

The WTO Panel Report in *Australia – Plain Packaging: Findings and Implications*

McCabe Centre for Law and Cancer, November 2018

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Introduction

On 28 June 2018, the World Trade Organization (WTO) dispute settlement panel hearing the legal challenge to Australia’s tobacco plain packaging laws [issued a decision in favour of Australia](#),¹ dismissing all claims brought by Cuba, the Dominican Republic, Honduras and Indonesia against the measure. The panel found that tobacco plain packaging was not more trade restrictive than necessary to protect public health, and that it did not infringe any obligations relating to the protection of intellectual property. The panel decision is a major victory for public health, and has important implications for legal challenges to tobacco plain packaging and other tobacco control measures in both domestic and international courts.

This paper discusses the findings and key themes of the panel report. A shorter initial summary of the case is available [here](#), and further background to the dispute [here](#). Documents associated with the dispute are available from the WTO website for each of [Cuba](#), the [Dominican Republic](#), [Honduras](#), and [Indonesia](#).

Tobacco plain packaging in Australia

In 2011, Australia enacted the Tobacco Plain Packaging Act 2011, becoming the first country in the world to mandate plain packaging for tobacco products (known as standardised packaging in the United Kingdom and New Zealand). All tobacco products sold in Australia have been required to comply with the legislation since December 2012. Australia’s [Tobacco Plain Packaging Act](#) and [Tobacco Plain Packaging Regulations](#) standardise the appearance of tobacco products and tobacco product packaging by banning the use of logos, brand imagery, symbols, other images, colours and promotional text on tobacco products and tobacco product packaging and requiring all tobacco product packaging and tobacco products to be in the standard shapes, colours and finishes prescribed by the legislation / regulations. Products may be distinguished by brand and product name printed on the packaging in a standard colour, position, font size and style. Related laws require tobacco packs to carry graphic health warnings covering 75% of the front and 90% of the back principal display areas, as well as other required consumer information and manufacturer details. (see **figure 1**)

¹ Panel Report, *Australia — Certain Measures Concerning Trademarks, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (28 June 2018) (*‘Australia – Plain Packaging’*).



Figure 1: cigarette packs in Australia before and after plain packaging. Photo courtesy of Quit Victoria.

Section 3 of the Tobacco Plain Packaging Act describes the objects of the act as follows:

- (1) The objects of this Act are:
- (a) to improve public health by:
 - (i) discouraging people from taking up smoking, or using tobacco products; and
 - (ii) encouraging people to give up smoking, and to stop using tobacco products; and
 - (iii) discouraging 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; and
 - (b) to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control.
- (2) It is the intention of the Parliament to contribute to achieving the objects in subsection (1) by regulating the retail packaging and appearance of tobacco products in order to:
- (a) reduce the appeal of tobacco products to consumers; and
 - (b) increase the effectiveness of health warnings on the retail packaging of tobacco products; and
 - (c) reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.

As described in the [explanatory memorandum to the legislation](#), plain packaging ‘is one of the means by which the Australian Government will give effect to Australia’s obligations under the World Health Organization Framework Convention on Tobacco Control’ (WHO FCTC), particularly the obligation to address the use of misleading packaging and labelling under WHO FCTC article 11, and to implement a comprehensive ban on tobacco advertising, promotion and sponsorship under WHO FCTC article 13. The implementation [guidelines to articles 11 and 13 of the WHO FCTC](#), adopted by the Conference of Parties to the treaty, both recommend the adoption of plain packaging.

Background to the WTO dispute

Five WTO members – Cuba, the Dominican Republic, Honduras, Indonesia and Ukraine – initiated proceedings against Australia under the WTO’s Dispute Settlement Understanding (DSU) at different times from 2012 to 2014. A WTO panel was constituted in May 2014 to hear the disputes. Ukraine discontinued its participation in the dispute in May 2015. The plain packaging dispute is formally four separate disputes, but the working procedures provide for a single panel report and a coordinated timeline and procedures.

Thirty-five additional states (not including Ukraine or the four complainants when intervening in each others’ disputes) intervened as third parties, with a total of 41 states participating across the four disputes, a record for WTO dispute settlement. Executive summaries of the submissions of the parties and third parties are available in an [addendum to the WTO panel’s report](#).

The WTO dispute is one of three legal challenges to Australia’s tobacco plain packaging laws. A constitutional case brought in the High Court of Australia by the four major multinational tobacco companies operating in Australia was [dismissed with costs in 2012](#), and an investment dispute brought by Philip Morris Asia under a 1993 bilateral investment treaty between Hong Kong and Australia was dismissed for [lack of jurisdiction](#) in 2015, with [costs awarded against Philip Morris Asia](#) in 2017. There have also been unsuccessful legal challenges to tobacco plain packaging in the domestic courts of the [United Kingdom, France, and Norway](#).

Overview of claims and the panel’s findings

The complainants brought ten claims, principally falling into the following three groups

- The claim that plain packaging is ‘more trade-restrictive than necessary’ for a legitimate public health objective under article 2.2 of the Technical Barriers to Trade Agreement
- The claim that plain packaging is an unjustifiable encumbrance by special requirements on the use of trademarks in the course of trade under article 20 of the TRIPS Agreement
- Seven other claims relating to intellectual property, centred on the relationship between the use of trademarks and intellectual property rights protection provided under the TRIPS Agreement

Cuba also brought a claim under the General Agreement on Tariffs and Trade 1994 art IX:4, which relates to how requirements for origin marks (i.e. markings indicating where a product was made) should be applied to imports.

Australia won on all ten claims. The panel’s conclusions can be summarised as follows:

- Plain packaging is no more trade-restrictive than necessary under TBT article 2.2 for the legitimate objective of protecting public health, given its contribution to reducing the use of and exposure to tobacco products, the gravity of failing to address the use of and exposure to tobacco products, and the absence of less trade-restrictive alternatives²
- Plain packaging is not ‘unjustifiable’ under TRIPS article 20, because the contribution it makes to the protection of public health provides sufficient reasons for the resulting encumbrances on trademarks³

² Paras 7.1724-7.1732.

³ Paras 7.2604-2605.

- There is no right to use a trademark or geographical indication under TRIPS, and prohibitions on use do not engage protections relating to registration or infringement of trademarks or unfair competition⁴
- GATT art IX:4 does not concern whether or not origin marks can be used, but only the procedural requirements regarding how they should be applied⁵

The panel also made important factual findings in relation to Australia’s tobacco plain packaging laws, which can be summarised as follows:

- Tobacco use and exposure to tobacco smoke is an exceptionally grave public health problem⁶
- Packaging and branding of tobacco products is a means of promoting tobacco products⁷
- Tobacco product promotion drives primary demand (i.e. attracts new smokers and encourages tobacco product use), not simply secondary demand (i.e. choice of brand by existing smokers)⁸
- Plain packaging is based on a consistent body of evidence⁹
- Plain packaging reduces the appeal of tobacco packaging and increases the effectiveness of graphic health warnings¹⁰
- Plain packaging has contributed to decreases in smoking prevalence and tobacco consumption¹¹
- Plain packaging has not increased illicit trade¹²
- Plain packaging had not led to increased price competition between brands as a result of ‘downtrading’ (i.e. consumers switching to cheaper tobacco products)¹³
- Plain packaging does not cause actual consumer confusion between different brands of tobacco products¹⁴

Article 2.2 of the Technical Barriers to Trade Agreement

The complainants claimed that plain packaging violated Article 2.2 of the Technical Barriers to Trade Agreement (TBT) because it was more trade-restrictive than necessary for the legitimate objective of protecting public health. The relevant part of TBT article 2.2 reads:

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 fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: ... protection of human health or safety’

⁴ Paras 7.1978, 7.1664-7.1769, 7.1894-7.1897, 7.2026, 7.2098, 7.2116-7.2119, 7.2794, 7.2860.

⁵ Paras 7.3027-3028, 7.3068-7.3070.

⁶ Paras 7.1310, 7.2592.

⁷ Paras 7.734-7.737.

⁸ Paras 7.744-7.747.

⁹ Para 7.778, 7.825, 7.927, 7.930-7.931.

¹⁰ Para 7.958.

¹¹ Para 7.979, 7.986.

¹² Paras 7.993-7.1023.

¹³ Para 7.1197-7.1198, 7.1218.

¹⁴ Paras 7.2723, 7.2764, 7.2794, 7.2867-7.2868.

As outlined by the panel and in previous WTO jurisprudence, the approach for assessing whether or not a measure is more trade restrictive than necessary to fulfil a legitimate objective under TBT article 2.2 involves¹⁵:

- Determining whether or not the measure is a technical regulation, and therefore whether the TBT agreement is applicable to it
- Identifying whether the measure is for a legitimate objective
- Weighing and balancing:
 - the degree of contribution the measure makes to the objective, against
 - the degree of trade-restrictiveness of the measure, taking into account
 - the nature of the risks and the gravity of the consequences of non-fulfilment, and
 - any alternative measures reasonably available to the responding state

In addition, TBT article 2.5 states that if a technical regulation is based on an international standard, it is rebuttably presumed to be consistent with article 2.2.

The panel found that there was no violation of TBT article 2.2. In reaching this conclusion, it found that:

- the plain packaging measures were a technical regulation
- plain packaging was for the objective of improving public health by reducing the use of and exposure to tobacco products
- plain packaging was apt to and did contribute to this objective
- plain packaging was trade-restrictive to the extent that by successfully reducing consumption of tobacco products, it would also reduce overall volume of imports
- the consequences of not fulfilling the objective of reducing the use of and exposure to tobacco products would be extremely grave
- there was no less trade-restrictive alternative reasonably available to Australia.

Whether plain packaging measures are a technical regulation

The panel found that Australia’s plain packaging measures, including the Tobacco Plain Packaging Act, the Tobacco Plain Packaging Regulations, and related amendments to the Trade Marks Act, together constituted a technical regulation, because they either regulated the appearance of tobacco products and packaging, and therefore laid down mandatory product characteristics for an identifiable group of products, or were ‘applicable administrative provisions’ for doing so.¹⁶ The TBT Agreement therefore applied to them.

Objective of the measure

The parties agreed that the objective of tobacco plain packaging was to protect public health, which is explicitly recognised as a legitimate objective under article 2.2, but disagreed on how the public health objective was to be characterised. The complainants sought to characterise the objective as reducing smoking prevalence, while Australia sought to characterise the objective as also including the Act’s mechanisms – reducing the appeal of tobacco packaging, improving the effectiveness of graphic health warnings, and reducing the ability of the tobacco product packaging to mislead.

¹⁵ Paras 7.26-7.46.

¹⁶ Paras 7.171-7.182.

The panel decided that the objective of tobacco plain packaging is to reduce the use of, and exposure to, tobacco products.¹⁷ However, the mechanisms were relevant to assessing the degree to which plain packaging contributed to that objective.¹⁸

Whether rebuttable presumption for measures based on international standards applies

The panel considered whether or not the Article 11 and 13 guidelines were an ‘international standard’, and whether tobacco plain packaging should therefore be rebuttably presumed to be consistent with TBT article 2.2 because it implemented those guidelines.

An international standard is:¹⁹

- a ‘document’
- which is ‘approved by a recognized body’;
- which provides ‘rules’, ‘guidelines’, or ‘characteristics’ for ‘products’ or ‘related processes and production methods’;
- which is for ‘common and repeated use’;
- and for which compliance is ‘not mandatory’

The panel found that the provisions of the WHO FCTC guidelines which recommend plain packaging did not meet this definition of an ‘international standard’ under article 2.5 of the TBT Agreement, because they were not for ‘common and repeated use’.²⁰ It considered that the paragraphs of the guidelines recommending plain packaging needed to be understood in light of the fact that they described modalities of implementing international obligations, and thus allowed parties bound by those obligations some degree of flexibility to implement them in a way that was appropriate to their national context (for example, two WHO FCTC parties could both adopt standardised packaging, but standardise the packaging in different ways).²¹ As such, the guidelines were not for ‘common and repeated use’, because they were not intended to establish a ‘maximum degree of order’ across countries, but to guide effective implementation of a binding international obligation for a particular WHO FCTC party.²² They therefore did not meet the TBT definition of an international standard.

The panel emphasised that its findings on the international standard argument did not change the fact that the burden of proof for TBT article 2.2 lay on the complainants or the relevance of the WHO FCTC to its reasoning on other provisions.²³

Degree of contribution the measure makes to the objective

The panel assessed whether or not tobacco plain packaging contributes to the protection of public health. It found that the plain packaging measures were ‘apt to, and do in fact, contribute’ to their public health objective of reducing the use of and exposure to tobacco products.²⁴ The panel’s review of the evidence is extensive and discussed in more detail at pages 17-23 below.

¹⁷ Para 7.232.

¹⁸ Para 7.229.

¹⁹ Para 7.281.

²⁰ Para 7.388.

²¹ Paras 7.386-7.387.

²² Paras 7.387-7.388.

²³ Paras 7.403-7.405, 7.412-7.417.

²⁴ Para 7.1025.

The panel noted that the degree of contribution the measure makes to its objective is to be determined from the ‘design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure.’²⁵ The types of evidence the panel considered for each of these are discussed more at pages 17-20 below.

Design, structure, and operation

In relation to the design, structure, and operation of the measure, the panel found that there was a credible pre-implementation evidence base (discussed more at pages 20-22 below) suggesting that plain packaging would reduce the appeal of tobacco product packaging, increase the effectiveness of graphic health warnings, and reduce the ability of tobacco product packaging to mislead consumers, and that Australia had based its measure on this evidence.

Evidence relating to the application of the measure

The panel considered the post-implementation evidence on plain packaging (discussed more at pages 22-23 below). It concluded that the evidence before it was consistent with the view that plain packaging, together with large GHWs, had reduced the appeal of tobacco products and made GHWs more noticeable, and that it had accelerated decreases in smoking prevalence and in cigarette sales.²⁶

The panel acknowledged that it was difficult to isolate the effects of plain packaging from those of other measures, especially the increase in size of the GHWs. It noted that it is inevitable that where tobacco control measures were implemented as a comprehensive suite of policy measures, other measures in the suite would also affect relevant outcomes, which would affect the degree to which the effects of plain packaging could be isolated from those of other measures.²⁷

However, the panel found that it was not necessary to isolate impacts or demonstrate short-term effects to support a finding that plain packaging contributed to its objectives given the regulatory context of the measure. It cited the Appellate Body’s statement in *Brazil – Tyres* that:

‘certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions — for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time — can only be evaluated with the benefit of time.’²⁸

It agreed with the Appellate Body that where this was the case, the kinds of evidence that are relevant to determining the contribution of a measure to its objective could include qualitative and quantitative evidence of past or present impact, projections of future impact, and hypotheses/reasoning supported by an evidentiary basis.²⁹

²⁵ Para 7.484, citing Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, AB-2012-3, WT/DS384/AB/R (29 June 2012) para 373.

²⁶ Paras 7.958, 7.963, 7.972, 7.979, 7.986.

²⁷ Paras 7.980-7.986.

²⁸ Para 7.981, citing Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, AB-2007-4, WT/DS332/AB/R (3 December 2007) para 151.

²⁹ Para 7.982.

The panel considered that overall, the available post-implementation evidence supported the proposition that plain packaging contributes to its objectives, and that this was confirmed by accelerated decreases in prevalence and tobacco consumption post-implementation.³⁰

Overall conclusions on contribution

The panel concluded that Australia’s tobacco plain packaging measures, in combination with other measures including large GHWs, were ‘apt to, and do in fact, contribute to Australia’s objective of reducing the use of, and exposure to, tobacco products’³¹

Trade restrictiveness

The panel considered that in the absence of a ‘de jure restriction on the opportunity for imports to compete in the market or of any alleged discrimination’ in respect of such competitive opportunities, a ‘sufficient demonstration’ was required to show a ‘limiting effect’ on international trade.³² The panel found that tobacco plain packaging was trade-restrictive, but rejected all three arguments by the complainants for why this was the case:

- *Effect on competitive environment in the Australian market:* the complainants argued that plain packaging made it more difficult for new brands to compete on the market because they would not be able to establish consumer awareness through branding. The panel found, however, that it was not clear that this would have a limiting effect on trade. The reduced ability for new entrants to use branding to attract a market would be counterbalanced by their increased ability to compete due to the reduced brand associations of established brands, and it was not clear what the relative size of each effect would be.³³
- *Effects on the level of trade in tobacco products:* the complainants argued that consumers would ‘down-trade’ to cheaper tobacco products once there was no branding to entice them to use more expensive brands, and thus the overall value of imports in tobacco products would be reduced. However, the panel found that the complainants had not demonstrated that there had been a decline in the value of the market for imported tobacco products as a result of ‘downtrading’ or increased price competition.³⁴
- *Costs of complying with regulatory requirements:* the complainants argued that plain packaging imposed compliance costs on manufacturers. The panel considered that the complainants had not demonstrated that the cost of complying with tobacco plain packaging would be of such a magnitude or nature as to have a limiting effect on international trade, particularly since such costs were largely a once-off expenditure.³⁵ The panel also held that any penalties for failure to comply with plain packaging did not create an additional limiting effect over and above any limiting effect from the measure itself.³⁶

Instead, the panel concluded that the plain packaging measures were trade restrictive because they led to a decrease in the overall consumption of tobacco products, as a result of their contribution to overall reductions in tobacco use and exposure. As tobacco products in Australia are entirely

³⁰ Paras 7.1023-7.1043.

³¹ Para 7.1025.

³² Para 7.1075.

³³ Paras 7.1172-7.1187.

³⁴ Paras 7.1218, 7.1224-7.1225.

³⁵ Para 7.1244.

³⁶ Para 7.1254.

imported, this would reduce the overall volume of imports, thus having a limiting effect on international trade.³⁷

Nature of the risks that non-fulfilment would create and the gravity of their consequences

The panel described the nature of the risk if the objective of plain packaging was not fulfilled as the risk that ‘public health would not be improved, as the use of, and exposure to, tobacco products would not be reduced.’³⁸ It found that the consequences of this risk were extremely grave, considering that it is ‘widely recognised, and undisputed in these proceedings, that the public health consequences of the use of, and exposure to, tobacco, including in Australia, are particularly grave’,³⁹ as recognised by the parties, in the WHO FCTC, in various WHO documents, and in scientific literature.⁴⁰ The panel recalled previous WTO jurisprudence that health is ‘vital and important in the highest degree’, and that WTO panels had previously found smoking to pose ‘serious risk[s] to human health’.⁴¹

The panel also found that the ‘consequences of not fulfilling the objective of reducing the use of, and exposure to, tobacco products, are especially grave for youth’,⁴² and noted that it was uncontested by the parties to the dispute that tobacco use disproportionately harmed Aboriginal and Torres Strait Islander peoples.⁴³

Whether less trade-restrictive alternatives were available to Australia

The panel considered whether or not less trade-restrictive alternatives were open to Australia, as part of an overall assessment of whether or not plain packaging was more trade-restrictive than necessary. Examining whether or not they would be less trade restrictive, make at least an equivalent contribution to public health; and be reasonably available to Australia,⁴⁴ the panel rejected the following four alternatives proposed by the complainants:

- *Increasing the minimum legal purchasing age* from 18 to 21 years of age, because such a measure would be a complement to plain packaging rather than a substitute – a minimum age increase would affect availability of tobacco products for young people, whereas plain packaging would affect the advertising and promotion of tobacco products to consumers across all age groups. It was also not clear that an increase in the minimum legal purchasing age was less trade-restrictive than plain packaging, given that it would also reduce imports by an amount commensurate to its contribution to reductions in tobacco use.⁴⁵
- *Additional tax increases*, because tax measures were complements to tobacco plain packaging, because they affected price rather than advertising and promotion of tobacco

³⁷ Paras 7.1208, 7.1255.

³⁸ Para 7.1287, 7.1297.

³⁹ Para 7.1310.

⁴⁰ Paras 7.1298-7.1309.

⁴¹ Para 7.1311, citing Report of the Appellate Body, [European Communities – Measures Affecting Asbestos and Asbestos Containing Products](#), AB-2000-11, WT/DS135/AB/R (12 March 2001) para 172; Report of the Appellate Body, [Brazil – Measures Affecting Imports of Retreaded Tyres](#), AB-2007-4, WTDS332/AB/R (3 December 2007), para 144; Panel Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/R (2 September 2011) para 7.1, 7.347; GATT 1947 Panel Report, [Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes](#), DS10/R – 37S/200 (7 November 1990) para 73.

⁴² Para 7.1317.

⁴³ Para 7.1318.

⁴⁴ Paras 7.1363-7.1375.

⁴⁵ Paras 7.1417, 7.1458-7.1464, 7.1468-7.1471.

products. Both tax and restriction of advertising and promotion were pillars of Australia’s comprehensive approach to tobacco control, and removing one pillar would weaken the total effect by reducing synergies between its components. In any case, it was not clear that taxation was less trade-restrictive than plain packaging, to the extent that a tax increase would be calibrated to achieve the same decrease in tobacco consumption and therefore tobacco imports.⁴⁶

- *Improved social marketing campaigns*, because such campaigns were already being implemented by Australia, were complementary rather than substitutable for removing promotion on packaging, and would be equally trade-restrictive to the extent that they reduced imports of tobacco products by the same amount. It was also not clear that changing specific aspects of how Australia conducted its social marketing would make a contribution equivalent to that of plain packaging combined with existing social marketing measures.⁴⁷
- *Pre-vetting tobacco packaging* prior to entry to the market to ensure that they did not contain misleading elements. The panel found that a pre-vetting scheme was not necessarily less trade-restrictive because to the extent that it reduced consumption it would also reduce imports, and because it introduced significant additional compliance costs for industry participants. It would also not make an equivalent contribution to the health objective.⁴⁸

The panel also rejected the argument that applying all four of these alternatives together would be a less trade-restrictive alternative, noting that Australia was in fact already pursuing a comprehensive approach, and that the four alternatives cumulatively applied still failed to adequately address the use of packaging as promotion, misleading packaging design, and the effectiveness of GHWs.⁴⁹

Conclusion on TBT article 2.2

The panel thus concluded that while plain packaging was trade-restrictive, it was for a legitimate objective, contributed to that public health objective, addressed an extremely grave risk, and that there were no less trade-restrictive alternatives. Weighing all of these factors together, the panel concluded that there was no violation of TBT article 2.2.⁵⁰

Article 20 of the Agreement on Trade-Related Aspects of Intellectual Property Rights

The complainants made a large number of intellectual property-related claims, of which the one the panel most extensively discussed was the claim that plain packaging breached article 20 of TRIPS. The relevant part of TRIPS article 20 reads:

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.

The panel considered that article 20 would be breached if the following three criteria were met:⁵¹

⁴⁶ Paras 7.1491-7.1495, 7.1525-7.1531, 7.1542-7.1545.

⁴⁷ Paras 7.1574-7.1576, 7.1604, 7.1610-7.1615, 7.1620-7.1624.

⁴⁸ Para 7.1654, 7.1680-7.1685, 7.1713-7.1716.

⁴⁹ Paras 7.1718-7.1723.

⁵⁰ Paras 7.1725-7.1726.

⁵¹ Para 7.2172.

- first, a member must adopt a measure that imposes ‘special requirements’
- second, these special requirements must ‘encumber the use of a trademark in the course of trade’
- third, the resulting encumbrances on trademarks must be ‘unjustifiable’

The burden of proof for each of these elements lay on the complainants.⁵²

The panel found that plain packaging was a special requirement that encumbered the use of a trademark in the course of trade, but that it was justifiable, and therefore not a breach of article 20.

‘Special requirements’

The panel defined a ‘special requirement’ as a condition which must be complied with; has a close connection with or specifically addresses the use of trademarks; and is limited in application.⁵³ It considered that special requirements could include both requirements that trademarks be used in a certain way, and prohibitions on their use altogether. As such, the relevant special requirements included both those aspects of plain packaging that standardise the appearance of word marks, and those that prohibit other trademarks such as logos, images, and figurative and stylised word marks.⁵⁴

‘Encumber the use of a trademark in the course of trade’

The panel likewise considered that ‘encumbrances’ included both total prohibitions, and requirements or restrictions on how trademarks should be displayed.⁵⁵

The panel found that the uses of trademarks prohibited by plain packaging constituted use in the course of trade.⁵⁶ The panel found that the course of trade covered not only advertising functions up to the point of retail sale, but also advertising functions served by trademarks after the final sale,⁵⁷ and that the relevant use included all commercial uses of the trademarks, not simply use to distinguish the products of one undertaking from those of another.⁵⁸

Unjustifiability

The panel rejected the article 20 claim on the grounds that the plain packaging measures were not unjustifiable.⁵⁹ It examined the ordinary meaning of the word ‘unjustifiable’, as well as the context, object and purpose of the TRIPS Agreement. It noted that the TRIPS Agreement preamble, article 7, and article 8 all acknowledge the importance of balancing the interests of trademark holders with other societal interests, including public health.⁶⁰

It also noted that the Doha Declaration on TRIPS and Public Health, adopted by the Ministerial Council in 2001, is a ‘subsequent agreement’ to TRIPS within the meaning of article 31(3)(a) of the Vienna Convention on the Law of Treaties.⁶¹ According to the panel, this confirmed that the object and purpose of TRIPS is to be informed by articles 7 and 8,⁶² which recognise the importance of

⁵² Para 7.2169.

⁵³ Para 7.2231.

⁵⁴ Para 7.2231, 7.2243, 7.2245.

⁵⁵ Para 7.2236-7.2239, 7.2244-7.2245.

⁵⁶ Para 7.2291-7.2292.

⁵⁷ Para 7.2260-7.2264.

⁵⁸ Para 7.2282, 7.2284-7.2286.

⁵⁹ Para 7.2604-7.2605.

⁶⁰ Para 7.2396-7.2411.

⁶¹ Para 7.2409-7.2410.

⁶² Para 7.2408, 7.2411.

‘social and economic welfare, and a balance of rights and obligations’ and the right of members to adopt measures necessary to protect public health respectively. The panel also considered that the term ‘unjustifiably’ must be read in light of its context, including the fact that different provisions in the WTO Agreements use different terms such as ‘necessary’, ‘justifiable’, ‘arbitrary and unjustifiable’, and that these differences in terms reflect deliberate choices by the treaty negotiators.⁶³

The panel decided that the assessment of whether or not a measure is unjustifiable is a case-by-case assessment, with a standard of review distinct from both that of whether or not a measure is ‘necessary’ under the GATT and TBT, and that of whether a measure is ‘arbitrary and unjustifiable’ under the GATT article XX chapeau.⁶⁴ It stated that the assessment of whether or not a general regulatory measure restricting trademarks is unjustifiable should be considered by reference to their impacts on trademarks as a whole, and was not an individualised assessment per trademark.⁶⁵

Taking all of these factors into account, the panel established the following three criteria for determining whether or not an encumbrance by special requirements is ‘unjustifiable’:⁶⁶

- The nature and extent of the encumbrance resulting from the special requirements, bearing in mind the legitimate interest of the trademark owner in using its trademark in the course of trade and thereby allowing the trademark to fulfil its intended function
- The reasons for which the special requirements are applied, including any societal interests they are intended to safeguard
- Whether these reasons provide sufficient support for the resulting encumbrance

Applying these criteria to tobacco plain packaging in Australia, the panel concluded that plain packaging was not unjustifiable, because the reasons for adopting plain packaging sufficiently supported the resulting encumbrances on the use of trademarks in the course of trade.

Nature and extent of encumbrance

The panel found that plain packaging significantly encumbered the use of certain trademarks for the purposes of extracting economic value from the use of design features, but this had not impacted consumers’ ability to distinguish tobacco products or trademark holders’ ability to maintain registration rights or prevent infringement of trademarks.⁶⁷ It found that tobacco trademark holders had a legitimate interest (though not a legal right) in using the trademark, and noted that the prohibitions on using stylised and figurative marks had far-reaching consequences for the exploitation of economic value from such marks, although this was mitigated in practice by the allowance of word marks on packaging to distinguish brands of tobacco products from each other.⁶⁸ The panel noted that there was no indication that the value of trade in tobacco products had been reduced by either increased price competition or ‘downtrading’, and that the complainants had not suggested that consumers were actually unable to distinguish between products.⁶⁹ The panel also noted that the plain packaging laws preserved the ability to maintain registration of a trademark.⁷⁰

⁶³ Paras 7.2415-7.2422.

⁶⁴ Para 7.2431; paras 7.2419-7.2422..

⁶⁵ Para 7.2505-7.2508.

⁶⁶ Para 7.2430.

⁶⁷ Paras 7.2556-7.2574

⁶⁸ Paras 7.2569-7.2570.

⁶⁹ Paras 7.2570-7.2573.

⁷⁰ Para 7.2574.

Reasons for the special requirements, and whether or not they provide sufficient support

The panel considered that there was a strong societal interest in prohibiting and restricting the use of the relevant trademarks, and that the reasons for applying the special requirements therefore provided sufficient support for the resulting encumbrances.

The panel noted that it was undisputed that the relevant special requirements ‘address an exceptionally grave domestic and global health problem involving a high level of preventable morbidity and mortality’.⁷¹ It found that the special requirements, as part of plain packaging and as part of a comprehensive tobacco control strategy, ‘are capable of contributing, and do in fact contribute, to Australia’s objective of improving public health by reducing the use of, and exposure to, tobacco products’, adopting its findings on the contribution of plain packaging to public health from its discussion on TBT article 2.2.⁷² This ‘suggest[ed] that the reasons for which these special requirements are applied provide sufficient support for the application of the resulting encumbrances on the use of trademarks’.⁷³

The panel emphasised that the trademark restrictions were an integral part of plain packaging, recalling its earlier findings that the removal of design features was ‘apt to reduce the appeal of tobacco products and increase the effectiveness of GHWs’.⁷⁴ Restricting figurative features and signs, including those that were the subject of trademarks, as well as standardising tobacco packaging and product appearance overall, was ‘integral’ to this approach.⁷⁵ As such, the reasons for the special requirements sufficiently supported their imposition.

The panel confirmed the importance of such restrictions on trademarks by reference to the WHO FCTC and its guidelines. It pointed out that plain packaging is recommended under the article 11 and 13 guidelines, and that one of Australia’s intentions in enacting plain packaging was to give effect to certain obligations under the WHO FCTC. As such, ‘the importance of the public health reasons for which the trademark-related special requirements under the TPP measures are applied is further underscored by the fact that Australia pursues its domestic public health objective in line with its commitments under the FCTC, which was “developed in response to the globalization of the tobacco epidemic” and has been ratified in 180 countries’.⁷⁶

Alternative measures and TRIPS article 20

The complainants argued that assessing whether or not an encumbrance is ‘unjustifiable’ requires an assessment of alternative measures a WTO member could have adopted, raising the same four alternative measures as under TBT article 2.2.⁷⁷ The panel rejected the idea that a similarly intensive review of alternatives as required under TBT article 2.2 is required under article 20 of TRIPS, noting that ‘unjustifiably’ ‘provides a degree of latitude to a Member to choose an intervention to address a policy objective ... as long as the reasons sufficiently support any resulting encumbrance’.⁷⁸ However, it noted that alternatives may inform an assessment of these reasons.⁷⁹ It referred back to its

⁷¹ Para 7.2592

⁷² Para 7.2604.

⁷³ Para 7.2604.

⁷⁴ Para 7.2593.

⁷⁵ Para 7.2593

⁷⁶ Para 7.2596.

⁷⁷ Para 7.2599.

⁷⁸ Para 7.2598.

⁷⁹ Para 7.2598.

conclusions under TBT article 2.2 that none of the four alternatives ‘would be apt to make a contribution to Australia’s objective equivalent to that of the TPP measures’.⁸⁰

Conclusions on unjustifiability

The panel concluded that Australia had not acted beyond the bounds of its latitude in choosing to implement plain packaging.⁸¹ The tobacco plain packaging measures, including their trademark restrictions, were ‘an integral part of Australia’s comprehensive tobacco control policies, and designed to complement the pre-existing measures’.⁸² They were ‘capable of contributing, and do in fact contribute, to Australia’s objective of improving public health by reducing the use of, and exposure to, tobacco products’.⁸³ As such, the reasons for adopting the special requirements ‘provide[d] sufficient support’ for the resulting encumbrances on trademarks.⁸⁴

The panel confirmed its findings by noting that Australia pursued its domestic public health objective ‘in line with the emerging multilateral public health policies in the area of tobacco control as reflected in the FCTC and the work under its auspices, including the Article 11 and Article 13 FCTC Guidelines’.⁸⁵

Other intellectual property claims

The panel rejected seven other intellectual property claims made by the complainants, each of which dealt with the relationship between the use of a trademark and other obligations under TRIPS. These claims can be grouped into three categories: claims relating to trademark registration, claims relating to the impact of non-use on the ability to prevent infringement of trademarks, and claims regarding unfair competition and geographical indications.

Claims relating to trademark registration

The panel found that prohibiting the use of trademarks did not breach TRIPS obligations regarding registration of trademarks:

- Prohibiting the use of trademarks permitted in other countries did not violate the obligation to protect trademarks ‘as-is’ under article 6quinquies of the Paris Convention on Industrial Property, incorporated into the TRIPS Agreement via TRIPS article 2.1, because this was an obligation to accept trademarks for registration in the same form as registered in other countries, and not an obligation to allow for their use in the same manner permitted in other countries⁸⁶
- Plain packaging measures are not an obstacle to the registration of a trademark on the basis of the nature of the product under TRIPS article 15.4, because the obligation under TRIPS article 15.4 does not govern the use of a trademark either before or after registration⁸⁷

⁸⁰ Para 7.2600.

⁸¹ Para 7.2604.

⁸² Para 7.2604.

⁸³ Para 7.2604.

⁸⁴ Para 7.2604.

⁸⁵ Para 7.2604.

⁸⁶ Para 7.1665-7.1769, 7.1774.

⁸⁷ Paras 7.1857, 7.1864-7.1868, 7.1873-7.1874, 7.1894-7.1897, 7.1912-7.1913.

Claims relating to the impact of non-use on the ability to prevent infringement

Although the complainants accepted that there was no right to use a trademark, they argued that the right to prevent third parties from infringing the trademark in TRIPS article 16.1 implied that WTO members should allow a ‘minimum level of use’ in order to maintain the distinctiveness of a trademark, and thus maintain the market conditions required to bring an infringement claim. The panel rejected these arguments, affirming that trademark rights under TRIPS article 16.1 are negative rights that give rise only to a right to prevent infringement of trademarks by third parties.⁸⁸ The obligation under 16.1 was to provide a legal right to challenge such infringement if the legal definition of infringement was met, and not a guarantee of market conditions that might affect whether or not infringement occurred on the facts.⁸⁹ Article 16.1 therefore did not protect the distinctiveness of a given trademark, which ‘inevitably fluctuates according to market conditions and the impact of regulatory measures on those market conditions’.⁹⁰ Plain packaging therefore did not affect any rights protected under article 16.1.⁹¹

The panel also found that there was no breach of article 16.3 of TRIPS, which provides additional protections against infringement for ‘well-known’ trademarks.⁹²

Claims regarding unfair competition and geographical indications

The panel found that plain packaging did not violate the obligation to provide protection against unfair competition in article 10bis of the Paris Convention (incorporated into the TRIPS Agreement by TRIPS article 2.1). It found that plain packaging was not itself an act of unfair competition, nor did it compel any private actors to engage in acts of unfair competition.⁹³

The panel likewise found that the plain packaging measures did not constitute or require private actors to undertake acts of unfair competition in relation to geographical indications under TRIPS article 22(b),⁹⁴ nor had they resulted in diminished protection for any particular geographical indication under TRIPS article 24.3.⁹⁵

Article IX:4 of the General Agreement on Tariffs and Trade

Finally, the panel rejected Cuba’s claim under GATT article IX:4, finding the plain packaging measures did not fall within the scope of this provision.⁹⁶

The panel therefore dismissed all claims brought by the complainants.⁹⁷

The panel’s factual findings and its treatment of the evidence

In the course of reaching its conclusions, the panel assessed an extraordinary amount of evidence and made a large number of factual findings, most significantly in relation to the contribution of plain

⁸⁸ Para 7.1978.

⁸⁹ Para 7.1999-7.2002, 7.2010-7.2016.

⁹⁰ Para 7.2015.

⁹¹ Para 7.2031-7.2032, 7.2038-7.2040, 7.2050-7.2051.

⁹² Para 7.2116-7.2123, 7.2129-7.2130.

⁹³ Paras 7.2724, 7.2765, 7.2795-7.2796.

⁹⁴ Paras 7.2861, 7.2870.

⁹⁵ Paras 7.2950, 7.2956-7.2957.

⁹⁶ Para 7.3021, 7.3027-7.3028.

⁹⁷ Paras 8.1-8.3.

packaging to the protection of public health, but also in relation to the impact of plain packaging on the market for tobacco products. The panel’s detailed discussion of this evidence matters not only to the WTO case, but also to legal challenges and legislative developments in other jurisdictions. We discuss some of these findings below.

Contribution of plain packaging to health outcomes

The major factual finding of the panel was that Australia’s plain packaging laws were ‘apt to, and do in fact, contribute’ to their goal of protecting public health by reducing use of and exposure to tobacco products.⁹⁸

The panel’s discussion of this finding is very detailed, with 150 pages in the panel report reviewing the evidence of the impact of plain packaging on public health, and a further 150-page annex analysing the post-implementation evidence. The panel’s analysis can be divided into:

1. Its discussion of how to approach the evidence
2. Its analysis of the pre-implementation evidence base for plain packaging, and
3. Its analysis of the post-implementation impact of plain packaging in Australia.

Approach to the evidence

The panel started by considering how it should approach the evidence. At the time of its implementation in Australia, plain packaging had never been implemented, and there was therefore no evidence relating to its application in real-world settings. However, there were a significant number of studies showing the impact of a potential plain packaging measure on the appeal of packaging, beliefs about harm, and the effectiveness of accompanying graphic health warnings. There was also an established evidence base linking those beliefs to initiation, cessation and relapse behaviours and thus tobacco consumption and exposure to tobacco smoke. This evidence base and the theoretical model of its contribution to public health formed the basis for Australia’s legislation (**figure 2**).

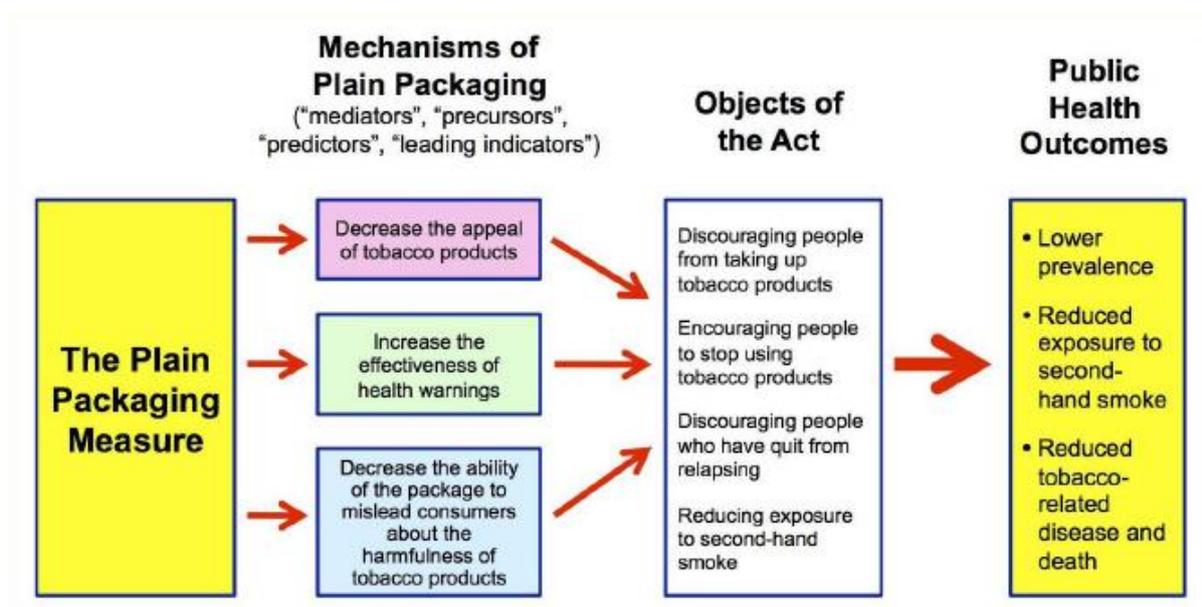


Figure 2: Australia’s model for how the plain packaging legislation contributes to the achievement of public health outcomes (from panel report)

⁹⁸ Para 7.1025.

By the time of the panel proceedings, there was also post-implementation evidence covering both these intermediate outcomes and the impact of plain packaging on prevalence of tobacco use. However, the panel was only able to consider evidence up to March 2016 (approximately 3 years post-implementation), while the measure was designed to work over a much longer time period, which meant that much of the measure's long-term impacts would not have been captured. Further, plain packaging had been implemented alongside several other measures, including increases in the size of graphic health warnings and staged annual increases in excise tax, and it was difficult to determine the relative contribution of each measure to overall decreases in prevalence and tobacco consumption.

As such, the relevant evidence to include for the purpose of determining the contribution of plain packaging to the protection of public health was heavily disputed between the parties, with Australia arguing that the focus should be on a wide range of impacts, and the complainants arguing that the panel should focus on prevalence only (with the parties also disputing the extent to which plain packaging had contributed to decreases in smoking prevalence in Australia).

The panel decided that it would take into account the totality of the evidence.⁹⁹ It identified three types of impacts relevant to its assessment¹⁰⁰ (see **figure 3**):

- Proximal outcomes, which demonstrate the measure's impact on the mechanisms through which it works, such as the effectiveness of GHWs, the ability of tobacco product packaging to mislead, and the appeal of tobacco products
- Distal outcomes, such as intentions and attempts to quit, which are intention or behaviour outcomes that are closely related to smoking behaviours such as intention, relapse, cessation, and exposure
- Smoking behaviours, such as initiation, cessation, and relapse

⁹⁹ Paras 7.499.

¹⁰⁰ Paras 7.490-7.491, fn 1443.

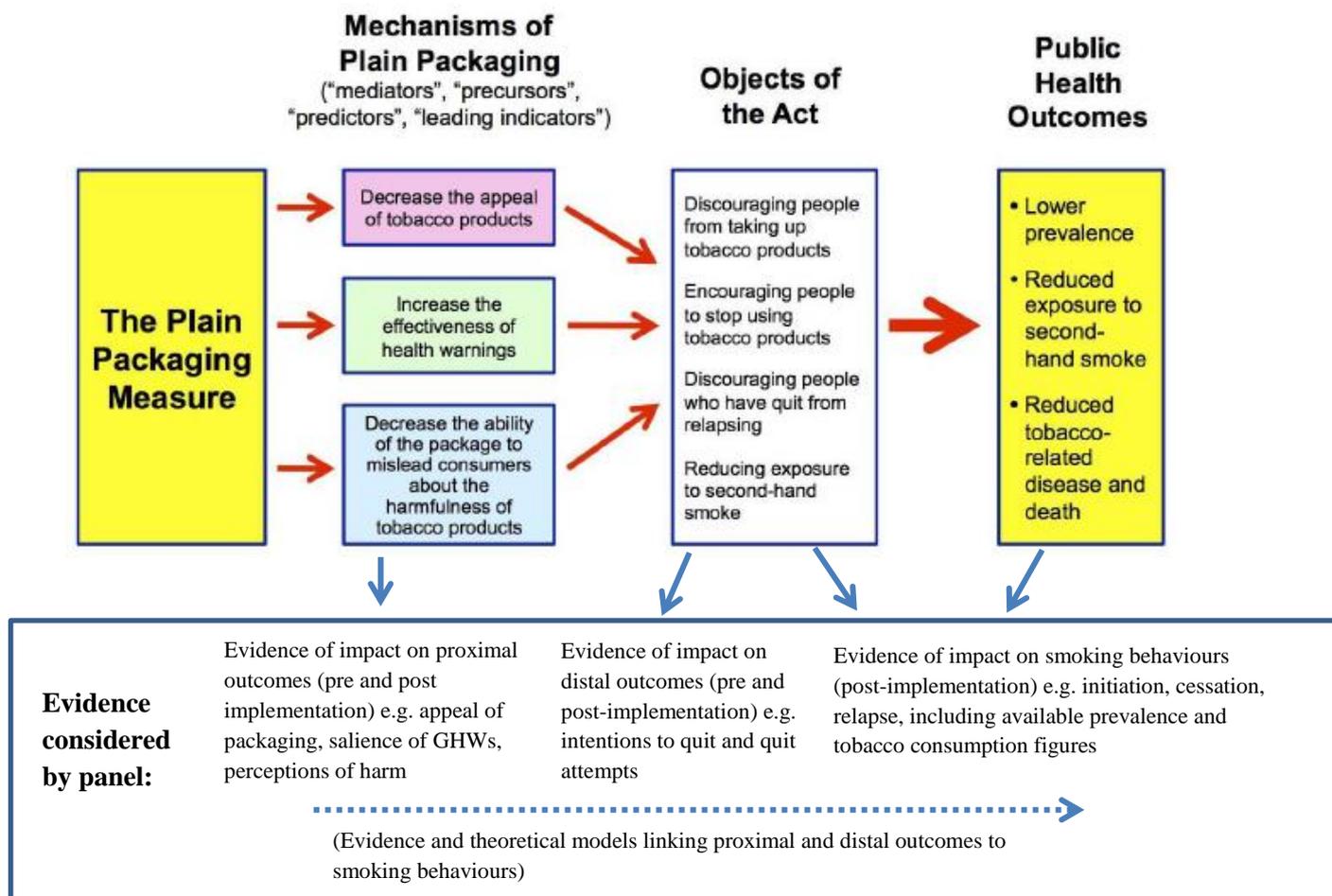


Figure 3: Types of evidence considered by the panel as compared to Australia’s legislative model

For each of these, both pre- and post-implementation evidence were relevant, while ‘the weight to be given to such evidence depends on the nature, quality and probative value of it’.¹⁰¹

The panel emphasised that its ‘role is not to make scientific determinations or otherwise seek to resolve scientific disputes’.¹⁰² Rather, its task was to make an ‘objective assessment, based on the arguments and evidence before [the panel], of the degree of contribution of the TPP measures to their objective’.¹⁰³

In undertaking this task, the panel considered that principles for assessing scientific evidence developed in the context of the Sanitary and Phytosanitary Standards Agreement would also be useful in this case. This included an assessment of whether the evidence ‘comes from a qualified and respected source’, has the ‘necessary scientific and methodological rigour’, is ‘legitimate science according to the standards of the relevant scientific community’, and/or an assessment of whether ‘the reasoning articulated on the basis of the scientific evidence is objective and coherent’.¹⁰⁴

¹⁰¹ Para 7.499.

¹⁰² Para 7.514.

¹⁰³ Para 7.514.

¹⁰⁴ Para 7.516-7.517.

Pre-implementation evidence

Complainant’s critiques of pre-implementation literature

The complainants made three general critiques of the pre-implementation literature base relied on by Australia, arguing that:¹⁰⁵

- the studies were not objective because they were conducted by a small community of researchers with particular professional preferences
- the studies could not say anything about the efficacy of plain packaging because they focused on proximal and distal outcomes rather than actual smoking behaviours
- the studies lacked methodological rigour

The panel rejected all three of these critiques. It found that

- There was no reason to question the objectivity of researchers working on plain packaging, who represented a wide range of institutions, countries, and disciplines. The convergence of results in the plain packaging literature reflected strength of conclusions on the merits rather than ‘publication bias’.¹⁰⁶
- It was not a flaw for Australia to rely on proximal/distal outcomes as one aspect of the evidence base informing its measures. Prior to implementation, it would have been impossible to conduct experiments on actual smoking behaviours for practical and ethical reasons. It was therefore not a flaw to use other indicators of potential impact, provided there was an adequate theoretical basis for linking proximal/distal outcomes to actual smoking behaviours.¹⁰⁷
- The complainants’ experts’ critique of the literature as lacking in methodological rigour did not reflect relevant scientific community standards.¹⁰⁸ The panel found that plain packaging was supported by comprehensive and independent reviews of the evidence outside the context of the WTO proceedings, and that the complainants had not presented a body of studies which contradicted the conclusions of the existing literature.¹⁰⁹

The panel concluded that there was a reputable body of research supporting Australia’s adoption of plain packaging; that while some studies may have had limitations, such limitations were unavoidable due to practical and ethical constraints and did not undermine the conclusions of the research as a whole; and that independent reviews had found the research to be robust.¹¹⁰

Whether plain packaging reduces appeal of packaging & consequences of this reduction

The panel found that:

- packaging was a form of promotion, as evidenced in tobacco industry internal documents, the WHO FCTC and its guidelines, and the claimants’ own submissions about the importance of branding to the sale of tobacco products¹¹¹

¹⁰⁵ Paras 7.540-7.541, 7.543, 7.552, 7.565.

¹⁰⁶ Para 7.544-7.551.

¹⁰⁷ Para 7.564.

¹⁰⁸ Para 7.569.

¹⁰⁹ Para 7.577, 7.580, 7.609-7.638.

¹¹⁰ Paras 7.628-7.635.

¹¹¹ Para 7.656-7.665.

- there was a credible body of scientific literature suggesting that plain packaging would reduce the appeal of tobacco products,¹¹² and Australia aligned its tobacco plain packaging laws to this evidence¹¹³
- there was evidence that reduced appeal of tobacco products leads to reduced smoking behaviours,¹¹⁴ including tobacco industry internal research on the importance of branding to promoting a product, and the agreement of experts on each side as to the ability of packaging design to convey particular associations with a product¹¹⁵
- branding was important not simply for competition between brands (secondary demand), but also for driving overall consumption of tobacco products by inducing people to smoke (primary demand), given the recognised importance to the tobacco industry of recruiting ‘replacement smokers’ to replace customers who quit smoking or died¹¹⁶
- it was important to the tobacco industry to recruit children and young people as these replacement smokers, given that most smokers started using tobacco products as children or young people¹¹⁷
- it was therefore unconvincing to argue that branding on tobacco packaging did not aim to attract new smokers, or that it had no effect on inducing children and young people to smoke¹¹⁸
- there was also credible evidence that removing the branding from packaging made it less likely that packaging would act as a cue for smoking, and that it would therefore make cessation easier and relapse less likely¹¹⁹

Whether plain packaging improves effectiveness of GHWs

The panel found that

- there were a significant number of studies, ‘emanating from qualified sources and favourably reviewed in external reviews’, which supported the proposition that plain packaging increased the effectiveness of graphic health warnings and reduced the ability of packaging design to detract from them¹²⁰
- there was ‘credible evidence’ that ‘that plain packaging of tobacco products may increase the salience of GHWs, by making them easier to see, more noticeable, and perceived as more credible and more serious’¹²¹
- it was not established that the large size of graphic health warnings meant that they could not be made more effective by plain packaging, or that levels of knowledge of smoking-related harms in Australia were such that increased salience of GHWs would make no difference to initiation, cessation or relapse behaviours¹²²

Whether plain packaging reduces ability of tobacco product packaging to mislead

The panel found that:

¹¹² Paras 7.633-7.638.

¹¹³ Paras 7.674-7.682.

¹¹⁴ Paras 7.744-7.747, 7.755, 7.774, 7.777-7.778.

¹¹⁵ Para 7.736-7.737.

¹¹⁶ Para 7.744.

¹¹⁷ Paras 7.744-7.747.

¹¹⁸ Para 7.747.

¹¹⁹ Paras 7.772-7.776.

¹²⁰ Para 7.825.

¹²¹ Para 7.869.

¹²² Paras 7.845, 7.869.

- standardised packaging reduced the ability of tobacco product packaging to mislead, and this reduction was greater than that which could be achieved through existing protections in Australian consumer law¹²³
- standardisation of packaging reduced the ability to mislead through comparative packaging design¹²⁴
- addressing misleading packaging design would have an impact on smoking initiation by young people and on cessation behaviours, since young people and smokers were particularly susceptible to incorrect perceptions about ‘lighter’ or ‘milder’ tobacco products being less harmful¹²⁵

Post-implementation evidence

Proximal outcomes

The panel reviewed the scientific evidence since the entry into force of tobacco plain packaging on the appeal of tobacco products, the effectiveness of graphic health warnings, and the ability of tobacco product packaging to mislead. It found that¹²⁶:

- plain packaging had reduced the appeal of tobacco products, and increased the effectiveness of graphic health warnings
- evidence on the impact on the ability of tobacco product packaging to mislead was more mixed and limited
- plain packaging reduced the appeal of tobacco products to youth, but that its effects on health beliefs and ability of tobacco product packaging to mislead were more mixed for youth

Quitting-related and other distal outcomes

The panel reviewed the evidence on quit attempts, and found that the post-implementation evidence on quit attempts was mixed, although there had been an increase in pack-avoidant behaviour amongst smokers and increases in calls to tobacco cessation services.¹²⁷

Smoking behaviours, including smoking prevalence and consumption and sales volume of tobacco products

The panel reviewed empirical evidence relating to smoking prevalence and tobacco consumption figures in Australia, and concluded that:¹²⁸

- Overall smoking prevalence decreases accelerated following the introduction of plain packaging
- Although it was not possible to separate the effects of plain packaging and the increase in graphic health warning sizes, there was econometric evidence that the acceleration of the decrease in prevalence figures could be attributed to plain packaging and graphic health warnings implemented together
- Overall decreases in cigarette sales accelerated after the introduction of plain packaging, and although it was not possible to separate GHWs and tobacco plain packaging it is likely that

¹²³ Paras 7.907-7.917.

¹²⁴ Paras 7.915, 7.924-7.925.

¹²⁵ Paras 7.920-7.923.

¹²⁶ Para 7.958.

¹²⁷ Para 7.963.

¹²⁸ Para 7.972.

the two together contributed to this acceleration, although the evidence on cigars was more limited

The tobacco epidemic and the role of tobacco product promotion in sustaining it

The gravity of the tobacco epidemic

Although the complainants did not contest the harmfulness of tobacco use and exposure to tobacco smoke, the panel affirmed the importance of addressing the global tobacco epidemic in its findings on the gravity and significance of tobacco use as a public health problem. It recognised that the health consequences of failing to address tobacco use and exposure were ‘exceptionally grave’ overall, and ‘especially grave for youth’.¹²⁹

The role of tobacco product promotion, including branding and packaging, in driving and sustaining the tobacco epidemic

The panel also confirmed that tobacco product promotion, including through tobacco product packaging, is a driver of the tobacco epidemic. In particular, it found that a key aim of tobacco product promotion is to attract new smokers, noting that

‘new smokers must continuously be recruited to maintain the primary demand for tobacco products at a level that will sustain the industry and “replace” those who cease to use the product because they have quit or died’.¹³⁰

It noted that branding, including packaging, was an important aspect of this recruitment:

‘designers of packaging innovations in the tobacco industry are conscious of the power of branding, including design and other elements of packaging, to elicit certain responses in the minds of consumers and imbue those products with images with which the prospective consumer would want to be associated.’¹³¹

Young people were particularly important targets of tobacco industry recruitment:

‘The evidence mentioned above indicates that it is essential that new users be recruited to smoke in order to sustain the industry, and that youth are strategically important in this regard given that adolescence represents the age at which initiation generally occurs, and because of the high degree of brand loyalty that young people exhibit over the course of their tobacco use.’¹³²

Impact of plain packaging on the market for tobacco products

The panel made factual findings regarding the impact of plain packaging on the market for tobacco products, many of which concern claims that are commonly made by the tobacco industry when opposing the introduction of plain packaging laws:

Illicit trade

The panel found that plain packaging had not led to an increase in illicit trade in tobacco products,¹³³ noting that it was not clear that the complainants’ estimate of the size of the illicit trade market in

¹²⁹ Paras 7.1310, 7.1317, 7.2592.

¹³⁰ Para 7.744.

¹³¹ Para 7.736.

¹³² Paras 7.745-7.746.

¹³³ Paras 7.993-7.1023.

Australia was accurate, it was not apparent that there was any relevant variation in the size of this market, and there was no indication that any variation was caused by plain packaging.¹³⁴ The panel also noted that illicit trade was driven by a variety of factors including law enforcement, ease of conducting illicit trade, and differences in prices between jurisdictions, and that Australia had a variety of other regulatory measures in place to address illicit trade.¹³⁵

Competition between brands of tobacco products

In relation to the impacts of plain packaging on competition between brands, the panel found:

- The complainants had not demonstrated that plain packaging had resulted in increased price competition as a result of downtrading¹³⁶
- The complainants had not demonstrated that plain packaging created barriers to entry for new brands¹³⁷
- There was no indication that consumers were actually unable to distinguish between brands of tobacco products as a result of plain packaging¹³⁸

Compliance costs

The complainants had not demonstrated that plain packaging created a barrier to trade through ongoing compliance costs for tobacco manufacturers.¹³⁹

Commentary

The panel's report is extremely comprehensive and covers a range of provisions and issues in the TBT and TRIPS Agreements that have never been considered in detail in WTO disputes before. It also encompasses a range of arguments that frequently appear in other fora, such as arguments on the scope of intellectual property rights or the assessment of evidence. We consider a few of its most significant themes and their implications below.

The panel's approach to assessing evidence

The panel's decision is notable for its extensive consideration of the scientific evidence in relation to plain packaging, and for its discussion of how such evidence should be assessed. The panel's factual findings and reasoning on the evidence are important not only in terms of the WTO dispute, but also because the panel comprehensively discusses arguments that the tobacco industry routinely makes when opposing the introduction of plain packaging legislation.

A key theme of the panel's reasoning is that the evidence supporting a measure must be considered in its regulatory context. This context is that plain packaging is part of a suite of complementary, interacting measures – plain packaging fills regulatory gaps in existing measures, such as the prohibition on tobacco advertising and promotion, and complements new measures, such as the increase in size of graphic health warnings. As such, the panel acknowledges that the impact of individual measures may be difficult to isolate, and does not require the exact quantification of the impact of plain packaging alone.

¹³⁴ Para 7.1023.

¹³⁵ Paras 7.1020-7.1022.

¹³⁶ Paras 7.1218, 7.1224-7.1225.

¹³⁷ Paras 7.1172-7.1187.

¹³⁸ Paras 7.2723, 7.2764, 7.2794, 7.2867-7.2868.

¹³⁹ Para 7.1244.

The panel also considers a wide range of evidence to be relevant to its assessment. It rejects the idea that only smoking prevalence is relevant to its assessment of whether or not plain packaging contributes to the protection of public health, given that tobacco control works over the long term and impacts on prevalence may not be visible for many years following implementation. It also reiterates the Appellate Body's remarks in *Brazil – Retreaded Tyres* that for measures whose potential effects are only apparent in the long-term, panels can consider not only quantitative and qualitative evidence from the past and present, but also quantitative projections and qualitative hypotheses/reasoning supported by an evidentiary basis to determine whether a measure contributes to its objective.¹⁴⁰ In the panel's application of these criteria, it accepts a wide range of evidence as relevant.

The panel's assessment of alternative measures

The panel also extensively discusses how to assess whether or not other measures might be an alternative to a challenged measure, for the purposes of assessing the overall necessity or justifiability of a measure. A key theme of this discussion is that in assessing whether or not a proposed alternative measure would make an equivalent contribution to public health, it is important to consider the extent to which the measures are complements, rather than substitutes. If that is the case, substituting the alternative measure for the challenged measure will not provide the same level of protection against the relevant risks, because the measures achieve their effect by acting in concert, and substituting one for the other may leave a regulatory gap. The panel also emphasises that it is necessary to query whether or not an alternative measure is actually less trade-restrictive.

Role of the WHO FCTC

The panel refers to the WHO FCTC extensively throughout its decision, and confirms that, as a treaty adopted by (then) 180 parties, the WHO FCTC can inform the panel's understanding of relevant aspects of tobacco control.

The panel notes that it is 'not uncommon' for non-WTO international instruments to be used as evidence of fact or in the interpretation of WTO provisions.¹⁴¹ It specifically notes that WTO panels and the Appellate Body have referred to the WHO FCTC on other occasions (including the cases of *US – Clove Cigarettes* and *Dominican Republic – Cigarettes*), and that the complainants themselves rely on the WHO FCTC to establish certain facts.¹⁴² The panel invokes the WHO FCTC and its guidelines in order:

To inform the panel's understanding of the measure

As Australia's plain packaging laws implement articles 11 and 13 of the WHO FCTC in line with recommendations in the relevant guidelines, the panel uses the WHO FCTC and references to the WHO FCTC in the legislation and explanatory memorandum of the Tobacco Plain Packaging Act to inform its understanding of how the measure works.

In particular, it cites them to support its findings on the regulatory purpose of the measure: that is, that the objective of plain packaging legislation is to improve public health by reducing the use of, and exposure to, tobacco products.¹⁴³

It also uses the WHO FCTC to inform its understanding of the regulatory context of the measure – in particular, that plain packaging is implemented as part of a comprehensive, multisectoral, and

¹⁴⁰ Para 7.981-7.982.

¹⁴¹ Para 7.412.

¹⁴² Paras 7.413-7.416.

¹⁴³ Para 7.243.

multifaceted approach, and that different tobacco control measures serve as complementary parts of this comprehensive approach.¹⁴⁴

To support the panel’s factual findings

The WHO FCTC, in combination with other evidence, supports many of the panel’s factual findings, including:

- The gravity of the relevant health risks, including the seriousness of the tobacco epidemic and the consequences of failing to address tobacco use and exposure to tobacco smoke¹⁴⁵
- The finding that packaging is a form of promotion,¹⁴⁶ and
- The finding that plain packaging is an important way to reduce the appeal of tobacco packaging design and its use in tobacco product promotion¹⁴⁷

The panel also refers to the WHO FCTC article 6 guidelines to confirm its understanding that tobacco taxation is an effective tobacco control measure and that it works best when implemented as part of a comprehensive suite of measures,¹⁴⁸ and to the article 11 guidelines to confirm its understanding that graphic health warnings are an effective tobacco control measure.¹⁴⁹

To support its findings on the justifiability of plain packaging

Finally, the panel invokes the WHO FCTC to support its findings on the justifiability of the encumbrances caused by plain packaging under article 20 of TRIPS. In the context of finding that the reasons for plain packaging sufficiently supported the resulting encumbrances on trademarks, it notes that the WHO FCTC underscores the importance of the public health reasons for tobacco plain packaging,¹⁵⁰ and takes into account that Australia implemented plain packaging ‘in line with the emerging multilateral public health policies in the area of tobacco control as reflected in the FCTC and the work under its auspices, including the Article 11 and Article 13 FCTC Guidelines’ in deciding that the encumbrances are justified.¹⁵¹

Nature of trademark rights

A common argument in legal challenges to tobacco control measures is that there is a right to use a trademark, whether under TRIPS or in domestic or regional law, which is restricted by measures that prohibit marketing or branding. There are now at least six tobacco control cases,¹⁵² as well as several WTO decisions in other contexts, which find that trademarks do not grant such positive rights to use but only negative rights to prevent infringement by third parties.¹⁵³ In *Australia – Plain Packaging*,

¹⁴⁴ Paras 7.1728-7.1730.

¹⁴⁵ Para 7.1309.

¹⁴⁶ Paras 7.664-7.665.

¹⁴⁷ Para 7.663-7.666, 7.2595-7.2596.

¹⁴⁸ Paras 7.1507-7.1511, 7.1527.

¹⁴⁹ Para 7.798-7.803.

¹⁵⁰ Para 7.2596.

¹⁵¹ Para 7.2604.

¹⁵² These include, in addition to the panel report, the following cases: *JTI v Commonwealth* [2012] HCA 43 (Australia); *British American Tobacco v. Secretary of State for Health* [2016] EWHC 1169 (Admin) (United Kingdom); *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*, Award, ICSID Case No. ARB/10/7, 8 July 2016 (Uruguay); *British American Tobacco v. Secretary of State for Health* [2016] EWCA Civ 1182 (United Kingdom); Conseil d’état, 23 décembre 2016, *Décision n° 399117, 399789, 399790, 399824, 399883, 399938, 399997, 402883, 403472, 403823, 404174, 404381, 404394*, *Société JT International SA, Société d’exploitation industrielle des tabacs et des allumettes, société Philip Morris France SA et autres* (France).

¹⁵³ Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complaint by the United States)*, WT/DS174/R (15 March 2005) para 7.210; Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for*

the complainants generally did not contest that intellectual property rights are negative and protect only against third party infringement. However, they argued that prohibitions on use had implications for other rights which are protected under TRIPS. In the course of reaching its decision, the panel confirms that there is no right to use a trademark or geographical indication under the TRIPS Agreement. The panel also clarifies the implications of trademarks being negative rights, finding that the inability to use a trademark is not an obstacle to registration of a trademark, nor does it affect the right to prevent third party infringement of intellectual property rights.

The interpretation of the WTO Agreements in public health cases

The panel also makes several statements that have systemic significance for the interpretation of the WTO agreements in cases regarding public health, namely, that:

- the [Doha Declaration on TRIPS and Public Health](#), which was adopted in 2001 to affirm members' right to use the flexibilities in TRIPS for public health, is a 'subsequent agreement' to TRIPS, and therefore to be taken into account in interpreting TRIPS under article 31(3)(a) of the [Vienna Convention on the Law of Treaties](#). The panel's decision confirms the legal status of the Doha Declaration, as well as the applicability of the Doha Declaration outside of its original context of access to medicines
- as affirmed in the Doha Declaration, TRIPS is to be interpreted in light of its object and purpose, which is contained in TRIPS articles 7 and 8. These provisions state respectively that intellectual property rights should be protected in a manner that is 'conducive to social and economic welfare, and to a balance of rights and obligations', and that members may 'adopt measures necessary to protect public health and nutrition' provided that such measures are consistent with TRIPS. The object and purpose of TRIPS is therefore not to protect intellectual property for its own sake, but in order to achieve social interests, and its interpretation must therefore take due account of public health.
- as stated in previous WTO jurisprudence, health is 'vital and important in the highest degree',¹⁵⁴ and panels must take this into account in assessing TBT article 2.2 claims and in assessing TRIPS article 20 claims.¹⁵⁵

Appellate Body proceedings

Honduras and the Dominican Republic have appealed the decision to the WTO's Appellate Body. Indonesia and Cuba have not appealed, and the panel reports for their disputes were adopted and became final on 27 August 2018.

Honduras and the Dominican Republic are appealing the panel's findings on TBT article 2.2, TRIPS article 20, and TRIPS article 16.1. Both Honduras and the Dominican Republic also argue that the panel did not make an objective assessment of the facts before it under DSU article 11. The panel's findings on the remaining claims are not being appealed.

[Agricultural Products and Foodstuffs \(Complaint by Australia\)](#), WT/DS290/R (15 March 2005) para 7.246; Appellate Body Report, [United States – Section 211 Omnibus Appropriations Act of 1998](#), AB-2001-7, WT/DS176/AB/R (2 January 2002) para 186.

¹⁵⁴ Report of the Appellate Body, [European Communities – Measures Affecting Asbestos and Asbestos Containing Products](#), AB-2000-11, WT/DS135/AB/R (12 March 2001) para 172; Report of the Appellate Body, [Brazil – Measures Affecting Imports of Retreaded Tyres](#), AB-2007-4, WTDS332/AB/R (3 December 2007), para 179.

¹⁵⁵ *Australia – Plain Packaging*, para 7.2587.

The WTO Appellate Body only has jurisdiction to review errors of law or legal interpretation, and it may not hear new evidence at the appeals stage. It is possible to appeal on the basis that a panel did not make an objective assessment of the facts under DSU art 11. However, this provision does not allow parties to re-litigate the factual findings – as the first instance trier of fact, the panel has a significant margin of discretion in its assessment of the evidence, and the Appellate Body interferes only in this assessment if the panel exceeds the scope of its discretion, and makes an error so material that it ‘undermine[s] the objectivity of the panel’s assessment of the matter before it’.¹⁵⁶

In theory, Appellate Body proceedings are to be completed within three months and shall not take longer than six months. However, in the last five years, few Appellate Body reports have met this timeframe, with [most appeals taking between 3 and 12 months](#). The Appellate Body has communicated to the parties that it [will not complete the appeal within the timeframes outlined in the DSU](#), but has not yet issued a revised timeframe.

Conclusion

The WTO panel report is a comprehensive victory for Australia that is important for both its evidentiary and legal findings. The panel reviews the evidence for plain packaging extremely thoroughly, and it finds the policy to be evidence-based, while rejecting several common tobacco industry myths, such as the claim that plain packaging increases illicit trade or that consumers will be unable to distinguish between plain packaged brands. The panel report is also part of an increasingly large body of jurisprudence about states’ ability to regulate for public health, and continues themes from that jurisprudence, including the idea that measures can be implemented in a comprehensive suite of policies, that a range of evidence is relevant to the assessment of complex policies with long-term effects, that intellectual property rights are not absolute, that there is no unqualified right to use trademarks in the marketing of harmful products, and that trade liberalisation is necessarily to be balanced against non-trade goals.

Given the frequency with which arguments relating to trade law and intellectual property find their way into domestic tobacco control litigation and discussions during regulatory processes, the panel’s report will have importance beyond the WTO dispute settlement system. WHO FCTC parties should find much in the panel’s report that is both useful and encouraging for the development of legislation and the defence of legal challenges.

¹⁵⁶ See, e.g., Appellate Body Report, [European Communities – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States](#), AB-2016-6, WT/DS316/AB/RW (15 May 2018) para 5.148.