WORLD TRADE ORGANIZATION

Panel established pursuant to Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes

Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (WT/DS435/441/458/467)

Integrated Executive Summary of Australia's Submissions

Geneva, 23 March 2016

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GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Abbreviation / Acronym	Full title
FCTC	World Health Organization Framework Convention on Tobacco Control
FCTC COP	Conference of the Parties to the Framework Convention on Tobacco Control
FCTC Guidelines	Guidelines for the Implementation of the World Health Organization Framework Convention on Tobacco Control
GATT 1994	*General Agreement on Tariffs and Trade 1994*
NDSHS	National Drug Strategy Household Survey
Paris Convention	*Paris Convention for the Protection of Industrial Property (as Revised at Stockholm in 1967)*
TBT Agreement	*Agreement on Technical Barriers to Trade*
TPP Act	*Tobacco Plain Packaging Act 2011* (Cth)
Tracking Survey	National Tobacco Plain Packaging Tracking Survey
TRIPS Agreement	*Agreement on Trade-Related Aspects of Intellectual Property Rights*
Vienna Convention	*The Vienna Convention on the Law of Treaties*
WHO	World Health Organization
WTO	World Trade Organization

LIST OF SHORT TITLES OF EXHIBITS USED IN REFERENCES

Short title	Full title
Australia's expert reports	
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Expert Report of F. Chaloupka, Exhibit AUS-9.	Expert Report of F. Chaloupka (Public Health) (7 March 2015).
Expert Report of N. Tavassoli, Exhibit AUS-10.	Expert Report of N. Tavassoli (10 March 2015).
Expert Report of J.P. Dubé, Exhibit AUS-11.	Expert Report of J.P. Dubé (9 March 2015).
Expert Report of P. Slovic, Exhibit AUS-12.	Expert Report of P. Slovic (4 March 2015).
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Expert Report of M. Katz, Exhibit AUS-18.	Expert Report of M. Katz (9 March 2015).
Expert Report of G. Fong, Exhibit AUS-531.	Second Expert Report of G. Fong (8 September 2015).
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Short title	**Full title**
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I. INTRODUCTION

1. For the reasons set out in Australia's written submissions, oral statements, responses to questions from the Panel, and comments on the complainants' responses, the complainants' claims that the tobacco plain packaging measure is inconsistent with Australia's obligations under the covered agreements are unfounded both in law and in fact.

2. As a matter of law, the complainants' claims either rely on clear distortions and misinterpretations of the relevant provisions of the TRIPS Agreement, the TBT Agreement, and the GATT 1994, or otherwise fail to satisfy the legal requirements for establishing a claim of violation under those provisions.

3. Moreover, even if the Panel were to find that the complainants have established the *prima facie* applicability of the relevant legal provisions, the complainants have failed to prove their claims of violation as a matter of evidence.

4. Under the two principal provisions at issue in this dispute – Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement – the complainants have assumed the burden of proving that the tobacco plain packaging measure will make *no* contribution to its public health objectives. The qualitative and quantitative evidence before the Panel, and the complainants' own contradictory arguments regarding the effects of the measure, demonstrate that the complainants have failed to discharge this burden.

5. In recognition of this failure, the complainants have attempted throughout their submissions to shift their legal burden to Australia by suggesting that Australia must positively demonstrate that the tobacco plain packaging measure has resulted in immediately observable and quantifiable declines in smoking prevalence and consumption in the limited period of time since the measure's implementation. Not only does this argument fundamentally ignore the nature of the tobacco plain packaging measure as a long-term public health measure that forms an integral part of a comprehensive suite of tobacco control measures, and the nature of tobacco use as a complex public health problem that requires a comprehensive response, it also constitutes an additional error of law that infects the complainants' arguments.

6. In light of the complainants' failure to prove that the tobacco plain packaging measure is inconsistent with Australia's obligations under the covered agreements, the Panel should reject the complainants' claims in their entirety.

II. SUMMARY OF THE RELEVANT CONTEXT FOR ASSESSING AUSTRALIA'S TOBACCO PLAIN PACKAGING MEASURE

7. This dispute concerns a Member's right to regulate the advertising and promotion of tobacco – a unique, highly addictive product that kills half of its long-term users; is the world's leading cause of preventable morbidity and mortality; is globally responsible for the deaths of nearly 6,000,000 people annually, including 600,000 non-smokers exposed to second-hand smoke; for which there is no safe level of use or safe level of exposure; and which harms nearly every organ in the body.[1]

[1] Australia's first written submission, Part II.A, paras. 23-24, 27-30, and Part II.B, para. 32.

8. In Australia, tobacco use is a leading cause of preventable disease and premature death. Over 15,000 Australians die each year from smoking-related diseases.[2]

9. To combat the global epidemic of tobacco use,[3] the FCTC requires comprehensive tobacco control strategies in recognition that they are the most effective means of reducing the incidence and prevalence of smoking.[4] To be effective, such comprehensive strategies must cover all aspects of supply and demand; apply to all tobacco products; optimize synergies between complementary measures; and be continually refreshed and revised.[5]

10. Australia's comprehensive suite of tobacco control measures includes: measures that have progressively restricted advertising of tobacco products; graphic health warnings; increased excise taxes; restrictions on youth access; retail and point-of-sale-display bans; bans on smoking in public places; support for cessation; and anti-smoking social marketing campaigns and public education campaigns.[6] The tobacco plain packaging measure was introduced to prohibit one of the last remaining avenues for the advertising and promotion of tobacco products to consumers and potential consumers in Australia: the retail packaging of tobacco products and the product itself.[7]

11. The measure achieves this objective by prohibiting the display of design features on the retail packaging of tobacco products, including trademarks (other than brand, business or company name or variant name), logos, symbols, imagery, colours and promotional text; imposing certain restrictions on the shape and finish of the retail packaging of tobacco products; and imposing certain other requirements related to the appearance of tobacco products.[8] To ensure that tobacco companies are still able to distinguish their products from other products in the marketplace, the measure permits the use of brand, business or company name and variant names on retail packaging, including names that are trademarked, in a standardised form.[9] These requirements apply to all tobacco products.[10]

12. Australia's decision to implement the tobacco plain packaging measure was based upon an extensive body of supporting scientific evidence,[11] and the explicit recommendation of the FCTC Guidelines to adopt tobacco plain packaging as a means of implementing Parties'

[2] Australia's first written submission, Part II.C, para. 34; Australia's opening statement at the first substantive meeting of the Panel, para. 7.
[3] Australia's first written submission, Part II.B, para. 31; Australia's opening statement at the second substantive meeting of the Panel, paras. 17-18.
[4] Australia's first written submission, Part II.D, paras. 38, 46-49; Australia's second written submission, para. 250; Australia's opening statement at the second substantive meeting of the Panel, para. 8; Australia's comments on responses to Panel Question No. 6, paras. 34-36.
[5] Australia's first written submission, Part II.D, paras. 38-49; Australia's opening statement at the second substantive meeting of the Panel, paras. 9-10; Australia's comments on responses to Panel Question No. 6, paras. 34-36.
[6] Australia's first written submission, Part II.D.2 and Part II.D.3; Australia's second written submission, para. 552; Australia's opening statement at the second substantive meeting of the Panel, para. 9.
[7] Australia's first written submission, Part II.D.3.
[8] Australia's first written submission, Part II.G.2.
[9] Australia's first written submission, Part II.G.2; Australia's second written submission, Part II.C.5(c); Australia's opening statement at the first substantive meeting of the Panel, paras. 50-54.
[10] Australia's first written submission, Part II.G.2(e).
[11] Australia's first written submission, Part II.E.3 and Part II.I.3; Australia's second written submission, Parts II.C.5(b) and III.D.3.

obligations under the FCTC.[12] Numerous other countries, including Ireland, the United Kingdom, France, Hungary, New Zealand, Norway, Chile and Singapore, have now adopted or are considering adopting their own tobacco plain packaging measures, consistent with the FCTC Guidelines, to improve public health in their respective jurisdictions.[13]

13. The synergies between Australia's comprehensive and complementary tobacco control measures are critical.[14] For example, tobacco plain packaging works together with excise tax increases to address youth initiation across each of its stages, including the early stages of experimentation with tobacco use.[15] Similarly, tobacco plain packaging enhances the effectiveness of Australia's social marketing campaigns, which are otherwise undermined by tobacco product marketing.[16] Tobacco plain packaging also increases the effectiveness of graphic health warnings, and the enhanced graphic health warnings reinforce the messages conveyed in anti-tobacco social marketing campaigns, and do so at a particularly important time – namely, the point of consumption.[17] Such measures therefore complement, rather than act as a substitute for, each other.[18]

14. Australia's comprehensive tobacco control strategy has resulted in a decline in the prevalence rates of smoking in Australia.[19] Prevalence in Australia is now the lowest it has been for many decades, with substantial declines occurring during the period in which tobacco plain packaging has been in force.[20]

15. The most recent NDSHS, which covers the period 2010-2013, showed a notable decline in prevalence rates. Rates of daily smoking declined from 15.9% to 13.3% among Australians aged 18 or older and, significantly, from 15.1% to 12.8% among Australians aged 14 or older.[21] This drop in prevalence of 2 to 3 percentage points translates to 200,000 fewer daily smokers, aged 14 or older.[22] Similarly, under the Australian Bureau of Statistics 2014-15 wave of the National Health Survey, daily smoking among Australians aged 18 and over was 14.5% in 2014-15, down from 16.1% in 2011-12.[23] These results are consistent with other

[12] Australia's first written submission, Part II.F; Australia's second written submission, paras. 242-245; Australia's opening statement at the second substantive meeting of the Panel, para. 11.
[13] Australia's comments on responses to Panel Question No. 163, paras. 117-118; Australia's second written submission, paras. 245-249; Australia's opening statement at the second substantive meeting of the Panel, para. 11.
[14] Australia's opening statement at the first substantive meeting of the Panel, paras. 16-17; Australia's opening statement at the second substantive meeting of the Panel, para. 10; Australia's response to Panel Question No. 158, para. 73; Australia's comments on responses to Panel Question No. 161, paras. 107-111.
[15] Australia's comments on responses to Panel Question No. 161, para. 108.
[16] Australia's comments on responses to Panel Question No. 161, para. 110.
[17] Australia's opening statement at the second substantive meeting of the Panel, para. 10; Australia's comments on responses to Panel Question No. 161, para. 110.
[18] Australia's opening statement at the second substantive meeting of the Panel, para. 10; Australia's second written submission, Part III.F; Australia's opening statement at the second substantive meeting of the Panel, paras. 9-10, 154-155.
[19] Australia's first written submission, Part II.C, para. 36 and Figure 1; Part II.D, para. 53, Figure 3; Australia's opening statement at the second substantive meeting of the Panel, paras. 12-15.
[20] Australia's first written submission, Part II.C, para. 36; Australia's opening statement at the second substantive meeting of the Panel, paras. 12-15.
[21] Australia's first written submission, Part II.C, para. 36; Australia's response to Panel Question No. 199, para. 310; Australia's opening statement at the second substantive meeting, para. 12.
[22] Australia's opening statement at the second substantive meeting of the Panel, para. 12.
[23] Australia's response to Panel Question No. 199, para. 389.

evidence before the Panel showing significant declines in smoking prevalence following the introduction of the tobacco plain packaging measure.

16. Recent data on smoking prevalence taken from the Roy Morgan monthly survey confirms a substantial reduction in prevalence. While Roy Morgan uses different survey methodologies, the pattern of rapid decline in prevalence is significant and consistent. Overall prevalence for Australian smokers aged 14 and over declined from 18.7% in the period from January to June 2012 (prior to the introduction of tobacco plain packaging) to 16.2% in the first six months of 2015.[24] Prevalence among Australians aged 14-24 also declined, from 16.7% to 14.1%. This translates to approximately 492,000 fewer smokers aged 14 and over, including approximately 86,000 fewer youth and young adult smokers.[25]

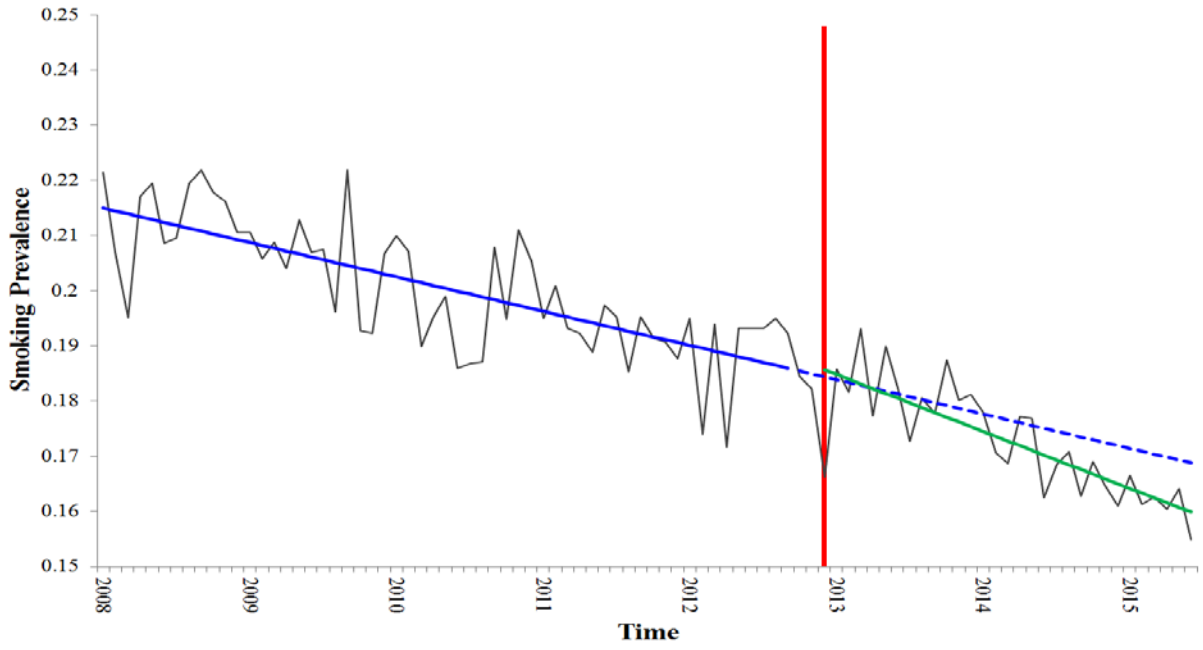
17. Since the complainants have assumed the burden of establishing that the tobacco plain packaging measure is incapable of contributing to Australia's public health objectives, they must demonstrate that *none* of the significant declines in smoking prevalence and consumption that have occurred since the measure's introduction can be attributed to the tobacco plain packaging measure; and that the measure is incapable of making *any* contribution to reducing the use of, and exposure to, tobacco products in the future.

18. As Australia has established in its submissions throughout these proceedings, the complainants have failed entirely to discharge this burden. Because the complainants' failure to discharge this burden is fatal to the complainants' principal claims under Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement, Australia will summarise the relevant arguments and evidence concerning the measure's contribution to its public health objectives before addressing the other deficiencies in the complainants' claims.

III. THE COMPLAINANTS HAVE FAILED TO DEMONSTRATE THAT THE TOBACCO PLAIN PACKAGING MEASURE IS INCAPABLE OF CONTRIBUTING TO ITS OBJECTIVES

19. Australia has witnessed an acceleration in the significant decline in smoking prevalence since the introduction of tobacco plain packaging as part of a comprehensive suite of tobacco control measures in late 2012, as the following graph shows.[26]

[24] Australia's opening statement at the second substantive meeting of the Panel, para. 14.
[25] Australia's opening statement at the second substantive meeting of the Panel, para. 14.
[26] Australia's response to Panel Question No. 196, para. 222.



20. In the same period, the consumption of tobacco products also fell. Average per capita monthly sales in the twelve months to September 2015 fell by more than 15% as compared to the equivalent twelve months prior to the introduction of the measure.[27]

21. Nevertheless, the complainants claim that there is insufficient evidence to satisfy the Panel that the tobacco plain packaging measure will ever contribute to its public health objectives. While it is the complainants that bear the burden of proving this argument, Australia has demonstrated that, properly analysed, the weight of the qualitative and quantitative evidence before the Panel overwhelmingly supports the conclusion that the measure is apt to contribute to reducing the use of tobacco products, and exposure to tobacco smoke.

A. THE COMPLAINANTS HAVE FAILED TO ESTABLISH ON THE BASIS OF THE QUALITATIVE EVIDENCE BEFORE THE PANEL THAT THE MEASURE IS INCAPABLE OF CONTRIBUTING TO ITS OBJECTIVES OR IS UNJUSTIFIABLE

22. Throughout the course of these proceedings, Australia has submitted a large body of qualitative evidence that supports the conclusion that tobacco plain packaging is apt to contribute to reducing the use of tobacco products and exposure to tobacco smoke. As Australia has explained, there are multiple hypotheses that are "tested and supported by sufficient evidence"[28] which justify the conclusion that the measure is apt to contribute to Australia's public health objectives.

23. The complainants have failed to discredit any of this evidence. The complainants' assertion that tobacco plain packaging is incapable of contributing to its objectives amounts, at most, to a request that the Panel take a different view of this evidence. This is insufficient

[27] Australia's comments on responses to Panel Question No. 146, para. 14.
[28] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

as a matter of law to establish that there is no credible evidentiary support for the conclusion that tobacco plain packaging is capable of contributing to its objectives.

1. The complainants have failed to sever the clear link between advertising and smoking-related behaviours

24. The evidence shows that there is a clear link between advertising and smoking-related behaviours and that because retail packaging represents a medium for advertising and promoting tobacco products, the tobacco plain packaging measure is capable of affecting smoking-related behaviours. The clear weight of scientific evidence supports this link. This evidence dates back to the 1980s, and includes successive, eminent reports of United States Surgeons General, the World Health Organization, the United States National Cancer Institute, and the United States Institute of Medicine.[29] These reports have consistently concluded that tobacco companies deliberately target their marketing and advertising to young people to "lure them into starting smoking".[30]

25. There can be no real dispute that advertising increases primary demand for tobacco products. While the complainants have attempted to dispute this, their evidence fails genuinely to contest the proposition that tobacco advertising causes people to smoke.[31]

2. The complainants' argument that tobacco product packaging does not constitute advertising or promotion is implausible

26. Australia has placed a significant amount of qualitative evidence on the Panel record which demonstrates that retail tobacco packaging advertises and promotes tobacco products.[32] This evidence includes marketing theory and practice,[33] as well as evidence from the tobacco industry itself, which views the package as a "billboard"[34] and acknowledges that "tobacco companies, like other consumer goods companies, see branded packaging as one of the tools of advertising."[35] In short: branded packaging functions as a form of advertising and promotion, which increase primary demand for tobacco products.[36]

27. The complainants have disputed this proposition, relying on two key arguments. First, that packaging cannot be advertising because it does not fit within a textbook definition of "promotion". Second, that even if packaging does generally function as advertising, it cannot serve this function in the context of Australia's dark market. Both of these arguments are without foundation.

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[29] Australia's first written submission, para. 64; Australia's second written submission, paras. 217-236, citing Expert Report of F. Chaloupka, Exhibit AUS-9.
[30] Australia's first written submission, Part II.E, paras. 62-63, citing Teague, Exhibit AUS-69; R.J. Reynolds, Exhibit AUS-70; and *USA et al v. Philip Morris USA Inc., et al*, Exhibit AUS-71.
[31] Australia's first written submission, paras. 621-626; Australia's second written submission, paras. 214-226.
[32] Australia's first written submission, Part II.E; Australia's opening statement at the first substantive meeting of the Panel, paras. 26-55, and accompanying Powerpoint presentation; Australia's second written submission, paras. 227-236.
[33] Australia's first written submission, Part II.E.2(b), citing Expert Report of N. Tavassoli, Exhibit AUS-10; and Expert Report of J.P. Dubé, Exhibit AUS-11.
[34] Australia's first written submission, Part II.E.2(a) and (c); Australia's second written submission, para. 231. See also, *JT International SA v Commonwealth of Australia*, Exhibit AUS-84.
[35] Australia's opening statement at the second substantive meeting of the Panel, para. 32, citing Chantler, Exhibit AUS-81, para. 3.22.
[36] Australia's first written submission, paras. 70-84; Australia's second written submission, paras. 227-236.

(a) Packaging is advertising

28. Branded packaging plays a powerful role in consumer decision-making, a proposition supported by evidence from the tobacco industry and Australia and the complainants' marketing experts.

29. Extensive evidence before the Panel demonstrates that the tobacco industry has developed and exploited tobacco packaging for decades as "one of the tools of advertising" tobacco products,[37] including cigars,[38] to project positive images that appeal to specific demographic groups, especially young smokers.[39]

30. Australia has submitted expert marketing evidence, including the reports of Professors Dubé and Tavassoli,[40] which explains the role packaging plays in appealing to consumers and influencing consumer responses, including purchase and consumption behaviour.[41] The complainants' contention that packaging does not function as a form of advertising is directly contradicted by the complainants' own submissions[42] and the expert report of Professor Steenkamp,[43] who acknowledges that advertising plays a powerful role in consumer decision-making.[44]

(b) Tobacco packaging functions as advertising in Australia's dark market

31. Even if packaging is advertising, the complainants have asserted that because Australia is a "dark market",[45] packaging cannot possibly perform an advertising function.

32. This argument is contradicted by evidence from the tobacco industry itself showing that tobacco packaging became an increasingly important form of advertising and promoting tobacco products precisely *because* of Australia's dark market.[46] Indeed, reviews of

[37] Australia's first written submission, Part II.E.2, citing Chantler, Exhibit AUS-81; Philip Morris, Exhibit AUS-82; R.J. Reynolds, Exhibit AUS-83; and *JT International SA v Commonwealth of Australia*, Exhibit AUS-84; Australia's second written submission, paras. 227-231; Australia's opening statement at the first substantive meeting of the Panel, paras. 26-55, and accompanying Powerpoint presentation.
[38] Australia's first written submission, Part II.E.2, paras. 74, 82, citing Hammar, Exhibit AUS-87, Exhibit AUS-98, and Exhibit AUS-99; Swedish Match, Exhibit AUS-100; Miller et al, Exhibit AUS-102; and Swedish Match, Exhibit AUS-103.
[39] Australia's first written submission, paras. 66-86; Australia's second written submission, paras. 222-230 citing United States Surgeon General, Exhibit AUS-76; and WHO, Exhibit AUS-80.
[40] Australia's first written submission, Part II.E.2, paras. 70-72, citing Expert Report of N. Tavassoli, Exhibit AUS-10, and Expert Report of J.P. Dubé, Exhibit AUS-11.
[41] Australia's first written submission, Part II.E.2, paras. 70-84, citing Expert Report of N. Tavassoli, Exhibit AUS-10; Expert Report of J.P. Dubé, Exhibit AUS-11; Expert Report of P. Slovic, Exhibit AUS-12; Expert Report of A. Biglan, Exhibit AUS-13; Expert Report of G. Fong, Exhibit AUS-14. See also, Centre for Tobacco Control Research Core, Exhibit AUS-90; Hammond, Exhibit AUS-91; and United States Surgeon General, Exhibit AUS-76.
[42] Cuba's first written submission, para. 197.
[43] Australia's opening statement at the second substantive meeting of the Panel, paras. 41-42, citing Expert Report of J. Steenkamp, Exhibit DOM/HND-14, para. 92.
[44] Australia's response to Panel Question No. 204, para. 390; Australia's opening statement at the second substantive meeting of the Panel, paras. 37-46; Australia's comments on responses to Panel Question No. 197, para. 310.
[45] Australia's first written submission, para.8, fn 3: Australia is a "dark market" because it has a highly restricted regulatory environment for tobacco advertising and promotion.
[46] Australia's first written submission, Part II.E.2, para. 83, citing Philip Morris, Exhibit AUS-96.

Australian tobacco industry documents[47] show that the tobacco industry in Australia researched and adopted packaging design changes because they generate positive imagery that appeals to its target markets, notwithstanding Australia's general ban on advertising. The complainants have not even attempted to respond to this evidence.

33. The importance of packaging in a dark market is confirmed by the expert opinions of Professors Dubé and Tavassoli, who explained that Australia's dark market likely *enhances*, rather than diminishes, the ability of tobacco packaging to serve as an effective advertising vehicle.[48] Indeed, absent tobacco plain packaging, the surfaces, shape, size, structure, materials and texture of tobacco packaging[49] could all serve an advertising and promotion function, including through the use of branding, and figurative and design elements.[50]

34. Based on the complainants' own propositions and evidence, the tobacco plain packaging measure has clearly affected consumer behaviour in ways consistent with the packaging of tobacco products functioning as advertising. For example, the complainants contend that the absence of branded packaging in Australia's dark market has already altered consumers' behaviour by causing "downtrading".[51] According to the complainants' expert, Professor Steenkamp, this has occurred because removing branding reduces consumers' willingness to pay for tobacco products in general, and premium products in particular, and also reduces brand loyalty.[52] Professor Steenkamp opines that tobacco plain packaging "reduces the contribution of branding to the 'intangible benefits' for both premium and value brands" that may be conveyed to consumers, particularly of premium products.[53]

35. If branded packaging (even with a dominant graphic health warning) has the effect of promoting the "intangible benefits" of a tobacco product, increasing a consumer's willingness to pay for that product, and making consumers more loyal to their brand in the context of Australia's dark market, there is no serious dispute that tobacco packaging functions as advertising. Moreover, if, as the complainants contend, these "intangible benefits" can no longer be conveyed to consumers as a result of tobacco plain packaging, then by their own admission, Australia has eliminated a means of advertising tobacco products.[54]

3. The complainants have failed to refute that tobacco plain packaging is capable of affecting smoking-related behaviours by standardising tobacco products

36. If the Panel is satisfied that the tobacco plain packaging measure has eliminated an avenue for advertising tobacco products, the overwhelming weight of the evidence demonstrating that advertising increases smoking is a sufficient basis for the Panel to

[47] Australia's first written submission, paras. 83-84, see also Expert Report of A. Biglan, Exhibit AUS-13, paras. 69-75; Expert Report of P. Slovic, Exhibit AUS-12, paras. 60-83; and Expert Report of N. Tavassoli, Exhibit AUS-588, paras. 42-49.
[48] Australia's opening statement at the second substantive meeting of the Panel, paras. 38-39, citing Expert Report of J.P Dubé, Exhibit AUS-583, Section VI; and Expert Report of N. Tavassoli, Exhibit AUS-588.
[49] Australia's first written submission, paras. 125-131.
[50] Australia's response to Panel Question No. 204, paras. 392-399, citing Expert Report of N. Tavassoli, Exhibit AUS-588, paras. 6-8, 20-27
[51] Australia's second written submission, paras. 409-412.
[52] Australia's opening statement at the second substantive meeting of the Panel, paras. 41-42, citing Expert Report of J. Steenkamp, Exhibit DOM/HND-14, paras. 96-97.
[53] Australia's opening statement at the second substantive meeting of the Panel, paras. 40-44, citing Expert Report of J. Steenkamp, Exhibit DOM/HND-14, para. 93.
[54] Australia's opening statement at the second substantive meeting of the Panel, para. 42.

conclude that the measure is capable of contributing to Australia's public health objectives and is not unjustifiable.

37. However, and without prejudice to the burden of proof, Australia has advanced a number of other bases upon which the Panel can be satisfied that the measure is apt to contribute to Australia's public health objectives. Each of these core bases of scientific inquiry – namely, behavioural science, marketing, and economics – provides a separate hypothesis "tested and supported by sufficient evidence"[55] for the same conclusion: that by standardising the appearance of retail tobacco packaging and products,[56] the tobacco plain packaging measure is capable of affecting smoking related-behaviours[57] and will contribute to discouraging smoking initiation and relapse, encouraging quitting, and reducing people's exposure to smoke from tobacco products.[58]

(a) Behavioural science

38. The premise of tobacco plain packaging is that by reducing the appeal of tobacco products, increasing the effectiveness of graphic health warnings, and removing the ability of packaging to mislead, tobacco plain packaging will lead to behavioural change.[59] This premise is supported by behavioural psychology,[60] as well as by the complainants' own evidence, which confirms that tobacco plain packaging has reduced the appeal of tobacco products and increased the effectiveness of graphic health warnings,[61] and that these effects were durable.[62]

39. As Australia stated at the second substantive meeting of the Panel, these are important concessions on the part of the complainants. By accepting that the measure has reduced the appeal of tobacco products and increased the noticeability of graphic health warnings, the complainants' own experts have confirmed the findings of many of the published studies which were undertaken to investigate the effects of tobacco plain packaging, including experimental evidence.[63] These concessions represent a remarkable evolution from the complainants' early arguments that the body of literature supporting the tobacco plain packaging measure was biased, unpublishable and unavailing.[64] The complainants' own evidence affirms the correctness and utility of at least 50 studies on the Panel record.[65]

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[55] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[56] Australia's second written submission, Part II.C.5(a) and (c).
[57] Australia's first written submission, Part II.I.4; Australia's second written submission, paras. 237-255; Australia's opening statement at the second substantive meeting of the Panel, paras. 34-46.
[58] Australia's opening statement at the second substantive meeting of the Panel, paras. 49-63; Australia's second written submission, paras. 227-236, 444-459 and 476-481.
[59] *Tobacco Plain Packaging Act*, Exhibit AUS-1, section 3.
[60] Australia's first written submission, Part II.I.3; Australia's second written submission, Part III.D.3; Australia's opening statement at the second substantive meeting of the Panel, paras. 49-63.
[61] Australia's opening statement at the second substantive meeting of the Panel, para. 51; Australia's response to Panel Question No. 196, paras. 228-233, citing Expert Report of I. Ajzen et al, Exhibit DOM/IDN–2, Table 1A, p. 22 and Table 2A, p. 26; and Expert Report of I. Ajzen et al, Exhibit DOM/IDN–4, Table 1, p. 6.
[62] Australia's opening statement at the second substantive meeting of the Panel, para. 51, citing Expert Report of I. Ajzen et al, Exhibit DOM/IDN–2, Table 1A (final column), p. 22 and Table 2A (final column), p. 26.
[63] Australia's opening statement at the second substantive meeting of the Panel, paras. 65-68, citing, in particular, Thrasher et al, Exhibit AUS-229; and Wakefield et al, Exhibit AUS-149.
[64] Australia's opening statement at the second substantive meeting of the Panel, paras. 65-67; Australia's comments on responses to Panel Question No. 197, para. 351.
[65] Australia's opening statement at the second substantive meeting of the Panel, paras. 65-67.

40. Australia has submitted several reports by behavioural experts (including Professor Slovic, Professor Fong, Dr Biglan, and Dr Brandon)[66] that have established that, by reducing the appeal of tobacco products, increasing the effectiveness of graphic health warnings, and reducing the ability of the pack to mislead, the tobacco plain packaging measure will result in behavioural change,[67] such as reduced smoking initiation[68] and relapse, and increased quitting.[69] This evidence is also consistent with the conclusions of Advocate General Kokott of the European Court of Justice in her recently released opinion on tobacco plain packaging,[70] as well as the substantial body of evidence on the effects of tobacco marketing and advertising;[71] and the tobacco industry's own marketing strategies.[72]

41. In seeking to contest that the tobacco plain packaging measure will alter smoking behaviour through these mechanisms, the complainants have relied principally on the evidence of Professor Ajzen. Professor Ajzen, relying on his own theoretical construct of human behaviour, claims that there is no evidence of the measure's effects moving from appeal through to intentions and then behaviour. In reaching this conclusion, Professor Ajzen ignores the evidence of changes in intentions revealed in post-implementation studies[73] and changes in behaviour revealed in the evidence.[74] Professor Ajzen instead focuses on surveys that are not designed to pick up the effects of the measure on the cohort at which it is primarily directed – youth who have not yet initiated smoking.

42. Professor Ajzen's view that the appeal of tobacco products is not related to smoking behaviour[75] is contradicted by decades of research on the effects of tobacco marketing on smoking behaviour, the tobacco industry's own internal research, the complainants' own

[66] Australia's first written submission, paras. 78 and 98, citing Expert Report of P. Slovic, Exhibit AUS-12; Expert Report of A. Biglan, Exhibit AUS-13; Expert Report of G. Fong, Exhibit AUS-14; Expert Report of T. Brandon, Exhibit AUS-15; Australia's second written submission, citing Expert Report of A. Biglan, Exhibit AUS-533; Expert Report of G. Fong, Exhibit AUS-531; Expert Report of P. Slovic, Exhibit AUS-532; and Expert Report of T. Brandon, Exhibit AUS-534; Australia's response to Panel Question No. 196, para. 249, citing Expert Report of G. Fong, Exhibit AUS-585.
[67] Australia's first written submission, Part II.I.3; Australia's second written submission, paras. 452-459; Australia's opening statement at the second substantive meeting of the Panel, paras. 49-63.
[68] Australia's first written submission, paras. 92-96, 161; Australia's response to Panel Question No. 196, para. 260, citing Expert Reports of P. Slovic, Exhibit AUS-12, paras. 26, 46-51, 60-67, and Exhibit AUS-532, paras. 77-80; Expert Reports of A. Biglan, Exhibit AUS-13, paras. 32-51, 177-178, and Exhibit AUS-533, paras. 6-15; Expert Report of G. Fong, Exhibit AUS-14, paras. 141-179; Expert Report of N. Tavassoli, Exhibit AUS-10, paras. 50-53, 68, 78-85; and Expert Report of J. Samet, Exhibit AUS-7, para. 125; Australia response to Panel Question No. 196, para. 268.
[69] Australia's first written submission, paras. 97-102, 201-205, citing Expert Report of A. Biglan, Exhibit AUS-13; Australia's opening statement at the second substantive meeting of the Panel, para. 68; Australia's response to Panel Question No. 196, para. 276, citing Expert Reports of T. Brandon, Exhibit AUS-15, and Exhibit AUS-534.
[70] Australia's comments on responses to Panel Question No. 159, para. 98, citing the Opinion of Advocate General Kokott, Exhibit AUS-608.
[71] Australia's first written submission, paras. 87-102; Australia's second written submission, paras. 217-236.
[72] Australia's first written submission, paras. 73-74, 77, 80-83, 85, 95; Australia's second written submission, paras. 221-222, 227-233.
[73] Australia's first written submission, para. 355, citing Young et al, Exhibit AUS-214.
[74] Australia's first written submission, para. 202, citing Zacher et al, Exhibit AUS-222; and Zacher et al, Exhibit AUS-223. See also, Expert Report of T. Chipty, Exhibit AUS-591, p.33, Table 5.
[75] Powerpoint presentation of I. Ajzen displayed during Dominican Republic's opening statement at the second substantive meeting of the Panel, slide 10.

arguments on "downtrading", and, in the words of the Quebec Superior Court, flies "furiously in the face of common sense and normal business practice."[76]

43. Further, there are many accepted approaches to determining the effect of appeal on behaviour that do not rely on Professor Ajzen's particular theory, including those explained by Professor Slovic,[77] Professor Fong[78] and Dr Biglan[79] in their expert reports for Australia.

44. The totality of the significant volume of public health literature and experimental evidence, and the opinions of Australia's experts in behavioural psychology, combined with the complainants' own arguments, means there cannot be any serious question that the tobacco plain packaging measure has reduced the appeal of tobacco products and increased the effectiveness of graphic health warnings, and thus that the mechanisms through which the measure is designed to work are in place.

45. Accordingly, behavioural science provides credible hypotheses, tested and supported by sufficient evidence, that demonstrate that the measure will contribute to its public health objectives. The evidence submitted by the complainants on this point has not only failed to rebut Australia's arguments, but has in fact confirmed that the tobacco plain packaging measure is working as intended.

(b) Marketing

46. Marketing science also confirms the link between the impact of tobacco plain packaging on product appeal and smoking behaviour.[80] As outlined in paras. 28-35, both Australia and the complainants' marketing experts agree that packaging has the power to influence a consumer's perception of the quality and characteristics of tobacco products.

47. On this basis, Professor Dubé explained that the adoption of standardised packaging would likely reduce the perceived quality of tobacco products and reduce consumers' willingness to pay for them.[81] His assessment of the likely effects of tobacco plain packaging was confirmed by the findings of the Tracking Survey.[82] Professor Dubé's view is that because tobacco plain packaging reduces the desirability of tobacco brands, and reduces consumers' willingness to pay across all price segments (propositions accepted by the complainants' marketing expert, Professor Steenkamp),[83] there will be a reduction in total primary demand for tobacco products as a result of the measure.

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[76] Australia's closing statement at the first substantive meeting of the Panel, para. 5 and fn 2.
[77] Australia's second written submission, paras. 454-455, citing Expert Reports of P. Slovic, Exhibit AUS-12 and Exhibit AUS-532.
[78] Australia's second written submission, para. 453, citing Expert Report of G. Fong, Exhibit AUS-14.
[79] Australia's second written submission, para. 456, citing Expert Reports of A. Biglan, Exhibit AUS-13 and Exhibit AUS-533.
[80] Australia's first written submission, paras. 55, 70-84; Australia's opening statement at the second substantive meeting of the Panel, paras. 37-46, citing Expert Reports of J.P. Dubé, Exhibit AUS-11 and Exhibit AUS-583; and Expert Reports of M. Katz, Exhibit AUS-18, and Exhibit AUS-584.
[81] Australia's opening statement at the second substantive meeting of the Panel, para. 59, citing Expert Report of J.P. Dubé, Exhibit AUS-11, paras 25-37.
[82] Australia's opening statement at the second substantive meeting of the Panel, para. 51, citing Expert Report of I. Ajzen et al, Exhibit DOM/IDN–2, Table 1A p. 22.
[83] Australia's opening statement at the second substantive meeting of the Panel, para.60, citing Expert Report of J. Steenkamp, Exhibit DOM/HND-14, paras. 92-93.

(c) Economics

48. Finally, the field of economics offers a straightforward explanation as to why reducing the appeal of tobacco products and increasing the effectiveness of health warnings on tobacco packaging will lead to changes in smoking behaviour.[84] This analysis depends upon three propositions. All three propositions are substantiated by the complainants' own experts.

49. First, it is agreed between the economic experts that

> if one believes that plain packaging will both reduce the appeal of tobacco products and increase their prices, then one does not need a model to assess plain packaging's impact … the conclusion is immediate because both of these effects push consumption down.[85]

50. Second, and as outlined above at paras. 38-41, it is agreed that the 2012 tobacco packaging changes have reduced the appeal of tobacco products as intended by the measure.[86]

51. Third, it is agreed that since the introduction of tobacco plain packaging, prices for tobacco products have increased.[87] The complainants' expert, Professor Klick, and Australia's expert, Professor Katz, have both considered this phenomenon. Professor Klick's view is that tobacco plain packaging appears to have caused tobacco prices to rise.[88] Professor Katz in his reports has provided a theoretical explanation for why this is so, as well as empirical evidence demonstrating this fact.[89]Thus, where the tobacco plain packaging measure has reduced the appeal of tobacco products, and the price of tobacco products has increased since the measure's introduction, the clear prediction of economics is that demand for tobacco products will fall.

52. Indeed, a fall in demand is precisely what has been observed in the data. As described above at paras. 14-16 and 19-20, smoking prevalence and tobacco consumption have both fallen since the introduction of the tobacco plain packaging measure. Given the strength of the theoretical underpinning for the measure, it would be perverse to find that *none* of the observed declines in prevalence and consumption since the introduction of tobacco plain packaging are attributable to that measure.

4. Conclusion

53. The qualitative evidence strongly supports the conclusion that tobacco plain packaging has made and is capable of making a contribution to Australia's public health objectives. Indeed, the evidence upon which Australia relies in support of the tobacco plain packaging

[84] Australia's second written submission, paras. 479-480; Australia's opening statement at the first substantive meeting of the Panel, paras. 61-63.
[85] Australia's comments on responses to Panel Question No. 197, paras. 297-298, citing Expert Report of D. Neven, Exhibit HON-123, para. 73.
[86] See Australia's first written submission, paras. 148-162; Australia's opening statement at second substantive meeting of the Panel, para. 65.
[87] Australia's second written submission, para. 412; Australia's response to Panel Question No. 151, para. 42; Australia's comments on response to Panel Question No. 197, paras. 294-298.
[88] Australia's response to Panel Question No. 151, para. 42, citing Expert Report of J. Klick, Exhibit HND–122, fn 71.
[89] Australia's comments on response to Panel Question No. 197, paras. 294-298, citing Expert Reports of M. Katz, Exhibit AUS-18, and Exhibit AUS-584.

measure "reflects at least the majority view, and potentially the unanimous view" within the international scientific community.[90] Each of the separate hypotheses outlined above leads to the same conclusion: the tobacco plain packaging measure is apt to contribute to Australia's objectives to improve public health by discouraging initiation of tobacco use; encouraging cessation; discouraging relapse; and reducing people's exposure to tobacco smoke.

B. THE COMPLAINANTS HAVE FAILED TO ESTABLISH ON THE BASIS OF THE QUANTITATIVE EVIDENCE BEFORE THE PANEL THAT THE MEASURE IS INCAPABLE OF CONTRIBUTING TO ITS OBJECTIVES OR IS UNJUSTIFIABLE

54. The post-implementation quantitative evidence is consistent with the substantial body of qualitative evidence in demonstrating that tobacco plain packaging is apt to contribute to Australia's public health objectives.

55. The fact that smoking prevalence and tobacco consumption have declined to their lowest levels in decades since the introduction of the tobacco plain packaging measure provides quantitative evidence, consistent with the qualitative evidence presented above, that the tobacco plain packaging measure is capable of contributing to reducing smoking behaviour.

56. In the face of this quantitative evidence, the complainants have, in relation to datasets of varying quality, attempted to isolate the specific effects of Australia's tobacco packaging changes from all of the other tobacco control measures that Australia has adopted. The complainants rely on an asserted inability to demonstrate a positive effect from those changes as evidence that the measure has not contributed and will not contribute to its public health objectives.[91]

57. In doing so, the complainants disregard the relevant legal and evidentiary standards for assessing the contribution of a measure to its public health objectives.[92] In particular, the complainants' arguments ignore the Appellate Body's findings in *Brazil – Retreaded 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 … can only be evaluated with the benefit of time.[93]

58. Tobacco plain packaging is clearly such a measure and should be approached in the way recommended by the Appellate Body. The complainants cannot discharge their burden

[90] Australia's second written submission, paras. 271-272; Australia's response to Panel Question No. 206; Australia's comments on the complainants' responses to Panel Question No. 206; Panel Report, *US – Clove Cigarettes*, para. 7.401.
[91] See, e.g. Dominican Republic's response to Panel Question No. 126, para. 273; Honduras' response to Panel Question No. 124, p. 35.
[92] Australia's second written submission, paras. 434-439.
[93] Australia's second written submission, para. 436; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

merely by asserting that at this point in time they are unable to isolate the specific effects of the measure in the data.

59. Further, even if the evidence established that at this point, the measure has had no discernible effect on smoking initiation, quitting, relapse or smoking around others in its first three years of implementation (which it does not), such evidence would be insufficient to establish that the measure is not apt to contribute to its public health objectives in the future. Tobacco plain packaging is a long term public health measure that, for the reasons explained below, will take time for its full effects to become apparent. In addition, the measure's immediate effects may be difficult to isolate in the short term in the datasets that are available. Finally, the complainants' attempts to demonstrate that there is no effect from tobacco plain packaging on smoking behaviour that can be discerned and isolated in the current data sets have failed. The complainants' quantitative evidence is deeply flawed and when these flaws are corrected, the quantitative evidence is consistent with tobacco plain packaging already having an effect.

1. Tobacco plain packaging is a long term measure

60. Throughout these proceedings, the complainants have contended that whether or not an effect of the measure can be isolated within the short time since its implementation is dispositive. Contrary to the complainants' arguments,[94] the tobacco plain packaging measure was always expected to have its greatest effects in the long term[95] – a fact explicitly acknowledged at the time of the measure's introduction.[96] This is due to the time required for the cohort of children who have never been exposed to fully-branded tobacco packaging to reach adolescence and therefore to be included in national health surveys; and the nature of tobacco addiction.[97]

61. In these circumstances, even if the complainants had succeeded in establishing that the measure has had no effect at this point in time (which they have not), this would not be sufficient to discharge the complainants' burden. The complainants must instead establish that not only has the tobacco plain packaging measure not worked to date, it will never work.

2. The immediate effects of the measure may be difficult to discern in the data

62. The complainants' claimed inability to isolate a statistically significant effect on smoking prevalence or tobacco consumption that is attributable to the tobacco plain packaging measure in the short time since the measure's implementation does not in itself establish that the measure is not already working.[98] Time is required for the effects of tobacco

[94] See, e.g., the Dominican Republic's response to Panel Question No. 126, para. 283; Honduras' response to Panel Question No. 126, p. 37; Indonesia's Response to Panel Question No. 126, para. 77.
[95] Australia's first written submission, para. 12; Australia's second written submission, paras. 495-499; Australia's opening statement at the second substantive meeting of the Panel, para. 20; Australia's response to Panel Question No. 200, para. 320.
[96] Australia's first written submission, para. 670, Annexure E, paras. 11-17; Australia's second written submission, paras. 489, 492-505;
[97] Australia's first written submission, para. 670, Annexure E, para. 12; Australia's second written submission, paras. 495-496.
[98] Australia's second written submission, paras. 495-499; Australia's comments on responses to Panel Question No. 197, para. 211, citing Expert Reports of T. Chipty, Exhibit AUS-586, paras. 34-40, and Exhibit AUS-591, paras. 47-52.

control measures, like tobacco plain packaging, to be detected and isolated in the data.[99] As Professor Chaloupka demonstrated, it took four years before statistically significant effects of the introduction of graphic health warnings in Canada could be discerned in the relevant data.[100]

63. As Dr Chipty and Professor Scharfstein explain, there is significant scope for the policy to be working exactly as intended but for its effects to prove difficult to isolate in the data in the short-term.[101] Australia has addressed the complainants' experts' attempts to respond to some aspects of this evidence.[102] In other respects, the complainants and their experts have simply failed to respond at all to the evidence of Australia's experts.[103]

64. The complainants' related contention that the effects of the tobacco plain packaging measure will "wear out" over time is equally unfounded and contrary to the available evidence.[104] The complainants' own evidence establishes that the reduced appeal associated with tobacco plain packaging did not wear out.[105] Further, a number of post-implementation studies reveal that tobacco plain packaging has had certain effects on smoking behaviour, including a significant and *lasting* reduction in smoking at outdoor venues where children are present.[106] The expert reports of Professors Slovic and Dubé clearly demonstrate that the permanent *absence* of features designed to appeal to consumers and potential consumers does not "wear out" – tobacco packaging does not become more appealing in the continued absence of such features.[107] Professor Chaloupka's evidence establishes that, in fact, the impact of tobacco plain packaging is likely to *grow* over time.[108]

3. The post-implementation quantitative evidence supports the proposition that the measure is working

65. Australia has explained at paras. 56-65 above that a claimed inability to isolate a plain packaging effect in the limited period since the measure's implementation is insufficient to discharge the complainants' legal burden. However, assuming *arguendo* that such a conclusion would be determinative of whether the measure is apt to contribute to its public health objectives, the evidence before the Panel is plainly insufficient to demonstrate that the

[99] Australia's first written submission, Annexure E, paras. 12, 14-15; Australia's second written submission, paras. 492-505; Australia's response to Panel Question No. 200, paras. 319-341.
[100] Australia's first written submission, Annexure E, para. 16; Australia's response to Panel Question No. 126, para. 160, fn 38; Australia's second written submission, para. 497; Australia's response to Panel Question No. 200, paras. 333-335, citing Expert Report of F. Chaloupka, Exhibit AUS-9, paras. 89-96; Australia's comments on responses to Panel Question No. 197, paras. 262-267.
[101] Australia's first written submission, Annexure E, paras. 14-15 and 23-45; Australia's response to Panel Question No. 4, paras. 3-12; Australia's response to Panel Question No. 200, paras. 329-332.
[102] Australia's response to Panel Question No. 200, paras. 329-332.
[103] Australia's comments on responses to Panel Question No. 197, para. 213, fn 341, citing Expert Report of D. Scharfstein, Exhibit AUS-587.
[104] Australia's second written submission, paras. 501-505; Australia's response to Panel Question No. 196, paras. 243-247; Australia's comments on responses to Panel Question No. 197, paras. 377-380; Australia's comments on responses to Panel Question No. 203, paras. 395-400.
[105] Australia's comments on responses to Panel Question No. 203, para. 398.
[106] Australia's second written submission, para. 464, citing Zacher et al, Exhibit AUS-223.
[107] Australia's second written submission, paras. 502-504; Australia's comments on responses to Panel Question No. 203, para. 398.
[108] Australia's comments on responses to Panel Question No. 197, para. 380.

measure has *in fact* made no contribution to its public health objectives since its introduction. Indeed, properly analysed, the evidence indicates that the measure is already working.

66. In particular, Australia's evidence including that of Dr Chipty shows that the 2012 packaging changes have made a statistically significant contribution to reductions in smoking prevalence and tobacco consumption. Dr Chipty has also demonstrated that small reasoned corrections to the models originally proposed by the complainants produce results showing a statistically significant plain packaging effect.

67. The complainants' experts have responded to this evidence by abandoning the models they originally advocated and creating multiple new models with more restrictive assumptions;[109] making unfounded criticisms of Australia's expert, including criticising her adoption of approaches to the data that they themselves originally endorsed;[110] falsely asserting that Australia has only responded to a narrow subset of the complainants' empirical evidence;[111] and reporting their results in ways that are more restrictive than the approach originally advocated by the complainants earlier in these proceedings.[112]

4. Conclusion

68. Accordingly, the complainants have no credible basis for asserting that they have demonstrated on the basis of "consistent and clear" evidence that the tobacco plain packaging measure has "not worked" and will not work in the future.[113] Rather, the quantitative data upon which the complainants rely are entirely consistent with the measure having contributed to reducing smoking prevalence and tobacco consumption in the limited period since its implementation. The assessment of the available post-implementation quantitative data thus confirms that the complainants have failed to discharge their burden of establishing that the tobacco plain packaging measure has not contributed and is not apt to contribute to its objectives.

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

69. The complainants' claims under the TRIPS Agreement are based on interpretations of the relevant provisions that find no basis in the ordinary meaning of these provisions, properly interpreted in their context and in light of the object and purpose of the Agreement. Rather, their claims are based on theories of "interests" that supposedly "pervade" the TRIPS Agreement, and on attempts to rewrite various provisions of the TRIPS Agreement to create rights and obligations that do not exist in the text itself.

[109] Australia's opening statement at the second substantive meeting of the Panel, paras. 105-108; Australia's response to Panel Question No. 196, paras. 185, 188-220; Australia's comments on responses to Panel Question No. 197, paras. 229-233, 238-244, 245-247.
[110] Australia's comments on responses to Panel Question No. 197, paras. 223-54.
[111] Australia's comment on response to Panel Question No. 197, paras. 220-225.
[112] Australia's opening statement at the second substantive meeting of the Panel, paras. 90-104; Australia's comments on responses to Panel Question No. 197, paras. 255-261.
[113] Australia's comments on responses to Panel Question No. 197, paras. 257, 259-261.

A. THE COMPLAINANTS HAVE FAILED TO DEMONSTRATE THAT THE MEASURE IS INCONSISTENT WITH ARTICLE 20 OF THE TRIPS AGREEMENT

70. The complainants have failed to establish a *prima facie* case that the tobacco plain packaging measure imposes "special requirements" that "encumber" the "use of a trademark in the course of trade". In particular, the complainants have failed to demonstrate how any special requirements imposed by the measure encumber the use of a trademark to distinguish the goods or services of one undertaking from those of other undertakings in the course of trade and have therefore failed to demonstrate the threshold applicability of Article 20. Even if the complainants have established a *prima facie* case of applicability, they have failed to demonstrate that any encumbrance imposed by the tobacco plain packaging measure has been imposed "unjustifiably".

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

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

71. All parties appear to agree that, to establish a violation of Article 20, a complainant must demonstrate that any special requirements imposed by the measure at issue "encumber" the "use" of a trademark in the course of trade. The parties further appear to agree that Article 15.1 of the TRIPS Agreement provides the basis for identifying the relevant "use" of a trademark under Article 20;[114] and that this "use" is the use of a trademark to distinguish the goods or services of one undertaking from those of other undertakings.[115] To demonstrate that a measure encumbers the "use" of a trademark in the course of trade under Article 20, a complainant must therefore demonstrate that the measure encumbers the use of a trademark "to *distinguish* the goods or services of one undertaking from those of other undertakings".

72. Until the second substantive meeting of the Panel, however, the parties appeared to disagree on what it means for trademarks to "distinguish" the goods of one undertaking from those of other undertakings. The complainants argued that the relevant "use" of a trademark under Article 20 also encompasses the use of a trademark to "distinguish" products "in terms of their quality, characteristics, and reputation".[116] This proposition has no interpretative foundation. Nothing in the text of Article 15.1 refers to the use of trademarks to distinguish products in terms of their "quality, characteristics, and reputation", or even implies such a use. Rather, the formula is taken from a *different* section of the TRIPS Agreement – Section 3 – which pertains to geographical indications.[117]

[114] See Dominican Republic's first written submission, para. 248; Indonesia's first written submission, para. 132; Honduras' first written submission, para. 155; Cuba's response to Panel Question No. 87.
[115] Australia's second written submission, para. 86.
[116] Dominican Republic's first written submission, paras. 14, 240; Dominican Republic's response to Panel Question No. 87, para. 4; Honduras' first written submission, para. 144; Indonesia's response to Panel Question No. 87, para. 2.
[117] Australia's second written submission, paras. 97-103; Australia's comments on the complainants' responses to Panel Question Nos. 167 and 168, para. 127.

73. In an evolution of their position,[118] the complainants now appear to accept Australia's understanding of which "use" of a trademark is relevant under Article 20 and which "uses" are not. While the complainants' formula of "quality, characteristics, and reputation" appeared to be simply a euphemism for the use of trademarks to advertise and promote tobacco products,[119] in the course of the proceedings the complainants recharacterised their notion of "quality, characteristics, and reputation", as referring to the "consistency" function of trademarks.[120] The parties now appear to agree that it is the ability of a trademark to convey a *consistency* of quality, rather than any particular *perceived* quality ("high quality", "value", "masculine", "feminine", etc.) that may be relevant to the source distinguishing function of trademarks described by Article 15.1 of the TRIPS Agreement.

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

74. In addition to distinguishing the products of one undertaking from those of other undertakings, it is widely recognised that trademarks serve an advertising function by conveying certain associations with the trademarked product.[121] Particularly in the case of a largely undifferentiated consumer product like tobacco products, trademark owners carefully calibrate the associations conveyed by the trademark to appeal to different market segments.[122]

75. While the use of trademarks to advertise and promote a product is an acknowledged function of trademarks, no party (or third party) has advanced an argument as to why this should be considered a relevant "use" of trademarks under Article 20. It therefore appears to be common ground that limiting the use of trademarks to increase the perceived appeal of tobacco products is not an "encumbrance" upon the use of trademarks that falls within the scope of Article 20. It follows that evidence pertaining to such a limitation, at which the tobacco plain packaging measure is directed, is not relevant to establishing a *prima facie* case of inconsistency under this provision.

(c) The complainants have not even attempted to demonstrate that the tobacco plain packaging measure encumbers the relevant use of trademarks in the course of trade

76. The existence of an encumbrance is an *evidentiary* question. While the complainants have placed massive quantities of expert evidence on the record of this dispute, including commissioning numerous studies and empirical analyses specifically for these proceedings,

[118] See in particular the Dominican Republic's opening statement at the second substantive meeting of the Panel, para. 7; the Dominican Republic's response to Panel Question No. 167; Australia's comments on responses to Panel Question Nos. 167 and 168, paras. 127-129.
[119] Australia's second written submission, para. 118; Australia's comments on responses to Panel Question Nos. 167 and 168, para. 128.
[120] Dominican Republic's opening statement at the second substantive meeting of the Panel, para. 7; Australia's comments on the complainants' responses to Panel Question Nos. 167 and 168, para. 130.
[121] Australia's second written submission, para. 91. See also Expert Report of N. Tavassoli, Exhibit AUS-10, para. 34.
[122] See Expert Report of N. Tavassoli, Exhibit AUS-10, Sections 2.1-2.4; Australia's first written submission, paras. 71-82, 85-86, and exhibits cited therein.

they have failed to adduce any relevant evidence.[123] In particular, they have offered no evidence at all that any special requirements established by the tobacco plain packaging measure encumber the use of trademarks to distinguish the tobacco products of one undertaking from those of other undertakings – even in response to the Panel's specific question asking them to identify such evidence.[124] The complainants' inability to identify any empirical evidence to support this contention, which is a key element of their claim under Article 20, is also notable in the light of their insistence that the Panel focus exclusively on post-implementation empirical evidence to assess the effectiveness of the tobacco plain packaging measure.[125]

77. Absent such empirical evidence, the Dominican Republic and Indonesia fall back on their arguments concerning "downtrading" as "evidence" that the permitted use of brand and variant names on retail tobacco packaging does not "adequately distinguish commercial source, quality, characteristics, and reputation."[126] However, the complainants' downtrading theory is based on the inability of tobacco companies to use figurative elements and other design features to create *perceived* differences between "premium" and "value" brands.[127] As all parties agree, the use of trademarks to advertise and promote a product (e.g. by creating perceptions or positive associations with the product) is not part of the source distinguishing function of trademarks protected under Article 20. The complainants' downtrading assertions, even if proven, therefore in no way discharge their task of demonstrating that the tobacco plain packaging measure encumbers the source distinguishing function of a trademark.[128]

78. In the absence of any evidence, the complainants essentially argue that because Article 15.1 of the TRIPS Agreement provides that "[a]ny sign, or any combination of signs", including "figurative elements and combinations of colours", shall be "eligible for registration as trademarks", any limitation on the use of colours, figurative elements, and other signs that are eligible for registration as trademarks constitutes an encumbrance on the capability to distinguish the goods of one undertaking from those of other undertakings.[129] Such an argument in no way discharges the complainants' burden of demonstrating that any special requirements established by the tobacco plain packaging measure encumber the use of a trademark to distinguish the products of one undertaking from those of another in the course of trade.[130]

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[123] Australia's second written submission, paras. 121-128; Australia's comments on responses to Panel Question Nos. 167 and 168, paras. 133-136, 141; Dominican Republic's response to Panel Question No. 206, para. 313; Honduras' response to Panel Question No. 206; Cuba's response to Panel Question No. 206.
[124] See Dominican Republic's response to Panel Question No. 167, para. 185; Cuba's response to Panel Question No. 168; Honduras' response to Panel Question No. 168; and Indonesia's response to Panel Question No. 168, paras. 32-34.
[125] Australia's comments on responses to Panel Question Nos. 167 and 168, paras. 136; Dominican Republic's response to Panel Question No. 206, para. 313; Honduras' response to Panel Question No. 206; Cuba's response to Panel Question No. 206.
[126] Dominican Republic's response to Panel Question No. 167, para. 185; Indonesia's response to Panel Question No. 168, para. 31.
[127] See para. 33 above; Expert Report of J. Steenkamp, Exhibit DR-HON-5, paras. 62, 64; Dominican Republic's response to Panel Question No. 169, para. 194.
[128] Australia's comments on responses to Panel Question Nos. 167 and 168, paras. 137-138.
[129] Dominican Republic's first written submission, paras. 365-366; Dominican Republic's response to Panel Question No. 167, para. 170; Honduras' responses to Panel Question Nos. 87 and 168; Cuba's response to Panel Question No. 87; Indonesia's response to Panel Question No. 87.
[130] Australia's comments on responses to Panel Question Nos. 167 and 168, paras. 139-141.

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

79. Article 20 of the TRIPS Agreement does not encompass the aspects of the tobacco plain packaging measure which prohibit the use of trademarks on tobacco packaging and products. Properly interpreted in context, Article 20 concerns special requirements that encumber *how* a trademark may be used when municipal law otherwise permits the use of trademarks.[131] A contrary interpretation of Article 20 has the potential to bring within its scope a variety of measures that, in Australia's view, were never intended to be covered by the TRIPS Agreement, such as advertising restrictions and point-of-sale restrictions.[132] The complainants appear to agree with Australia that Article 20 was not meant to cover these types of measures,[133] arguing that the term "special requirements" does not encompass measures that only "incidentally" affect the use of trademarks.[134] It is on this basis that the complainants seek to explain the application of Article 20 to the tobacco plain packaging measure, but not to other measures. The complainants have provided no interpretative basis for this distinction.[135] All third parties that address this issue agree that there is no basis for the distinction.[136] Nor can the complainants articulate how such a distinction would operate in practice.

80. However, assuming *arguendo* that the special requirements include both the prohibitive and permissive aspects of the measure, and considering the tobacco plain packaging measure as a whole, the fact remains that the complainants have failed to adduce any evidence to demonstrate that the measure encumbers the ability of the permitted word mark, in a standardised form, to distinguish the product of one undertaking from those of other undertakings.[137]

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

81. Even if the Panel were to find that the complainants have proven that the tobacco plain packaging measure encumbers by special requirements a relevant use of trademarks in the course of trade, the complainants have failed to prove that Australia has imposed this encumbrance "unjustifiably".

[131] Australia's first written submission, paras. 338-345.
[132] Australia's second written submission, paras. 132-139.
[133] See Honduras' opening statement at the first substantive meeting of the Panel, para. 27. See also Dominican Republic's opening statement at the first substantive meeting of the Panel, para. 16.
[134] See Dominican Republic's response to Panel Question No. 38; see also Indonesia's response to Panel Question No. 38; Honduras' response to Panel Question No. 38.
[135] See, e.g. Dominican Republic's response to Panel Question No. 95; Dominican Republic's opening statement at the first substantive meeting of the Panel, paras. 15-17; Honduras' response to Panel Question No. 38; Honduras' opening statement at the first substantive meeting of the Panel, paras. 23-26; Indonesia's response to Panel Question Nos. 95, 96. See Australia's first written submission, para. 341; Australia's response to Panel Question No. 38; Australia's second written submission, paras. 134-142; Australia's comments on responses to Panel Question No. 172, paras. 155-159.
[136]See also Norway's third party response to Panel Question No. 13; South Africa's third party response to Panel Question No. 13; Chinese Taipei's third party response to Panel Question No. 13; New Zealand's third party response to Panel Question No. 13; Canada's third party response to Panel Question No. 13.
[137] Australia's first written submission, para. 344; Australia's second written submission, para. 213 and fn. 211.

82. All parties appear to agree that, in order to be found not "unjustifiable", the encumbrance must be imposed in pursuit of a *legitimate objective*.[138] The legitimacy of Australia's public health objectives has not been questioned in this dispute. All parties also appear to agree that, in order to be found not "unjustifiable", there must be a *nexus* between the encumbrance imposed by the special requirements and its legitimate objective,[139] and this connection must be one that is rational or reasonable.

83. However, the Dominican Republic, Honduras, Cuba and a minority of the third parties believe that in order to be found not "unjustifiable", the encumbrance must be the *least-restrictive option available* to accomplish the Member's legitimate objective, in light of *reasonably available alternatives* that would make an equal or greater degree of contribution to the fulfilment of that objective while imposing a lesser degree of encumbrance upon the use of trademarks[140] – a test that is functionally equivalent to a standard of "necessity". Further, the complainants argue that any interpretation of the term "unjustifiably" must take into account "the nature of trademarks and trademark protection". It is on this basis that the complainants argue that Australia was required to undertake an "individualised assessment" of the "specific features" of particular trademarks.

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

84. The ordinary meaning of the term "unjustifiably" focuses on the rationality or reasonableness of the connection between the encumbrance imposed by a measure and the measure's legitimate public policy objective.[141] Under a rational connection standard, the relevant inquiry is whether the complainants have shown that the relationship between the encumbrance imposed by the measure and the measure's objective is not one that is within the range of rational or reasonable outcomes.[142]

85. All parties appear to agree that an encumbrance that "goes against" or "cannot be reconciled with" its objective is one that is neither rational nor reasonable.[143] There is no credible evidence or argument before the Panel that the tobacco plain packaging measure will undermine its public health objectives and the complainants abandoned this argument at the first hearing.[144] In order to prove a violation of Article 20, the complaining Member must demonstrate that the responding Member has "*unjustifiably* encumbered" the use of a

[138] Australia's first written submission, para. 366; Dominican Republic's first written submission, para. 743; Honduras' first written submission, para. 296; Cuba's first written submission, paras. 319-320; Indonesia's response to Panel Question No. 108.
[139] Australia's first written submission, paras. 370-383; Dominican Republic's first written submission, para. 388; Honduras' first written submission, para. 296; Cuba's first written submission, paras. 317-318; Indonesia's response to Panel Question No. 108.
[140] See, e.g. Honduras' response to Panel Question No. 108; Dominican Republic's first written submission, para. 743; Cuba's first written submission, paras. 356-362.
[141] See Australia's first written submission, paras. 370-383.
[142] Australia's second written submission, para. 149.
[143] Dominican Republic's first written submission, para. 737; Honduras' first written submission, para. 297; Cuba's first written submission, para. 319; Indonesia's first written submission, para. 360; Australia's response to Panel Question No. 105, paras. 62-66; Australia's second written submission, para. 150.
[144] Expert Report of J. List, Exhibit DR/IND-1, para. 16. See also Expert Report of J. Klick, Exhibit HON-118, fn 24; cited in Australia's second written submission, para. 150.

trademark in the course of trade.[145] As with any affirmative obligation, it is the complaining Member that bears the burden of proving that the obligation has been violated.[146] Thus, the complainants must demonstrate that any encumbrance imposed by the measure is incapable of contributing to its objectives in order to discharge their burden of proof.[147]

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

86. The majority of the third parties agree with Australia that the term "unjustifiably" requires an evaluation of the rationality or reasonableness of the relationship between the encumbrance and its objective, and that this term cannot be understood as equivalent to a standard of "necessity".[148] And yet, the complainants have treated their analysis of whether the tobacco plain packaging measure is "unjustifiable" under Article 20 of the TRIPS Agreement as essentially interchangeable with their analysis of whether the measure is "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement. Such an approach ignores the ordinary meaning of the term "unjustifiable" and represents an attempt by the complainants to rewrite Article 20 to say something that it does not.

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

87. The relevant inquiry under a proper interpretation of the term "unjustifiably" is whether there is a rational relationship between the encumbrance imposed by the measure and the pursuit of a legitimate public policy objective, rather than a relational analysis of various factors that are more appropriately considered within the context of a "necessity" analysis.[149]

88. The *Declaration on the TRIPS Agreement and Public Health* serves to underscore that the term "unjustifiably" in Article 20 provides Members with a wide degree of latitude to implement measures to protect public health and, unlike the term "necessary", contemplates a range of possible outcomes that are "able to be shown to be just, reasonable, or correct" or that are "within the limits of reason". In this relevant context, it is not a panel's function to "weigh and balance" the considerations, including public health considerations, that the Member took into account when crafting the measure at issue in order to substitute the panel's own assessment for that of the implementing Member.[150] Rather, the panel's function is to evaluate whether the complaining Member has demonstrated that an encumbrance upon the use of trademarks resulting from the measure at issue is "unjustifiable".

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[145] See, e.g. Dominican Republic's response to Panel Question No. 104, para. 113; Australia's second written submission, paras. 156-157.
[146] See Australia's first written submission, paras. 427-430; Australia's second written submission, paras. 154-157.
[147] Australia's second written submission, para. 151.
[148] See New Zealand's third party written submission, paras. 61-63; Singapore's third party written submission, paras. 52-53; Norway's third party written submission, para. 59; Uruguay's third party written submission, paras. 52-53; Argentina's third party written submission, para. 10; European Union's third party written submission, paras. 24-37; China's third party written submission, para. 49; Japan's third party written submission, para. 19.
[149] Australia's first written submission, paras. 384-408; Australia's response to Panel Question No. 105, paras. 65-66; Australia's second written submission, paras. 159-164.
[150] Australia's second written submission, para. 163.

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

89. Interpreting the term "unjustifiably" to include a requirement of "least restrictiveness" would render this term functionally equivalent to a standard of "necessity".[151] The term "necessary" requires an evaluation of whether the measure at issue was the least restrictive means of accomplishing the Member's legitimate objective in light of other reasonably-available alternative measures that would have made an equal or greater degree of contribution to that objective.[152] The fact that Article 20 does not use the term "necessary", which had a well-established meaning in the GATT *acquis* prior to the Uruguay Round,[153] as the basis for its standard of justification must be given interpretative effect,[154] and indicates that Article 20 does not impose a requirement of "least restrictiveness".

90. The complainants' argument that the term "unjustifiably" should be interpreted to impose a requirement of "least restrictiveness" is based on a contextual argument. In essence, the complainants argue that because trademark owners have a "legitimate interest" in using their trademarks under Article 17 of the TRIPS Agreement or a "protected treaty interest" in the use of trademarks, the term "unjustifiably" in Article 20 must be interpreted to encompass a requirement of "least restrictiveness".[155]

iii. The context of Article 17

91. The complainants have offered no explanation for why the context provided by Article 17 would require the Panel to read the requirements of that provision into Article 20. The contextual relevance of Article 17 to the interpretation of Article 20 is primarily by way of contrast.[156] It is contextually significant that the TRIPS Agreement does not address encumbrances upon the use of trademarks as "exceptions" to the "rights conferred" by a trademark. This confirms that the TRIPS Agreement does not confer upon trademark owners a right to use their trademarks, as the parties have now agreed.[157] Furthermore, the fact that Article 20 does not require Members to "take into account the legitimate interests of the owner of the trademark", in contrast to Article 17, strongly suggests that the drafters of the TRIPS Agreement did not consider this to be a relevant or necessary requirement in the case of measures that impose an encumbrance upon the use of a trademark.[158]

92. The obligation in Article 17 – to "take account of" the "legitimate interests" of trademark owners when establishing exceptions to the rights of exclusion conferred by a trademark – is a limited affirmative obligation and does not mean that a Member must not prejudice those legitimate interests.[159] It provides no basis for the complainants' argument that

[151] Australia's first written submission, paras. 396-408.
[152] Australia's second written submission, para.167.
[153] Australia's first written submission, para. 392; Australia's second written submission, para. 168.
[154] See Australia's first written submission, para. 394 and fn 575; Australia's second written submission, paras. 169-171.
[155] Australia's second written submission, para. 172.
[156] See Australia's response to Panel Question No. 99; Australia's second written submission, paras. 179-185.
[157] Australia's second written submission, para. 180; See, however, Cuba's response to Panel Question No. 99.
[158] Australia's second written submission, para. 182; See also, e.g. Singapore's third party written submission, para. 49; New Zealand's third party response to Panel Question No. 14; Canada's third party response to Panel Question No. 14; Norway's third party response to Panel Question No. 14.
[159] Australia's second written submission, para. 184.

a trademark owner's legitimate interest is an "interest" that must be "pervasive" in the interpretation of the Agreement's trademark provisions.[160] If anything, it is the *absence* of a comparable obligation in Article 20 that provides the more relevant context for the interpretation of the term "unjustifiably".

iv. "Protected Treaty Interest"

93. In a closely related argument, the complainants refer to the use of trademarks as a "protected treaty interest" or "protected interest" and suggest that because the drafters of the TRIPS Agreement chose to "protect" this "interest" in Article 20, this provision must be interpreted to require the least possible intrusion upon the use of trademarks.[161]

94. This approach is not supported by a proper interpretation of Article 20 in accordance with the Vienna Convention. It is neither based on the context of Article 20 nor on a consideration of the object and purpose of the TRIPS Agreement. The object and purpose of the TRIPS Agreement is to promote the "effective and adequate protection of intellectual property *rights*".[162] All parties agree that these rights do not include a "right" to use trademarks.

95. The obligation set forth in Article 20 of the TRIPS Agreement is that Members may not encumber by special requirements the use of trademarks in the course of trade "unjustifiably".[163] For the reasons that Australia has explained, the term "unjustifiably", properly interpreted, is not equivalent to a standard of "necessity" and does not impose a requirement of "least restrictiveness". The complainants' arguments about "protected treaty interests", whatever their interpretative relevance, do not support a different conclusion.

v. The jurisprudence under the chapeau to Article XX

96. Finally, the complainants' reliance on prior panel and Appellate Body reports interpreting the chapeau to Article XX of the GATT 1994 to support their interpretation of the term "unjustifiably" are based on misguided analogies between Article XX of the GATT 1994 and Article 20 of the TRIPS Agreement.

97. The jurisprudence concerning the meaning of the term "unjustifiable" in the chapeau to Article XX of the GATT 1994 confirms that the term "unjustifiably" concerns the rationality or reasonableness of the connection between the encumbrance and its objective.[164] The complainants, on the other hand, have sought to find support in this jurisprudence for their contention that the ordinary meaning of the term "unjustifiably" is equivalent to a standard of "necessity".[165] Article 20 of the TRIPS Agreement is not an exceptions provision, and there is no basis to transpose the structure and functions of Article XX of the GATT 1994 into Article 20 of the TRIPS Agreement, as the Dominican Republic argues. The term "unjustifiably" in Article 20 of the TRIPS Agreement does not take on a different meaning

[160] Australia's second written submission, para. 184.
[161] See, e.g. Dominican Republic's response to Panel Question Nos. 108 and 89, para. 26; Indonesia's response to Panel Question No. 99.
[162] Australia's second written submission, para. 187.
[163] Australia's second written submission, para. 193.
[164] Australia's second written submission, paras. 195, 199.
[165] See, e.g. Dominican Republic's opening statement at the first substantive meeting of the Panel, paras. 49-50; Australia's second written submission, para. 196.

merely because it stands by itself, whereas it is only one element of the legal inquiry under a different and unrelated provision of the covered agreements.[166] Moreover, the examples that the complainants cite in support of their arguments that a measure must be the "least-restrictive" in order to be "not unjustifiable" reflect the application by panels and the Appellate Body of the *entire* standard set forth in the chapeau, i.e. "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".[167]

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

98. The complainants, the Dominican Republic in particular, argue that any interpretation of the term "unjustifiably" must take into account "the nature of trademarks and trademark protection",[168] as the basis for the assertion that the term "unjustifiably" requires an "individualised assessment" of the "specific features" of individual trademarks, at least in some cases.[169]

99. The Dominican Republic's "individualised assessment" argument has no interpretative basis. The Dominican Republic has made clear that the foundation for its argument is its theory of "legitimate interests",[170] which Australia has already refuted at paras. 91-92 above, rather than the ordinary meaning of the term "unjustifiably". The Dominican Republic has not identified anything in the context of Article 20 or in the object and purpose of the TRIPS Agreement that would support this asserted requirement.[171]

100. The Dominican Republic's "individualised assessment" argument appears to be based on the proposition that because trademarks are registered and enforced on an individual basis, it follows that any encumbrance upon the use of trademarks must be justified on an individual basis, at least if the rationale for the encumbrance relates to the "specific features" of trademarks.[172] Contrary to the Dominican Republic's assertions, the panel's findings in *EC – Trademarks and Geographical Indications (US)* provide no support for this approach. The panel found that even though the regulation at issue required a case-by-case analysis of the geographical indication at the time of registration, "nothing in the text of Article 17 indicates that a case-by-case analysis is a requirement under the TRIPS Agreement."[173]

101. Further, an entire *category* of trademarks might possess some feature that is relevant to the objective of a measure covered by Article 20. Nothing in Article 20 of the TRIPS Agreement implies that any sort of "individualised assessment" is required, under *any* circumstance. Whether or not a measure covered by Article 20 is "unjustifiable" will depend

[166] Australia's second written submission, para. 197.
[167] Australia's second written submission, para. 198.
[168] Dominican Republic's response to Panel Question No. 89, para. 25; Dominican Republic's opening statement at the first substantive meeting of the Panel, paras. 27-29.
[169] Dominican Republic's response to Panel Question Nos. 99, para. 69, and 108, paras. 127-131; Honduras also makes this argument: see Honduras' first written submission, paras. 289-291, 309.
[170] Dominican Republic's response to Panel Question No. 99, para. 69.
[171] Australia's second written submission, para. 201.
[172] Australia's second written submission, para. 202.
[173] Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.672 (emphasis added), cited in Australia's second written submission, para. 202.

upon the rationale of the measure as it relates to the affected category of trademarks as a whole.[174]

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

102. The premise of the complainants' "individualised assessment" argument is that the concern underlying the tobacco plain packaging measure is that there are "specific features" of particular trademarks that increase the appeal of tobacco products, detract from the effectiveness of graphic health warnings, and mislead consumers as to the harms of tobacco use. The complainants appear to believe that the term "unjustifiably" requires Australia to identify every trademark used in Australia in connection with tobacco products, and then evaluate each trademark against a set of criteria that would allow Australia to determine whether or not that particular trademark implicates Australia's public health concerns.[175]

103. The premise of the complainants' argument is incorrect. The premise of the tobacco plain packaging measure is not that "specific features" of particular trademarks increase the appeal of tobacco products, detract from the effectiveness of graphic health warnings, or mislead consumers as to the harms of tobacco use. The premise of the tobacco plain packaging measure is that requiring a standardised, plain appearance for retail tobacco packaging eliminates, or at least significantly curtails, the ability of tobacco companies to use the package as a vehicle for advertising and promoting the product, which in turn reduces the appeal of tobacco products, increases the effectiveness of graphic health warnings and reduces the ability of the package to mislead. This goal has nothing to do with the "specific features" of trademarks and, instead, has "everything to do with features of the product inside the packaging", namely that it is a consumer product that is uniquely hazardous to human health. Allowing tobacco companies to use figurative elements and other non-standardised design elements on the package can only serve to increase the appeal of the package relative to a package design that does not permit the use of these elements.[176]

104. The Dominican Republic concedes that no "individualised assessment" is required when the measure does not seek to address concerns about the "specific features" of trademarks, even under its erroneous interpretation of the term "unjustifiably".[177]

105. For these reasons, no purpose would be served by examining the "specific features" of particular trademarks because those features in isolation are irrelevant to the policy decision to require all tobacco products to be sold in a standardised, plain package.[178] The complainants' "individualised assessment" argument therefore provides no basis for finding that the tobacco plain packaging measure is "unjustifiable".[179]

[174] Australia's second written submission, para. 203-204.
[175] Australia's second written submission, para. 288.
[176] Australia's second written submission, paras. 289-294; 296-298.
[177] Dominican Republic's response to Panel Question No. 108, paras. 133-134.
[178] Australia's second written submission, para. 295.
[179] Australia's second written submission, para. 299.

4. The complainants have failed to prove that any encumbrance resulting from the measure is "unjustifiable"

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

106. The tobacco plain packaging measure lays out detailed requirements that specify the standardised, plain appearance of tobacco products and retail packaging, including by prohibiting the use of *all* signs, whether or not any of those signs are also trademarks. The measure prohibits the use of trademarks (other than trademarked brand and variant names) not because they are trademarks, but because the use of these signs would re-introduce opportunities for advertising and promoting the product. At the same time, the measure permits the use of brand and variant names in a standardised format because these particular signs distinguish the tobacco products of one undertaking from those of other undertakings. The tobacco plain packaging measure thus reduces the ability of tobacco companies to use retail tobacco packaging to advertise and promote tobacco products, while preserving the ability of tobacco companies to use trademarks to distinguish their products from those of other undertakings.[180]

107. The "encumbrance" upon the use of trademarks, if any, that the Panel must evaluate in relation to a legal standard of "unjustifiability" is necessarily an "encumbrance" that results from the special requirements just described. As explained above, Australia does not consider that the prohibitive aspects of the tobacco plain packaging measure are "special requirements" that are encompassed by Article 20 of the TRIPS Agreement.[181] However, assuming, *arguendo,* that the special requirements at issue include both the permissive and prohibitive aspects of the measure relating to the use of trademarks, the issue before the Panel is whether the complainants have demonstrated that any encumbrance resulting from these special requirements, when viewed as a whole,[182] is "unjustifiable". Even if the use of trade marks to advertise and promote a product were encompassed by "use" within the meaning of Article 20, the complainants have failed to prove that it is "unjustifiable" for Australia to encumber the use of trademarks to advertise and promote tobacco products.

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

108. Without prejudice to the burden of proof, Australia has outlined significant evidence at Part III above, including reports of eminent public health institutions such as the United States Surgeons General, the WHO, the United States National Cancer Institute, and the United States Institute of Medicine, which clearly demonstrates that the tobacco plain packaging measure, and any encumbrance it imposes, *is* capable of contributing to its public health objectives. This evidence shows that: (i) there is a clear link between advertising and smoking-related behaviours; (ii) retail packaging is a recognised form of advertising and promotion, and also affects smoking-related behaviours; and (iii) because retail tobacco packaging represents a medium for advertising and promoting tobacco products, the

[180] Australia's second written submission, para. 210-212.
[181] See para. 78 above.
[182] Australia's second written submission, para. 213 and fn. 211, citing Appellate Body Report, *EC – Asbestos,* para. 64; Appellate Body Report, *EC – Seal Products,* para. 5.193.

restriction of the advertising and promotional use of trademarks on retail tobacco packaging is capable of affecting smoking-related behaviours, just as other restrictions on tobacco advertising and promotion have been shown to do.[183]

109. Therefore, there is clearly a rational connection between any encumbrance imposed by the tobacco plain packaging measure and its public health objectives.

(c) The complainants have failed to show that any encumbrance upon the use of trademarks resulting from the measure is not capable of contributing to its objectives

110. The complainants bear the burden of demonstrating that any encumbrance upon the use of trademarks in the course of trade resulting from the tobacco plain packaging measure is "unjustifiable". Having abandoned the proposition at the first substantive meeting of the Panel that the tobacco plain packaging measure would "backfire" or "go against" its objectives, i.e. that it would lead to an *increase* in tobacco prevalence and consumption, the complainants therefore bear the burden of demonstrating that any encumbrance upon the use of trademarks resulting from the tobacco plain packaging measure is not capable of contributing to the measure's legitimate public health objectives. As Australia has demonstrated at Part III above, the complainants have failed to discharge this burden.

5. Conclusion

111. The complainants have failed to show that the tobacco plain packaging measure is inconsistent with Article 20 of the TRIPS Agreement. The complainants have failed to show that the measure encumbers by special requirements the relevant "use" of a trademark to distinguish the goods of one undertaking from those of other undertakings in the course of trade, and have therefore failed to establish the threshold applicability of Article 20. The use of trademarks to advertise and promote tobacco products is not a relevant "use" of trademarks under Article 20. Any encumbrance upon this use is therefore irrelevant to establishing the applicability of Article 20.

112. The complainants have failed to provide a coherent interpretative or factual basis for their assertion that the prohibitive elements of the tobacco plain packaging measure are "special requirements" that fall within the scope of Article 20, while other widely-adopted measures that affect the use of a trademark do not. Assuming arguendo that these prohibitive elements do fall within the scope of Article 20, the complainants have failed to demonstrate that the measure as a whole encumbers the relevant use of a trademark.

113. Even if the Panel finds that the complainants have established an encumbrance on the use of a trademark, they have failed to demonstrate that any encumbrance upon the use of trademarks in the course of trade resulting from the special requirements at issue has been imposed "unjustifiably". Specifically, the complainants have failed to demonstrate that any such encumbrance goes against or is otherwise not capable of contributing to its objectives and therefore that there is no rational connection between the encumbrance and the objective. There is, in fact, overwhelming evidence to demonstrate that tobacco plain packaging *is* capable of contributing to the legitimate public health objectives set forth in the TPP Act. By requiring the standardisation of the appearance of retail tobacco packaging and of the product

[183] Australia's second written submission, paras. 159-178.

itself, there is a clear rational connection between the encumbrance and the public health objectives of the measure, and the complainants have failed to demonstrate otherwise.

114. For the sake of completeness, Australia notes that the Panel would need to reach the same conclusion even if it were to accept the position of some parties that the term "unjustifiably" requires the Panel to "weigh and balance" the extent to which the tobacco plain packaging measure encumbers a relevant use of trademarks, the extent to which it is capable of making a contribution to its public health objectives, and the importance of the public health objectives that the measure seeks to fulfil.

115. The tobacco plain packaging measure preserves the ability of tobacco companies to use trademarks to distinguish their products from those of other undertakings, while curtailing the use of retail tobacco packaging to advertise and promote tobacco products, detract from the effectiveness of graphic health warnings, and mislead consumers as to the harms of tobacco use in order to achieve a vital public policy objective. If the Panel were to "weigh and balance" these factors, there is no question that Australia's tobacco plain packaging measure is not unjustifiable.

116. Thus, under any conceivable interpretation of the term "unjustifiably", the complainants have failed to discharge their burden of proving that any encumbrance upon the use of trademarks in the course of trade resulting from the special requirements imposed by the tobacco plain packaging measure is "unjustifiable". The Panel must therefore reject the complainants' claims under Article 20 of the TRIPS Agreement.[184]

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

117. The complainants' claims under Articles 2.1 (incorporating Article 6*quinquies* A(1) and Article 10*bis* of the Paris Convention), 15.4, 16.1, 16.3, 22.2(b) and 24.3 of the TRIPS Agreement, all of which are dependent on a "right of use", are fundamentally flawed and must be dismissed by the Panel. The defects in the complainants' claims are summarised below.

118. In relation to Article 2.1 of the TRIPS Agreement, incorporating Article 6*quinquies* A(1) of the Paris Convention, Honduras maintains that Members are required to "ensur[e] that trademark owners can 'use' their trademarks"[185] in order for those trademarks to be "accepted for filing and protected as is", despite Honduras' express acknowledgment that trademark owners have no positive right to use those trademarks. Honduras has failed to demonstrate that Australia's tobacco plain packaging measure prevents the registration of trademarks that are registered in the territory of another Member based on their form and therefore, that the tobacco plain packaging measure is inconsistent with

[184] Australia's second written submission, paras. 301-306. Australia does not separately address the complainants' arguments concerning "less restrictive alternatives" under Article 20 of the TRIPS Agreement because this is clearly not required under a legal standard of "unjustifiability". See paras. 89-90 above. Australia notes, however, that the "less restrictive alternatives" that the complainants purport to identify in this context are the same that they identify in connection with their TBT claims, addressed at Part E below.
[185] Honduras' first written submission, para. 266.

Article 2.1 of the TRIPS Agreement incorporating Article 6*quinquies* A(1) of the Paris Convention.

119. In relation to Article 15.4, the complainants argue that Members must guarantee (or at least not prevent) the use of all signs that are not yet "capable of distinguishing" goods, so that these "non-inherently distinctive" signs may then potentially become distinctive in the future, so that they may constitute a trademark that is then eligible for registration. The complainants' interpretation of Article 15.4 fundamentally confuses the concepts of "signs" and "trademarks".[186] A proper interpretation of Article 15.4 makes clear that a Member can regulate a product in a way that may restrict or prohibit the use of a trademark in its territory, as long as a Member does not refuse to register that trademark based on the nature of a product.[187] The complainants have failed to establish that under the tobacco plain packaging measure, Australia refuses to register trademarks based on the nature of the underlying product, and therefore that the measure is inconsistent with Article 15.4.

120. In relation to Article 16.1, the complainants argue that Members must ensure that trademarks can be used in order to ensure that a "likelihood of confusion" is created in the market, so that trademark owners have increased opportunities to exercise their right of exclusion to prevent this confusion. These arguments, besides being nonsensical, cannot be reconciled with the complainants' admission that Article 16.1 obliges Members to confer only negative rights of exclusion on trademark owners.[188] The complainants have therefore failed to demonstrate that the tobacco plain packaging measure is inconsistent with Article 16.1 of the TRIPS Agreement.

121. In relation to Article 16.3, Indonesia argues that Members are under an obligation to guarantee (or at least not prevent) trademark owners to use their trademarks in order to "maintain" their well-known status or to "become" well known in the future.[189] However, the rights conferred under Article 16.3 of the TRIPS Agreement (and Article 6*bis* of the Paris Convention) are negative rights of exclusion.[190] Properly interpreted, Article 16.3 protects well known registered trademarks – not trademarks that may become well known in the future or trademarks that were once well known.[191] The tobacco plain packaging measure in no way prevents a trademark owner from availing itself of the protections that are afforded to owners of registered well known trademarks in accordance with Article 16.3.[192]

122. In relation to Article 2.1, incorporating Article 10*bis* of the Paris Convention, the complainants argue that Members must allow the use of signs and trademarks on tobacco packaging because the omission of these signs and trademarks is liable to confuse and mislead

[186] Australia's first written submission, paras. 303-305; Australia's second written submission, para. 25.
[187] Australia's first written submission, paras. 244-246, 298-301. See also Singapore's third party written submission, paras. 23-26; Norway's third party written submission, paras. 27-30; New Zealand's third party written submission, paras. 17-25; Uruguay's third party written submission, para. 50; Argentina's third party written submission, para. 22; Canada's third party written submission, paras. 35-43; South Africa's third party oral statement at the first substantive meeting of the Panel, paras. 3.3-3.5.
[188] Australia's second written submission, para. 14.
[189] See Australia's second written submission, para. 33.
[190] See Expert Report of C. Correa, Exhibit AUS-16, para. 18.
[191] See Australia's first written submission, paras. 324-325. See also Canada's third party written submission, paras. 54-57; New Zealand's third party written submission, paras. 34-39; Singapore's third party written submission, paras. 31-34; Uruguay's third party written submission, paras. 46, 107.
[192] Australia's first written submission, para. 331.

consumers and constitutes an act of unfair competition. However, Article 10*bis* actually requires that Members assure effective protection against "particular deeds" of "dishonest" or "untruthful" commercial "rivalry" – i.e. attempts by a market actor to gain a commercial advantage over a rival market actor that are liable to influence consumers on the basis of false or misleading representations.[193] Australia provides a range of legal mechanisms for affected private parties to prevent or obtain redress for false or misleading representations,[194] and thus gives effect to its obligations under Article 10*bis*. The tobacco plain packaging measure has no impact on the availability of these legal mechanisms,[195] and the complainants have not suggested otherwise. Instead, the complainants maintain that the tobacco plain packaging measure violates Article 10*bis* because the measure allegedly "compels" private actors to engage in acts of unfair competition.[196] Even assuming that government regulations that compel private actors to behave in certain ways were to fall within the scope of Article 10*bis*, the complainants have failed to demonstrate either that the measure compels acts of competition or that the measure compels acts of competition that are unfair.[197] Accordingly, the complainants' unfair competition claims should be dismissed in their entirety.

123. In relation to Article 22.2(b) of the TRIPS Agreement, the complainants argue that the provision requires Members to guarantee the use of geographical indications so that consumers are not misled into thinking that all tobacco products from all geographical origins are the same, so as to constitute an act of unfair competition. The complainants' interpretation of Article 22.2(b) is contrary to its plain text, which makes clear that the nature of protection provided is negative[198] and requires Members to provide the legal means for interested parties to prevent any act of using a geographical indication that constitutes an act of unfair competition (as defined by Article 10*bis* of the Paris Convention).[199] Australia provides a range of legal mechanisms for interested parties to prevent any such act by third parties.[200] The complainants have failed to demonstrate that the tobacco plain packaging measure is inconsistent with Article 22.2(b) of the TRIPS Agreement.[201]

124. Finally, in relation to Article 24.3 of the TRIPS Agreement, the complainants argue that Members are obligated to allow geographical indications to be used in a manner that will "allow for indications to acquire, maintain, or enforce their status as geographical indications".[202] The complainants' claims that the tobacco plain packaging measure is inconsistent with this provision are based on the existence of an asserted protected "right of use" in relation to geographical indications under Australian law at the time of entry into force of the TRIPS Agreement. As the complainants have now correctly acknowledged that no "right to use" geographical indications existed under Australian law prior to 1 January

[193] See Australia's first written submission, paras. 446-449.
[194] See Australia's first written submission, para. 458.
[195] See Australia's first written submission, para. 459.
[196] Indonesia's first written submission, paras. 151, 161-168, 178-181; Cuba's first written submission, paras. 383-388; Dominican Republic's first written submission, paras. 854-856, 875-879, 883; Honduras' first written submission, paras. 687-690, 694.
[197] Australia's second written submission, paras. 41-44.
[198] Australia's first written submission, paras. 479-485.
[199] Australia's first written submission, paras. 469-472, 480-482, 485; Australia's second written submission, para. 67.
[200] Australia's first written submission, paras. 486-487.
[201] See Australia's first written submission, paras. 477-487.
[202] Dominican Republic's response to Panel Question No. 48, para. 216.

1995,[203] the complainants' claims under Article 24.3 of the TRIPS Agreement must be dismissed.[204]

125. In sum, and as Australia has demonstrated in its written submissions,[205] each of the complainants' claims under Article 2.1 (incorporating Article 6*quinquies* A(1) and Article 10*bis* of the Paris Convention), 15.4, 16.1, 16.3, 22.2(b) and 24.3 of the TRIPS Agreement hinges upon the existence of a positive "right of use" with respect to signs, registered trademarks and geographical indications. As the complainants themselves have expressly acknowledged that there is no such "right of use", and given that the complainants have offered no legal justification or evidence in support of their claims, their claims under each of these provisions must fail.

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

126. The complainants' claims under Article 2.2 of the TBT Agreement fail at the threshold. The tobacco plain packaging measure is entitled to the presumption in Article 2.5 that it does not constitute an unnecessary obstacle to international trade, and the complainants have failed to rebut that presumption with the type of evidence required.[206] Even if the complainants' claims were found to overcome that fundamental hurdle, the complainants have also failed to establish a *prima facie* case that the tobacco plain packaging measure is trade-restrictive *at all*, let alone that it is *more* trade-restrictive than necessary having regard to the contribution it makes to its public health objectives and the risks that non-fulfilment of those objectives would create.

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

127. Australia enacted its tobacco plain packaging measure in accordance with the FCTC Guidelines, which set out the relevant international standard for the plain packaging of tobacco products.[207] A technical regulation adopted for a legitimate objective in accordance with the relevant international standard benefits from the presumption in Article 2.5 of the TBT Agreement, whereby it is rebuttably presumed not to constitute an unnecessary obstacle to international trade under Article 2.2.[208] The presumption reflects one of the central purposes of the TBT Agreement, to incentivise Members to adopt and use relevant international standards, in order to harmonise technical regulations, on as wide a basis as possible.

[203] See Dominican Republic's response to Panel Question No. 48, para. 213; Indonesia's response to Panel Question No. 48, citing its response to Panel Question No. 44.
[204] See Australia's second written submission, para. 69.
[205] Australia's first written submission, Part IV.B and Part IV.C; Australia's second written submission, Part II.B.
[206] Australia's response to Panel Question No. 162; Australia's second written submission, paras. 347-356; Australia's response to Panel Question No. 67, paras. 161-164.
[207] Australia's first written submission, paras. 567-582; Australia's second written submission, paras. 316-345; Australia's responses to Panel Question No. 128, No. 129, Nos. 135, No. 150.
[208] Australia's first written submission, paras. 567-582.

128. The FCTC – one of the most widely embraced treaties in the United Nations system – explicitly recommends the implementation of tobacco plain packaging in the FCTC Guidelines for Article 11 (concerning the packaging and labelling of tobacco products) and Article 13 (concerning tobacco advertising, promotion, and sponsorship).[209] The FCTC Guidelines for Article 11 recognise that:

> [Tobacco plain packaging] may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address the industry package design techniques that may suggest that some products are less harmful than others.[210]

129. The FCTC Guidelines reflect the international scientific consensus[211] on the comprehensive range of tobacco control measures, including tobacco plain packaging, that countries should enact in order to address the grave and serious health impact of tobacco consumption and are relied on by the 180 Parties to the FCTC in implementing their own tobacco control measures.

130. Consistent with the criteria for determining what is an "international standard" for the purposes of Article 2.5,[212] Australia has demonstrated that the FCTC Guidelines are: standards within the meaning of the TBT Agreement;[213] have been adopted by the FCTC COP, which is an "international standardizing body or organization" that has "recognised activities in standardization[214] and whose membership is open to the relevant bodies of at least all Members";[215] and have been made available to the public.[216]

131. For these reasons, Australia has demonstrated that the FCTC Guidelines are an international standard that is "relevant" to the tobacco plain packaging measure, which has been adopted "in accordance with" those Guidelines.[217] The FCTC Guidelines were developed by working groups in which FCTC Parties (including at least one of the complainants) participated, were adopted by the FCTC COP, and were based on "available scientific evidence and the experience of the Parties themselves in implementing tobacco control measures."[218] The FCTC Guidelines provide "guidelines" for "common and repeated use" by the FCTC Parties, concerning the characteristics of a "product" (tobacco), and related "processes and production methods" (manufacture and sale of tobacco products).[219]

132. The complainants contend that the FCTC Guidelines are not "international standards", on two bases. First, the complainants maintain that the FCTC COP is not an "international standardizing body". As Australia has demonstrated, this claim is without merit: the FCTC COP has "recognized activities in standardization", as is evidenced by the COP's role in developing guidelines for testing and measuring contents and emissions of tobacco

[209] WHO, Exhibit AUS-109, Article s 11, p. 63 and 13, pp. 99-100.
[210] WHO, Exhibit AUS-109, Article 11, p. 63.
[211] Panel Report, *US – Clove Cigarettes*, para. 7.414, cited in Australia's second written submission, para. 271.
[212] Panel Report, *US – Tuna II (Mexico)*, para. 7.664, cited in Australia's first written submission, para. 570.
[213] Australia's first written submission, paras. 571-574.
[214] Australia's second written submission, paras. 333-341; Australia's response to Panel Question No. 128
[215] Australia's first written submission, paras. 575-579; Australia's second written submission, para. 316, citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 359.
[216] Australia's first written submission, para. 580.
[217] Australia's first written submission, para. 582; Australia's second written submission, paras. 316-318.
[218] WHO, Exhibit AUS-42, para. 19. See also Australia's first written submission, paras. 103-113.
[219] Australia's first written submission, para. 573; Australia's second written submission, para. 316.

products, and for the regulation of those contents and emissions.[220] Second, the complainants argue that in order to be considered an international standard, it must be sufficiently "precise" so as to be relied upon for "common and repeated use", within the meaning of the definition of a standard in Annex 1.2 of the TBT Agreement. This contention has no legal basis in the TBT Agreement.[221] Moreover, the FCTC Guidelines are capable of and are in fact being relied upon for "common and repeated use".[222] In particular, Ireland, the United Kingdom, France, Hungary, New Zealand, Norway and Chile, have now either adopted or proposed their own tobacco plain packaging measures in reliance on the FCTC Guidelines.[223]

133. The complainants also argue that if some element of Australia's measure goes beyond the international standard, then those aspects of Australia's measure that are consistent with the FCTC Guidelines should be deprived of the benefit of the presumption under Article 2.5. Not only is there no factual basis for this argument, given that Australia's measure is clearly in accordance with the properly identified scope of the FCTC Guidelines,[224] there is also no legal basis for this argument in the text of Article 2.5 of the TBT Agreement.[225]

134. Given that the tobacco plain packaging measure benefits from the presumption in Article 2.5 that it does not constitute an "unnecessary obstacle to international trade" within the meaning of Article 2.2, and the complainants have failed to adduce any evidence of the type that would be required to rebut this presumption,[226] the Panel need not proceed further in its analysis of the complainants' claim under Article 2.2 of the TBT Agreement.

B. THE COMPLAINANTS HAVE FAILED TO MAKE A *PRIMA FACIE* CASE THAT THE MEASURE IS TRADE-RESTRICTIVE UNDER ARTICLE 2.2 OF THE TBT AGREEMENT

135. Notwithstanding their failure to rebut the presumption established by Article 2.5, the complainants' claims under Article 2.2 would fail in any event because they have not established a *prima facie* case that the tobacco plain packaging measure is "trade-restrictive" under a proper interpretation of that provision.

1. The complainants' claims of trade-restrictiveness fail as a matter of law

136. Properly interpreted, the terms "trade-restrictive" and "obstacle to international trade" in Article 2.2 require the complainants to establish that the tobacco plain packaging measure will result, or has resulted, in a limiting effect on international trade in tobacco products.[227]

[220] Australia's second written submission, paras. 333-341.
[221] Australia's second written submission, paras. 321-323; Australia's response to Panel Question No. 163, para. 101; Australia's comments on responses to Panel Question No. 163, para. 119.
[222] Australia's second written submission, paras. 324-327. Australia's response to Panel Question No. 163; Australia's comments on responses to Panel Question No. 163.
[223] Australia's response to Panel Question No. 163.
[224] Australia's response to Panel Question No. 135.
[225] Australia's responses to Panel Question Nos. 135 and 150.
[226] Australia's response to Panel Question No. 162; Australia's second written submission, paras. 347-356; Australia's response to Panel Question No. 67, paras. 161-164.
[227] Australia's second written submission, paras. 363-398; Australia's first written submission, paras. 521-530; Australia's response to Panel Question No. 117, paras. 110-113; Australia's comments on responses to Panel Question Nos. 151 and 165, paras. 37-49.

137. The complainants' claims of trade-restrictiveness do not even attempt to meet this fundamental requirement. The complainants have instead tried to expand the standard of trade-restrictiveness to an abstract and meaningless concept of a "limitation on competitive opportunities"[228] in order to accommodate their principal claim:[229] that the design, structure and operation of the tobacco plain packaging measure has a limiting effect on the *ability to use design features* on tobacco packaging to advertise and promote tobacco products.[230] The complainants further contend that a "limitation on competitive opportunities" solely within a particular product segment or solely for a particular Member[231] suffices to demonstrate a measure's trade-restrictiveness, even where the measure *enhances* overall trade in that product.[232]

138. The complainants' proposed "limitation on competitive opportunities" standard of trade-restrictiveness cannot be reconciled with either the text of Article 2.2 or the jurisprudence of the Appellate Body and thus fails as a matter of law.[233]

2. The complainants' claims of trade-restrictiveness fail as a matter of evidence

139. The complainants' alternative bases for claiming that the tobacco plain packaging measure is trade-restrictive fail for a lack of evidence. None of the complainants has substantiated its claims that the tobacco plain packaging measure entails compliance costs, or increases barriers to market entry, such as to constitute a limiting effect on international trade in tobacco products.[234]

140. The complainants' only attempt to establish actual trade effects is their argument that the tobacco plain packaging measure has caused "downtrading" in the Australian market by shifting demand for tobacco products from higher-priced to lower-priced products. Even if the Panel were to find that downtrading is attributable in part to the tobacco plain packaging measure,[235] that fact alone would be insufficient to demonstrate a limiting effect on overall trade in tobacco products, with respect to either the volume or value of trade.[236] An alleged decrease in sales in the premium segment alone does not establish a limiting effect on the *volume* of overall trade in tobacco products. Moreover, the uncontested evidence before the Panel is that real weighted prices of cigarettes have increased since the introduction of the tobacco plain packaging measure; and the complainants' own experts accept that the measure has *caused* prices to increase.[237] The complainants' downtrading claims thus also fail to establish a limiting effect on the *value* of overall trade in tobacco products.

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[228] Australia's second written submission, paras. 370-374; Australia's comments on responses to Panel Question Nos. 151 and 165, paras. 40-49.
[229] Australia's comments on responses to Panel Question Nos. 151 and 165, paras. 43-45, 54-55.
[230] Australia's opening statement at the second substantive meeting of the Panel, paras. 157-158; Australia's comments on responses to Panel Question Nos. 151 and 165, paras. 43-44. 54-55.
[231] Australia's second written submission, paras. 383-385, 397; Australia's response to Panel Question No. 154; Australia's comments on responses to Panel Question Nos. 151 and 165, para. 63.
[232] Australia's second written submission, paras. 383-397.
[233] Australia's second written submission, paras. 363-398; Australia's first written submission, paras. 521-530; Australia's response to Panel Question No. 117, paras. 110-113; Australia's comments on responses to Panel Question Nos. 151 and 165, paras. 37-49.
[234] Australia's first written submission, paras. 547-561; Australia's response to Panel Question No. 155.
[235] Australia's first written submission, paras. 542-545; Australia's second written submission, paras. 414-420.
[236] Australia's first written submission, paras. 533-541; Australia's second written submission, paras. 407, 409-413.
[237] Australia's comments on responses to Panel Question Nos. 151 and 165, paras. 59-60.

141. The complainants acknowledge that evidence of actual trade effects may be required when a qualitative assessment of a non-discriminatory technical regulation fails to establish any trade-restrictive effects.[238] However, not one of the complainants has introduced a single piece of evidence demonstrating that tobacco producers in their countries have experienced a decrease in export volumes, prices, revenues or profits in Australia attributable to the tobacco plain packaging measure.[239] Given the resources at the complainants' disposal, it is reasonable to assume that if such evidence supported their claims this would have been provided to the Panel.[240]

142. The complainants have thus failed entirely – as a matter of both law and fact – to demonstrate any credible basis on which to conclude that Australia's measure is trade-restrictive within the meaning of Article 2.2. Accordingly, the Panel need not proceed further in its analysis.

C. THE COMPLAINANTS HAVE FAILED TO ESTABLISH THAT THE MEASURE IS INCAPABLE OF CONTRIBUTING TO ITS OBJECTIVES

143. In the unlikely event that the Panel were to consider that the complainants have made a *prima facie* case that the tobacco plain packaging measure is "trade-restrictive" under a proper interpretation of that term, the complainants have failed in their attempt to establish that the tobacco plain packaging measure is not capable of contributing to its objectives of reducing the use of and exposure to tobacco products in Australia.

144. As outlined in Part III above, the overwhelming weight of the qualitative evidence unequivocally establishes that, by prohibiting tobacco packaging from being used to advertise and promote tobacco products – and thereby reducing the appeal of tobacco products, increasing the effectiveness of graphic health warnings, and reducing the ability of tobacco packaging to mislead consumers – the tobacco plain packaging measure is capable of discouraging smoking initiation and relapse, encouraging cessation, and reducing people's exposure to tobacco products. The quantitative evidence corroborates this conclusion, and is consistent with the tobacco plain packaging measure operating synergistically with other elements of Australia's comprehensive tobacco control policy to reduce further the use of tobacco products and exposure to tobacco smoke in Australia. Moreover, the complainants' own concessions and evidence clearly establish that the measure is apt to contribute to achieving its objectives.

145. The complainants have thus failed entirely to discharge their burden of establishing that the tobacco plain packaging measure is incapable of contributing to its public health objectives.

[238] See, e.g. Dominican Republic's and Honduras' responses to Panel Question No. 117.
[239] Australia's response to Panel Question No. 117, paras. 122-123; Australia's opening statement at the second substantive meeting of the Panel, para. 149.
[240] Australia's opening statement at the second substantive meeting of the Panel, para. 149.

D. THE COMPLAINANTS HAVE FAILED TO ESTABLISH THAT THE RISKS ARISING FROM NON-FULFILMENT OF THE MEASURE'S OBJECTIVES ARE NOT GRAVE

146. The grave risks to public health that would arise from non-fulfilment of the objectives of the tobacco plain packaging measure overwhelmingly weigh in favour of a finding that the tobacco plain packaging measure is no more trade-restrictive than necessary to achieve those objectives within the meaning of Article 2.2. In an attempt to persuade the Panel of the counter-intuitive proposition that those risks would be anything other than serious and grave, the complainants have once again misconstrued the relevant legal standard.[241]

147. To this end, the Dominican Republic and Indonesia have fundamentally misinterpreted the nature of the relevant risks that the Panel must assess. Contrary to the plain text of Article 2.2, which makes clear that this aspect of the holistic analysis requires the Panel to assess the "risks non-fulfilment would create" – i.e. the risks that would arise *assuming* non-fulfilment of the tobacco plain packaging measure's objectives – both complainants argue that the Panel must instead assess the *likelihood* of the measure not fulfilling its objectives.[242] Honduras also makes the preposterous argument that because Australia has adopted a comprehensive approach to tobacco control that has successfully reduced smoking prevalence and consumption, the consequences of not *further* reducing tobacco-related premature deaths and serious disease through the tobacco plain packaging measure would not be grave.[243]

148. Properly interpreted, the risks that would arise from the non-fulfilment of the public health objectives of the tobacco plain packaging measure are significant and grave, and the consequences would include increased tobacco-related deaths and disease in Australia.[244] This is affirmed by the acknowledgment by Honduras and the Dominican Republic, respectively, that the nature of the serious health risks at issue is a "paramount" concern to any society,[245] and that the consequences of not fulfilling the measure's objectives "would be serious and grave",[246] providing unequivocal support for the conclusion that the tobacco plain packaging measure is no more trade-restrictive than necessary to fulfil its legitimate objectives.

E. THE COMPLAINANTS HAVE FAILED TO PROPOSE ALTERNATIVE MEASURES THAT ESTABLISH THAT THE TOBACCO PLAIN PACKAGING MEASURE IS MORE TRADE-RESTRICTIVE THAN NECESSARY

149. Finally, were the Panel to continue its holistic analysis under Article 2.2, notwithstanding the complainants' failure to establish that the tobacco plain packaging measure is trade-restrictive under a proper interpretation,[247] the complainants have failed to discharge their burden of proposing reasonably available alternatives that are less trade-

[241] Australia's second written submission, para. 527.
[242] Australia's second written submission, paras. 532, 541-542; Australia's comments on responses to Panel Question No. 157, paras. 86-94.
[243] Australia's second written submission, paras. 545-547.
[244] Australia's second written submission, paras. 531-540, 543-544; Australia's first written submission, paras. 683-694; Australia's comments on responses to Panel Question No. 157, paras. 86-90.
[245] Australia's second written submission, para. 540; Honduras' first written submission, para. 891.
[246] Australia's second written submission, para. 543; Dominican Republic's first written submission, para. 1029.
[247] Appellate Body Report, *US – Tuna II (Mexico)*, para. 322, fn 647.

restrictive than the tobacco plain packaging measure, and that are capable of making an equivalent contribution to its public health objectives.[248]

150. In particular, three of the complainants' four purported "alternatives" – an increase in excise tax, an increase in the minimum legal purchase age for tobacco products, and improved social marketing campaigns – are not alternatives at all, as they constitute variations on *existing* elements of Australia's comprehensive tobacco control policy.[249] Consistent with the findings in *Brazil – Retreaded Tyres*, such measures cannot be a *substitute* for the tobacco plain packaging measure,[250] particularly given the importance of a comprehensive approach to tobacco control.[251] Rather, any such substitution would narrow the range of mechanisms deployed in Australia's comprehensive tobacco control policy, thereby limiting its ability to impact the broadest range of consumers and potential consumers possible and undermining the effectiveness of existing tobacco control measures.[252] This would weaken Australia's comprehensive tobacco control policy by reducing the synergies between its components, as well as its total effect.[253] The complainants have failed to demonstrate that, within this policy context, any of their three proposed variations to existing measures would (or could) make an *equivalent* degree of contribution to the objectives of the tobacco plain packaging measure.[254]

151. Furthermore, the complainants' criticisms of Australia's existing measures are entirely unfounded, given that Australia: is a world leader in its use of excise as a tobacco control measure[255] – a fact that Honduras has expressly acknowledged;[256] has in place an extensive and dynamic range of policies to restrict youth access to tobacco;[257] and is a world leader in its use of social marketing campaigns as a tobacco control strategy.[258]

152. With respect to the only actual *alternative* measure the complainants propose – a pre-vetting scheme – the complainants have failed to provide any credible evidence or argument to support their implausible assertion that the scheme would make "an equivalent or greater contribution" to that of the tobacco plain packaging measure when its purpose is to eliminate

[248] Australia's first written submission, paras. 700-742; Australia's second written submission, paras. 550-569; Australia's response to Panel Question No. 157, paras. 68-71; Australia's comments on responses to Panel Question No. 157, paras. 74-95.
[249] Australia's first written submission, paras. 703-706; Australia's second written submission, paras. 551-554; Australia's response to Panel Question No. 64, paras. 142-144; Australia's response to Panel Question No. 148, para. 21.
[250] Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 159, 172.
[251] Australia's first written submission, paras. 38-49; Australia's comments on responses to Panel Question No. 159, para. 100.
[252] Australia's response to Panel Question No. 64, paras. 141-144; Australia's second written submission, para. 562; Australia's response to Panel Question No. 148, paras. 26-27; Australia's comments on responses to Panel Question No. 159, para. 102.
[253] Australia's first written submission, para. 706; Australia's response to Panel Question No. 64, paras. 142-144; Australia's response to Panel Question No. 69, para. 181; Australia's second written submission, paras. 553-554; Australia's response to Panel Question No. 148, paras. 23-27; Australia's response to Panel Question No. 157, paras. 38-40; Australia's response to Panel Question No. 158; Australia's comments on responses to Panel Question No. 161, paras. 107-111.
[254] Australia's first written submission, paras. 718-724; Australia's second written submission, paras. 556-562; Australia's response to Panel Question No. 139, para. 41; Australia's comments on responses to Panel Question No. 157, paras. 74-80; Australia's comments on responses to Panel Question Nos. 151 and 165, paras. 56-57.
[255] Australia's response to Panel Question No. 158.
[256] Australia's response to Panel Question No. 158, para. 87.
[257] Australia's first written submission, paras. 709-711.
[258] Australia's first written submission, paras. 713-717; Australia's comments on responses to Panel Question No. 157, para. 79.

the standardisation of tobacco packaging,[259] and reinstate tobacco packaging as a vehicle for advertising and promoting tobacco products.[260] In any event, a pre-vetting scheme is not "reasonably available" due to the prohibitive costs and burdens it would entail.[261]

153. Moreover, the complainants have failed to discharge their burden of proposing alternatives that are *less* trade-restrictive than the tobacco plain packaging measure.[262] Under the complainants' abstract "limitation on competitive opportunities" test, their alternatives are in fact *more* trade-restrictive than the tobacco plain packaging measure[263] – a conclusion the complainants have sought to obscure through various contrived arguments.[264] Furthermore, under a proper interpretation of trade-restrictiveness, the complainants explicitly assume that their alternatives would be *equally* restrictive of the volume of trade in tobacco products in order to make an equivalent contribution to the objectives of the tobacco plain packaging measure.[265] There is no basis in WTO jurisprudence for preferring an *equally* trade-restrictive alternative to the measure at issue.[266]

154. Thus, an assessment of the complainants' proposed alternative measures reinforces the conclusion that the tobacco plain packaging measure is no "more trade-restrictive than necessary" to fulfil its legitimate objectives under Article 2.2 of the TBT Agreement.

VI. CUBA HAS FAILED TO ESTABLISH A *PRIMA FACIE* CASE UNDER ARTICLE IX:4 OF THE GATT 1994

155. The basis of Cuba's claim that the tobacco plain packaging measure is inconsistent with Article IX:4 of the GATT 1994 is that the prohibition on the use of the mark "Habanos" on the packaging of Cuba's large hand-made cigars ("LHM") materially reduces their value.

156. This argument is entirely without merit, because: (i) Cuba has failed to establish that measures affecting marks other than country of origin marks fall within the scope of Article IX;[267] (ii) even assuming, *arguendo*, that other marks, such as the mark "Habanos" fell within scope, the Appellate Body has unambiguously confirmed that Article IX only disciplines measures that *require* marks of origin, not measures that prohibit such markings;[268] and (iii) Cuba has failed to substantiate its assertion that there has been any

[259] Australia's first written submission, para. 728; Australia's second written submission, para. 564.
[260] Australia's first written submission, para. 728; Australia's second written submission, paras. 564-569; Australia's response to Panel Question No. 157; Australia's comments on responses to Panel Question No. 157, paras. 84-85.
[261] Australia's first written submission, paras. 725-728, 736, 740; Australia's opening statement at the second substantive meeting of the Panel, para. 155; Australia's response to Panel Question No. 157; Australia's comments on responses to Panel Question No. 157, paras. 81-83.
[262] Australia's first written submission, paras. 734-736, 740; Australia's second written submission, para. 563.
[263] Australia's first written submission, paras. 734-736, 740; Australia's second written submission, para. 563; Australia's opening statement at the second substantive meeting of the Panel, para. 156; Australia's response to Panel Question No. 151, paras. 45-51; Australia's comments on responses to Panel Question Nos. 151 and 165, para. 61; Australia's comments on the Dominican Republic's response to Panel Question No. 153, paras. 68-69.
[264] Australia's comments on responses to Panel Question Nos. 151 and 165, paras. 50-55.
[265] Australia's opening statement at the second substantive meeting of the Panel, para. 157; Australia's response to Panel Question No. 151, para. 40; Australia's comments on responses to Panel Question Nos. 151 and 165, para. 58.
[266] Australia's comments on responses to Panel Question Nos. 151 and 165, para. 58.
[267] Australia's first written submission, paras. 750-751; Australia's response to Panel Question No. 83; Canada's third party written submission, para. 104.
[268] Australia's second written submission, paras. 577-578; Australia's response to Panel Question No. 133; Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.356; Australia's first written submission, paras. 745-749.

reduction in the value of Cuban LHM cigars since the introduction of the tobacco plain packaging measure, let alone to demonstrate a "material" reduction that is attributable to the prohibition on the use of the mark "Habanos".[269] Each of these factors is fatal to Cuba's argument.

157. Even assuming, *arguendo*, that the tobacco plain packaging measure were somehow found provisionally inconsistent with Article IX:4, the measure would benefit from the exception under Article XX(b).[270]

158. Given that Cuba has failed to establish a *prima facie* case that the tobacco plain packaging measure is inconsistent with Article IX:4 of the GATT 1994, Cuba's claim must be rejected in its entirety.

VII. CONCLUSION

159. For the reasons stated herein and explained more fully in Australia's written submissions, oral statements, responses to questions from the Panel, and comments on the complainants' responses, each of the complainants' claims in this dispute is unfounded both in law and fact.

160. Moreover, the complainants' claims and arguments in this case have disturbing implications for all WTO Members considering the adoption of public health measures and for the WTO dispute settlement system itself.[271] The improbable standard[272] by which the complainants have asked the Panel to evaluate Australia's tobacco plain packaging measure has no foundation in WTO law and ignores entirely the policy context in which public health policymakers discharge their important responsibilities.[273] The complainants' claims and arguments in this case threaten the essential right of a WTO Member, as consistently recognised by prior panels and the Appellate Body, to decide the level of protection it seeks to achieve when it comes to protecting the lives and wellbeing of its citizens.[274]

161. Tobacco plain packaging is a legitimate public health measure, based upon an extensive body of scientific evidence and the explicit recommendations of the Parties to the FCTC. The evidence demonstrates that the measure is already contributing to achieving Australia's public health objectives and its effects are likely to grow over the long term. The complainants have failed to demonstrate that this effective tobacco control measure is inconsistent with Australia's obligations under the covered agreements. Australia therefore respectfully requests that the Panel reject the complainants' claims under Articles 2.1 (incorporating Article 6*quinquies* A(1) and Article 10*bis* of the Paris Convention), 15.4, 16.1, 16.3, 20, 22.2(b), and 24.3 of the TRIPS Agreement, Article 2.2 of the TBT Agreement,[275] and Article IX:4 of the GATT 1994 in their entirety.

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[269] Australia's second written submission, paras. 579-585; Australia's response to Panel Question No. 137.
[270] Australia's second written submission, paras. 586-595; Australia's first written submission, paras. 754-761.
[271] Australia's closing statement at the second substantive meeting of the Panel.
[272] Australia's closing statement at the second substantive meeting of the Panel, paras. 7-22.
[273] Australia's closing statement at the second substantive meeting of the Panel, paras. 15-20, 27-35.
[274] Australia's closing statement at the second substantive meeting of the Panel, paras. 30-32.
[275] Australia notes that in their respective requests for the establishment of a Panel the complainants made claims under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 (national treatment). The complainants have not pursued these claims in any of their written or oral submissions in these proceedings. These claims must therefore be considered to have been abandoned by the complainants.