packaging measure.

615. Moreover, as a result of his basic calculation error, Professor List's analysis and review of the evidence proceeded on a basis which was unduly critical of Professor Scharfstein and unduly favourable to IPE. That Professor List's report includes such a basic error, with such significant implications, suggests that it would not be appropriate for the Panel to give any weight to his evidence.

⁶⁹² Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, para. 61.

⁶⁹³ Australia's first written submission, Annexure E, para. 44.

⁶⁹⁴ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, para. 109.

⁶⁹⁵ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, para. 109.

⁶⁹⁶ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 8(e).

⁶⁹⁷ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 8(e).

6. Professor List's "fresh look" at the data does not support his conclusion that the tobacco plain packaging measure is not working

616. As discussed in the body of Australia's submissions, Professor List conducts two new analyses of the post-implementation data.⁶⁹⁸

617. In the first analysis, Professor List attempts, based on historical data, to build a model of what cigarette consumption would have looked like in the absence of tobacco plain packaging.⁶⁹⁹ He then assesses whether actual consumption post-plain packaging was less than what he predicted it would be without the measure. In his report Professor List finds no effect statistically different from zero when he compares actual consumption with his counter-factual model.

618. However, as Dr Chipty explains in her report, Professor List's consumption analysis is fundamentally flawed.⁷⁰⁰ Critical to the efficacy of this exercise is how well constructed the counter-factual model is. To draw any conclusions from the analysis, you need to be confident that the counter-factual generated provides a sensible and reliable prediction of what would have occurred in the absence of tobacco plain packaging. One way to test whether that is the case is to consider how the methodology performs in predicting the effects of less controversial tobacco control measures like increases in tobacco excise. As Dr Chipty explains in her report, when Professor List's study methodology is applied to Australia's 2010 excise increase, it suggests that a 25 per cent increase in tobacco excise led to a statistically significant *increase* in tobacco consumption.⁷⁰¹ In simple terms, Professor List's model predicts that increasing the price of cigarettes causes consumption to rise.

619. Strangely, Professor List specifically notes in his report that he is "able to find a significant effect of the [2010] tax on per capita sales"⁷⁰² using his model. What he fails to disclose is that the effect on sales is in the opposite direction to what economics, common sense and long experience predicts is the result of such a tax increase.

⁶⁹⁸ See Part III.D.4(b).

⁶⁹⁹ Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, paras. 125-137.

⁷⁰⁰ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, paras. 4(c), 33-44.

⁷⁰¹ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, paras. 37-39.

⁷⁰² Expert Report of J. List (1 June 2015), Exhibit DR/IND-1, para. 138.

620. In her report, Dr Chipty identifies other problems with Professor List's consumption analysis.⁷⁰³ However, the fact that his model fails the most basic test of efficacy demonstrates that it is not a reliable means of assessing the effect of tobacco plain packaging on consumption, and the Panel should disregard it.

621. The second aspect of Professor List's data analysis is a micro-econometric study of smoking prevalence. Australia discussed the issues with Professor List's prevalence analysis in the body of its submission. In particular, Australia described how by making minor, reasoned modifications to Professor List's own model, Dr Chipty was able to identify a statistically significant decline in smoking prevalence consistent with what Professor List would describe as a "plain packaging effect".⁷⁰⁴

622. However, even without Dr Chipty's analysis, in Australia's view Professor List's analysis of smoking prevalence data does not provide any foundation for a claim that the tobacco plain packaging measure is "not working". Professor List's own analysis shows a substantial reduction in smoking prevalence attributable to the 2012 packaging changes.⁷⁰⁵ Although that reduction is not statistically significant (according to the standard errors calculated by Professor List), this in no way justifies a finding that the tobacco plain packaging measure is "not working".⁷⁰⁶ Put simply, Professor List cannot on his own analysis rule out that the measure reduced smoking prevalence.⁷⁰⁷

B. FLAWS IN PROFESSOR KLICK'S ANALYSIS

623. Professor Klick's further report seeks to address various flaws in his first report identified by Dr Chipty in her report of 9 March 2015. However, as demonstrated below, Professor Klick's rebuttal analyses fail to address the fundamental flaws that Dr Chipty described in her report. Instead, as Dr Chipty explains in her report of 14 September 2015,

⁷⁰³ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, paras. 33-44.

⁷⁰⁴ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, paras. 20-32. See also paragraphs 517-522 above.

⁷⁰⁵ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, paras. 13-16.

⁷⁰⁶ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, paras. 13-16.

⁷⁰⁷ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 16.

Professor Klick's rebuttal report "contains several misleading statements and irrelevant analyses, some of which contradict and undermine his own analyses and conclusions".⁷⁰⁸

624. The significant flaws in Professor Klick's analyses, which to date he has not been able adequately to address, confirm that his evidence is of little probative value to the Panel in assessing whether the tobacco plain packaging measure is apt to contribute to its objectives.

1. Professor Klick still has no valid pre-period to implement a difference-in-differences analysis of his commissioned survey data

625. In her initial report, Dr Chipty noted that Professor Klick's study did not have a valid "pre-period" because the first wave of the survey was run at a time when plain packaged tobacco products were already available in Australia and a significant proportion of smokers had been exposed to them.⁷⁰⁹ In his further report, Professor Klick attempts to minimise this issue by claiming that the possibility that respondents in his survey were exposed to tobacco plain packaging is "unlikely, or in any event, relatively minor".⁷¹⁰ As Dr Chipty explains in her report, Professor Klick's claim is baseless.⁷¹¹

626. Professor Klick attempts to address Dr Chipty's criticism by purporting to identify those respondents that were exposed to tobacco plain packaging in Wave 1 of his survey, and then excluding those respondents from his analysis. However, Professor Klick's attempts to identify those respondents that might have been exposed to tobacco plain packaging are fundamentally flawed.

627. Professor Klick tries to identify the participants in his study who were exposed to tobacco plain packaging in Wave 1 by analysing answers to certain questions in his survey.⁷¹² He concludes, on the basis of this method, that the number of participants exposed to tobacco

⁷⁰⁸ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 4(c).

⁷⁰⁹ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 18-21, 24.

⁷¹⁰ Second Expert Report of J. Klick (8 July 2015), Exhibit HON-118, para. 23.

⁷¹¹ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, paras. 55-62.

⁷¹² Second Expert Report of J. Klick (8 July 2015), Exhibit HON-118, paras. 20-23.

plain packaging in Wave 1 was small and that those participants are readily excludable from the results of that wave thus creating a valid pre-period sample.⁷¹³

628. A simple way of testing whether Professor Klick has used an effective method of excluding survey participants exposed to tobacco plain packaging is to apply the same method to participants in Wave 2 of the survey and determine how many are identified as having been exposed to the measure using Professor Klick's approach. Wave 2 was conducted in March 2013, by which time it had been mandatory for all retail tobacco packaging to be plain packaged for at least three months. Accordingly, it is reasonable to expect that a large majority of participants in the survey would have been exposed to tobacco plain packaging by that time. If the technique applied by Professor Klick is effective at identifying survey participants exposed to tobacco plain packaging, the analysis of the Wave 2 results should show a significantly higher percentage of persons exposed to the measure. However, using Professor Klick's method for identifying individuals exposed to tobacco plain packaging in Wave 2 suggests that only *9 per cent* of those surveyed in Australia in March 2013 had been exposed to plain packaged tobacco products.⁷¹⁴ Such a result cannot possibly accurately reflect the number of Australian smokers in the survey exposed to tobacco plain packaging by March 2013, given that all tobacco products in the Australian retail market were plain packaged at that date.

629. This result indicates very strongly that the method adopted by Professor Klick for identifying individuals exposed to tobacco plain packaging in Wave 1 of the survey is woefully inadequate and is likely to significantly under-report whether or not an individual had been exposed to the policy.

630. The shortcomings of Professor Klick's approach are discussed in more detail in Dr Chipty's rebuttal report.⁷¹⁵ Dr Chipty's conclusion is that Professor Klick's survey is simply incapable of identifying which Australian respondents were and were not exposed to tobacco plain packaging in the supposed "pre-period" (Wave 1).⁷¹⁶ Further, Dr Chipty

⁷¹³ Second Expert Report of J. Klick (8 July 2015), Exhibit HON-118, paras. 23-24.

⁷¹⁴ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 61.

⁷¹⁵ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, paras. 55-62.

⁷¹⁶ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 62.

explains that Professor Klick's attempts to salvage his pre-period are insufficient to resurrect his difference-in-differences analysis.⁷¹⁷

2. Professor Klick's attempts to justify New Zealand as a valid counterfactual are irrelevant

631. A second major criticism of Professor Klick's analysis that Dr Chipty identified in her initial report was the lack of a valid counterfactual country.⁷¹⁸ As Dr Chipty explained, New Zealand (the country Professor Klick chose as his counterfactual country) introduced a 10 per cent excise tax increase in January 2013. In his initial report, Professor Klick made no mention of this excise increase. Indeed, it is not clear whether he was even aware of it. As Dr Chipty explained, the New Zealand excise increase is highly relevant to Professor Klick's study as it has the potential to effectively "mask" any effect of tobacco plain packaging on Australian smokers.⁷¹⁹

632. In his further report, Professor Klick does not attempt to address Dr Chipty's criticism squarely, but rather seeks to obfuscate the issue by suggesting that "Dr Chipty places an inordinate degree of emphasis on this single difference in tobacco control policies".⁷²⁰ This is an extraordinary response by Professor Klick. As Dr Chipty observes in her report, this entire dispute is about a single policy – tobacco plain packaging.⁷²¹ Moreover, the fact that the New Zealand excise increase is a single policy is completely irrelevant.⁷²² The critical point, which seems to have been lost on Professor Klick, is that at approximately the same time that Australia introduced the tobacco plain packaging measure, New Zealand introduced its own tobacco control policy – an excise increase – which can be expected to lead to less smoking. This is clearly a confounding factor, irrespective of the fact that it is a "single" policy, and Professor Klick's failure to account for this change invalidates his various analyses of his commissioned Roy Morgan survey data.

⁷¹⁷ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, paras. 63-66.

⁷¹⁸ Expert Report of D. Scharfstein (9 March 2015), Exhibit AUS-20, paras. 22-24.

⁷¹⁹ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 22-24.

⁷²⁰ Second Expert Report of J. Klick (8 July 2015), Exhibit HON-118, para. 47. As Dr Chipty explains in her report, Professor Klick seeks to further obfuscate this issue by undertaking an "irrelevant" statistical analysis: Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 70.

⁷²¹ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 68.

⁷²² Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 68.

3. Professor Klick invalidates his own survey data analysis

633. In her report dated 9 March 2015, Dr Chipty demonstrated how Professor Klick's survey data show that daily smoking incidence in Australia has been falling at a faster rate than in New Zealand following the introduction of tobacco plain packaging.⁷²³ Professor Klick attempts to address Dr Chipty's analysis by suggesting that *his own data* are not suitable for estimating trends in such a short period of time (that is, over the 5 or 6 waves of Professor Klick's survey).⁷²⁴ However, as Dr Chipty explains in her report:

Professor Klick's arguments undermine his own difference-in-differences analysis, which itself is a trend analysis that compares changes in smoking behavior over six survey waves in Australia to changes in New Zealand over the same time. In effect, Professor Klick appears to be arguing that he can use six waves of data to implement his trend analysis which requires a valid pre-period, but that I cannot use five waves of data to implement my trend analysis which does not require a pre-period. Further, Professor Klick's pre-period is based solely on a single wave of data (i.e., Wave 1) that was gathered during a single calendar month. Difference-in-differences analysis requires accurate data from a baseline time period, before the implementation of the intervention. In essence, Professor Klick's estimation strategy compares changes between Wave 1 and Waves 2 to 6 in Australia to changes between Wave 1 and Waves 2 to 6 in New Zealand. By acknowledging that his data contain large wave-to-wave variability, Professor Klick is invalidating his own pre-period, which relied exclusively on only one month of data.⁷²⁵

634. Professor Klick makes no attempt to reconcile this apparent inconsistency in his evidence. Moreover, as Dr Chipty notes in her report, Professor Klick's concerns should, if anything, make it *more difficult* to detect a statistically significant effect in the data.⁷²⁶ However, several of Dr Chipty's analyses were able to demonstrate a statistically significant difference in the trends of daily smoking incidence between Australia and New Zealand following the introduction of the tobacco plain packaging measure.⁷²⁷

⁷²³ Expert Report of T. Chipty (9 March 2015), Exhibit AUS-17, paras. 28-30.

⁷²⁴ Second Expert Report of J. Klick (8 July 2015), Exhibit HON-118, paras. 76-85.

⁷²⁵ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 52.

⁷²⁶ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 53.

⁷²⁷ Third Expert Report of T. Chipty (14 September 2015), Exhibit AUS-535, para. 53.