

*AS DELIVERED*

**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)**

**Oral Statement of Australia at the Second Meeting of  
the Panel**

Geneva, 28 October 2015

## **I. Introduction**

1. Mr Chairman, distinguished members of the Panel, good morning. My name is Hamish McCormick, and I am Australia's Ambassador and Permanent Representative to the WTO. Australia is pleased to have this opportunity to present its views at the beginning of the Panel's second substantive meeting with the parties, and I would like to take this opportunity to introduce you to the members of the Australian delegation who will be presenting our case this morning.

2. Dr Wendy Southern is the Deputy Secretary of the Australian Department of Health's National Programme Delivery Group, and has responsibility for leading and overseeing the Department of Health's tobacco control policies to improve public health in Australia. Today, Dr Southern will be highlighting the integral role of tobacco plain packaging in Australia's comprehensive suite of tobacco control measures.

3. Next, Mr Damien O'Donovan, Senior General Counsel of the Australian Government Solicitor, will examine in some detail the evidence before the Panel on the question of whether the measure is apt to contribute to Australia's public health objectives.

4. Third, Ms Elisabeth Bowes, as the head of the Department of Foreign Affairs and Trade's Tobacco Plain Packaging Taskforce, will discuss the complainants' claims under the TRIPS Agreement.

5. Fourth and finally, Mr Stephen Bouwhuis, Senior Counsel, Office of International Law from the Attorney-General's Department, will address the complainants' claims under the TBT Agreement, before we conclude Australia's opening statement.

6. Australia thanks the Panel for its consideration of this matter, and the Secretariat for the significant amount of effort that continues to go into running these proceedings. We look forward to the remainder of the proceedings this week, and stand ready to answer any questions the Panel may have over the coming days. I will pass to my colleague.

## **II. Public Health Introduction**

7. Good morning Mr Chairman, members of the Panel. I am Dr Wendy Southern. I represent a country that is concerned about the regulation of the promotion of a unique, highly addictive, and deadly product. Worldwide, tobacco kills one in two of its users. Australia confronts an annual death toll of over 15,000 Australians from smoking.

8. In order to combat the global epidemic of tobacco use, the World Health Organization Framework Convention on Tobacco Control recommends that parties adopt comprehensive tobacco control strategies that optimize synergies from a mix of policies.

9. As outlined extensively in our written submissions, Australia has adopted a comprehensive suite of tobacco control measures, including:

- measures which have progressively restricted advertising of tobacco products;
- graphic health warnings;
- increased excise taxes;
- restrictions on youth access;
- point-of-sale-display bans;
- bans on smoking in public places;
- support for cessation; and
- anti-tobacco media campaigns.

10. The synergies between these measures are critical. For example, tobacco plain packaging increases the effectiveness of enlarged graphic health warnings. The enhanced graphic health warnings reinforce the messages conveyed in anti-tobacco social marketing campaigns. In this way, social marketing campaigns and graphic health warnings are enhanced by tobacco plain packaging. These measures complement, rather than act as a substitute for, each other. These are just some examples of how all tobacco control policies work together in a synergistic fashion.

11. Australia based its decision to implement the tobacco plain packaging measure on the extensive body of scientific evidence available at the time, and the explicit recommendation under the Framework Convention to adopt tobacco plain packaging as a means to implement Members' obligations under the Convention.<sup>1</sup> Numerous countries, including New Zealand, Ireland, the United Kingdom, France, Norway, and Chile are now introducing, or considering the introduction of, tobacco plain packaging to improve public health in their respective jurisdictions.

12. Since the introduction of the tobacco plain packaging measure, and contrary to the impression given by the complainants in this dispute, Australia's comprehensive suite of measures has seen the prevalence rates of smoking in Australia continue to decline. The most recent National Drug Strategy Household Survey, which covers the period 2010-2013, showed a notable decline in prevalence rates. During this period, 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. A drop of 2 to 3 percentage points in prevalence might seem small, but this translates to 200,000 fewer daily smokers, aged 14 or older.

13. More recent data on smoking prevalence taken from the Roy Morgan monthly survey also confirms a substantial reduction in prevalence. While Roy Morgan uses different survey methodologies, the pattern of rapid decline in prevalence is significant and consistent.

14. As you can see up on the screen now, overall prevalence for smokers 14 years and over declined from 18.7% in the period from January to June 2012 (prior to the introduction of plain packaging) to 16.2% in the first six months of this year. Prevalence among 14-24 year olds has also declined, from 16.7% to 14.1%. This means that approximately 492,000 fewer Australians aged 14 years and over,<sup>2</sup> including

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<sup>1</sup> *WHO Framework Convention on Tobacco Control: Guidelines for Implementation* (2013 edition) Exhibit AUS-109, Article 11, p. 63 and Article 13, pp. 99-100.

<sup>2</sup> Using the RMSS data, overall smoking prevalence rates are calculated for two six-month periods – January to June of 2012 and 2015. The average Australian population during January to June of 2015 is then calculated based on the sample weights in the RMSS data. The reduction in the number of

approximately 86,000 fewer youth and young adults, are now smoking in Australia.<sup>3</sup> It is impossible to believe that tobacco plain packaging has played no role whatsoever in these remarkable declines.

15. 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. Australia welcomes the success of its comprehensive tobacco control efforts, of which the tobacco plain packaging measure is an integral part.

16. However, despite these results, the complainants maintain that falling prevalence rates are some kind of natural phenomenon that has nothing to do with Australia's comprehensive tobacco control strategy in general or plain packaging in particular.<sup>4</sup> This is untenable.

17. As Professor Chaloupka points out in his latest report, the assumption that tobacco use will continue to fall without the implementation of new policies, and the strengthening of existing policies, is naive at best.<sup>5</sup> Indeed, around the world we can see examples of slowing falls in prevalence rates where countries do not pursue, and regularly strengthen, comprehensive tobacco control strategies. For example, just consider the following graphs of prevalence rates in Germany and Australia, or Greece and Australia. In the first slide, we can see that Germany has made little progress in reducing smoking prevalence. As Professor Chaloupka explains in his report, this is due in large part to Germany's generally weak tobacco control policies and the lack of change in these policies over time. In the next slide we can see that in Greece, prevalence of

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smokers is calculated as the reduction in smoking prevalence from 2012 to 2015, multiplied by the average Australian population in 2015 (all based on January to June of each year).

<sup>3</sup> Using the RMSS data, overall smoking prevalence rates are calculated for two six-month periods – January to June of 2012 and 2015. The average Australian population during January to June of 2015 is then calculated based on the sample weights in the RMSS data. The reduction in the number of smokers is calculated as the reduction in smoking prevalence from 2012 to 2015, multiplied by the average Australian population in 2015 (all based on January to June of each year).

<sup>4</sup> Dominican Republic's second written submission, para. 341, citing List Empirical Evidence Report, Exhibit DR/IND-1, paras. 110 and 122; and Updated IPE Report, Exhibit DOM-303, chapter 6. See also Honduras' second written submission, paras. 54-55, and 61; Indonesia's second written submission, paras. 4 and 173; and Cuba's second written submission, para. 277.

<sup>5</sup> Supplementary expert report of F. Chaloupka (26 October 2015), Exhibit AUS-582, paras. 37-45.

smoking has actually increased. Again, this is largely attributable to its weak tobacco control policies.

18. Similarly, the United States Surgeon General noted in its latest report on smoking in 2014 that, in the United States, "the decline in the prevalence of smoking has slowed in recent years and that burden of smoking attributable mortality is expected to remain at high and unacceptable levels for decades to come unless urgent action is taken."<sup>6</sup> One of the actions it identifies as a potential means of reducing smoking is tobacco plain packaging.<sup>7</sup>

19. As I read the complainants' written submissions in this dispute, I note the complainants' repeated claims that the effect of Australia's tobacco plain packaging measure has thus far been "weak", "mixed" or "disappointing",<sup>8</sup> and future effects are not likely to be realised.

20. To be clear, Australia does not regard the early signs in relation to tobacco plain packaging as disappointing. On the contrary, and as conceded by the complainants themselves, there is already evidence that tobacco plain packaging has had an impact on reducing the appeal of tobacco products and the noticeability of graphic health warnings. Moreover, as my colleagues will discuss, the complainants' own evidence and statistical analyses, when properly corrected, indicate statistically significant declines in smoking prevalence and tobacco consumption attributable to Australia's packaging changes. While these meaningful declines have been detected in just the first two-and-a-half years since implementation of the tobacco plain packaging measure, Australia has always been clear that the effects of the measure will be felt most significantly in the longer term.

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<sup>6</sup> United States Department of Health and Human Services, *The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General* (2014), Exhibit AUS-37, p. i.

<sup>7</sup> United States Department of Health and Human Services, *The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General* (2014), Exhibit AUS-37, p. 855.

<sup>8</sup> Dominican Republic's second written submission, paras. 19 and 402-456; and Honduras' second written submission, para. 175. See also Ajzen, Hortaçsu, List and Shaikh: Reconsideration of Empirical Evidence on the Effectiveness of Australian Plain Packaging Legislation: Evidence from the National Plain Packaging Tracking Survey (NPPTS) and other datasets (15 September 2015), Exhibit DOM/IDN-2, paras. 10, 19, 20 and 234.

Nonetheless, even small declines in prevalence at this early stage are significant at a population level, as I have already outlined.

21. Mr Chairman, members of the Panel, I turn now to my colleagues to explain why the complainants' case against Australia's tobacco plain packaging measure has no foundation, either in law or in fact. Thank you.

### **III. Contribution**

22. Good morning. My name is Damien O'Donovan. This morning, I will address the complainants' arguments that the tobacco plain packaging measure is not apt to contribute to Australia's public health objectives. These arguments are relevant to the complainants' claims under Article 20 of the TRIPS Agreement and Article 2.2 of the TBT Agreement.

23. As my colleague, Dr Southern, has just explained, Australia's comprehensive approach to tobacco control is working. As is evident from the graphs that we showed a moment ago, Australia's approach has resulted in a consistent drop in smoking prevalence in recent years, including in the period following the implementation of tobacco plain packaging.

24. In order for the complainants to satisfy the burden of proof that they have taken on in this dispute, they must demonstrate that none of this decline in prevalence is attributable to the tobacco plain packaging measure, and that the measure is incapable of making a contribution to the objective of reducing the use of, and exposure to, tobacco products in the future. Notwithstanding the enormous volume of evidence that the complainants have filed in this dispute, they have failed to make their case.

25. I am going to address the complainants' case on contribution in some detail this morning, but with the principal goal of conveying to the Panel just four key points.

26. First, the tobacco plain packaging measure rests upon the well accepted proposition that changes in the appeal of tobacco products and the salience of the risks of their use will lead to positive changes in smoking behaviour.

27. Second, by filing the report prepared by Professor Ajzen, Professor List and his colleagues from the University of Chicago, the complainants have now accepted that tobacco plain packaging reduces the appeal of tobacco products and increases the noticeability of graphic health warnings. Consequently, there is no longer any dispute about the findings of the vast majority of the published studies, nor is there any dispute that the mechanisms through which the measure works are operating in the manner intended.

28. Third, all parties to this dispute accept that tobacco plain packaging affects consumer behaviour. Consequently, the issue is not whether the measure will change people's behaviour, but rather what the nature of that change will be. The complainants bear the burden of explaining why the measure will have only the behavioural effects they claim arise from tobacco plain packaging, but none of the behavioural effects that decades of tobacco control experience indicate it will have on smoking.

29. Fourth and finally, the data upon which the complainants rely so heavily does not support the contention that the measure has had no statistically significant effect on smoking prevalence or consumption. Quite the reverse. The data is entirely consistent with the measure having affected both prevalence and consumption since its introduction and the effects of the measure are likely to grow over time.

30. Bearing these four key points in mind, I will begin this morning with the fact that tobacco packaging can serve to advertise and promote tobacco products. In Australia's view, this fact alone is a sufficient basis for the Panel to conclude that the tobacco plain packaging measure is apt to contribute to Australia's public health objectives.

**A. Tobacco packaging functions as advertising**

31. The Honourable Nicola Roxon, Australia's former Health Minister, summed up the thinking behind the measure this way:

The point of having plain packaging is to make sure that we get rid of the last way that tobacco companies can advertise and promote their products,



particularly to new smokers...they use colour, they use logos, they use gold embossing to pretend that these are attractive and safe products.<sup>9</sup>

32. The proposition that packaging functions as a form of advertising is not one that even the tobacco industry itself contests. A spokesman from British American Tobacco Australia acknowledged in an interview with Sir Cyril Chantler that "tobacco companies, like other consumer goods companies, see branded packaging as one of the tools of advertising".<sup>10</sup>

33. Consequently there should be no real dispute that the proper analytical starting point when approaching packaging is that one of the functions it performs is to advertise.

34. If the Panel accepts that packaging is a form of advertising, then it faces two choices. The Panel can either accept the proposition that the tobacco industry trots out whenever advertising restrictions are raised as a possibility – that brand advertising has no role in attracting new smokers – or it can accept the findings of most reputable public health bodies, international organisations and domestic courts that have looked at this question and concluded that there is a causal relationship between tobacco advertising and increased tobacco use.

35. As Australia has explained in detail in its submissions, the United States Surgeon General, the World Health Organization, the United States National Cancer Institute and every country that has adopted controls on tobacco advertising or signed up to the Framework Convention all accept that the total weight of evidence demonstrates a causal relationship between tobacco advertising and increased tobacco use.

36. Against these views, the complainants rely on two arguments. First, they seek to deny the advertising function of packaging based on a semantic argument that packaging falls within the textbook classification of "product" and not "promotion". Second, they

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<sup>9</sup> The Hon. Nicola Roxon MP, Minister for Health and Ageing, Transcript Interview with Matt Moran on TEN 9am News, 24 August 2011, Exhibit AUS-589, p. 1.

<sup>10</sup> C. Chantler, *Standardised packaging of tobacco: A Report of the independent review undertaken by Sir Cyril Chantler* (2014), Exhibit AUS-81, para. 3.22.

contend that even if packaging generally functions as advertising, it cannot serve this function in the context of Australia's dark market.

37. The first argument deserves little of the Panel's attention. No marketing expert in this dispute, including the complainants' expert, Professor Steenkamp, denies that branded packaging plays a powerful role in consumer decision-making. It is clear from Professor Steenkamp's published work, and the reports that he has filed in these proceedings, that he understands the promotional role that packaging plays. To use his words:

Brand, logo, font, color and other brand-related packaging elements are important channels through which consumer quality perceptions are built and sustained.<sup>11</sup>

38. In other words, branded packaging functions as advertising.

39. The complainants' second argument amounts to a claim that in Australia's dark market, because the pack is dominated by a 75% graphic health warning, the branding elements that remain are overwhelmed by the negative message that is communicated by the graphic health warning. Accordingly, the complainants contend that the pack cannot function as advertising and have the same behavioural effects as other advertising media. Australia's experts have addressed these contentions and explained why they are baseless. As Professor Dubé and Professor Tavassoli point out, for example, the fact that Australia is a dark market likely *enhances* the ability of the pack to serve as an effective advertising vehicle rather than the opposite as the complainants contend.<sup>12</sup>

40. But on a far more basic level, the simplest response to this argument can be found in the complainants' own contentions. A key premise of the complainants' argument concerning trade restrictiveness in relation to their claims under Article 2.2 of the TBT Agreement is that tobacco plain packaging has already significantly altered consumer behaviour by triggering downtrading.

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<sup>11</sup> Expert Report of J.B. Steenkamp, "Tobacco Packaging in the Australian Context – Lessons from Marketing Principles and Empirical Data: A Rebuttal to Arguments Raised by Australia and its Experts" (11 September 2015), Exhibit DOM/HND-14, para. 92.

<sup>12</sup> Supplementary expert report of J.P. Dubé (26 October 2015), Exhibit AUS-583, Section VI, and Supplementary expert report of N. Tavassoli (26 October 2015), Exhibit AUS-588.

41. Professor Steenkamp in his latest report offers an explanation for this phenomenon:

Under plain packaging brand specific elements are eliminated thereby reducing the contribution of branding to the intangible benefits of both premium and value brands...packaging plays an important part in establishing and maintaining the high intangible benefits attributed to premium products. Thus, while the intangible benefits decrease for both value and premium brands when differentiation decreases, the decrease in intangible benefits for premium brands significantly exceeds the decrease in intangible benefits of the value brand.<sup>13</sup>

42. If tobacco plain packaging is triggering the changes in perception that Professor Steenkamp describes, then the complainants' own argument rests on the proposition that a branded pack dominated by a graphic health warning could still perform the function of promoting the "intangible benefits" of smoking the product. If, as the complainants contend, these "intangible benefits" can no longer be conveyed to consumers as a result of plain packaging, then by their own admission, Australia has eliminated a means of advertising tobacco products.

43. Furthermore, the complainants have yet to explain, much less demonstrate, why the appearance of tobacco products is capable of influencing only the human behaviours that they have identified, and not those that Australia has identified. It is evident from the complainants' downtrading argument that the parties all agree that plain packaging, even on a pack with a large graphic health warning, is capable of influencing human behaviour. Accordingly, what is the basis for the complainants' contention that the only impact that the measure will have on human behaviour is that brand loyalty will decrease and consumers will be less willing to pay a higher price for a product, to the exclusion of the behavioural effects that Australia has posited? The Panel will search the complainants' submissions and the reports of their experts in vain for an answer to this critical premise of their case.

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<sup>13</sup> Expert Report of J.B. Steenkamp, "Tobacco Packaging in the Australian Context – Lessons from Marketing Principles and Empirical Data: A Rebuttal to Arguments Raised by Australia and its Experts" (11 September 2015), Exhibit DOM/HND-14, para. 93.

44. This fundamental tension in the complainants' case is one that the tobacco industry has confronted for years in its challenges to advertising bans and restrictions. The complainants have the burden of proof in this dispute, and so they are responsible for demonstrating how it is that the measure will have only certain effects on human behaviour and not others.

45. In this respect, Australia's experts have established why the complainants face an insurmountable burden in trying to convince the Panel of this proposition which lies at the heart of their case. For example, Australia's marketing expert Professor Tavassoli has explained that if tobacco plain packaging reduces the perceived value of the most preferred brands – as the complainants themselves contend – then it will also have the effect of reducing the perceived value of the whole tobacco category. On this basis, Professor Tavassoli concludes that tobacco plain packaging will result in a reduction in primary demand for tobacco products.<sup>14</sup> This is a point echoed in the expert reports of Professors Katz and Dubé.<sup>15</sup>

46. For all of these reasons, the complainants' claim that the tobacco plain packaging measure is not apt to contribute to Australia's public health objectives is simply not plausible. If tobacco packaging is advertising (and it is), and if it is well established that advertising contributes to increased tobacco use (and it is), then by prohibiting tobacco packaging from acting as an advertising medium, the tobacco plain packaging measure is apt to contribute to reduced tobacco use. It is that simple.

47. In Australia's view, no further analysis is necessary for the Panel to conclude that the tobacco plain packaging measure is apt to contribute to Australia's public health objectives.

48. There is, nonetheless, substantial additional evidence before the Panel that would support the same conclusion. It is to a discussion of this evidence that I will now turn.

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<sup>14</sup> Expert Report of N. Tavassoli (10 March 2015), Exhibit AUS-10, Section 3.

<sup>15</sup> Expert Report of J.P. Dubé (9 March 2015), Exhibit AUS-11; and Expert Report of M. Katz (9 March 2015), Exhibit AUS-18. See also Supplementary expert report of J.P. Dubé (26 October 2015) Exhibit AUS-583; and Supplementary expert report of M. Katz (26 October 2015), Exhibit AUS-584.

**B. Australia has presented substantial additional evidence linking reduced appeal to reduced smoking**

49. Australia has provided the Panel with evidence from a range of disciplines that provides other reliable bases for the Panel to corroborate that tobacco plain packaging is apt to contribute to the objective of reduced smoking.

50. In particular, the field of behavioural psychology provides a clear foundation for that conclusion.

51. The premise of the tobacco plain packaging measure is that by reducing appeal and increasing risk salience, tobacco plain packaging will lead to behavioural change. It is therefore important to note that in the report prepared by Professor Ajzen and a number of economists from the University of Chicago, filed with the complainants' second written submissions, the complainants' experts have confirmed that tobacco plain packaging has reduced the appeal of tobacco products and has increased the noticeability of graphic health warnings<sup>16</sup> – just as the measure was designed to do. In saying that the measure has reduced the appeal of tobacco products, it is important to emphasise that the reduction in appeal was not merely aesthetic. Professor Ajzen and his colleagues confirm that since plain packaging was introduced, not only do more smokers dislike their pack, but also more smokers rate the product as being of lower quality, providing lower satisfaction, and representing lower value.

52. These are important concessions on the part of the complainants. By accepting that the measure has reduced the appeal of tobacco products, 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. Once it is conceded that tobacco plain packaging reduces the appeal of tobacco products, behavioural psychology provides the foundation for the conclusion that the change in appeal will lead to changes in smoking behaviour.

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<sup>16</sup> Ajzen, Hortaçsu, List and Shaikh: Reconsideration of Empirical Evidence on the Effectiveness of Australian Plain Packaging Legislation: Evidence from the National Plain Packaging Tracking Survey (NPPTS) and other datasets (15 September 2015), Exhibit DOM/IDN-2, paras. 90 and 106 (respectively).

53. For example, in his first report, Professor Fong concluded that if tobacco plain packaging led to reduced levels of appeal, then attitudes toward tobacco products would be increasingly negative and this would lead to changes in smoking behaviour.<sup>17</sup> Professor Ajzen countered this view by arguing that there is a weak relationship between attitudes and behaviour in the smoking context - so weak, in fact, that Professor Ajzen posited that changing consumer attitudes would not bring about changes in smoking behaviour. However, it is clear that on this subject, Professor Ajzen holds a distinctly minority view.

54. As Professor Fong explains in his second report, there is in fact a well-established relationship between appeal and behaviour in the smoking context. For example, in U.S. studies, non-smoking youths who reported that cigarette advertisements had made smoking appear attractive to them were significantly more likely to start smoking over the next two years.<sup>18</sup> Within the domain of consumer preferences, in which studies of plain packaging clearly belong, the relationship between attitudes and behaviours is very strong.<sup>19</sup>

55. The strong link between appeal and behaviour that has been identified by Professor Fong is supported by other behavioural theories before the Panel. Professor Slovic, for example, discusses the behavioural theories based on the "affect heuristic". The affect heuristic is the mental shortcut or mode of thinking that allows people to make decisions based on positive or negative perceptions rather than as a result of analytical decision-making.<sup>20</sup>

56. The tobacco industry has long understood the extent to which the decision to smoke is not based on reason, but rather is the product of reactions based on affect, or appeal. This is why their advertising campaigns from at least the 1970's onwards did not

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<sup>17</sup> Expert Report of G. Fong (4 March 2015), Exhibit AUS-14, para. 251.

<sup>18</sup> Second Expert Report of G. Fong (8 September 2015), Exhibit AUS-531, para. 129.

<sup>19</sup> Second Expert Report of G. Fong (8 September 2015), Exhibit AUS-531, para. 16.

<sup>20</sup> Expert Report of P. Slovic (4 March 2014), Exhibit AUS-12, paras. 27-83; Second Expert Report of P. Slovic (11 September 2015), Exhibit AUS-532.

include reasons to smoke, but instead focused on positive imagery dominated by attractive people and beautiful landscapes.

57. That this remains the tobacco industry's approach in its marketing decisions is clear from the industry's reaction to plain packaging. As you will see on the screen, after the tobacco plain packaging measure was introduced and the only markings permitted on a cigarette stick were alphanumeric codes, British American Tobacco chose codes like NYC for its Pall Mall brand, AUS for its quintessentially Australian brand, Winfield, and OZ for its budget brand, Just Smokes. Each marking creates a targeted association for particular brand users. In taking these liberties the tobacco companies risked heavy fines for breaching the requirements of the legislation.

58. Why were tobacco companies willing to take the risk of heavy fines if, as the complainants contend, the markings on the sticks don't matter? Because the tobacco industry understands the importance and value of imbuing their products with positive affect and they will take any and every opportunity to do so.

59. The approach of behavioural psychology is mirrored in marketing science, which provides an additional analytical approach in support of the efficacy of the tobacco plain packaging measure. For example, Australia's expert, Professor Dubé explained in his first report that reducing the appeal of a product reduces consumers' willingness to pay for that product, and hence the demand for it. In circumstances where plain packaging influences not just the consumer's assessment of the packaging, but alters the experience of the product itself, a reduction in demand for the product is the only sensible prediction available.<sup>21</sup>

60. The complainants' marketing expert, Professor Steenkamp, fails to contest that proposition, and indeed lends weight to it in his latest report by confirming that tobacco

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<sup>21</sup> Expert Report of J.P Dubé (9 March 2011), Exhibit AUS-11, para. 37.

plain packaging reduces the intangible benefits of smoking both value and premium tobacco products.<sup>22</sup>

61. In addition to the support for the efficacy of the measure found in the fields of behavioural psychology and marketing science, the field of economics also provides a straightforward explanation for why, based on facts uncontested by the complainants, tobacco plain packaging has in all likelihood already contributed to reduced smoking.

62. The logic is simple – the parties all agree that tobacco plain packaging will reduce consumers' willingness to pay for tobacco products. And the undisputed evidence is that since the plain packaging measure was introduced the prices of tobacco products have risen. In these circumstances the clear prediction of economics is that demand for tobacco products will fall. The result will be lower smoking prevalence and consumption. The complainants' own economic expert, Professor Neven, sums up the issue nicely. He says

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.<sup>23</sup>

63. As all parties accept that tobacco plain packaging has reduced appeal, and that, since the measure's introduction, prices have gone up, there cannot be any dispute that the net effect has been to reduce smoking.

### **C. The complainants dispute only a few facts before the Panel**

64. It should be clear from what I just discussed that there are multiple ways for the Panel to reach the conclusion that tobacco plain packaging is apt to contribute to Australia's public health objectives. The complainants' own experts have confirmed that tobacco products are now less appealing than they were prior to the introduction of tobacco plain packaging. It is therefore clear that the critical fact underlying the

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<sup>22</sup> Expert Report of Expert Report of J.B. Steenkamp, "Tobacco Packaging in the Australian Context – Lessons from Marketing Principles and Empirical Data: A Rebuttal to Arguments Raised by Australia and its Experts" (11 September 2015), Exhibit DOM/HND-14, para. 92.

<sup>23</sup> Second expert report of D. Neven (16 September 2015), Exhibit HON-123, para. 73



behavioural psychology, marketing and economics theories that I have just discussed is not in dispute.

65. At this point, it is worth taking a moment to consider the number of published studies on tobacco plain packaging that stand for propositions that the complainants now accept. The Panel will recall that at the beginning of this dispute, the studies demonstrating that putting tobacco products in plain packages reduce their appeal were pilloried by the complainants as biased or unpublishable, and derided as making no contribution to our understanding of the likely effects of the measure. But as we sit here today, the complainants' experts have accepted the tobacco plain packaging measure has had significant and durable effects on the appeal of tobacco products.<sup>24</sup> That concession alone confirms the correctness and utility of 50 of the published studies which are on the Panel record.<sup>25</sup>

66. Professor Ajzen and his co-authors also confirm a durable and statistically significant increase in the noticeability of graphic health warnings following the introduction of tobacco plain packaging.<sup>26</sup> This concession confirms the findings of at least 15 published studies which are on the Panel record.<sup>27</sup>

67. The complainants' contention that the measure will reduce willingness to pay for plain packaged products, which is advanced as part of their downtrading case and confirmed by their own expert, means that they accept the findings of at least 5 experimental studies.<sup>28</sup> This includes the simulated auction studies that demonstrated this

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<sup>24</sup> Ajzen, Hortaçsu, List and Shaikh: Reconsideration of Empirical Evidence on the Effectiveness of Australian Plain Packaging Legislation: Evidence from the National Plain Packaging Tracking Survey (NPPTS) and other datasets (15 September 2015), Exhibit DOM/IDN-2, para. 97.

<sup>25</sup> Supplementary expert report of G. Fong (27 October 2015), Exhibit AUS-585, para. 40, and Appendix B.

<sup>26</sup> Ajzen, Hortaçsu, List and Shaikh: Reconsideration of Empirical Evidence on the Effectiveness of Australian Plain Packaging Legislation: Evidence from the National Plain Packaging Tracking Survey (NPPTS) and other datasets (15 September 2015), Exhibit DOM/IDN-2, para. 106.

<sup>27</sup> Supplementary expert report of G. Fong (27 October 2015), Exhibit AUS-585, para. 40, and Appendix B.

<sup>28</sup> Centre for Health Promotion (University of Toronto), *Effects of plain packaging on the image of tobacco products among youth*, The Canadian Cancer Society, 1993, Exhibit JE-24(14); London Economics, *The role of packaging imagery on consumer preferences for experience goods: a consumer behavioural experiment*, London, UK: London Economics, 2012, Exhibit JE-24(37); Northrup, D and

phenomenon. Again these studies have previously been derided by the complainants as being without merit.

68. Other behavioural changes predicted by published studies,<sup>29</sup> and now conceded by the complainants, include an increase in consumers engaging in avoidant behaviour, such as concealing the pack;<sup>30</sup> and an increased motivation to quit,<sup>31</sup> highlighted by increased calls to the Quitline.<sup>32</sup>

69. So where are we left? The complainants accept that the measure has, at the very least reduced the appeal of tobacco products and increased the noticeability of graphic health warnings. The complainants also positively assert that the measure has already had effects on consumer behaviour in the form of downtrading.

70. Accordingly, the complainants now stand on the narrowest ledge imaginable – conceding almost everything about the predicted effect of the measure and the mechanisms through which it is intended to work, but still insisting that the measure won't affect smoking behaviour. This is an untenable proposition.

**D. The complainants' arguments that the measure is not apt to contribute to Australia's public health objectives are unpersuasive**

71. The complainants only have two bases for persisting with their claim that tobacco plain packaging will not make a contribution to positive changes in smoking behaviour.

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Pollard, J, *Plain packaging of cigarettes, event marketing to advertise smoking and other tobacco issues: a survey of grade seven and grade nine Ontario students*, Toronto, Ontario: York University, 1995, Exhibit JE-24(48); Rousu, M and Thrasher, JF, Demand Reduction from plain and pictorial cigarette warning labels: evidence from experimental auctions, *Applied Economic Perspectives and Policy*, 2013, 35(1):171-184, Exhibit JE-24(54); Thrasher, JF, Rousu, MC, Hammond, D, Navarro, A and Corrigan, JR, Estimating the impact of pictorial health warnings and "plain" cigarette packaging: Evidence from experimental auctions among adult smokers in the United States, *Health Policy*, 2011, 102(1):41-48, Exhibit JE-24(58).

<sup>29</sup> See, for example, studies outlined in the Expert Report of G. Fong (8 March 2015), Exhibit AUS-14, paras. 33, 58, 282-286, 431-434.

<sup>30</sup> Ajzen, Hortaçsu, List and Shaikh: Reconsideration of Empirical Evidence on the Effectiveness of Australian Plain Packaging Legislation: Evidence from the National Plain Packaging Tracking Survey (NPPTS) and other datasets (15 September 2015), Exhibit DOM/IDN-2, para. 107.

<sup>31</sup> Ajzen, Hortaçsu, List and Shaikh: Reconsideration of Empirical Evidence on the Effectiveness of Australian Plain Packaging Legislation: Evidence from the National Plain Packaging Tracking Survey (NPPTS) and other datasets (15 September 2015), Exhibit DOM/IDN-2, para. 109.

<sup>32</sup> Ajzen, Hortaçsu, List and Shaikh: Reconsideration of Empirical Evidence on the Effectiveness of Australian Plain Packaging Legislation: Evidence from the National Plain Packaging Tracking Survey (NPPTS) and other datasets (15 September 2015), Exhibit DOM/IDN-2, paras. 17, 167, 171, 237-245.

The first is the complainants' contention that Australia's case depends upon the behavioural theory of Professor Ajzen, and that some elements of Professor Ajzen's chain of effects hypothesis are incompletely established by what is known as the National Tobacco Plain Packaging Tracking Survey, which, for convenience, I will refer to as the Tracking Survey. The second argument is the complainants' repeated assertion that the measure is not having any effect on smoking prevalence or consumption.

72. Neither argument withstands scrutiny.

73. First, let us dispense with the notion that the Panel should view the tobacco plain packaging measure through the very narrow prism of Professor Ajzen's behavioural theories. As I have described this morning, Australia does not depend on any one theory to support its view that tobacco plain packaging will work. Rather, the evidence upon which Australia relies reflects a breadth of behavioural, marketing, and economic theories that Australia considers support the conclusion that reducing appeal and increasing risk salience will affect smoking behaviour.

74. The complainants have, since the first meeting of the parties in June, sought to give Professor Ajzen's construct more prominence than it deserves, so it comes as no surprise to us that he will be speaking here again today.

75. Australia suspects that Professor Ajzen will focus on the Tracking Survey. The complainants have tried to portray this survey in their second written submissions as the most important data source available to the Panel. In his report, Professor Ajzen claims that the Tracking Survey establishes that tobacco plain packaging is not currently working and is incapable of doing so in the future.<sup>33</sup> The fact is the Tracking Survey does nothing of the sort.

76. As I have already discussed, the complainants' own expert analysis of the Tracking Survey confirms not only that tobacco plain packaging has decreased the appeal of tobacco products and increased the noticeability of graphic health warnings, but also

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<sup>33</sup> Ajzen, Hortaçsu, List and Shaikh: Reconsideration of Empirical Evidence on the Effectiveness of Australian Plain Packaging Legislation: Evidence from the National Plain Packaging Tracking Survey (NPPTS) and other datasets (15 September 2015), Exhibit DOM/IDN-2, para. 41.

that these effects were sustained for 12 months after implementation.<sup>34</sup> While the complainants' experts seek to disparage other results of the Tracking Survey in respect of what are described as more distal outcomes – like changes in intentions and behaviour – their criticisms ignore that such outcomes were less likely to be detected by the survey, given its design.

77. As Australia's public health expert, Professor Chaloupka, notes in his new report,

"[w]hile the tracking survey is useful for assessing the impact of tobacco plain packaging on the most proximal outcomes among current smokers and recent quitters, it is not a comprehensive tool for assessing the overall effects of plain packaging, something that neither Ajzen and colleagues nor Klick acknowledge".<sup>35</sup>

78. Most importantly, by its very design, the Tracking Survey focused only on current smokers and recent quitters aged 18 through to 69. As a consequence, it cannot be used to assess the impact of tobacco plain packaging on the population most likely to be influenced by the measure – that is never-smokers susceptible to taking up tobacco use, particularly youth under the age of 18.<sup>36</sup> Nor can the survey be used to assess the impact of plain packaging on relapse among former smokers who have quit for a longer time. In addition, because recent quitters are excluded from questions concerning quitting intentions, the survey cannot detect any impact on intentions which plain packaging had on that important cohort. Finally, as the study designers acknowledge, the survey was not designed to, and indeed is not capable of, assessing smoking prevalence.<sup>37</sup>

79. All of these limitations, and a number of others identified in Professor Chaloupka's report should have been understood by the complainants' experts and resulted in far more cautious conclusions than the sweeping ones they have sought to draw.

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<sup>34</sup> Ajzen, Hortaçsu, List and Shaikh: Reconsideration of Empirical Evidence on the Effectiveness of Australian Plain Packaging Legislation: Evidence from the National Plain Packaging Tracking Survey (NPPTS) and other datasets (15 September 2015), Exhibit DOM/IDN-2, paras. 97 and 109, and Tables 1A and 2A.

<sup>35</sup> Supplementary expert report of F. Chaloupka (26 October 2015) Exhibit AUS-582, para. 3.

<sup>36</sup> Supplementary expert report of F. Chaloupka (26 October 2015), Exhibit AUS-582, para. 3.

<sup>37</sup> Centre for Behavioural Research in Cancer, *Australian National Tobacco Plain Packaging Tracking Survey: Technical Report* (March 2015), Exhibit AUS-570, page 7, section 1.2.

80. Professor Chaloupka also explains the flaws in the complainants' experts' contention that the Tracking Survey results support their view that the effects of tobacco plain packaging "wear out" over time. As Professor Chaloupka demonstrates in his most recent report, there is no substance to that claim. Quite the reverse. As Professor Dubé explains, a permanent reduction in the appeal of cigarettes will result in durable change with effects that are magnified in the future.<sup>38</sup>

81. I will now turn to the complainants' second argument, which is that the measure is not having any actual effect on smoking prevalence or consumption.

82. Given the substantial energy that the complainants have devoted to their contention that tobacco plain packaging is not having an effect on prevalence and consumption, it is worth taking a few minutes this morning to look closely at the data analyses on which the complainants rely, and how their arguments have essentially collapsed over the course of the proceedings.

83. In this part of the discussion, I want to look at three issues.

84. First, the implications of the complainants' early claim that the measure had backfired, and their subsequent abandonment of that claim.

85. Second, the fact that the complainants' experts are now reporting their results in a more restricted way than at the start of the proceedings, with the consequence that results which are consistent with the measure having its intended effect are not being brought to the Panel's attention.

86. Third, the fact that when the flaws in the complainants' experts earlier work are identified by Australia's experts, their response is not to concede the defects in their original approach, but to adopt more restricted models to conceal the findings of statistically significant effects which their original models produce.

87. Dealing with the backfiring issue first. It is important to recall that a year ago, the complainants' expert reports and submissions were full of statements and graphs that

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<sup>38</sup> Supplementary expert report of J.P. Dubé (26 October 2015), Exhibit AUS-583, paras. 34-35.

implied, or specifically asserted, that tobacco consumption had risen in the face of tobacco plain packaging. Honduras, for example, had a part of its first written submission entitled "Post-implementation data demonstrates that plain packaging makes no contribution to achieving Australia's objective and indeed backfires by leading to an increase in consumption".

88. In the face of Australia's corrective expert analyses, the complainants' claim that there was already evidence that the measure had "backfired" was formally abandoned at the first meeting of the parties. Australia notes, however, that it is only because Australia was in a position to expend substantial resources on corrective analysis that it was able to identify and correct the misleading presentations of data by IPE<sup>39</sup> and Professor Klick.<sup>40</sup>

89. This state of affairs is unsatisfactory, and should not be forgotten in any subsequent assessment of the complainants' claims about the data.

90. The second point that the Panel should note about the complainants' presentation of data is that the complainants no longer apply the rules that they advocated a year ago when presenting their results.

91. At paragraph 448 of its first written submission, the Dominican Republic stated that it was "consistent with standard practice in empirical research" to confirm results using various robustness checks, including different confidence intervals and alternative implementation dates for the tobacco plain packaging measure. The submission specifically noted that IPE, their experts, had adopted the practice of using October and November 2012 as alternative start dates of the measure to test the robustness of its findings, and that IPE had adopted the practice of reporting results that were statistically significant at the 10%, 5% and 1% levels. This was described by the Dominican Republic as the "customary approach".<sup>41</sup>

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<sup>39</sup> Honduras' first written submission, para. 368.

<sup>40</sup> Honduras' first written submission, para. 392.

<sup>41</sup> Dominican Republic's first written submission, fn 400.

92. When Professor List came on the scene, his adherence to these rules was less strict. In some models in his June report, Professor List reported statistical significance at the 10% level, but in his September report Professor List adopted a uniform practice of only reporting statistical significance at the 5% level. This is contrary to the standard Professor List adopts in his published academic papers where he commonly reports findings at the 10%, 5% and 1% significance levels,<sup>42</sup> and is a clear departure from the "customary approach" advocated by the complainants.

93. Had Professor List adopted the "customary approach" for reporting standard errors and used the robustness checks used by IPE – and advocated by the complainants – the fact is he would have reported evidence of meaningful declines in smoking prevalence attributable to the 2012 packaging changes in both his June and September reports.

94. In his latest report, Professor List presents to the Panel a table that shows the results of his microeconomic analysis of prevalence. As presented, the table does not disclose any statistically significant effect from tobacco plain packaging. Based on this table, Professor List reports that nothing has materially changed from his June report as a result of adding 15 months of extra data.

95. However, as Dr Chipty points out in her report filed today, that statement is not correct.<sup>43</sup> The findings in his September report *are* materially different from his June report. This would have been obvious if Professor List reported his findings in accordance with the "customary approach" advocated by the complainants.

96. Had he done so, a number of things would have been evident. First, it would have been obvious that every single one of Professor List's results concerning declines in smoking prevalence in his September report, regardless of the start date used, were statistically significant at the 10% level. Not only that, if he had reported his results using

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<sup>42</sup> Supplementary expert report of T. Chipty (26 October 2015), Exhibit AUS-586, para. 22 and fn 38.

<sup>43</sup> Supplementary expert report of T. Chipty (26 October 2015), Exhibit AUS-586, paras. 19-23.

alternative start dates for the measure, he would have been obliged to report two results which are statistically significant at the 5% level.

97. To emphasise how easy it is to miss the importance of Professor List's results, it is worth looking at the differences between what Professor List did report, and the customary approach advocated by the complainants.

98. What you see on the screen now is a table reflecting what Professor List disclosed in his September report. As you can see, his results show a negative impact on smoking prevalence attributable to plain packaging – this is denoted by the negative sign in each column.

99. Taking the first column, the number (-)0.0296 means that Professor List's model suggests that Australia's packaging changes have reduced smoking prevalence. And not by a trivial amount. That (-)0.0296 translates into an almost 1 percentage point drop in prevalence.<sup>44</sup> This might seem like a small number, but as Dr Southern has already explained, reductions of this magnitude translate into thousands fewer smokers as a result of Australia's packaging changes. Professor List dismisses these meaningful results by presenting them as being statistically insignificant. In other words, they could just be the product of chance.

100. But if Professor List had adopted the complainants' "customary approach" in reporting these results, they would in fact have been presented to the Panel as statistically significant.

101. This next table on the screen shows Professor List's results presented using the "customary approach". Results which are statistically significant at the 10% level are marked with a single asterisk. Results which are statistically significant at the 5% level are marked with 2 asterisks. We have underlined those results for emphasis. As a robustness check, alternative start dates for the measure have been reported. Again, we

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<sup>44</sup> Backup production for Supplementary expert report of T. Chipty (26 October 2015) (Zip format) (contains Strictly Confidential Information), Exhibit AUS-586.A.



recall that testing results in this way has been described by the complainants as "consistent with standard practice in empirical research."

102. You can see on the screen in the first box again the number (-)0.0296. This number is now marked as statistically significant, just as it would have been had Professor List reported his results using the complainants' "customary approach". In fact as you can see, in all possible specifications, the effect of the 2012 packaging changes is negative and statistically significant.

103. This last table you see on the screen shows Professor List's results with one modification. Statistical significance has been determined using the method advocated by the complainants' other experts, IPE. It is different from the method used by Professor List. What is clear is that if Professor List had used this method for determining statistical significance and reported his results using the customary approach, the conclusions his model suggest are very different from the ones he invites the Panel to draw. Every result his model throws up shows statistically significant declines at the 5% or better level, and two results statistically significant at the 1% level.

104. Professor List to date has not explained why he opted to report his results in such a restricted way, rather than using the customary approach that was advocated by the complainants and their experts 12 months ago. Perhaps Professor List's colleagues can explain why this "customary approach" to reporting was not applied in relation to these important findings.

105. The third issue that it is important to discuss is how the complainants' experts have responded to criticism. While they claim that they accept the criticisms made by Australia's experts, what they in fact do in response is abandon the original models that they advocated and create new ones with more restrictive assumptions.

106. The best example of this is the complainants' analysis of the data on wholesale tobacco consumption. IPE's original model was criticised by Dr Chipty for not taking into account the fact that retailers, prior to a publicised excise increase in December 2013, stocked up on cigarettes. When this was taken into account, IPE's original model showed

a decline in consumption attributable to the 2012 packaging change of between 5 and 6%. A very significant impact.

107. IPE now accept that Dr Chipty was correct in allowing for stocking up by retailers in late 2013 when assessing the impact of plain packaging on tobacco consumption. IPE do not dispute that when their original consumption model is corrected, it shows declines in tobacco consumption of between 5 and 6%. IPE's only answer to this has been to abandon their original model, develop a new model that by its very design is less likely to find a plain packaging effect, and present this new analysis to the Panel. Their new report is not a rebuttal report but a report full of new analyses.

108. Australia encourages the Panel to read carefully the reports of Dr Chipty and Australia's other statistician, Professor Scharfstein, and to note each time that the complainants' experts have changed their position or their model specification<sup>45</sup>. With every iteration, the complainants' experts move further and further away from the models that they proposed at the outset of this dispute. In Australia's view, every time the complainants' experts change a model specification, it is because they are seeking to avoid the fact that many of their models, once corrected, produce results that are consistent with tobacco plain packaging having an effect.

109. In fact, the only statistical expert on the complainants' side who has not changed his model is Professor Klick. He remains dogmatically wedded to the fundamentally defective model that he first proposed. Time does not permit me to re-visit the multiple defects in Professor Klick's approaches, but these are detailed fully in Australia's earlier submissions, and in Dr Chipty's reports.

110. In Australia's submission, the proper conclusion from the data that the complainants have presented is that it is consistent with the tobacco plain packaging measure having an important impact on smoking prevalence and consumption. The results are entirely consistent with the measure already having significant behavioural effects, and there is no evidence that these behavioural effects are wearing out.

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<sup>45</sup> Expert Report of D. Scharfstein (9 March 2015) Exhibit AUS-20, and Supplementary expert report of D. Scharfstein (26 October 2015) Exhibit AUS-588

111. In the face of the available evidence, the complainants' arguments that the measure has had no positive effect in the short term, and that the measure will not work in the long term, are unfounded. The evidence demonstrates that the measure has decreased appeal, increased the noticeability of graphic health warnings and changed smoking behaviour. The more immediate question for this Panel is whether the complainants have established that the measure is not apt to contribute to Australia's public health objectives. The simple fact remains – they have not.

#### **IV. TRIPS Agreement Claims**

112. Good morning, Mr Chairman and distinguished members of the Panel. My name is Elisabeth Bowes and I am the head of the Department of Foreign Affairs and Trade's Tobacco Plain Packaging Taskforce. It is a pleasure to see you here again this morning. I will be discussing the complainants' claims under the TRIPS Agreement.

113. Let me begin with Article 20. All parties appear to agree that the term "unjustifiably" requires a rational connection between any encumbrance upon the use of trademarks in the course of trade, on the one hand, and the pursuit of a legitimate objective, on the other. The parties further appear to agree that a rational connection exists so long as the encumbrance is capable of contributing to the measure's legitimate objectives. Thus, in order to prove that any encumbrance imposed by the tobacco plain packaging measure has been imposed "unjustifiably" under Article 20, the complainants must demonstrate that this encumbrance has not contributed, and is not capable of contributing, to the measure's indisputably legitimate public health objectives.

114. I'll return in a moment to the question of whether the complainants have demonstrated the existence of an "encumbrance" upon the use of trademarks and, if so, what the nature of that "encumbrance" is. For now, let's assume that the complainants have identified a relevant "encumbrance" upon the "use" of trademarks "in the course of trade". As Mr O'Donovan has just finished explaining, the complainants have failed to prove that the tobacco plain packaging measure has not contributed and is incapable of contributing to the measure's ultimate objectives of reducing tobacco prevalence and consumption. On the contrary, the undisputed evidence shows that there have been

marked reductions in prevalence and consumption since the introduction of the tobacco plain packaging measure. The complainants have failed to prove that no part of these declines can be attributed to the introduction of tobacco plain packaging in December 2012, or that the measure is incapable of making further contributions to Australia's tobacco control objectives over the longer term.

115. In Australia's view, this should be the end of the inquiry into whether the tobacco plain packaging measure is "unjustifiable". If an encumbrance upon the use of trademarks in the course of trade is capable of contributing to a measure's legitimate public health objectives, then it is not "unjustifiable" for a Member to impose that encumbrance. This conclusion follows from the ordinary meaning of the term "unjustifiably", properly interpreted in accordance with its context and in light of the object and purpose of the TRIPS Agreement. A measure that is capable of contributing to a reduction in tobacco prevalence and consumption is unquestionably one that is "able to be shown to be just, reasonable, or correct" and that is "[w]ithin the limits of reason".<sup>46</sup> Such a measure is, moreover, consistent with the recognition by Members that the TRIPS Agreement "does not and should not prevent members from taking measures to protect public health", and is consistent with the right of Members to use "to the full" the flexibilities contained in the TRIPS Agreement for this purpose.<sup>47</sup>

116. For the complainants, the fact that an encumbrance upon the use of trademarks is capable of contributing to its legitimate objectives is a necessary, but not sufficient basis to find that the encumbrance is consistent with Article 20. The complainants continue to maintain that the term "unjustifiably" imposes a standard that is functionally equivalent to a standard of "necessity", or even *beyond* "necessity", as Honduras would have it.<sup>48</sup> The complainants argue, first, that the term "unjustifiably" requires the Panel to "weigh and balance" factors such as the extent of the encumbrance and the extent of contribution, and, second, that it requires the Panel to determine whether the encumbrance imposed by

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<sup>46</sup> See Australia's second written submission, para. 148.

<sup>47</sup> WTO Ministerial Conference, 'Declaration on the TRIPS Agreement and Public Health', WT/MIN(01)/DEC/2, (20 November 2011), Exhibit AUS-247.

<sup>48</sup> Honduras' second written submission, para. 357.

the measure is the "least restrictive" encumbrance possible in light of reasonably available alternatives.

117. The complainants do not seriously contend that either one of these alleged requirements follows from the ordinary meaning of the term "unjustifiably". Instead, the complainants have concocted elaborate "contextual" arguments in support of their contention that the term "unjustifiably" must be interpreted *beyond* its focus on reasonableness and rationality.

118. The only genuine contextual argument on which the complainants rely is the reference to "legitimate interests" in Article 17 of the TRIPS Agreement. As Australia demonstrated in its second written submission, however, the reference to "legitimate interests" in Article 17 simply does not support the conclusion that the term "unjustifiably" should be interpreted as equivalent to a standard of "necessity". This leaves the complainants with their pseudo-contextual arguments that because Article 20 is concerned with the "use" of trademarks, it must be the case that this "protected treaty interest" warrants the highest levels of protection and that the term "unjustifiably" must be interpreted in that light. This circular method of treaty interpretation finds no basis in the *Vienna Convention*. The mere fact that a treaty provision imposes an affirmative obligation tells us nothing about the meaning of the terms that make up that obligation. The complainants' non-VCLT approach to the interpretation of the term "unjustifiably" is, in fact, characteristic of their approach to the interpretation of the TRIPS Agreement more generally.

119. As Australia has stressed throughout these proceedings, however, any differences among the parties concerning the proper interpretation of the term "unjustifiably" are not ultimately determinative of the Panel's resolution of this dispute. The fact is that the complainants have failed to demonstrate that any encumbrance resulting from the tobacco plain packaging measure is "unjustifiable" under *any* conceivable interpretation of that term.

120. I'll begin with the alleged "encumbrance" upon the use of trademarks that the complainants must show to be "unjustifiable". First of all, Australia does not believe that

the complainants have provided a plausible interpretative basis for their contention that the prohibitive elements of the tobacco plain packaging measure fall within the scope of Article 20. Their arguments in this respect rely upon distinctions between measures that "directly" prohibit the use of trademarks and those that only "incidentally" prohibit the use of trademarks. As Australia has shown, and as most third parties agree, distinctions between the "direct" and "incidental" effects of a measure are arbitrary, unmanageable, and find no basis in the text of the Agreement.<sup>49</sup> The complainants' inability to resolve this interpretative problem confirms Australia's view that Article 20 applies only to measures that encumber the use of trademarks when domestic law otherwise permits their use, an interpretation that is fully supported by the text and context of Article 20.

121. Even more fundamental, however, is the complainants' failure to present any evidence that the tobacco plain packaging measure encumbers the use of trademarks to distinguish the commercial source of one tobacco product from the commercial source of other tobacco products. Article 15.1 of the TRIPS Agreement makes clear that this is the only relevant "use" of trademarks that can be "encumbered" under Article 20. In the absence of any evidence that this use of trademarks has been encumbered, the complainants have failed to establish a prima facie case of inconsistency.

122. The complainants' allegations of an "encumbrance" relate entirely to the "use" of trademarks to "distinguish" tobacco products "in terms of their quality, characteristics, and reputation". This phrase is merely a euphemism for advertising and promotion. This was made evident by the complainants' expert Professor Steenkamp, who repeatedly refers in his second report to the use of trademarks on branded packaging to convey the "intangible benefits" of the product and the "perceived quality" of the brand. This "use" of trademarks has nothing to do with the source distinguishing function that is relevant under Part II, Section 2 of the TRIPS Agreement. While trademarks are undoubtedly used to advertise and promote the products with which they are associated, any encumbrance upon *this* use of trademarks is not relevant to establishing the existence of an encumbrance upon the use of trademarks under Article 20.

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<sup>49</sup> See Australia's second written submission, paras. 138-140.

123. It is obvious why the complainants have refused to acknowledge that their *actual* objection to the tobacco plain packaging measure relates to the fact that the measure limits the ability of tobacco companies to advertise and promote their products. Even if this were a relevant use of trademarks under the TRIPS Agreement – which it is not – the fact is that the tobacco plain packaging measure preserves the ability of tobacco companies to distinguish the commercial source of their products through the use of trademarked brand and variant names, while limiting the use of trademarked branding elements to increase the appeal of the product, detract from graphic health warnings, and mislead consumers as to the risks of tobacco use.

124. Seen in this light, and taking into account the undisputed importance of Australia's legitimate public health objectives, Australia's tobacco plain packaging measure strikes a reasonable and not unjustifiable balance between the use of trademarks, on the one hand, and Australia's interest in further curtailing the advertising and promotion of tobacco products, on the other. Limiting the ability of tobacco companies to convey the "intangible benefits" of smoking is what the tobacco plain packaging measure is all about. Moreover, the complainants clearly consider that the tobacco plain packaging measure is effective in achieving this objective – otherwise, why would we be here today? Thus, even if the Panel were to consider that the use of trademarks to advertise and promote a product falls within the scope of Article 20, and even if the Panel were to "weigh and balance" the relevant considerations on all sides, the Panel would still need to conclude that the complainants have failed to prove that Australia has imposed this encumbrance upon the use of trademarks "unjustifiably".

125. This leaves only the complainants' contention that an encumbrance upon the use of trademarks is "unjustifiable" if it is not the "least restrictive" encumbrance possible in light of reasonably available alternatives. As this dispute has progressed, this argument has become essentially indistinguishable from the complainants' contention that Australia was required to undertake an "individualised assessment" of the "specific features" of particular trademarks to determine if they "cause people to smoke". This "individualised assessment" argument has in fact become the centrepiece of the complainants' claims under Article 20.

126. Australia has demonstrated in its prior submissions why nothing in Article 20 requires an "individualised assessment", under any circumstance. Indeed, the Dominican Republic concedes that no "individualised assessment" is required unless the measure concerns the "specific features" of particular trademarks.<sup>50</sup> In point of fact, however, the tobacco plain packaging measure does *not* concern the "specific features" of particular trademarks, as the complainants allege. The complainants' "individualised assessment" argument is therefore moot by their own admission. The rationale for tobacco plain packaging is not that there are "specific features" of particular trademarks that "cause people to smoke".

127. Rather, in designing the plain packaging requirements, Australia "sought to identify one plain packaging design ... that would minimize appeal and attractiveness, whilst maximising perceived harm and the noticeability of the graphic health warnings".<sup>51</sup> At the same time, the design ensured that the tobacco products of different undertakings could be distinguished in the course of trade. That standardised design is the package design that appears on the screen, with which you are by now very familiar, and is in accordance with the recommendations contained in the Framework Convention Guidelines for the Implementation of Articles 11 and 13. As shown on the screen, the tobacco plain packaging measure also prescribes a standardised, plain appearance for the tobacco products themselves, including cigarettes, cigars, and cigarillos.

128. The addition of any non-standardised design element to the package or product would necessarily reduce the efficacy of the measure, because it is designed to work through the requirement of a standardised, plain appearance for all tobacco products and packaging. This conclusion does not depend upon the "specific features" of any trademarked design element that a tobacco company might seek to reintroduce. The standardised, plain appearance of the package and product *is* the basis upon which the measure is designed to contribute to its public health objectives, by removing any opportunity to advertise and promote the product.

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<sup>50</sup> Dominican Republic's response to Panel Question No. 108, paras. 133-134.

<sup>51</sup> GfK Bluemoon, *Market Research to Determine Effective Plain Packaging of Tobacco Products* (August 2011), Exhibit AUS-117, p. 6.



129. Let's consider the packages shown on the left of the screen and the standardised, plain package shown on the right of the screen. All of the packages on the left were sold in Australia prior to the introduction of the tobacco plain packaging measure. No "individualised assessment" of the many packages shown here was required to determine that the package on the right is less appealing, more likely to increase the effectiveness of graphic health warnings, and less likely to mislead consumers as to the risks of tobacco use.

130. Now let's imagine, for the moment, that *all* uses of trademarks are encompassed by Article 20. Let's further imagine that when the complainants refer to "distinguishing" products in terms of their "quality, characteristics, and reputation", they are referring to the use of trademarks to convey information about the *actual* "quality, characteristics, and reputation" of a product, to the extent that is even possible.<sup>52</sup> Even if all of this were true, we can see by example that the only reason why tobacco companies would wish to reintroduce trademarked branding elements through an "individualised assessment" would be to advertise and promote the product.

131. Let's consider the variations that I've put up on the screen. The "Marlboro" package shown on the left is clearly sufficient to distinguish the commercial source of the product. We know this because "Marlboro" is a registered trademark and, by definition, is capable of distinguishing this product from those of other undertakings. The reintroduction of the additional branding elements moving from left to right is not necessary to indicate that these are cigarettes of the "red" variety manufactured under the control of the commercial undertaking that owns the "Marlboro" brand.

132. Nor have the complainants offered any explanation as to how the reintroduction of these additional branding elements would convey information about the actual "quality, characteristics, and reputation" of this or indeed any other product, if this were even relevant under Article 20. Just ask yourself this question: What information about the quality, characteristics, and reputation of this product do the three branded variations in this example convey that was not already conveyed by the plain packaging design,

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<sup>52</sup> See Australia's second written submission, paras. 105-117.

including the brand name and variant? What, for example, does the Marlboro typeface or the red colour tell us about the actual quality, characteristics, and reputation of the product? Nothing.

133. The reintroduction of trademarked branding elements to the package or product through an "individualised assessment" would serve only to convey the "intangible benefits" of the product or "*perceived*" differences in its quality, characteristics, and reputation. That is advertising and promotion. Australia did not need to undertake an "individualised assessment" of the "specific features" of particular trademarks to know that their use would be inconsistent with the standardised, plain appearance of the package and product, and therefore with the objective of reducing the ability of tobacco companies to advertise and promote their products through the medium of the package and the product.

134. Unable to prove that the tobacco plain packaging measure is incapable of contributing to its legitimate public health objectives, the complainants have made the "individualised assessment" argument their argument of last resort under Article 20. In addition to having no legal basis, the complainants' position ignores that the tobacco plain packaging measure is not concerned with the "specific features" of particular trademarks, and the complainants' "individualised assessment" argument is therefore moot by its own terms.

135. In sum, and concluding my remarks with respect to Article 20, the complainants have failed to prove that any encumbrance upon the use of trademarks resulting from the tobacco plain packaging measure has been imposed "unjustifiably", even under the complainants' unfounded interpretations of what this term means. The Panel must therefore reject these claims.

136. Mr Chairman, members of the Panel, with respect to the complainants' other claims under the TRIPS Agreement, Australia rests on its prior submissions because, in our view, the complainants' second written submissions did not present any new arguments or evidence to which Australia has not already responded. It suffices to note that these claims continue to depend upon the existence of what Indonesia calls a

"minimum opportunity for use", which is plainly indistinguishable from a "right of use" that all parties now agree is not conferred under the TRIPS Agreement.

## V. TBT Agreement Claims

137. Mr Chairman, members of the Panel, my name is Stephen Bouwhuis, Senior Counsel for International Law, and I will address the complainants' claims under the TBT Agreement. The parties are in agreement that in order to give proper effect to the presumption in Article 2.5 of the TBT Agreement, the Panel must begin its analysis with Article 2.5.

138. In this respect, Australia welcomes the clarifications provided by the World Health Organization and the Secretariat to the Framework Convention in response to the Panel's request for additional information. Their response confirms that the tobacco plain packaging measure has been adopted in accordance with the relevant international standards reflected in the Guidelines for implementation of Articles 11 and 13 of the Framework Convention.

139. In particular, Australia welcomes their unequivocal confirmation that both the World Health Organization and its subsidiary bodies, such as the Conference of Parties to the Framework Convention, engage in standard-setting activities that are widely recognized by all Members. Their response also establishes that the Conference of Parties' activities in standardization satisfy both the factual and normative dimensions of recognition.<sup>53</sup> This is illustrated by the fact that regional bodies such as the Gulf Cooperation Council, the Council for Trade and Economic Development of the Caribbean Community, and the European Union have developed standards that reference the guidelines and by individual Members such as Ireland, the United Kingdom, France and Norway which are in the process of adopting laws or regulations that are in accordance with the Guidelines.

140. The World Health Organization also lays to rest the complainants' argument that the Guidelines were not developed in accordance with the principles set out in the TBT

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<sup>53</sup> Appellate Body Report, *US – Tuna II*, para. 361.

Committee Decision. The World Health Organization describes in detail how the decision-making process of the Conference of Parties complies with the principles of "openness and transparency" by providing all States with ample opportunity to participate in the process of drafting and adopting the Guidelines.

141. Unable to rebut Australia's *prima facie* case that the tobacco plain packaging measure satisfies the requirements of Article 2.5, the complainants have been forced to concoct untenable arguments that are devoid of any textual basis in Article 2.5 of the TBT Agreement.

142. Prominent among these is the argument that the Conference of Parties is not a standard-setting body because the Framework Convention does not have an express trade-facilitating mandate. Whilst Australia agrees that international standards fulfill an important harmonizing function, it does not agree that international standards that protect human health are "antithetical"<sup>54</sup> to the objectives of the TBT Agreement. To the contrary, Australia considers that the object and purpose of the TBT Agreement, as reflected in both Articles 2.2 and 2.5, strikes a balance between a Member's interest in pursuing legitimate regulatory objectives, and the interest of the WTO Membership in preventing unnecessary obstacles to international trade. Australia would note in this respect that international bodies such as CODEX, which the complainants admit is an international standard-setting body, have a mandate to protect human health in a manner that is not dissimilar to the Framework Convention.

143. Consequently, Australia has established that the tobacco plain packaging measure was adopted in accordance with the relevant international standards under Article 2.5, and therefore must be deemed presumptively consistent with Article 2.2. The complainants, in turn, have failed to adduce any evidence of the kind necessary to rebut this presumption, and for this reason alone, the Panel should dismiss their claims under the TBT Agreement in their entirety.<sup>55</sup>

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<sup>54</sup> Dominican Republic's second written submission, para. 862.

<sup>55</sup> Australia's second written submission, paras. 347-356.

144. A separate and independent basis for rejecting the complainants' claim under the TBT Agreement at the threshold is their failure to make a *prima facie* case that the Australia's measure is trade-restrictive under a proper interpretation of Article 2.2.

145. The complainants' case of trade-restrictiveness essentially hinges on two separate but closely related arguments. First, the complainants argue that the design, structure and operation of Australia's measure limits "competitive opportunities" by limiting the tobacco industry's ability to use trademarks and other packaging elements to convey "intangible benefits" about competing tobacco products.

146. As Australia demonstrated in its second written submission, the complainants' "limitation on competitive opportunities" test for trade-restrictiveness cannot be reconciled with either the text of Article 2.2 or the jurisprudence of the Appellate Body interpreting this provision. Properly interpreted, the terms "trade-restrictive" and "obstacle to international trade" in Article 2.2 require the complainants to establish that Australia's measure has a limiting effect on international trade in tobacco products. The complainants' "competitive freedom" construct would render these terms in Article 2.2 meaningless. Virtually all technical regulations will prescribe a product characteristic or related process and production method in a manner that removes a "freedom" previously enjoyed by at least one market participant. The absurd consequences that would flow from the complainants' interpretation were illustrated in Australia's second written submission with respect to the trade *enhancing* effects of a hypothetical auto emission standard, which under the complainants' view would nonetheless constitute a measure having a "*limiting* effect on trade". The complainants' "competitive freedom" test for trade-restrictiveness thus fails as a matter of law.

147. The complainants' alternative arguments in support of their claim of trade-restrictiveness fail for a lack of evidence. The complainants readily admit 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. In an effort to establish actual trade effects, their second line of argument is that tobacco plain

packaging has caused "downtrading effects" in that it has shifted demand for tobacco products from higher-priced to lower-priced products.

148. Even if the Panel were to accept that downtrading is attributable in part to the tobacco plain packaging measure, that fact alone would be insufficient to demonstrate a limiting effect on *overall trade* in tobacco products, either with respect to the volume or value of trade. An alleged decrease in sales in the premium segment alone does not establish a limiting effect on the volume of overall trade. Moreover, a downward shift in consumer brand preference will have no impact on the value of trade if, for example, tobacco firms adopt a "harvesting" strategy of increasing their prices in response to the very measure alleged to contribute to the downtrading. In fact, the evidence on the Panel record suggests that this is precisely what has happened in Australia – all Parties agree that prices for all tobacco products have increased (net of excise tax increases) subsequent to the adoption of Australia's measure.<sup>56</sup>

149. This no doubt explains why, despite all the complainants' rhetoric about Australia's measure having destroyed the "very essence of competition" in the tobacco market,<sup>57</sup> not one of them has introduced a *single* piece of evidence purporting to demonstrate that the tobacco producers in their countries have experienced a decrease in export volumes, prices, revenues or profits in Australia.<sup>58</sup> Similarly, the complainants have failed to introduce any actual evidence substantiating their arguments that Australia's measure entails compliance costs or increased barriers to market entry. Given the abundant resources at the complainants' disposal, surely if such evidence supported their claims it would have been put before the Panel by now.

150. 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

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<sup>56</sup> Expert Report of M. Katz (9 March 2015), Exhibit AUS-18, paras. 63-67; Expert Report of D. Neven (2 October 2014), Exhibit UKR-3, pages 10-12.

<sup>57</sup> Dominican Republic's second written submission, para. 934; Dominican Republic's response to Panel Question No.117, para. 228; Indonesia's second written submission, para. 266; Indonesia's response to Panel Question No. 117, para. 57; Honduras' first written submission, para. 688, fn 611.

<sup>58</sup> Expert Report of Houston Kemp (9 March 2015), Exhibit AUS-19, pp. 29-32 [Contains SCI].

trade-restrictive within the meaning of Article 2.2. Accordingly, the Panel need not proceed further in its analysis.

151. If, however, the Panel were to conclude that the complainants have established that Australia's measure *is* trade-restrictive, the "weighing and balancing" analysis that would then need to be undertaken under Article 2.2 demonstrates unequivocally that Australia's measure is not more trade-restrictive than necessary to fulfil its legitimate public health objectives.

152. As outlined by my colleague Mr O'Donovan earlier this morning, the complainants' own concessions and evidence, together with the evidence presented by Australia, clearly establishes that Australia's measure is apt to contribute to achieving its objectives.

153. Likewise, the complainants have failed in their attempts to establish the counter-intuitive proposition that the risks that would arise from non-fulfilment of Australia's public health objectives are insignificant. Properly interpreted, the nature of the risks in this case, are the risks to public health caused by the use of and exposure to tobacco products. The gravity of the consequences that would arise from not reducing such use and exposure through Australia's measure – namely, increased tobacco-related deaths and disease in Australia – unequivocally establish that the risks arising from non-fulfilment of the measure's objectives are significant and grave. Accordingly, this factor also weighs strongly in favour of the conclusion that Australia's measure is not more trade-restrictive than necessary to fulfil its legitimate public health objectives.

154. Further, the complainants have failed to demonstrate the existence of less trade-restrictive, reasonably available alternative measures that would make an equivalent contribution to Australia's public health objectives. To begin with, most of the alternatives put forward by the complainants cannot be considered true alternatives because they consist of existing elements of Australia's comprehensive suite of tobacco control measures. The complainants thus ignore the Appellate Body's warning that "substituting one element of [a] comprehensive policy for another would weaken the

policy by reducing the synergies between the components, as well as its total effect".<sup>59</sup> As a consequence, the complainants' proposed alternative measures, such as further increases in excise taxes, alleged improvements to existing social marketing campaigns, and further increases in the minimum legal purchase age, cannot be deemed as true alternatives when these measures already operate synergistically under Australia's comprehensive tobacco control policy.

155. The only measure advanced by the complainants that is not a current element of Australia's tobacco control strategy is the proposed pre-vetting scheme. As Australia has amply demonstrated, this measure is not "reasonably available" for a variety of reasons, including the fact that Australia may need to create an entirely new agency to administer the pre-vetting scheme,<sup>60</sup> as well as the prohibitive costs that would be entailed in the spate of litigation that would inevitably result from such a scheme.<sup>61</sup> Further, this proposal would not be seen as effective as plain packaging as it contemplates the return of the pack as an advertising vehicle, allowing the pack to increase consumer perceptions of the "intangible benefits" of smoking.<sup>62</sup>

156. The complainants have also failed to demonstrate that any of their proposed alternative measures are *less* trade-restrictive. Under the complainants' misguided definition of trade-restrictiveness, all of their purported alternatives are in fact *more* trade-restrictive than plain packaging. For example, the complainants admit that measures such as an increase in excise taxes would cause substantially more downtrading in the Australian market than is allegedly caused by tobacco plain packaging.<sup>63</sup>

157. Moreover, under a proper interpretation of trade-restrictiveness, the complainants appear to proceed on the assumption that each of their purported alternatives would limit international trade in tobacco products to the *same* degree as Australia's measure. For

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<sup>59</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172.

<sup>60</sup> Dominican Republic's second written submission, para. 719.

<sup>61</sup> Australia's second written submission, para. 566.

<sup>62</sup> Expert Report of J.B. Steenkamp, "Tobacco Packaging in the Australian Context – Lessons from Marketing Principles and Empirical Data: A Rebuttal to Arguments Raised by Australia and its Experts" (11 September 2015), Exhibit DOM/HND-14, paras. 93-94.

<sup>63</sup> See e.g. Dominican Republic's first written submission, para. 499.



example, in asserting that its purported alternative measures "make an equivalent contribution to the objective of reducing smoking behaviour",<sup>64</sup> the Dominican Republic expressly assumes that these measures would entail "the same reduction in the volume of tobacco products sold".<sup>65</sup> In so doing, the Dominican Republic has failed to discharge its burden of articulating an alternative measure that is *less* trade-restrictive.

158. Instead, the complainants essentially re-package their arguments under the TRIPS Agreement to contend that their purported alternatives are less trade-restrictive solely because they do not restrict the ability to use trademarks and design features to advertise and promote tobacco products. This only serves to highlight that the complainants' Article 2.2 claims are not really concerned with a restriction on international *trade* in tobacco products at all, and for this reason alone they should be rejected in their entirety.

## **VI. Conclusion**

159. Mr Chairman, members of the Panel, for the reasons that we have discussed here today, and explained more fully in Australia's written submissions, each of the complainants' claims in this dispute is without merit. In relation to Australia's tobacco plain packaging measure, there is no reason for the Panel to depart from the international consensus reflected in the Framework Convention. Tobacco plain packaging is contributing to behavioural change in Australia and is effective in achieving Australia's public health goals. It is a measure that will have its greatest effect over time as a whole generation of Australian youth are raised without any exposure to tobacco advertising. The complainants have failed to demonstrate that this effective tobacco control measure is inconsistent with the covered agreements.

160. On behalf of the Government of Australia, I would like to conclude by once again thanking the Panel and the members of the Secretariat staff for their hard work in preparing for this second meeting of the Panel. We look forward to the remainder of the proceedings this week and to answering your questions tomorrow. Thank you.

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<sup>64</sup> Dominican Republic's second written submission, para. 973.

<sup>65</sup> Dominican Republic's second written submission, para. 975.