



The *Australia – Plain Packaging* disputes at the WTO: a summary and stocktake after the final Appellate Body decision

McCabe Centre for Law and Cancer, February 2021

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Introduction

On 9 June 2020, the WTO Appellate Body ended almost a decade of litigation against Australia's tobacco plain packaging laws with a comprehensive victory in favour of Australia.¹ The decision upholds the first-instance decision by a [WTO panel](#) in June 2018,² which 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 new Appellate Body decision confirms the panel's conclusions, and is the final decision possible in the WTO system.

Australia has now won all three legal challenges that were brought against its tobacco plain packaging laws: it successfully defended a constitutional case in the High Court of Australia, an investment dispute before a tribunal under the 1993 Hong Kong – Australia bilateral investment treaty, and a WTO dispute brought in the first instance by Cuba, the Dominican Republic, Honduras, Indonesia, and Ukraine (with Ukraine later discontinuing its case) and on appeal by the Dominican Republic and Honduras.

The WTO Appellate Body decision is the last of the cases to be resolved, more than ten years after plain packaging was announced in February 2010. It is a major victory for public health and has important implications both for implementation of the World Health Organization Framework Convention on Tobacco Control (WHO FCTC) and for the relationship between trade and public health more broadly. Most importantly, it decisively rejects some of the most common legal and evidentiary arguments against plain packaging, many of which are also raised in relation to graphic health warnings on tobacco packages. Given the Appellate Body's role as the final dispute settlement mechanism of the multilateral trading system, this rejection gives confidence to many more countries to move ahead with the measure. The Appellate Body also addresses many aspects of the relationship between trade and health that have significance for other public health measures – it conclusively rejects the expansive view of intellectual property put forward by the tobacco industry, and recognises that relevant provisions of the relevant WTO agreements need to provide countries with the regulatory autonomy to achieve public health goals. Parties should find much in the report that is encouraging for their implementation of the WHO FCTC, and public health measures more broadly.

This paper is a guide to the WTO cases. It provides an overview of plain packaging laws in Australia and the legal challenges brought against them, discusses the findings of the panel and Appellate Body reports, and draws out some of the key themes of the decisions. A shorter summary of the Appellate Body decision is available [here](#), and further resources on legal challenges to plain packaging, including materials on the investment decision, are available from our Knowledge Hub website at <https://untobaccocontrol.org/kh/legal-challenges/tag/plain-packaging/>

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

¹ Appellate Body 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 (9 June 2020) ('Appellate Body Report').

² 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) ('Panel Report').

principal display areas, as well as other required consumer information and manufacturer details. (see **figure 1**)



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 panel found in favour of Australia on 28 June 2018. Subsequently, Honduras and the Dominican Republic appealed the decision to the Appellate Body. Indonesia and Cuba did not appeal, and the panel reports for their disputes were adopted on 27 August 2018. The appeal brought by Honduras and the Dominican Republic was decided in favour of Australia on 9 June 2020, and the panel report as affirmed by the appeal was adopted on 29 June 2020.

The plain packaging dispute was formally four separate disputes (with two appeals), but the working procedures provided for a single report and a coordinated timeline and procedures. Thirty-five additional states (not including Ukraine or the four complainants when intervening in each other's disputes) intervened as third parties, with a total of 41 states participating across the four disputes, a record for WTO dispute settlement. Third parties are WTO member states who are not party to the dispute and not bound by the outcome, but may be heard by the panel and Appellate Body to ensure that their interests (including for example those relating to systemic issues, their own similar measures, or their exports or imports) are represented during the proceedings.

The WTO dispute was 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](#), as well as a legal challenge in Ireland that was resolved in Ireland's favour when the European Court of Justice upheld related provisions of the EU Tobacco Products Directive.

The panel proceedings

At the panel stage, 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 (TBT) 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 Agreement on Trade-Related Aspects of Intellectual Property Rights (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 alternatives³
- 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 trademarks⁴

³ Panel Report, paras 7.1724-7.1732.

⁴ Panel Report, 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 competition⁵
- 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 applied⁶

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 problem⁷
- Packaging and branding of tobacco products is a means of promoting tobacco products⁸
- 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)⁹
- Plain packaging is based on a consistent body of evidence¹⁰
- Plain packaging reduces the appeal of tobacco packaging and increases the effectiveness of graphic health warnings¹¹
- Plain packaging has contributed to decreases in smoking prevalence and tobacco consumption¹²
- Plain packaging has not increased illicit trade¹³
- Plain packaging had not led to increased price competition between brands as a result of ‘downtrading’ (i.e. consumers switching to cheaper tobacco products)¹⁴
- Plain packaging does not cause actual consumer confusion between different brands of tobacco products¹⁵

Article 2.2 of the Technical Barriers to Trade Agreement

The complainants claimed that plain packaging violated Article 2.2 of the TBT Agreement 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’

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 involves¹⁶:

- 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

⁵ Panel Report, paras 7.1978, 7.1664-7.1769, 7.1894-7.1897, 7.2026, 7.2098, 7.2116-7.2119, 7.2794, 7.2860.

⁶ Panel Report, paras 7.3027-3028, 7.3068-7.3070.

⁷ Panel Report, paras 7.1310, 7.2592.

⁸ Panel Report, paras 7.734-7.737.

⁹ Panel Report, paras 7.744-7.747.

¹⁰ Panel Report, paras 7.778, 7.825, 7.927, 7.930-7.931.

¹¹ Panel Report, para 7.958.

¹² Panel Report, paras 7.979, 7.986.

¹³ Panel Report, paras 7.993-7.1023.

¹⁴ Panel Report, para 7.1197-7.1198, 7.1218.

¹⁵ Panel Report, paras 7.2723, 7.2764, 7.2794, 7.2867-7.2868.

¹⁶ Panel Report, paras 7.26-7.46.

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.¹⁷ 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.

The panel decided that the objective of tobacco plain packaging is to reduce the use of, and exposure to, tobacco products.¹⁸ However, the mechanisms were relevant to assessing the degree to which plain packaging contributed to that objective.¹⁹

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:²⁰

- 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'.²¹ 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

¹⁷ Panel Report, paras 7.171-7.182.

¹⁸ Panel Report, para 7.232.

¹⁹ Panel Report, para 7.229.

²⁰ Panel Report, para 7.281.

²¹ Panel Report, para 7.388.

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).²² 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.²³ 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.²⁴

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.²⁵ The panel’s review of the evidence is extensive and discussed in more detail at pages 14-20 below.

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.’²⁶ The types of evidence the panel considered for each of these are discussed more at pages 15-16 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 16-19 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 19-20 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.²⁷

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.²⁸

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

²² Panel Report, paras 7.386-7.387.

²³ Panel Report, paras 7.387-7.388.

²⁴ Panel Report, paras 7.403-7.405, 7.412-7.417.

²⁵ Panel Report, para 7.1025.

²⁶ Panel Report, 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.

²⁷ Panel Report, paras 7.958, 7.963, 7.972, 7.979, 7.986.

²⁸ Panel Report, paras 7.980-7.986.

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.’²⁹

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.³⁰

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.³¹

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’³²

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.³³ 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.³⁴
- *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.³⁵
- *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.³⁶ 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.³⁷

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

²⁹ Panel Report, 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.

³⁰ Panel Report, para 7.982.

³¹ Panel Report, paras 7.1023-7.1043.

³² Panel Report, para 7.1025.

³³ Panel Report, para 7.1075.

³⁴ Panel Report, paras 7.1172-7.1187.

³⁵ Panel Report, paras 7.1218, 7.1224-7.1225.

³⁶ Panel Report, para 7.1244.

³⁷ Panel Report, para 7.1254.

reductions in tobacco use and exposure. As tobacco products in Australia are entirely imported, this would reduce the overall volume of imports, thus having a limiting effect on international trade.³⁸

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.’³⁹ 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’,⁴⁰ as recognised by the parties, in the WHO FCTC, in various WHO documents, and in scientific literature.⁴¹ 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’.⁴²

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’,⁴³ and noted that it was uncontested by the parties to the dispute that tobacco use disproportionately harmed Aboriginal and Torres Strait Islander peoples.⁴⁴

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,⁴⁵ 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.⁴⁶
- *Additional tax increases*, because tax measures were complements to tobacco plain packaging, because they affected price rather than advertising and promotion of tobacco 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.⁴⁷
- *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

³⁸ Panel Report, paras 7.1208, 7.1255.

³⁹ Panel Report, paras 7.1287, 7.1297.

⁴⁰ Panel Report, para 7.1310.

⁴¹ Panel Report, paras 7.1298-7.1309.

⁴² Panel Report, 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.

⁴³ Panel Report, para 7.1317.

⁴⁴ Panel Report, para 7.1318.

⁴⁵ Panel Report, paras 7.1363-7.1375.

⁴⁶ Panel Report, paras 7.1417, 7.1458-7.1464, 7.1468-7.1471.

⁴⁷ Panel Report, paras 7.1491-7.1495, 7.1525-7.1531, 7.1542-7.1545.

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.⁴⁸

- *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.⁴⁹

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.⁵⁰

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 2.2.⁵¹

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:⁵²

- 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.⁵³

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.⁵⁴ 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.⁵⁵

⁴⁸ Panel Report, paras 7.1574-7.1576, 7.1604, 7.1610-7.1615, 7.1620-7.1624.

⁴⁹ Panel Report, paras 7.1654, 7.1680-7.1685, 7.1713-7.1716.

⁵⁰ Panel Report, paras 7.1718-7.1723.

⁵¹ Panel Report, paras 7.1725-7.1726.

⁵² Panel Report, para 7.2172.

⁵³ Panel Report, para 7.2169.

⁵⁴ Panel Report, para 7.2231.

⁵⁵ Panel Report, paras 7.2231, 7.2243, 7.2245.

‘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.⁵⁶

The panel found that the uses of trademarks prohibited by plain packaging constituted use in the course of trade.⁵⁷ 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,⁵⁸ 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.⁵⁹

Unjustifiability

The panel rejected the article 20 claim on the grounds that the plain packaging measures were not unjustifiable.⁶⁰ 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.⁶¹

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.⁶² According to the panel, this confirmed that the object and purpose of TRIPS is to be informed by articles 7 and 8,⁶³ which recognise the importance of ‘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.⁶⁴

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.⁶⁵ 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.⁶⁶

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’:⁶⁷

- 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.

⁵⁶ Panel Report, paras 7.2236-7.2239, 7.2244-7.2245.

⁵⁷ Panel Report, paras 7.2291-7.2292.

⁵⁸ Panel Report, paras 7.2260-7.2264.

⁵⁹ Panel Report, paras 7.2282, 7.2284-7.2286.

⁶⁰ Panel Report, paras 7.2604-7.2605.

⁶¹ Panel Report, paras 7.2396-7.2411.

⁶² Panel Report, paras 7.2409-7.2410.

⁶³ Panel Report, paras 7.2408, 7.2411.

⁶⁴ Panel Report, paras 7.2415-7.2422.

⁶⁵ Panel Report, paras 7.2419-7.2422, 7.2431.

⁶⁶ Panel Report, paras 7.2505-7.2508.

⁶⁷ Panel Report, para 7.2430.

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.⁶⁸ 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.⁶⁹ 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.⁷⁰ The panel also noted that the plain packaging laws preserved the ability to maintain registration of a trademark.⁷¹

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'.⁷² 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 2.2.⁷³ 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'.⁷⁴

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'.⁷⁵ 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.⁷⁶ 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'⁷⁷

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 2.2.⁷⁸ 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

⁶⁸ Panel Report, paras 7.2556-7.2574

⁶⁹ Panel Report, paras 7.2569-7.2570.

⁷⁰ Panel Report, paras 7.2570-7.2573.

⁷¹ Panel Report, para 7.2574.

⁷² Panel Report, para 7.2592

⁷³ Panel Report, para 7.2604.

⁷⁴ Panel Report, para 7.2604.

⁷⁵ Panel Report, para 7.2593.

⁷⁶ Panel Report, para 7.2593

⁷⁷ Panel Report, para 7.2596.

⁷⁸ Panel Report, para 7.2599.

‘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’.⁷⁹ However, it noted that alternatives may inform an assessment of these reasons.⁸⁰ It referred back to its 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’.⁸¹

Conclusions on unjustifiability

The panel concluded that Australia had not acted beyond the bounds of its latitude in choosing to implement plain packaging.⁸² 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’.⁸³ 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’.⁸⁴ As such, the reasons for adopting the special requirements ‘provide[d] sufficient support’ for the resulting encumbrances on trademarks.⁸⁵

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’.⁸⁶

Other claims

The panel rejected seven other TRIPS claims made by the complainants, each of which dealt with the relationship between the use of a trademark and other obligations under TRIPS, as well as a GATT claim brought by Cuba. The TRIPS 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, and claims regarding unfair competition and geographical indications.

TRIPS 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 countries⁸⁷
- 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 registration⁸⁸

TRIPS 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

⁷⁹ Panel Report, para 7.2598.

⁸⁰ Panel Report, para 7.2598.

⁸¹ Panel Report, para 7.2600.

⁸² Panel Report, para 7.2604.

⁸³ Panel Report, para 7.2604.

⁸⁴ Panel Report, para 7.2604.

⁸⁵ Panel Report, para 7.2604.

⁸⁶ Panel Report, para 7.2604.

⁸⁷ Panel Report, paras 7.1665-7.1769, 7.1774.

⁸⁸ Panel Report, paras 7.1857, 7.1864-7.1868, 7.1873-7.1874, 7.1894-7.1897, 7.1912-7.1913.

infringement of trademarks by third parties.⁸⁹ 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.⁹⁰ 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’.⁹¹ Plain packaging therefore did not affect any rights protected under article 16.1.⁹²

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.⁹³

TRIPS 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.⁹⁴

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),⁹⁵ nor had they resulted in diminished protection for any particular geographical indication under TRIPS article 24.3.⁹⁶

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.⁹⁷

The panel therefore dismissed all claims brought by the complainants.⁹⁸

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 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.⁹⁹

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.

⁸⁹ Panel Report, para 7.1978.

⁹⁰ Panel Report, paras 7.1999-7.2002, 7.2010-7.2016.

⁹¹ Panel Report, para 7.2015.

⁹² Panel Report, paras 7.2031-7.2032, 7.2038-7.2040, 7.2050-7.2051.

⁹³ Panel Report, paras 7.2116-7.2123, 7.2129-7.2130.

⁹⁴ Panel Report, paras 7.2724, 7.2765, 7.2795-7.2796.

⁹⁵ Panel Report, paras 7.2861, 7.2870.

⁹⁶ Panel Report, paras 7.2950, 7.2956-7.2957.

⁹⁷ Panel Report, paras 7.3021, 7.3027-7.3028.

⁹⁸ Panel Report, paras 8.1-8.3.

⁹⁹ Panel Report, para 7.1025.

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**).

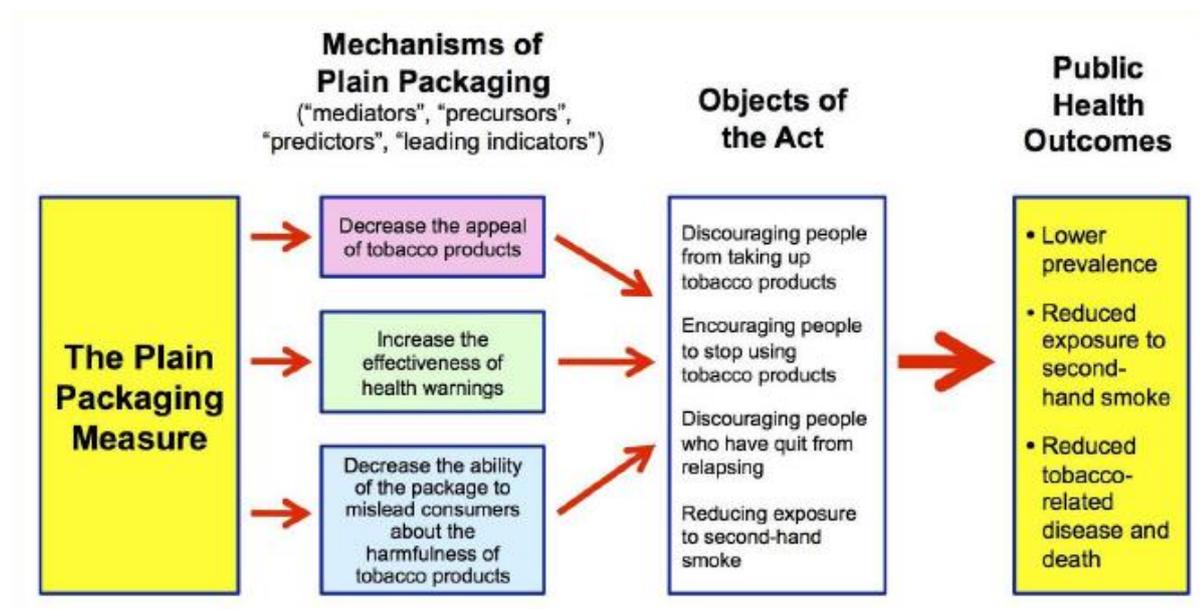


Figure 2: Australia's model for how the plain packaging legislation contributes to the achievement of public health outcomes (from panel report)

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.¹⁰⁰ It identified three types of impacts relevant to its assessment¹⁰¹ (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

¹⁰⁰ Paras 7.499.

¹⁰¹ Paras 7.490-7.491, fn 1443.

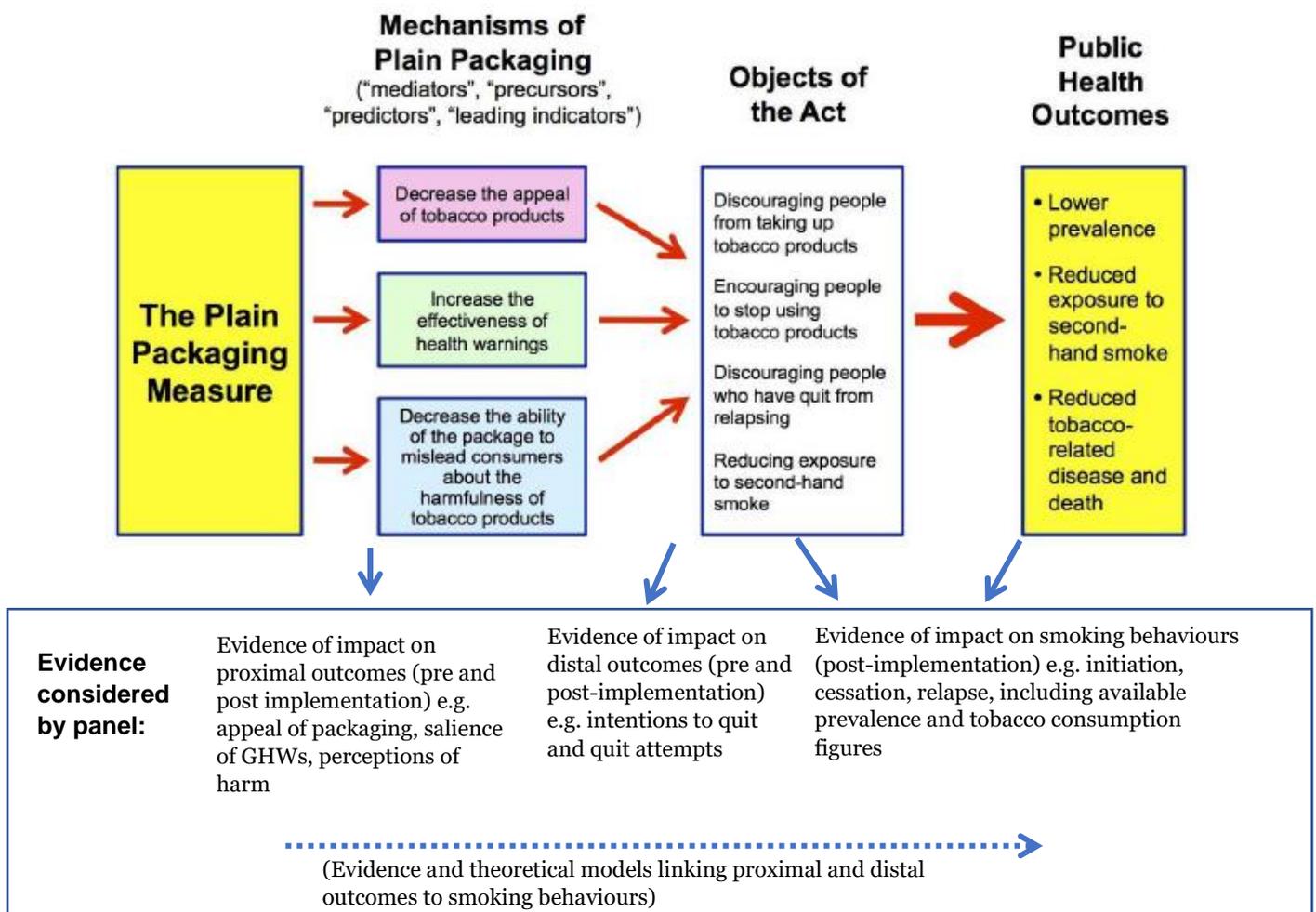


Figure 3: Types of evidence considered by the panel as compared to Australia’s legislative model

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’.¹⁰²

The panel emphasised that its ‘role is not to make scientific determinations or otherwise seek to resolve scientific disputes’.¹⁰³ 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’.¹⁰⁴

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’.¹⁰⁵

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:¹⁰⁶

¹⁰² Panel Report, para 7.499.

¹⁰³ Panel Report, para 7.514.

¹⁰⁴ Panel Report, para 7.514.

¹⁰⁵ Panel Report, paras 7.516-7.517.

¹⁰⁶ Panel Report, paras 7.540-7.541, 7.543, 7.552, 7.565.

- 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’.¹⁰⁷
- 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.¹⁰⁸
- The complainants’ experts’ critique of the literature as lacking in methodological rigour did not reflect relevant scientific community standards.¹⁰⁹ 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.¹¹⁰

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.¹¹¹

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 products¹¹²
- there was a credible body of scientific literature suggesting that plain packaging would reduce the appeal of tobacco products,¹¹³ and Australia aligned its tobacco plain packaging laws to this evidence¹¹⁴
- there was evidence that reduced appeal of tobacco products leads to reduced smoking behaviours,¹¹⁵ 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 product¹¹⁶
- 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 died¹¹⁷
- 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 people¹¹⁸

¹⁰⁷ Panel Report, paras 7.544-7.551.

¹⁰⁸ Panel Report, para 7.564.

¹⁰⁹ Panel Report, para 7.569.

¹¹⁰ Panel Report, para 7.577, 7.580, 7.609-7.638.

¹¹¹ Panel Report, paras 7.628-7.635.

¹¹² Panel Report, paras 7.656-7.665.

¹¹³ Panel Report, paras 7.633-7.638.

¹¹⁴ Panel Report, paras 7.674-7.682.

¹¹⁵ Panel Report, paras 7.744-7.747, 7.755, 7.774, 7.777-7.778.

¹¹⁶ Panel Report, paras 7.736-7.737.

¹¹⁷ Panel Report, para 7.744.

¹¹⁸ Panel Report, paras 7.744-7.747.

- 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 smoke¹¹⁹
- 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 likely¹²⁰

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 them¹²¹
- 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’¹²²
- 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 behaviours¹²³

¹¹⁹ Panel Report, para 7.747.

¹²⁰ Panel Report, paras 7.772-7.776.

¹²¹ Panel Report, para 7.825.

¹²² Panel Report, para 7.869.

¹²³ Panel Report, paras 7.845, 7.869.

WHETHER PLAIN PACKAGING REDUCES ABILITY OF TOBACCO PRODUCT PACKAGING TO MISLEAD

The panel found that:

- 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 law¹²⁴
- standardisation of packaging reduced the ability to mislead through comparative packaging design¹²⁵
- 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 harmful¹²⁶

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 that¹²⁷:

- 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.¹²⁸

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:¹²⁹

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

¹²⁴ Panel Report, paras 7.907-7.917.

¹²⁵ Panel Report, paras 7.915, 7.924-7.925.

¹²⁶ Panel Report, paras 7.920-7.923.

¹²⁷ Panel Report, para 7.958.

¹²⁸ Panel Report, para 7.963.

¹²⁹ Panel Report, para 7.972.

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’.¹³⁰

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’.¹³¹

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.’¹³²

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.’¹³³

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,¹³⁴ noting that it was not clear that the complainants’ estimate of the size of the illicit trade market in 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.¹³⁵ 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.¹³⁶

¹³⁰ Panel Report, paras 7.1310, 7.1317, 7.2592.

¹³¹ Panel Report, para 7.744.

¹³² Panel Report, para 7.736.

¹³³ Panel Report, paras 7.745-7.746.

¹³⁴ Panel Report, paras 7.993-7.1023.

¹³⁵ Panel Report, para 7.1023.

¹³⁶ Panel Report, paras 7.1020-7.1022.

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 downtrading¹³⁷
- The complainants had not demonstrated that plain packaging created barriers to entry for new brands¹³⁸
- There was no indication that consumers were actually unable to distinguish between brands of tobacco products as a result of plain packaging¹³⁹

Compliance costs

The complainants had not demonstrated that plain packaging created a barrier to trade through ongoing compliance costs for tobacco manufacturers.¹⁴⁰

The Appellate Body proceedings

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

Honduras and the Dominican Republic contested the panel's findings on TBT article 2.2, TRIPS article 20, and TRIPS article 16.1, and also claimed that the panel did not make an objective assessment of the facts before it under DSU article 11. The Appellate Body dismissed these appeals on 9 June 2020, finding no breach of the WTO agreements and upholding the panel's decision.

Article 2.2 of the Technical Barriers to Trade Agreement

In relation to article 2.2 of the TBT Agreement, Honduras and the Dominican Republic challenged the panel's findings on:

- the contribution of plain packaging to its public health objective
- the trade-restrictive nature of the measure
- whether there were less trade restrictive measures which would have made an equivalent contribution that were reasonably available

The appellants also made DSU article 11 claims in relation to each of these three arguments, claiming that the panel had not made an objective assessment of the facts.

Contribution, including challenges to the evidence under article 11 of the Dispute Settlement Understanding

The Appellate Body upheld the panel's finding that plain packaging was apt to and does make a meaningful contribution to its public health objectives of reducing the use of and exposure to tobacco products.¹⁴¹ The appellants had extensively challenged the findings of the panel on plain packaging's contribution to public health. The vast majority of these challenges related to the panel's approach to assessing the evidence.

The 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

¹³⁷ Panel Report, paras 7.1218, 7.1224-7.1225.

¹³⁸ Panel Report, paras 7.1172-7.1187.

¹³⁹ Panel Report, paras 7.2723, 7.2764, 7.2794, 7.2867-7.2868.

¹⁴⁰ Panel Report, para 7.1244.

¹⁴¹ Appellate Body Report, paras 6.361, 6.373.

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’.¹⁴²

Honduras and the Dominican Republic made several DSU article 11 claims in relation to contribution under TBT article 2.2. Honduras also argued that the panel had applied an incorrect legal standard to the assessment of the evidence, although the Appellate Body declined to consider this claim, finding that it did not raise separate issues to the challenge to the evidence.¹⁴³

The Appellate Body found that the appellants had failed to establish a claim under DSU article 11. It emphasised that the burden of proof was on the complainants to show either that plain packaging did not contribute at all to its public health objective, or that an equivalent contribution could be made through less trade-restrictive alternative means.¹⁴⁴ It also emphasised that a claim that a panel had not made an objective assessment of the facts under DSU article 11 was a ‘very serious allegation’,¹⁴⁵ that panels had significant discretion as to how they would decide to assess the evidence,¹⁴⁶ and that the AB would ‘not entertain attempts by the appellants to resubmit their factual arguments under the guise of challenging the objectivity of the Panel’s assessment of the facts of the case’.¹⁴⁷ It described the extensive challenges to the evidence by Honduras and the Dominican Republic as ‘unprecedented’.¹⁴⁸

The Appellate Body noted that it was not necessary to deal with each claim of error raised by Honduras and the Dominican Republic, and that certain others could be dealt with in cross-cutting clusters rather than individually. It therefore divided its analysis into:

- Challenges to the panel’s assessment of pre-implementation evidence on the design, structure, and intended operation of plain packaging
- Challenges to the panel’s assessment of post-implementation evidence on the application of the measures
- The panel’s statements on the potential future impact of the measures
- Challenges to post-implementation evidence which did not need to be addressed to resolve the dispute
- The panel’s overall conclusions on the facts regarding contribution

Challenge to pre-implementation evidence

The complainants challenged the panel’s findings on both the validity and the sufficiency of Australia’s pre-implementation evidence.¹⁴⁹ They argued that the panel had not correctly assessed this evidence, and also that the pre-implementation evidence was insufficient to show that plain packaging was apt to contribute to its objectives.

The Appellate Body rejected these challenges to the pre-implementation evidence.

- It rejected claims that the panel had disregarded ‘flaws’ in the pre-implementation base. The Appellate Body noted that panel had rejected rather than disregarded the complainants’ arguments about these so-called ‘flaws’ – the panel did not consider that the literature’s focus on proximal outcomes (such as the appeal of tobacco packs) in the pre-implementation literature or the use of study designs other than randomised experiments or counterfactual designs was a ‘flaw’ in the evidence base, and the Appellate Body agreed with the panel.¹⁵⁰
- It noted that the panel had in fact provided detailed reasoning on why this literature as a whole provided a reasonable evidence base underlying the plain packaging sources, and in particular that it

¹⁴² 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.

¹⁴³ Appellate Body Report, paras 6.25-6.26.

¹⁴⁴ Appellate Body Report, paras 6.34-6.35.

¹⁴⁵ Appellate Body Report, paras 6.48, 6.295.

¹⁴⁶ Appellate Body Report, paras 6.49-6.50, 6.286, 6.295, 6.325.

¹⁴⁷ Appellate Body Report, para 6.50.

¹⁴⁸ Appellate Body Report, para 6.48.

¹⁴⁹ Appellate Body Report, paras 6.55, 6.60.

¹⁵⁰ Appellate Body Report, paras 6.69-6.71.

- had extensively explained why it considered that the research came from a respected and qualified source, that it was objective and coherent, and that it had methodological rigour.¹⁵¹
- It found that the panel had not disregarded the Dominican Republic's evidence or offered incoherent reasoning on the appeal of tobacco packs. The Dominican Republic had argued that the panel ignored its expert evidence, however, the Dominican Republic's experts had argued that packs were unappealing overall (based on both negative messaging from large graphic health warnings and positive messaging branded elements) whereas the panel's finding that branding could appeal to consumers examined specifically the role of tobacco industry marketing on tobacco packs.¹⁵²
 - It emphasised that the burden of proof was on the complainants to show that plain packaging could not contribute to its objective, and that even if the complainants had shown that the panel's evidence was of insufficient probative value, they would not necessarily have discharged their burden of proof on this point.¹⁵³

Challenges to post-implementation evidence

The Appellate Body then examined the challenges to the post-implementation data on prevalence and consumption of tobacco products. The panel had undertaken this analysis by examining whether prevalence and consumption had declined after plain packaging, whether the rate of declines had accelerated, and whether these accelerations in decline were attributable to plain packaging. This had been done through a highly technical analysis of econometric modelling based both on expert evidence from the parties' and the panel's own statistical testing of these models, which the panel had included in appendices to its decision.

DISCRETE CHALLENGES TO POST-IMPLEMENTATION EVIDENCE

The complainants undertook a range of challenges to this body of evidence. The Appellate Body dealt with five of these challenges as discrete claims:¹⁵⁴

- Whether there had been a decrease in smoking prevalence following implementation of plain packaging
- Whether declines in cigarette consumption had accelerated
- Whether these accelerated decreases in either smoking prevalence or cigarette consumption were attributable to plain packaging
- Whether the complainants had been denied due process in the way the panel conducted this analysis
- Whether any errors found would be material

In relation to the decrease in smoking prevalence, Honduras argued that the panel had made inconsistent statements about the rate of prevalence decrease and the dates at which the decline had started. However, the Appellate Body noted that the statements Honduras complained about were not findings of the panel, but the panel's summary of the parties' evidence. The panel had referred to several pieces of evidence which showed overall declines in prevalence although with different estimates of how much, and concluded that these datasets consistently showed that prevalence had decreased. The Appellate Body did not consider that the panel had made any error in doing so.¹⁵⁵

In relation to declines in cigarette consumption, Honduras argued that the panel had dismissed their expert model as unreliable, while ignoring that a modified model suggested by Australia's expert had similar flaws. Honduras also argued that the panel then developed its own model which it did not give the parties an opportunity to comment on. However, the Appellate Body considered that what the panel had actually found was that the complex statistical modelling by the complainants' expert was unreliable, that the suggested modifications to this model by Australia's expert only 'slightly' improved its reliability, and that a standard mean comparison test (a 'simple statistical test'¹⁵⁶) that the panel used to check the results showed that declines in cigarette consumption had accelerated following the introduction of plain packaging in a much clearer way than either expert model. The Appellate Body considered that the panel had not erred in using a standard mean comparison test to check the results – it stated that 'the application of statistical testing to

¹⁵¹ Appellate Body Report, paras 6.74-6.75.

¹⁵² Appellate Body Report, paras 6.79-6.81, 6.92-6.95.

¹⁵³ Appellate Body Report, para 6.77.

¹⁵⁴ Appellate Body Report, para 6.106.

¹⁵⁵ Appellate Body Report, paras 6.113-6.116.

¹⁵⁶ Appellate Body Report, para 6.122.

verify statistical results' to be 'very much in accordance with the duty of a panel to review the evidence adduced by the parties'.¹⁵⁷

In relation to whether the acceleration of declines in prevalence and consumption could be attributed to plain packaging, Honduras and the Dominican Republic had at the panel level disputed this on the basis of statistical models developed by their experts. The panel had rejected much of this analysis and preferred the statistical models developed by Australia's experts (in highly technical analysis outlined in the annex to the panel report). On appeal, the Dominican Republic and Honduras challenged several of the reasons that the panel had rejected their experts' statistical models, including findings the panel had made regarding proportionality to price/cost,¹⁵⁸ overfitting due to the use of quadratic versus linear models,¹⁵⁹ endogeneity,¹⁶⁰ multicollinearity,¹⁶¹ non-stationarity,¹⁶² reweighting,¹⁶³ and standard error,¹⁶⁴ all of which essentially dealt with reasons the panel had preferred Australia's expert evidence to that of the complainants.

The Appellate Body rejected the vast majority of these challenges, finding that they fell within the discretion of the panel as a first-instance trier of fact, that the panel had adequately explained why it had preferred Australia's approach over the complainants' approach, and that it had taken an even handed approach to the limitations in each parties' modelling.

The Appellate Body also rejected an argument that the panel had erred because its summary of its findings on the prevalence and consumption evidence was two paragraphs long. The findings in question were a summary of a lengthier discussion of the evidence (including the 150 pages of appendices), and conciseness in summarising these results was not an error.¹⁶⁵

The Appellate Body did make a finding that there were two non-material errors in the panel's analysis:

- First, it considered that there had been a flaw in the way Australia's expert had analysed the relative impact of tobacco costliness in her models on tobacco consumption.¹⁶⁶ The panel had preferred Australia's expert evidence on the basis that it had addressed this flaw. Since the flaw was still present in her analysis, the panel should not have preferred Australia's consumption analysis on this basis, and thus the Appellate Body invalidated the panel's finding on the third step of its tobacco consumption analysis.¹⁶⁷ The Appellate Body emphasised that this only applied to one step of its findings on consumption, and that there was no equivalent error in the panel's analysis of prevalence, or in the findings that consumption had fallen, or that the rate of decline had accelerated.¹⁶⁸
- Secondly, the Appellate Body considered that for due process reasons, the panel should have given the parties the opportunity to comment on two of the statistical tests (on multicollinearity and non-stationarity) that it had run on the prevalence and consumption data, because the technical nature of the test, the discretion the panel had exercised in applying it, and the fact that the tests had been initiated by the panel and not the parties.¹⁶⁹ However, the Appellate Body considered that this did not affect the outcome of the panel's analysis, because even if the affected conclusions were invalidated, its conclusion on prevalence would still stand on the basis of its other reasons for preferring Australia's evidence (such as its findings on the endogeneity, overfitting, and robustness to alternative specifications).¹⁷⁰

It found that neither of these errors was material in light of other supporting evidence for plain packaging's contribution to public health.

¹⁵⁷ Appellate Body Report, para 6.122.

¹⁵⁸ Appellate Body Report, paras 6.145-6.150.

¹⁵⁹ Appellate Body Report, paras 6.151-6.155.

¹⁶⁰ Appellate Body Report, paras 6.156-6.167.

¹⁶¹ Appellate Body Report, paras 6.168-6.178.

¹⁶² Appellate Body Report, paras 6.179-6.190.

¹⁶³ Appellate Body Report, paras 6.191-6.202.

¹⁶⁴ Appellate Body Report, paras 6.203-6.217.

¹⁶⁵ Appellate Body Report, paras 6.224-6.225.

¹⁶⁶ Appellate Body Report, para 6.143.

¹⁶⁷ Appellate Body Report, para 6.362.

¹⁶⁸ Appellate Body Report, paras 6.144, 6.366.

¹⁶⁹ Appellate Body Report, paras 6.257.

¹⁷⁰ Appellate Body Report, paras 6.263-6.266.

CROSS-CUTTING CHALLENGES TO POST-IMPLEMENTATION EVIDENCE

The Appellate Body dealt with Honduras and the Dominican Republic's remaining claims against the post-implementation evidence as cross-cutting themes due to the large number of claims. It dismissed all of these claims:

- It found that several allegations were based on a 'misapprehension of the Panel's findings', i.e. the complainants had not correctly represented what the panel had said.¹⁷¹
- It emphasised that the burden of proof was on the complainants to show that plain packaging was not apt to and did not contribute to its public health objective. Several of the challenges to the evidence had been presented as if the burden of proof were on Australia, however, the challenges that were premised on an incorrect allocation of the burden of proof were rejected.¹⁷²
- It considered that at several points, the complainants were simply trying to relitigate the facts, under the guise of a DSU article 11 claim.¹⁷³ The Appellate Body rejected 'the attempts by the appellants to resubmit their factual arguments under the guise of challenging the objectivity of the Panel's assessment of the facts of the case', noting that re-opening such arguments 'undermine the Panel in its role as the trier of facts and the adjudicator of first instance in WTO dispute settlement'.¹⁷⁴
- It specifically noted that several items of evidence that Honduras claimed the panel had 'disregarded, significantly misrepresented, or distorted' were in fact *rejected* by the panel, as was appropriate to its role as the trier of fact, and that Honduras was simply attempting to re-open its panel level claims by making this argument.¹⁷⁵
- It also rejected the argument that the panel had disregarded some of Honduras' evidence which had not been connected to a legal argument, since it was up to the claimant to develop its case of WTO inconsistency, including by explaining how factual evidence related to its legal arguments.¹⁷⁶
- It stated that it was not necessary for the panel to explicitly cite and respond to each argument for each piece of evidence raised by the parties, only those that were material to its findings.¹⁷⁷
- It rejected the idea that it should re-open the panel's factual findings.¹⁷⁸
- The panel was not required to test a graph that it used to represent its factual findings with the parties, since the graph was simply a visual aid used to depict the parties' evidence on the panel record.¹⁷⁹
- It found that it was precluded from considering information that had not been on the panel record.¹⁸⁰

Future impact

The Appellate Body rejected Honduras and the Dominican Republic's contention that the panel had relied on a prediction of the future impact of the plain packaging measures. It found that the panel had simply described the limitations of the post-implementation evidence given the short amount of time that had elapsed following the implementation of tobacco plain packaging, and stated that it was not aiming to pre-judge any future impact the measure might have.¹⁸¹

Claims that the Appellate Body did not think needed to be resolved

The Appellate Body exercised its discretion not to consider the following claims

- Claims about the panel's criticism of one of the Dominican Republic's experts, since the Dominican Republic admitted that this was not material to the panel's findings of fact¹⁸²
- Claims that were better dealt with in relation to the panel's legal analysis of alternatives¹⁸³

¹⁷¹ Appellate Body Report, para 6.269.

¹⁷² Appellate Body Report, paras 6.278, 6.283-6.284.

¹⁷³ Appellate Body Report, paras 6.286-6.287

¹⁷⁴ Appellate Body Report, para 6.293.

¹⁷⁵ Appellate Body Report, paras 6.301-6.302.

¹⁷⁶ Appellate Body Report, para 6.308, 6.310.

¹⁷⁷ Appellate Body Report, para 6.311.

¹⁷⁸ Appellate Body Report, para 6.320.

¹⁷⁹ Appellate Body Report, para 6.324.

¹⁸⁰ Appellate Body Report, para 6.331.

¹⁸¹ Appellate Body Report, para 6.338.

¹⁸² Appellate Body Report, para 6.341.

¹⁸³ Appellate Body Report, para 6.343.

- Claims that the panel should not have relied on its own graph depicting prevalence decline to represent certain factual information because it had not presented this graph beforehand to the parties and should have done so for due process reasons. It was not necessary to consider this claim because the relevant finding was not just based on this graph, but also on two other graphs submitted by Australia, which had been available to the complainants (and extensively tested during the proceedings).¹⁸⁴

Findings on the panel's overall conclusions

The Dominican Republic and Honduras also challenged the overall approach of the panel, arguing that the panel should not have relied on pre-implementation evidence and evidence of proximal and distal outcomes more generally in light of 'contradictory' post-implementation evidence on prevalence and consumption.

The Appellate Body noted that the panel had assessed both the design, structure and implementation of tobacco plain packaging and its actual impact, and that it had placed more weight on the pre-implementation evidence base than on post-implementation evidence because of the limitations of the post-implementation evidence-base, including the short time that had elapsed since implementation of plain packaging, as well as the difficulty of isolating the impact of individual measures.¹⁸⁵ The Appellate Body found that the panel was well within its bounds as a first instance trier of fact to place more probative value on pre-implementation evidence in light of these limitations.¹⁸⁶

The Appellate Body also considered that the pre-implementation evidence, and post-implementation evidence of proximal and distal outcomes, was sufficient to support the panel's overall conclusion that plain packaging contributed to its public health objective.¹⁸⁷ It rejected the complainant's argument that the panel's conclusions could not stand without its findings on prevalence and consumption.¹⁸⁸

Further, the Appellate Body noted that it had upheld the vast majority of the panel's findings on smoking behaviours post-implementation, and found that the two errors it had identified were not material.

- The errors it had identified regarding due process in the tests for non-stationarity/multicollinearity, and the impact of tobacco costliness, did not vitiate the panel's findings that there had been an accelerating decline in prevalence attributable to plain packaging, because this conclusion had been based on other findings that were unaffected by the errors.¹⁸⁹
- In relation to tobacco consumption, although the finding that there was an accelerated decline in consumption attributable to plain packaging was vitiated due to the error regarding tobacco costliness, it was not material to the panel's conclusion that the actual impact of plain packaging was consistent with the pre-implementation hypothesis about its impact. This finding had been based not only on the impact on consumption as attributed to plain packaging, but also by its impact on the appeal of tobacco products, its impact on prevalence, and the general trend of accelerating declines in both prevalence and consumption.¹⁹⁰

The Appellate Body therefore affirmed the panel's findings that the post-implementation evidence on smoking behaviours was consistent with the hypothesized impact.

Taken together, these all confirmed the panel's overall finding that 'plain packaging was apt to, and did, contribute' to its objective of reducing the use of and exposure to tobacco. The Appellate Body therefore upheld the panel's finding on these points.

¹⁸⁴ Appellate Body Report, paras 6.344-6.345.

¹⁸⁵ Appellate Body Report, para 6.356.

¹⁸⁶ Appellate Body Report, para 6.358.

¹⁸⁷ Appellate Body Report, para 6.361.

¹⁸⁸ Appellate Body Report, para 6.359.

¹⁸⁹ Appellate Body Report, paras 6.257, 6.362.

¹⁹⁰ Appellate Body Report, para 6.366.

Summary of Appellate Body’s findings on evidence

For ease of reference, the following table summarises how the Appellate Body and panel treated the evidence in relation to plain packaging:

Body of evidence	Panel’s finding	Appellate Body’s finding
<p>Pre-implementation literature on proximal outcomes (design, structure, and expected operation of the measure)</p> <ul style="list-style-type: none"> - Studies of whether consumers would find packs less appealing if they were plain - Studies of whether graphic health warnings would be more effective - Studies of whether consumers would be less likely to be misled 	Supports finding of contribution	Upholds panel’s findings/no error
<p>Post-implementation literature on proximal outcomes, including</p> <ul style="list-style-type: none"> - Studies of whether consumers found packs less appealing - Studies of effectiveness of graphic health warnings - Studies of whether consumers were less likely to be misled 	Supports finding of contribution	Upholds panel’s findings/no error
Post-implementation literature on distal outcomes	Supports finding of contribution (although some areas more limited/mixed)	Upholds panel’s findings/no error
Post-implementation literature on accelerated falls in prevalence attributable to plain packaging	Supports finding of contribution	<p>Upholds panel’s overall finding that prevalence declines have accelerated as a result of plain packaging.</p> <p>Finds a non-material error in relation to due process in the use of the panel’s statistical tests on multicollinearity and non-stationarity (two statistical concepts used to evaluate models). The panel’s findings on prevalence stand because there are multiple reasons to prefer Australia’s expert evidence to the complainants’, and the error only affects one of those reasons.</p>
Post-implementation literature on accelerated falls in	Supports finding of contribution	Finds an error in the panel’s modelling which means the panel’s finding that consumption declines

Body of evidence	Panel's finding	Appellate Body's finding
consumption (sales data) attributable to plain packaging		are attributable to plain packaging do not stand (although the findings that there have been an overall fall in consumption which has accelerated since the implementation of plain packaging were upheld). The error is non-material in light of other findings of the panel supporting the overall finding of contribution.
Relative weight to be given to each aspect of the evidence base	Consider totality of evidence, bearing in mind limited time since plain packaging has been implemented and difficulty of isolating impacts will mean that there are limitations to post-implementation evidence	Panel well within bounds of discretion to give more probative value to pre-implementation than post-implementation evidence given limitations of latter
Overall conclusion:	Complainants fail to discharge burden of proof to show that plain packaging is not apt to contribute to its public health objective. Rather, plain packaging is apt to and does make a meaningful contribution to its public health objective.	Upholds panel's finding that plain packaging is apt to and does make a meaningful contribution to its public health objective and re-emphasises that the complainants have not discharged their burden of proof to show otherwise.

Trade-restrictiveness

The Appellate Body also upheld the finding that plain packaging was trade-restrictive only to the extent that it was successful in reducing consumption, and therefore imports, of tobacco products.

Honduras and the Dominican Republic both argued that the panel should have adopted a test focusing on limiting effects on competitive opportunities, including limiting the ability of producers to differentiate their brands.¹⁹¹ They argued that 1) the panel should have found that plain packaging's impact on brand differentiation was sufficient to demonstrate its trade-restrictiveness,¹⁹² and that 2) the panel was incorrect in its conclusion that plain packaging had not reduced the value (as opposed to the volume) of imports in tobacco products because increased prices had offset the drop in consumption.¹⁹³

The Appellate Body affirmed the panel's definition of trade-restrictiveness as involving a 'limiting effect on international trade', and rejected the idea that restrictions on brand differentiation were sufficient in themselves to show trade-restrictiveness.¹⁹⁴ It found that 'a showing of a reduction in the competitive opportunities of imported products is only relevant to the assessment of trade restrictiveness to the extent that it reveals a limiting effect on international trade.'¹⁹⁵ It noted that a limiting effect on competitive opportunities could demonstrate a limiting effect on international trade, for example, in the case of discriminatory measures, but that it would not be in itself sufficient to demonstrate trade-restrictiveness.¹⁹⁶ For non-discriminatory measures, it was possible for changes in the conditions of competition to have both

¹⁹¹ Appellate Body Report, paras 6.377-6.378.

¹⁹² Appellate Body Report, paras 6.381-6.382.

¹⁹³ Appellate Body Report, paras 6.377-6.378, 6.382, 6.404, 6.412.

¹⁹⁴ Appellate Body Report, paras 6.384-6.386.

¹⁹⁵ Appellate Body Report, para 6.386.

¹⁹⁶ Appellate Body Report, paras 6.387, 6.389.

trade-enhancing and trade-reducing effects.¹⁹⁷ It was therefore necessary to look at the measure's impact on imports as a group, not on individual brands or producers.¹⁹⁸ Further, it would be necessary to look at actual trade effects if it was not apparent from the design or structure of the measure whether or not the measure had a limiting effect on international trade.¹⁹⁹

On how the panel's approach had been applied to plain packaging, the Appellate Body:

- upheld the panel's finding that plain packaging did not restrict trade by limiting competitive opportunities through restricting brand differentiation. The complainants had not shown at the panel level that restricting branding on packs would have a limiting effect on trade, because such restrictions could increase competitive opportunities by allowing for more competition on price as well as reduce them by making it more difficult for new entrants to establish themselves on the market through advertising. There was no reason to question the panel's conclusion that it was not possible to tell what the overall impact on trade of restricting brand differentiation would be.²⁰⁰
- rejected the argument that plain packaging would lead to a decrease in the value of tobacco products as a result of switching from higher to lower-priced brands. It upheld the panel's finding that there had in fact not been a decrease in the value of the tobacco market, because increased prices had offset the decline in imports caused by the decrease in overall demand.²⁰¹ It also rejected an additional DSU article 11 claim by the Dominican Republic, noting that the sentence in the statistical annex that the Dominican Republic challenged had not been necessary to the panel's decision.²⁰²

The Appellate Body therefore upheld the finding that plain packaging was trade-restrictive only to the extent that it reduced overall consumption and therefore imports in a market where all tobacco products were imported.²⁰³

Alternatives

The Dominican Republic and Honduras appealed two of the panel's findings on alternatives, arguing that an increase in tax and an increase in the minimum legal purchasing age were reasonably available and less trade-restrictive alternatives that would make an equivalent contribution.²⁰⁴

The Appellate Body upheld the panel's finding that neither measure would be less trade restrictive if it achieved an equivalent contribution to its public health objective.²⁰⁵ Since the Appellate Body had upheld the panel's approach to trade-restrictiveness, there was no reason to find that these alternative measures would be less trade-restrictive if equally effective – since tobacco products are entirely imported in Australia, the trade-restrictiveness of each of the measures was related to how much they drove down consumption. The Appellate Body again rejected arguments that the trade-restrictiveness of alternative measures should be judged in terms of competitive conditions in the market regarding branding and/or impacts on the price of products, for substantially the same reasons as for the trade-restrictiveness of plain packaging itself.²⁰⁶

Unlike the panel, the Appellate Body did consider that increases in excise tax and the minimum legal purchasing age could have made an equivalent contribution to public health as tobacco plain packaging.²⁰⁷ The panel had found that they would not make an equivalent contribution even if they reduced tobacco use by the same amount or more, because implementing them as a substitute for plain packaging would leave aspects of Australia's comprehensive tobacco control strategy unaddressed and would not make the most of the synergies between the measures.²⁰⁸ The Appellate Body found that such gaps and synergies could be relevant considerations, but that they should not be decisive – rather, the synergies between the measures and any gaps the alternatives would leave were to be accounted for as part of an overall assessment of the

¹⁹⁷ Appellate Body Report, para 6.389.

¹⁹⁸ Appellate Body Report, para 6.389.

¹⁹⁹ Appellate Body Report, para 6.389.

²⁰⁰ Appellate Body Report, paras 6.408, 6.410-6.411.

²⁰¹ Appellate Body Report, para 6.441.

²⁰² Appellate Body Report, para 6.458.

²⁰³ Appellate Body Report, para 6.459.

²⁰⁴ Appellate Body Report, para 6.460.

²⁰⁵ Appellate Body Report, paras 6.516, 6.521.

²⁰⁶ Appellate Body Report, paras 6.478-6.479.

²⁰⁷ Appellate Body Report, para 6.503.

²⁰⁸ Appellate Body Report, para 6.496

contributions of each measure, as it was understood that both plain packaging and its alternatives were not intended to be implemented alone.²⁰⁹

However, the Appellate Body concluded that this would not change the outcome of the case, because if the measures made an equal contribution, they would still be equally trade-restrictive, and therefore were not less trade-restrictive alternatives.²¹⁰ It also noted that whether or not these measures were alternatives, and whether they were reasonably available was not challenged on appeal, and that its reasoning should therefore not be taken to suggest that either tax or minimum legal purchasing age could be substituted for plain packaging.²¹¹

The Appellate Body also rejected a number of the appellants' DSU article 11 claims in relation to how the alternative measures analysis had been conducted, finding that they were based on a misreading of the panel report.

Overall findings on TBT article 2.2

The Appellate Body therefore:²¹²

- Upheld the panel's finding that plain packaging was apt to and did make a meaningful contribution to reducing the use of and exposure to tobacco.
- Upheld the panel's finding that plain packaging was trade-restrictive only to the extent that it was successful in reducing overall consumption and therefore imports of tobacco products
- Upheld the panel's finding that there was no less-trade restrictive alternative measure that could make an equivalent contribution, on the basis that the alternatives were not less trade-restrictive

Combined with unchallenged findings on the legitimate objective and gravity of the measure, these meant that the Appellate Body upheld the panel's overall finding that there was no breach of TBT article 2.2.

Separate Opinion of one Appellate Body member on TBT article 2.2

In a Separate Opinion, one Appellate Body member agreed with the overall conclusions of the Appellate Body as a whole, but dissented on two points.²¹³ First, the member considered that the DSU article 11 claims on the evidence should not have been considered at all. The complainants were required to show that plain packaging was *not* apt to contribute to public health, and the appellants had not brought up any errors by the panel that would change its findings on this point on appeal.²¹⁴ Since WTO measures are presumed consistent until proven otherwise, the Appellate Body should not have examined the appeals on whether plain packaging actually contributes to public health or looked at claims of error in detail – rather, the DSU article 11 claims should have been rejected on the basis that none of the errors would have had the effect of discharging the complainants' burden of proof even if they were material.²¹⁵ Further, the member noted that the Appellate Body should not have made a decision on whether the contributions of the alternative measures could be equivalent, having already decided that they were not less trade-restrictive – in his opinion, given that the appeal was to be dismissed on that basis, the Appellate Body should have exercised judicial economy in relation to the degree of contribution of plain packaging and the alternatives respectively.²¹⁶

Second, the member considered that there was no breach of due process (non-material or otherwise) in relation to the econometric tests for multicollinearity. Panels had significant discretion in how they analyse evidence, and it was appropriate given the large amount of econometric analysis that the panel would test and examine this evidence.²¹⁷ The panel had stayed within the bounds of its discretion and was not required to provide this analysis to parties for comment, and further, the appellants had not objected to these tests at

²⁰⁹ Appellate Body Report, para 6.498-504.

²¹⁰ Appellate Body Report, para 6.479.

²¹¹ Appellate Body Report, para 6.505.

²¹² Appellate Body Report, para 6.519-6.522.

²¹³ Appellate Body Report, para 6.524.

²¹⁴ Appellate Body Report, paras 6.532-6.534.

²¹⁵ Appellate Body Report, para 6.535.

²¹⁶ Appellate Body Report, para 6.536.

²¹⁷ Appellate Body Report, para 6.538

the interim review stage of the panel's report. The member therefore did not consider the panel's use of these tests without opportunity for the parties to comment to be an error.²¹⁸

The member would therefore have left the panel's reasoning on TBT article 2.2 undisturbed in its entirety.

Article 16.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights

The Appellate Body affirmed the panel's decision that there was no violation of TRIPS article 16.1. It affirmed that:²¹⁹

- there is no right to use a trademark, and that trademarks are negative rights to prevent infringement, not positive rights for a trademark holder to use the right themselves.
- there is no obligation on the state to ensure the conditions that keep trademarks distinctive. The protections that must be implemented under TRIPS article 16.1 are legal rights to prevent infringement by third parties. These legal rights exist independently of whether or not infringements actually occur in the market, so there is no obligation to guarantee market conditions leading to the possibility of infringement.
- there is therefore no need to determine whether trademarks have actually become less distinctive under plain packaging, because this is not relevant to any legal enquiry required under TRIPS article 16.1.

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

The Appellate Body upheld the panel's findings that there was no violation of TRIPS article 20, rejecting the appellants' challenges to both the panel's interpretation of article 20 and its application of the provision to plain packaging.

The interpretation of Article 20

The Appellate Body affirmed the panel's test for whether an encumbrance by special requirements is 'unjustifiable', which involves an examination of:²²⁰

1. 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;
2. The reasons for which the special requirements are applied, including any societal interests they are intended to safeguard
3. Whether these reasons provide sufficient support for the resulting encumbrance

The Appellate Body confirmed the panel's finding that the reasons for special requirements could include public health. It based its interpretation on Article 8 of the TRIPS Agreement (which states that members 'may adopt measures to protect public health and nutrition ... provided that such measures are consistent' with the TRIPS Agreement otherwise, and the various other provisions of TRIPS which recognised flexibilities for public health.²²¹

Importantly, the Appellate Body clarifies the standard of review required by the term 'unjustifiable', finding that it provides more regulatory autonomy to states than the concept of 'necessity' in TBT article 2.2 or GATT article 20 required:

In our view, the term "unjustifiably" in Article 20 of the TRIPS Agreement reflects the degree of regulatory autonomy that Members enjoy in imposing encumbrances on the use of trademarks through special requirements. The reference to the notion of justifiability rather than necessity in

²¹⁸ Appellate Body Report, para 6.542-6.543.

²¹⁹ Appellate Body Report, para 6.619.

²²⁰ Appellate Body Report, paras 6.651, 6.659.

²²¹ Appellate Body Report, para 6.649.

Article 20 suggests that the degree of connection between the encumbrance on the use of a trademark imposed and the objective pursued reflected through the term "unjustifiably" is lower than it would have been had a term conveying the notion of "necessity" been used in this provision.²²²

In further elaborating this standard, the Appellate Body noted that 'Article 20 of the TRIPS Agreement provides to Members a certain margin of discretion in imposing encumbrances on the use of trademarks'.²²³ It considered that a WTO member 'must be able to provide a reasonable explanation of how an objective pursued by introducing special requirements warranted the resulting encumbrances'.²²⁴ Although this was more than a 'rational connection' test, because it required a consideration of both the nature and extent of the encumbrance as well as the reasons for the encumbrance, this provided a higher 'degree of discretion' compared to a test of 'necessity', and also did not require encumbrances to be 'limited' in nature as per TRIPS article 17.²²⁵ Further, it noted that it was not necessary to examine whether there were alternative measures involving a lesser degree of encumbrance on the use of a trademark, although such alternatives could be considered in the circumstances of a particular case.²²⁶ The Appellate Body considered that requiring an examination of alternatives would 'defy the drafters' intention to provide greater latitude to Members' by using the term 'unjustifiably' instead of 'a term reflecting the notion of necessity'.²²⁷

Finally, the Appellate Body upheld the panel's use of the Doha Declaration on TRIPS and Public Health. The panel had referred to paragraph 5(a) of the Doha Declaration, which states that 'In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles' in TRIPS articles 7 and 8. Honduras challenged the panel's use of the Doha Declaration on the grounds that the Doha Declaration applied only to access to medicines, and challenged the finding that the Doha Declaration was a subsequent agreement to the TRIPS Agreement. However, the Appellate Body considered that 'regardless of the legal status of the Doha Declaration', the principle in paragraph 5(a) was a general principle of treaty interpretation and there was no error in the panel relying on it.²²⁸ Further, the panel had referred to the Doha Declaration to 'reconfirm its previous conclusions regarding the contextual relevance of Articles 7 and 8 of the TRIPS Agreement'.²²⁹ There was therefore no error in the panel's reliance on paragraph 5(a) of the Doha Declaration.

The Appellate Body therefore rejected the challenges to the panel's interpretation of article 20, finding that the panel had correctly provided for flexibility for public health goals.²³⁰

The application of article 20 to plain packaging

The Appellate Body also upheld the panel's finding on the application of article 20 to plain packaging.²³¹ Honduras had appealed the panel's approach to the nature and extent of the encumbrance (which focused on the economic value of the trademarks), as well as its determination that the public health impact of plain packaging provided 'sufficient support' for the encumbrance.

Nature and extent of encumbrances

On the nature and extent of encumbrances, Honduras argued that the panel had erroneously focused on the economic value of the trademarks rather than their distinguishing function, and that it had incorrectly considered the continued ability to use word trademarks as a mitigating effect. The Appellate Body rejected these challenges, noting that the panel's focus had in fact been based on what the complainants themselves had argued before the panel – they had not argued that consumers were in fact unable to distinguish products but rather made numerous arguments regarding the economic impact of the measures.²³² The Appellate Body also noted that the panel's statements on word marks recognised that despite prohibitions on

²²² Appellate Body Report, para 6.647.

²²³ Appellate Body Report, para 6.651.

²²⁴ Appellate Body Report, para 6.651

²²⁵ Appellate Body Report, paras 6.650-6.651, 6.653.

²²⁶ Appellate Body Report, para 6.653.

²²⁷ Appellate Body Report, para 6.655.

²²⁸ Appellate Body Report, para 6.657.

²²⁹ Appellate Body Report, para 6.658.

²³⁰ Appellate Body Report, paras 6.660, 6.719.

²³¹ Appellate Body Report, para 6.719.

²³² Appellate Body Report, para 6.672.

non-word marks, consumers could still distinguish between the sources of tobacco products via the word mark, and that they had not detracted from the panel's overall conclusion that the encumbrances were 'far-reaching'.²³³ The Appellate Body therefore did not consider that the panel had made an error in these statements.

Whether the public health reasons for plain packaging provide sufficient support for the resulting encumbrances on trademarks

In relation to whether or not plain packaging provided sufficient support for the encumbrances, Honduras argued that the panel had not undertaken sufficient weighing and balancing in its analysis of TRIPS article 20, because it had adopted its analysis from TBT article 2.2. It also argued that the panel had not adequately considered its less trademark-encumbering alternatives. The Appellate Body disagreed. It noted that in addition to recalling its findings under TBT article 2.2, the panel had also explained that the removal of design features and standardisation of packaging was integral to the measure, that Australia's public health objectives 'could be achieved only by uniform and standardized requirements that did not leave any space for possible administrative discretion or non-uniform application', and explained why alternative measures would not have achieved the same result.²³⁴ This analysis contained the necessary elements of a weighing and balancing exercise. In any case, the weighing and balancing exercise under article 20 did not have to be of the same level of detail as one under article 2.2, and although a panel could consider alternatives under article 20 it was not necessary to do so.²³⁵

The Appellate Body did note that if an alternative measure was analysed under article 20, the relevant question would be whether it was trademark-encumbering, not whether it was trade-restrictive, so analysis under TBT article 2.2 could not simply be transposed to TRIPS article 20.²³⁶ The same measure could have both trade-restrictive elements and trademark-encumbering elements and they would each need to be analysed under the appropriate provision.²³⁷ The Appellate Body found that the panel had appropriately considered the extent to which plain packaging and the alternatives put forward by the complainants had been trademark encumbering.²³⁸

The Appellate Body noted that it had found a legal error in the panel's finding that neither tax nor raising the minimum legal purchasing age could have made an equivalent contribution to plain packaging, and that the panel therefore could not have relied these findings for its analysis of alternatives under TRIPS article 20.²³⁹ However, it considered that the panel's finding that the trademark requirements of plain packaging contributed to their public health goal was enough in itself to ground the finding that plain packaging did not 'unjustifiably' encumber trademarks, as analysis of alternatives was not required under article 20 and members enjoyed a certain degree of regulatory autonomy under article 20.²⁴⁰

The Appellate Body confirmed that the contribution to public health made by plain packaging meant 'that Australia's public health reasons for the adoption of the TPP measures sufficiently supported the far-reaching encumbrances on the use of trademarks resulting from the trademark requirements of the TPP measures'.²⁴¹ It also dismissed the DSU article 11 claims under TRIPS article 20 that were essentially the same as the ones under TBT article 2.2.²⁴²

The weight placed on the WHO FCTC and its guidelines

Finally, Honduras also challenged the weight that the panel had placed on the WHO FCTC and its guidelines on articles 11 and 13 in its assessment of the TRIPS article 20 claims. Honduras argued that the FCTC did not include any binding commitment to adopt plain packaging, and that the guidelines could not be used to

²³³ Appellate Body Report, para 6.675.

²³⁴ Appellate Body Report, para 6.680.

²³⁵ Appellate Body Report, paras 6.681, 6.684.

²³⁶ Appellate Body Report, para 6.687.

²³⁷ Appellate Body Report, para 6.687.

²³⁸ Appellate Body Report, para 6.689.

²³⁹ Appellate Body Report, para 6.694.

²⁴⁰ Appellate Body Report, para 6.695.

²⁴¹ Appellate Body Report, para 6.697.

²⁴² Appellate Body Report, para 6.698.

justify WTO-inconsistent plain packaging measures, especially in situations where ‘countries go beyond the requirements of the [WHO] FCTC’.²⁴³

The Appellate Body rejected this challenge. It noted that the panel had cited the article 11 and 13 guidelines to further confirm and underscore findings it had already made, and considered that the panel had cited the WHO FCTC to support factual findings that it had made about the importance of Australia’s objective, and the fact that Australia had pursued its objective in line with ‘emerging multilateral public health policies in the area of tobacco control as reflected in the WHO FCTC’.²⁴⁴

The Appellate Body, therefore, did not agree with Honduras that the panel attributed undue legal weight to the WHO FCTC guidelines – it considered that the panel had ‘referred to Articles 11 and 13 of the FCTC Guidelines as additional factual support to its previous conclusion that the complainants failed to establish that Australia acted inconsistently with Article 20 of the TRIPS Agreement.’²⁴⁵

DSU challenge on individual cigarette sticks

Finally, the Appellate Body rejected the Dominican Republic’s argument that the panel had acted inconsistently with article 11 of the DSU by failing to address claims about the application of plain packaging to cigarette sticks. The Appellate Body pointed out that the panel’s analysis had in fact covered trademark restrictions on cigarette sticks.²⁴⁶

Overall conclusion on article 20

The Appellate Body therefore upheld and clarified the panel’s interpretation of article 20, and upheld the panel’s finding that the special requirements under plain packaging did not unjustifiably encumber the use of trademarks in the course of trade.²⁴⁷ There was, therefore, no breach of article 20.

Overall findings

Overall, the Appellate Body:

- Rejected the appeal on TBT 2.2, finding that plain packaging was not more trade-restrictive than necessary to achieve its public health objective
- Rejected the appeal on article 16.1, confirming that plain packaging does not affect rights of trademark owners
- Rejected the appeal on TBT article 20, finding that the public health reasons plain packaging was adopted provided sufficient support for encumbering trademarks

It therefore upheld the panel’s finding that there was no inconsistency between Australia’s plain packaging laws and the relevant provisions of the WTO Agreements.

Key themes of the decisions

The plain packaging WTO disputes are a landmark decision on trade and public health. We consider a few of their most significant themes and their implications below.

Closing the door on longstanding tobacco industry arguments about intellectual property

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. This argument has been a mainstay of tobacco industry legal challenges

²⁴³ Appellate Body Report, para 6.700.

²⁴⁴ Appellate Body Report, paras 6.706-6.707.

²⁴⁵ Appellate Body Report, para 6.707.

²⁴⁶ Appellate Body Report, paras 6.711, 6.715-6.717.

²⁴⁷ Appellate Body Report, paras 6.697, 6.699, 6.719.

since the 1990s, as part of a strategy to reframe public health measures as ones concerning trade and intellectual property.

There are now at least nine tobacco control cases,²⁴⁸ as well as several WTO decisions in other contexts,²⁴⁹ which find that trademarks do not grant such positive rights to use but only negative rights to prevent infringement by third parties. In *Australia – Plain Packaging*, 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 Appellate Body is even more clear in its statement that there is no right to use a trademark and that trademarks grant only negative and not positive rights. In particular, it rejects the idea that there is an obligation on the state to refrain from measures that will reduce the distinctiveness of a trademark, finding that this is not fundamentally different from arguing that there is a positive right to use a trademark, and it clearly states that the obligation under TRIPS article 16.1 is only to implement a legal right to prevent infringements by third parties, and not to guarantee particular market conditions.

Although there is no formal system of precedent in the WTO, as the appellate mechanism of the primary multilateral body on trade, the Appellate Body is likely to be highly persuasive in the interpretation of the TRIPS Agreement and in domestic laws and regional agreements whose text is based on the TRIPS Agreement. As such, the WTO Appellate Body's conclusive rejection of the 'right to use argument' and its variations confirms that trademarks do not prevent states from regulating marketing practices that make use of those trademarks.

Clarifying the relationship between the TRIPS Agreement and public health

The panel and Appellate Body also makes several statements that have systemic significance for the interpretation of the WTO agreements in cases regarding public health, particularly the TRIPS Agreement.

In particular, the Appellate Body confirms that paragraph 5(a) of the Doha Declaration, which states that TRIPS is to be interpreted in light of its object and purpose, including in particular TRIPS articles 7 and 8, reflects customary international law rules of interpretation, and that article 8 in particular should inform how TRIPS is interpreted.²⁵⁰ Articles 7 and 8 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.

²⁴⁸ These include, in addition to the panel and Appellate Body reports, 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), Conseil constitutionnel, *Decision n° 2015-727 DC of 21 January 2016*, *Loi de modernisation de notre système de santé*; *British American Tobacco Ltd v. Attorney General*, Constitutional Petition No. 46 of 2016 (28 May 2019, Constitutional Court of Uganda).

²⁴⁹ 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 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.

²⁵⁰ Appellate Body Report, para 6.657.

The panel had additionally stated 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 a whole, as well as the applicability of the Doha Declaration outside of its original context of access to medicines. The Appellate Body rejects the appellants' challenge to the panel's findings on the status of the Doha Declaration, although it does not specifically affirm them, instead stating that 'regardless' of the Doha Declaration's status, the paragraph cited by the panel represents a customary international law rule of interpretation.²⁵¹

The panel also confirmed that, as stated in previous WTO jurisprudence, health is 'vital and important in the highest degree',²⁵² and panels must take this into account in assessing TBT article 2.2 claims and in assessing TRIPS article 20 claims.²⁵³ This finding was not challenged on appeal.

Finally, the Appellate Body specifically notes that the term 'unjustifiable' in article 20 should be interpreted in a way that allows for regulatory autonomy and discretion on the part of WTO members, and establishes a more relaxed standard of review, as well as no need to assess alternatives, in reviewing measures under this provision.²⁵⁴ The Appellate Body's reasoning makes it clear that this provision is not intended to require the same level of detailed review of evidence as the standards under TBT article 2.2 or the health exception in GATT article XX, which gives states more leeway in defending their measures under this provision.

The panel and Appellate Body's approaches to assessing evidence

The panel and Appellate Body decisions are notable for their extensive consideration of the scientific evidence in relation to plain packaging, and for its discussion of how such evidence should be assessed. These findings are important not only in terms of the WTO dispute, but also because the panel comprehensively rejects claims that the tobacco industry routinely makes when opposing the introduction of plain packaging legislation. The panel and Appellate Body also make a number of systemic claims about how evidence should be assessed in public health cases.

Burden of proof and evidence on appeal

It is important to note that the burden of proof is on the complainant to show that there is no contribution, or that an equivalent contribution could be made by a less trade-restrictive alternative. The Appellate Body and panel, while finding and affirming that plain packaging is apt to and does make a meaningful contribution to public health, emphasises that it is not the role of the respondent state to positively establish the contribution of its measure:

“Given that the burden of proof rests on the complainant, where a panel finds that a complainant's proposition that the challenged measures makes no contribution is contradicted by evidence (e.g. because the respondent has presented credible evidence suggesting that the measure *does* make some contribution), then the panel is required to reject the complainant's proposition of no contribution”²⁵⁵

The plain packaging dispute is also notable for the volume of evidence brought on appeal under the article 11 DSU claims, which is highly unusual given that the Appellate Body does not have power to re-open factual findings. The Appellate Body strongly emphasises that the use of DSU article 11 to re-open findings of fact by the panel is inappropriate, and is critical of many of the complainants' challenges to the evidence throughout the proceedings. The Separate Opinion would have gone further, in not opening any of the DSU article claims at all, on the basis that none of the claimed errors would have been sufficient for the complainants to

²⁵¹ Appellate Body Report, para 6.657.

²⁵² 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.

²⁵³ Panel Report, para 7.2587.

²⁵⁴ Appellate Body Report, para 6.647, 6.697.

²⁵⁵ Appellate Body Report, para 6.278.

discharge their burden of proof. The plain packaging disputes demonstrate some of the systemic challenges facing WTO dispute settlement, including the ability of the dispute settlement system to handle lengthy, complex and aggressive litigation and how to handle attempts to relitigate facts via DSU article 11 claims.

Regulatory context

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.

What kinds of evidence should be considered?

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.²⁵⁶ In the panel's application of these criteria, it accepts a wide range of evidence as relevant, including pre- and post-implementation scientific studies, reviews of evidence conducted in other countries (such as the systematic reviews of plain packaging literature conducted in the UK), statistical modelling of prevalence and consumption data, and guidance provided by the WHO FCTC and its guidelines.

The Appellate Body upholds the panel's use of this evidence, and rejects the appellants' arguments that such evidence cannot be taken into account. Further, the Appellate Body explicitly notes that the panel was entitled to place more probative value on pre-implementation evidence than post-implementation evidence, given the limitations of the latter at the time of plain packaging's implementation. This statement is important for other countries implementing novel measures, where post-implementation evidence may be limited at the time of implementation, as it confirms the importance and value of pre-implementation scientific literature.

Complementary and alternative measures

The panel and Appellate Body also extensively discuss how to assess whether or not other measures might be an alternative to a challenged measure, for the purposes of assessing the overall necessity of a measure.

At the panel level, 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.

However, the Appellate Body de-emphasises this theme, noting that while the interaction between complementary measures may be relevant, it is not decisive. Rather, for both a measure and its alternatives, the degree of contribution must account for the regulatory context of a measure, including whether it is intended to be implemented as part of a suite of complementary measures. The Appellate Body notes that

“[I]n our view, whether and to what extent a measure creates synergies with other measures is one of the factors informing the overall degree of contribution that a measure makes to a legitimate objective, which all participants agree is the central question in determining equivalence. Thus, even where the challenged measure is implemented as part of a Member's comprehensive policy, a panel assessing equivalence will not be relieved from its duty to objectively ascertain, and compare, the

²⁵⁶ Panel Report, paras 7.981-7.982.

overall degrees of contribution that the challenged and alternative measures make to the legitimate objective by taking into account all pertinent factors. Depending on the case, such factors may include the relevant objective pursued by a Member's policy, the overall level of protection that the Member seeks to achieve through that policy, the respective degrees of contribution that the challenged and alternative measures are apt to make to the relevant objective, and whether and to what extent the contribution of each measure would be enhanced (or diminished) in the presence of the other existing measures, including due to the synergies created between different measures.”

This means that an alternative measure such as tax can be an alternative that makes an equivalent contribution to public health as plain packaging, even though they act through different mechanisms that are intended to work in concert toward the overarching goal. The fact that the two measures are implemented as part of a comprehensive suite will have a bearing on the degree of contribution made by each one, but does not mean that they cannot make an equivalent overall contribution to each other, because neither measure should be considered in isolation. Instead, a WTO panel must compare whether the contribution of each measure is equivalent, by reference to:

- The objective of the measure
- The overall level of protection that the member is seeking to achieve through the measure
- The respective degree of contribution that the measure and its alternatives make to the objective
- Whether and to what extent the contribution of each measure would be enhanced (or diminished) in the presence of the other existing measures, including due to the synergies created between different measures

The Appellate Body's approach still acknowledges the importance of complementary measures, but makes it one of a range of factors to be considered on a case by case basis rather than giving it the central role that the panel did.

The Appellate Body also upholds the panel's finding that neither of the alternatives is less trade restrictive if it makes an equivalent contribution, because if they are equally effective, they will restrict trade by the same amount. This finding takes on more importance in the Appellate Body's decision, given that it is possible for alternatives to make an equivalent contribution to a public health goal even if they are complements rather than substitutes for each other.

The practical difference of the panel and Appellate Body's approach for those implementing public health policies is therefore likely to be minimal for non-discriminatory measures, as it is difficult to imagine a situation in which two non-discriminatory measures would both make an equal contribution to reducing consumption of a harmful product and yet have a different level of trade-restrictiveness.

Finally, the Appellate Body notes that the reasonable availability of each alternative was not appealed in this particular case, nor the panel's framing of the objective, and that its decision therefore should not be taken as a suggestion that tax or minimum legal purchasing age increases can be a substitute for plain packaging.²⁵⁷

The Appellate Body also clarifies that an analysis of alternatives is not required under article 20 of TRIPS.

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 Appellate Body affirms the panel's approach on appeal, rejecting a challenge brought by Honduras and the Dominican Republic to the use of the WHO FCTC in the panel's article 20 analysis.

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.²⁵⁸ 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

²⁵⁷ Appellate Body Report, para 6.505.

²⁵⁸ Panel Report, para 7.412.

certain facts.²⁵⁹ The Appellate Body upholds the panel's approach, and notes that the panel mostly invoked the WHO FCTC and its guidelines to support its factual findings rather than in interpretation.

The factual findings supported by the WHO FCTC cover a variety of important aspects of the case at the panel level, including the following:

To support the panel's understanding of how the measure works

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.²⁶⁰

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 multifaceted approach, and that different tobacco control measures serve as complementary parts of this comprehensive approach.²⁶¹

These aspects were not challenged on appeal.

To support the panel's findings on the rationale and efficacy of particular measures

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 smoke²⁶²
- The finding that packaging is a form of promotion,²⁶³ and
- The finding that plain packaging is an important way to reduce the appeal of tobacco packaging design and its use in tobacco product promotion²⁶⁴

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,²⁶⁵ and to the article 11 guidelines to confirm its understanding that graphic health warnings are an effective tobacco control measure.²⁶⁶

These aspects were also not challenged on appeal.

To confirm the justifiability of plain packaging by reference to international consensus

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,²⁶⁷ and takes into account that Australia implemented plain packaging 'in line with the emerging multilateral public health

²⁵⁹ Panel Report, paras 7.413-7.416.

²⁶⁰ Panel Report, para 7.243.

²⁶¹ Panel Report, paras 7.1728-7.1730.

²⁶² Panel Report, para 7.1309.

²⁶³ Panel Report, paras 7.664-7.665.

²⁶⁴ Panel Report, paras 7.663-7.666, 7.2595-7.2596.

²⁶⁵ Panel Report, paras 7.1507-7.1511, 7.1527.

²⁶⁶ Panel Report, paras 7.798-7.803.

²⁶⁷ Panel Report, para 7.2596.

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.²⁶⁸

This particular invocation of the WHO FCTC by the panel was appealed by Honduras and the Dominican Republic. The Appellate Body upheld the way in which the panel invokes the WHO FCTC and its guidelines. It found that the panel was entitled to cite the WHO FCTC and its guidelines to reconfirm its factual findings that plain packaging was consistent with emerging multilateral public health policies, and that its importance was further underscored through the WHO FCTC.²⁶⁹ In doing so, the Appellate Body clarifies that this use of the WHO FCTC to confirm the results of its justifiability analysis is a factual question, and therefore governed by the scope of the panel's fact-finding authority rather than its jurisdiction to interpret non-WTO treaties.

What will the conclusion of the dispute mean?

Status of the WTO Appellate Body report

There is no further avenue of appeal from a WTO Appellate Body report. Although WTO cases do not strictly bind members who were not party to the dispute or create formal precedent, in practice, it is rare for subsequent panels to depart from a decision of the Appellate Body, given the Appellate Body's role in ensuring consistency in legal interpretation across disputes. WTO dispute settlement is also conducted between states, which means that for another WTO challenge to plain packaging to occur, a WTO member state would need to be willing to spend significant resources and political capital to bring a dispute whose main arguments have already been comprehensively rejected in an Appellate Body decision. Another challenge to plain packaging would therefore be unlikely, and if it did occur, would probably be decided similarly with significantly less time and resources required to resolve the case, all other things being equal.

As such, parties can be confident that this decision is the end of the line for WTO cases relating to plain packaging, and that it also effectively closes off arguments about how trademark obligations under TRIPS interact with other measures such as graphic health warnings. Further, as a large number of domestic intellectual property laws are based on TRIPS and investment disputes have also drawn on the TRIPS definitions and interpretations, the decision is likely to also be highly influential in legal challenges to tobacco control measures in other fora.

Implications for other risk factors

Although a comprehensive review of the implications of the decision for other risk factors is out of scope for this paper, the key findings of the panel and Appellate Body reports will also provide important guidance for other NCD risk factors, particularly measures to regulate unhealthy foods and alcoholic beverages. In particular, the key legal principles that there is no right to use a trademark under TRIPS, the general approach to TRIPS article 20, and the weighing and balancing exercise in TBT article 2.2 will be relevant across NCD risk factors.

Although the broad principles will be similar across risk factors, there are some differences in both the legal frameworks and how they are applied. The key differences are as follows:

- *International standards*: the legal framework for examining unhealthy diets differs slightly to that of tobacco, as the Codex Alimentarius standards of WHO and the Food and Agriculture Organization are recognised as international standards for the purposes of TBT 2.4 and TBT 2.5. TBT 2.4 requires parties to base their technical regulations on international standards. TBT 2.5 creates a presumption that measures that are in accordance with such standards are consistent with TBT article 2.2. As

²⁶⁸ Panel Report, para 7.2604.

²⁶⁹ Appellate Body Report, 6.704-6.707.

such, all three of TBT 2.2, 2.4, and 2.5 must be considered in relation to a measure to regulate unhealthy diets.

- *Differences in the nature of the regulatory measures*: the kinds of regulatory measures for food and alcohol which have been discussed in WTO committees so far are primarily health warnings on alcohol, interpretive labels on food, and partial restrictions on the design of packaging, rather than the more comprehensive standardization involved in plain packaging. As such, these measures will be significantly less trademark encumbering for the purposes of TRIPS article 20, and probably less trade-restrictive for the purposes of TBT article 2.2 as well (and as discussed above, there is no issue relating to other provisions of TRIPS for any of these measures due to the nature of a trademark as a negative right).
- *Role of international instruments*: one key difference often mentioned is that there is no binding international legal instrument for food or alcohol, although this difference is less significant in this context than might be assumed. Although the WHO FCTC played an important normative and evidentiary role in this case, several of the complainants were not parties to it, and the panel (as affirmed by the Appellate Body) therefore invoked it primarily to support its findings of fact. Non-binding normative instruments on other risk factors, such as WHO guidance, could potentially provide similar ‘factual support’, and there is no legal reason why a WTO panel could not consider them in a similar way.

Overall, however, many aspects of the analysis would be similar across different packaging and labelling measures to address NCD risk factors, and the Appellate Body’s decision does therefore clarify relevant WTO law principles in a way that affirms space to implement regulatory measures to prevent NCDs more broadly.

Conclusion

The WTO decisions on plain packaging are a comprehensive victory for public health and are important for both their evidentiary and legal findings. They review and uphold an unprecedented amount of evidence for a WTO dispute, and in doing so, decisively reject tobacco industry misinformation about plain packaging. The thoroughness, and the multilateral character, of these decisions should give confidence to states looking to move ahead with tobacco plain packaging and other measures implementing the WHO FCTC.

These reports are also part of a significant body of jurisprudence about states’ ability to regulate for public health, and continue themes from that jurisprudence, including that measures implemented as part of a comprehensive suite of policies need to be assessed in light of that context, 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 needs 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 and Appellate Body report will have importance beyond the WTO dispute settlement system. WHO FCTC parties should find much in these reports that is both useful and encouraging for the development of legislation and the defence of legal challenges.